Autar Krishen Koul

Guide to the WTO and GATT

Economics, Law and Politics

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To
My Grand Children
Siddarth, Shrikant, Nancy, Maya,
Ruby *and* ***Dev***
Who are very dear to me

Preface

The sixth edition of the Guide to the WTO: Economics, Law and Politics 2018 was prompted by the developments which have taken place in the last decade at the international trade relations level among the member states of WTO, and the membership of WTO has also swelled to more than 161 countries of the world. Further, WTO has got a new lease of life by negotiating the Ninth Ministerial Conference in December 2013 at Bali, Indonesia. The Ninth Ministerial Conference has yielded some important decisions, especially the Trade Facilitation Agreement, 2013 which came into force from February 2017. Also, some concessions have been extended to the least developed and the developing countries. This edition takes care of the developments taken place after the publication of the fifth edition, 2015.

It is a fact that International Trade Relations and Law has entered into a new phase wherein all the member countries of WTO are under obligations to oblige and comply with the WTO decisions taken regularly either through the various institutional structures of WTO or through the negotiations of Ministerial Conferences. There is also a happy augury that the division of the world into developed, developing and least developed has been arranged in such a way that there is an order in the international economic relations and law interse these countries supported by the decisions delivered by the dispute settlement systems of WTO.

It cannot be doubted that the international economic institutions and the international economic law have assumed a central importance in global economic relations in the middle of the twentieth century, especially after the end of the Second World War. However, it took five more decades to complete the unfinished agenda of establishing the international economic institutions such as World Trade Organisation (WTO), General Agreement on Tariffs and Trade (GATT 1994), International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD). These so-called Bretton Woods Institutions, International Trade Organisation (ITO), IMF and IBRD established in the year 1947 were half-way houses as ITO died a premature death and was replaced by a slander reed called GATT 1947, which essentially was a stop-gap arrangement. But, by the fortuity of circumstances, GATT 1947 made the international economic order and

law functional and prosperous. GATT 1947 was riddled with many inherent contradictions and was often sidetracked by ingenious methods of grandfather clauses, protocols of provisional applications and escape clauses. Yet, the allegiance to GATT continued unabated and the membership of GATT swelled. The effectiveness of GATT has been proved by seven tariff rounds concluded under GATT 1947 which not only reduced tariffs in international trade but also gave a stimulus to the growth and volume of global commerce. It is often said that the interpretative techniques developed and employed by the Contracting Parties of GATT 1947 till 1994 revealed the mystique of GATT amidst the thicket of economic verbiage in its articles, which led to the evolution of a 'jurisprudence' unique in its content and foresighted in its approach to international trade and economic relations.

The GATT's eighth round, the Uruguay Round of tariff negotiations (1987–1994), further strengthened the earlier international economic and trade law jurisprudence and completed the unfinished agenda of the Bretton Woods by setting up a new regime of trade institutions such as World Trade Organisation (WTO) and General Agreement on Tariffs and Trade (GATT 1994), modifying and replacing GATT 1947. Various side Agreements were also negotiated, such as Agreement on Technical Barriers to Trade, Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Trade-Related Investment Measures, Agreement on the Implementation of Article VI of GATT 1994, Agreement on Pre-shipment Inspection, Agreement on the Implementation of Article VII of GATT 1994, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards. World trade regime was further reinforced by major Agreements as part of WTO dispensation, namely General Agreement on Trade in Services (GATS), Agreement on Trade-Related Intellectual Property Rights (TRIPs), Dispute Settlement Understanding (DSU), Trade Policy Review Mechanisms (TPR) and Plurilateral Agreements on Public Procurement, Civil Aircraft, International Dairy Products.

The Ninth Round of Ministerial Conference produced the Bali Package and the Trade Facilitation Agreement 2013 (TFA) which entered into force in February 2017. TFA is believed to reduce the cost of trading, smoothen customs procedures, reduce red tape and enhance efficiency and transparency in international trade transactions. The Agreement makes it obligatory on the developed countries to assist the developing and the least developed countries to update their infrastructure and train customs officials for any costs associated with implementing the Agreement. The Agreement is in furtherance of the mandate imposed by the three articles of GATT 1994 such as Article V involving freedom of transit, Article VIII dealing with border fees and formalities and Article X dealing with publication and administration of regulations.

There are various estimates of economic gains flowing from the Trade Facilitation Agreement; some believe that the agreement could increase global GDP by one trillion USD; others believe that the reforms in this area of international trade would reduce costs by 14.5% for low-income countries, 15.5% for

lower-middle-income countries and 13.2% for upper-middle-income countries. However, the agreement is conceived to simplify customs procedures and lower transaction costs. There have been various concerns expressed by developing countries as to how to implement the trade facilitation measures conceived in TFA in the face of technological, scientific and economic constraints. Therefore, the final text of the agreement is divided into two parts: the first describes specific commitments countries will have to make to improve their custom procedures (Section I); the second involving special and differential treatment for developing countries (Section II). Achieving a balance between foreign commitments in Section I and technical assistance and capacity building in Section II was the measure stumbling block while negotiating the Agreement.

In order to reconcile the above objectives, the final agreement contains provisions allowing for flexibility in the scheduling and sequencing of implementation and linking commitments to acquired capacity resulting from technical assistance. There is a marked departure from the usual WTO practices that developing countries and least developing countries are allowed to self-define their implementation period within three categories of implementation modalities: Category A includes those provisions that are implemented immediately upon the agreement entering into force; Category B includes those commitments that will be implemented after a 'self-selected' transition period; Category C involves those commitments that will require both self-selected transition period and technical assistance. In the last category, the mechanism ensures that assistance arrangements be notified by donor countries before least developed countries would be obligated to notify their definitive implementation date, thereby linking implementation obligations to the provision of technical assistance and capacitive building. All these provisions in a great measure change the current approach to special and differential (S&D) treatment for developing countries, creating a new and innovative template for future solutions.

So far as agriculture negotiations are concerned, Bali package concentrated on reform of farm trade of developed countries: export subsidies and tariff rate quotas.

During the negotiations, concern was expressed by India that public food stock holding by India should not be considered as an infringement to the obligations of under either the WTO Agreement on Agriculture or any other WTO commitments as food security programs are essential for sustaining the poor and vulnerable sections of society. The WTO members gave two-year concessions to India and all other countries having similar programmes, and the General Council of WTO was asked to find a solution to India's and similar such food security programs.

The other issues such as developing and least developed countries concerns were the weakest components of the Bali package. However, it was agreed in principle that least developed countries would be extended duty-free, quota-free market access. The Bali package also established a monitoring mechanism on special and differential treatment which will serve as a focal point within WTO for analysing and reviving all aspects of the implementation of S&D treatment provisions. In case the review faces problems, the monitoring mechanism may put forward recommendations and possible negotiations would ensue in the relevant WTO body.

One of the elements of the Bali package deals with Rules of Origin which have been conferred to the products traded internationally. In the context of trade preferences granted to least developed countries, i.e. duty-free, quota-free, the rules of origin would define how much processing must take place locally before goods are considered to be of a least developed origin and may therefore get the benefit of preferential treatment; further, the rules of origin should be transparent, simple and objective. It also mandates that every country has the freedom to choose the methods to make rules of origin transparent and objective.

So far as least developed countries trade in services is concerned, the Bali ministerial agreed that WTO Council for Trade in Services shall initiate a process aimed at promoting the expeditious and effective operationalisation of the least developed countries services waiver.

In the area of duty-free, quota-free market access for least developed countries, the Bali package decided that duty-free, quota-free market access is an obligation on the developed countries members and the developed countries members should provide much more coverage for duty-free, quota-free market access to the products of the least developed countries. There has not been any substantial change so far as Cotton is considered as a symbol of the development dimension, as a discussion on Cotton remained inconclusive as Bali recognised that WTO has yet to deliver on the Cotton initiative and as such members requested to continue the negotiation in this sector.

At this juncture, it is important to emphasise that the international economic institutions and law have a unique interface with social, political, economic and cultural contexts, as such the study of GATT/WTO becomes unwieldy. However, for every practitioner and student of international trade law, the above interface cannot be avoided or eschewed. Thus, the important goal which this author has set for himself is to unravel in a systematic and coherent manner, the jurisprudence of GATT/WTO by collecting and collating the working of the GATT/WTO system along with main and side Agreements in a manner that the study of the international economic relations and the law is made intelligible and obvious to both the uninitiated and the practitioner of the subject.

The scope of GATT/WTO encompasses a wide array of subjects including new topics like environment, labour standards and competition on its agenda. Therefore, this author has tried to unfold the matrix of the subjects for a clear understanding of international trade law as propounded and laid down by GATT/WTO system. WTO in its Preamble states that the international economic institutions and law have to aim at raising the living standards, ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, seeking to both protect and preserve the environment' of the member nations. It thus underpins the fact that liberal trade or free trade is a panacea for achieving further prosperity of both the developed and developing countries. WTO, in fact, claims that open trade fuels engines of economic growth and creates new jobs, new incomes and power of open markets takes care of the poor.

Today, GATT/WTO is being considered as wealth-churning machines and indispensable tools for facilitating economic growth and job creation in the world at large. Of course, the justification for WTO/GATT is based on the theory of comparative cost advantage as propounded by economic theorists such as Adam Smith, David Ricardo, Paul Samuelson, and Jagdish Bhagwati.

In a globalised, liberalised and interdependent world, WTO has assumed an unprecedented role in shaping and fostering co-operation among member nations. It has also provided a forum for conflict resolutions through its dispensation of Dispute Settlement Understanding (DSU), which is considered a jewel in the crown of the WTO system. Moreover, WTO is playing a crucial role in lowering tariffs and reducing trade barriers, thereby maximising the world welfare.

The literature on GATT/WTO since 1994 has proliferated so much that for a keen observer including a student and practitioner of GATT/WTO jurisprudence the terrain is full of contradictions and complexity. It is true also of the panel and appellate decisions of WTO/DSB, as the decisions rendered by the dispute settlement bodies are lacking coherence, precedential value and are full of verbose. Therefore, the tasks of an author to marshal the literature and case law become quite tedious and asymmetrical. Further, as disciplines other than law, such as science, technology, economics and politics, are veered around the various Agreements having centrality to WTO, writing a book on GATT/WTO is equally daunting.

In view of the above challenges, the author's goals in this book are threefold.

First, to explain the subject in a coherent manner so that the convergence of economics, politics and international economic law is unfolded in a simple and lucid style; second, to explain how international trade law principles as evolved by the international economic institutions have interfaced with municipal legal principles and other contexts such as social, cultural and political; and third, to study the impact of decisions rendered by the international economic institutions such as GATT/WTO and how the settlement of disputes by the dispute settlement systems of WTO has opened up the municipal economic and legal systems of member nations to the jurisdiction and surveillance of WTO, its standards and norms keeping in view the interests of various and diverse stakeholders.

Finally, the major goal of this book is to make available and easily accessible vast and varied materials in a systematic and cohesive manner of a subject, which is virtually borderless. The student and practitioner alike have found the book very useful as it offers both of them a learning experience of a subject which is not only new but unique. The book has also been extensively used as a tool for further research in tackling real problems which are continuously being brought to the fore in international trade law jurisprudence.

As the book was first published in the year 2005, and the response of the scholars, lawyers and policy-makers was more than expected, the sixth edition was brought keeping in mind the developments which have taken place at the WTO/GATT counter and the decisions rendered by DSB on various critical issues from 2005 to 2017. The author has updated all the developments which have taken place over the last decade and has added a new chapter on WTO, International Trade and Human Rights. This addition takes care of WTO and Trade Policy

Review and the attendant changes brought in TRIPs by DOHA and the Ninth Ministerial Conference in December 2013, Declaration. A complete chapter on the Trade Facilitation Agreement, 2013 as entered into force in 2017 and Bali Package has been added in this edition.

Ranchi, India Autar Krishen Koul
August 2017

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Abbreviations

AMS	Aggregate Measurement Support
ASP	America Selling Price Method
ATC	Agreement on Textiles and Clothing
BDA	Budget Deficit Assessment
BDV	Brussels Definition of Value
BFA	Banana Framework Agreement
BITS	Bilateral Investment Treaties
CBD	Convention on Biological Diversity
CBI	Caribbean Basin Initiative
DMA	Domestic Marketing Assessment
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Dispute Settlement Undertaking
EC	European Community
EEC	European Economic Community
EEP	Export Enhancement Programme
ETP	Eastern Tropical Practice
FAA	Fund Articles of Agreement
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FOGS	Functioning of the GATT System
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GNG	Group on Negotiations of Goods
GNP	Gross National Product
GNS	Group on Negotiations of Services
HS	Harmonized System
IBRD	International Bank for Reconstruction and Development (also known as World Bank)

ICAO	International Civil Aviation Organization
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
IPIC	Intellectual Property in respect of Integrated Circuits
IPPC	International Plant Protection Convention
IPR	Intellectual Property Right
ITO	International Trade Organization
LDCs	Least Developing Countries
LTA	Long-Term Agreement
MAI	Multilateral Agreement on Investments
MFA	Multifibre Arrangement
MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MMPA	Marine Mammal Protection Act (of USA)
MTA	Multinational Trade Agreement
NAFTA	North American Free Trade Agreement
NIC	Newly Industrialized Country
NIEO	New International Economic Order
OECD	Organization for Economic Cooperation and Development
OIE	Office International Des Epizooties
OMA	Orderly Marketing Agreement
PGE	Permanent Group of Experts
PSE	Producers Support Estimates
RTA	Regional Trade Agreement
S&D	Special and Differential
SCM Code	Subsidies and Countervailing Measures Code
SG&A	Selling, General and Administrative
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TMB	Textile Monitoring Body
TNC	Trade Negotiations Committee
TPRM	Trade Policy Review Mechanism
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Aspects of Intellectual Property Rights
TSB	Textile Surveillance Body
VER	Voluntary Export Restraints
VIEs (or VIEA)	Voluntary Import Expansion Agreements
VRA	Voluntary Restraint Agreement
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Chapter 1
World Trade Organisation: Its Birth and Background

1 International Economic Relations Before Second World War

Prior to the establishment of the World Trade Organisation (WTO) 1995, international economic regulation of international trade was essentially structured within the General Agreement on Tariffs and Trade (GATT) which happened to come into existence by accident rather than by choice in 1947. While tracing the history of the evolution of regulations of international trade and its institutional structures in the nineteenth century, we find that, although the beginning of the century witnessed free trade and less protectionism, yet by the end of the nineteenth century the then independent countries had moved away from free trade to protectionist policies.[1]

The international economic relations in the twentieth century witnessed unprecedented developments which led to the evolving of concepts, precepts and doctrines completely unique not only to achieve order in global economic and trading relations but also in the establishment of international economic institutions. After the First World War, the international economic relations were subjected to higher trade barriers of one or the other type with the result that some countries raised unprecedented impediments to world trade and commodity exchanges.[2]

In 1916, the Allied Economic Conference, Paris, desired that after cessation of war, all commercial treaties between the allied and enemy powers should be declared invalid and that, for an agreed period of time, the latter should receive no benefits from the 'most-favoured-nations' obligations. During this period, the Wheat Executive of 1916 and the Allied Maritime Transport Council of 1917 were other efforts of multilateral action which eventually became a model for future international co-operation. Before the First World War, there had been some international multilateral endeavours such as European Danube Commission (1857)

[1]A. K. Koul, The Legal Framework of UNCTAD in World Trade, 9–10 (A. W. Sijhoff 1977).
[2]G. Curzon, Multilateral Commercial Diplomacy, 21 (London 1965).

A. K. Koul, *Guide to the WTO and GATT*,
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to achieve order and uniformity in the respective economic activity of these unions at the international level.

By 1920, prohibitions, quantitative restrictions and exchange controls had largely, though not entirely, disappeared outside Europe and in Great Britain, Netherlands, Belgium and Scandinavian countries. In other European countries, notably in central and south-east European nations, non-tariff barriers were dismantled more slowly with relapses. Nevertheless, by the mid-twenties, it could safely be said that trade, for the most part of the world, was unrestricted.[3]

In 1920, the Economic Committee of League of Nations convened the Brussels Conference. It recommended, *inter alia*, the abolition of artificial restrictions on international trade and restoration of pre-war trading. This Conference contributed in two significant ways to achieve order in international economic relations. Firstly, the recommendations of the Conference became a precedent and example for future attempts at multilateral solution of international problems; and secondly, the recommendations formulated a number of precepts which later exerted influence on governments and expert opinions. One of such precepts envisaged the conclusion of long-term commercial treaties embodying the unconditional 'most-favoured-nations' principle. Another was the abolition of prohibitions and quantitative restrictions, both of which had led to new problems in international trade.

During 1920–1930, the League of Nations contributed immensely in developing new principles and doctrines for free trade at international level. At the Genoa Conference (1922), a Convention on the Simplification of Customs Formalities was drawn up. This provided not only for the publication, in a simple and accessible form, of customs regulations, but also for the immediate publication of changes in tariff and customs regulations. The two Geneva Conferences of 1927 recommended 'collective action' to encourage the expansion of international trade set off by excessive customs tariffs.

In 1927, a Convention on the Abolition of Import and Export Prohibitions and Restrictions was adopted by the League of Nations. It was the most comprehensive multilateral economic agreement ever concluded up to that time. The World Economic Conference of 1927 refuted the traditional international legal doctrine that tariffs were a matter of domestic concern and sovereign power. It recommended reductions of tariffs by the nation states individually and collectively which was essential for world economy.[4]

After the end of the First World War, from 1919 to 1930, the world witnessed a steep rise in tariffs despite all the efforts the League of Nations employed to free international trade from such tariffs. Recalling the economic trends of that era, Curzon demonstrates that for almost all trading nations; the 'unconditional most-favoured-nations treatment' became inoperative because of discriminatory tariff specifications practiced by other countries and the non-negotiability of all important American tariffs. This meant that concessions passed on to the USA, in

[3]A. K. Koul, supra note 1, p. 10.

[4]Ibid, pp. 18–19.

accordance with 'most-favoured-nations treatment' were never reciprocated by USA after it had passed the Emergency Tariff Act, 1921 and the Fordney-McUmber Act, 1922. Under the Emergency Tariff Act, 1921, the USA imposed high duties on wheat, corn, wool, meat and sugar as a palliative for the agricultural unrest brought on by depression in the USA. The Fordney-McUmber Act of 1922 offered excessive protection to US producers. The combined policy of both these laws affected world economy severely.

With the general depression of 1930s', the world's leading trading nations were deep in recession. To worsen the situation, the USA raised tariffs on nine hundred items with the passing of the Hawley Smoot Tariff Act of 1930. This was immediately answered by a worldwide substantial increase in tariffs. The tariff increase echoed from one side of the world to the other, from Canada to Cuba, France, Australia, China, India, Italy, to cite only a few, and above all to Great Britain, which at the end of 1931 introduced its first major protective measures and soon replaced them by the Imports Duties Act of March 1932. All this led to reversal of the trend towards multilateralism.[5] Thus, the League of Nations witnessed from 1930 to 1939 an unprecedented world economic crisis. However, the USA in 1934 decided to liberalise trade by a Reciprocal Trade Agreements programme borne of Cordell Hull's imagination[6] to help recovery of the American export sector through reciprocal tariff bargaining. The main aim of the 'New Deal' was to liberate international trade from obstacles which had set in from 1929 to 1932.

A reference to Bruce Committee at this moment is necessary as it was established under the auspices of the League of Nations to study serious and continuing economic and social problems. The 'Bruce Committee' recommendations led to the establishment of the United Nations Economic and Social Council.[7] The League of Nations had its final meeting in Geneva in April 1946 and, by a series of resolutions, transferred its powers and functions to the United Nations which had already agreed to accept them.

2 International Economic Relations After Second World War

Even before the Second World War, there was a universal feeling that political security could not be divorced from international economic and financial stability with the result that the USA took the initiative which culminated in the Atlantic Conference of 1941.[8] This Conference released the Atlantic Charter, which was

[5]H. W. Arndt, The Economic Lessons of the Nineteen-Thirties, 17 (Oxford, 1944).

[6]Cordell Hull was then the Secretary of State of the U.S. Administration. See F. Walters, The History of League of Nations, Vol. II (London, 1952).

[7]See J. P. Sewell, Functionalism and World Politics, 6–7 (Princeton University Press, 1966).

[8]See generally, Richard N. Gardner, Sterling Dollar Diplomacy (Oxford, 1958).

regarded as a statement of basic ideas that are universal in their application, namely, that every nation has a right to expect that its legitimate trade will not be diverted or suppressed by towering tariffs, preferences, discriminations or narrow bilateral practices. The Charter was followed by the Mutual Aid Agreement between the USA and the UK of 1942, containing an undertaking to promote mutually advantageous economic relations and betterment of world economic relations. The objectives of this Agreement were, *inter alia*, the elimination of all discriminatory treatment in international commerce and the reduction of tariffs and other trade barriers.[9]

By the beginning of 1943, Anglo-American financial collaboration progressed further taking the shape of the White and Keynes Plans. The White Plan which originated in the US Treasury had a decisive influence on the future of Anglo-American economic collaboration. The Keynes Plan, which originated in the British Treasury, was responsible for devising a mechanism of international financial institutions. Both these plans were designed to facilitate the achievement of balance-of-payments equilibrium in an international environment of multilateral trade and in domestic conditions of full employment.

From 1943 to 1944, the British and American collaboration progressed further and produced a Keynes' and Whites' Plan which became public in 1944 as the joint statement of experts on the establishment of International Monetary Fund (IMF). The key provisions of this document were embodied in the Articles of Agreement of the International Monetary Fund adopted in July 1944 by the United Nations Conference at Breton Woods, New Hampshire.[10] The second financial institution, as an offshoot of the Breton Woods Conference, was the establishment of International Bank for Reconstruction and Development (IBRD) commonly known as the World Bank.[11]

3 Havana Charter for International Trade Organisation (ITO)

As these institutions, the International Monetary Fund and the International Bank for Reconstruction and Development established as an outcome of the Breton Woods Conference, were only financial in nature; there was no equivalent organisation for collaboration on the commercial side. Further, as 'American policy' was based on development of ideas during the Second World War, the USA recognised

[9]A. K. Koul, supra note 1, pp. 18–19.

[10]For the detailed evolution of IMF, see W. M. Scammell, The International Monetary Fund, The Evolution of International Organization (London, 1966); See also, Alexandrovich, World Economic Agencies (London, 1962).

[11]For a detailed analysis of the initiatives for economic co-operation during the World War II and the immediate post-War period, see John H. Jackson, World Trade and the Law of GATT, 36–57 (1969).

the need for international economic institutions to prevent the type of "beggar my neighbour policies" that were so disastrous to world trade during the interval period, and which in the minds of many leaders, were responsible to a great degree for the outbreak of Second World War itself.[12] To collaborate on the commercial policies as well as to remedy the disastrous policies pursued by the various governments before and during the Second World War, the United Nations Economic and Social Council established primarily to co-ordinate initiatives in international economic co-operation, took steps in 1946 by appointing a preparatory committee of nineteen countries to draft a convention for the consideration of an international conference on trade and employment to be held for the purpose of drafting a charter for an international trade organisation and also to pursue negotiations for reduction of tariffs worldwide.

In anticipation of the first meeting of the preparatory committee, the USA published a 'Suggested Charter for an International Trade Organisation of the United Nations'.[13] This very Charter finally led to the Havana Charter in 1948. However, when the preparatory committee met in October 1946 in London, 'inside and outside' the conference room, the central issue was still the conflict between free trade, which implied freedom for private enterprises to make their decisions on imports and exports in accordance with the laws of the markets and full employment policies which might necessitate control of the economy by the governments. This bitter conflict between private enterprises and state control was inevitable and continued to be the central issue at the ITO Conference and the succeeding GATT Rounds as well as in WTO negotiations. Basically all debates centred around one question: 'Were quantitative restrictions of whatever type and whatever trade area permitting state control of trade to be sanctioned or not'?[14] The second session of the preparatory committee met at Geneva in 1947 from April to October for the ITO negotiations. Later, the United Nations Conference on Trade and Employment held at Havana, Cuba from 21 November 1947 to 24 March 1948 drew up the Havana Charter for International Trade Co-operation, which is embodied in its Final Act. The Final Act was authenticated on 24 March 1948 by the representatives of 53 countries that had taken part in the Conference on Trade and Employment.

The proposals and suggested Charter were based on the principles, *inter alia*, that all restrictive devices used to distort normal flows of trade should be removed and preferences eliminated; that internal taxes and regulations should be imposed in a non-discriminatory manner; that all types of subsidies should be subjected to international consultation; and the subsidies on exports should be applied only in exceptional cases. It was also stressed that international agreements should be

[12]See John H. Jackson, ibid; p. 37; W. Brown, the United States and the Restoration of World Trade 2 (1950); C. Wilcox, Charter for World Trade (1949).

[13]For Text of the 'Suggested Charter', see United Nations, Economic and Social Council Report of the First Session of the preparatory Committee of the United Nations Conference on Trade and Employment, 52–67 (1946), E/PC/T/33. See also, Gardner, supra note 8, p. 269.

[14]Edward Dana Wilgress, A New Attempt at Internationalism, The International Trade Conferences and the Charter, A study of Ends and Means, Paris (1949).

designed to protect the producers of primary commodities in the event of surplus production and should correct abnormal situations without perpetuating them; that measures restricting exports or fixing prices, if unavoidable, should be limited in duration; that consuming and producing countries should be given equal voice in the formation and administration of International Agreements. It was also proposed that the commitments embodied in the Charter should be carried out through an international organisation without the framework of the United Nations.

The Havana Conference and the Charter were the culmination of years of preparation for drafting of International Trade Organisation (ITO) charter. Yet there was an acrimonious split of views and debates at Havana Conference which could be assessed as some 800 amendments were proposed to the draft charter prepared by the Preparatory Committee.[15]

Concern was expressed by less developing countries as to the advantages of unrestricted and free trade from the standpoint of their standards of living. The less developing countries contented that the 'suggested Charter' was negative rather than positive as its approach was to address prohibitions and restrictions in international trade rather than on positive approaches to expand trade. They emphasised on the necessity to retain freedom to promote industrialisation by imposing quotas to have some level playing field between developed and developing countries. This led to the inclusion of a chapter on economic development, under which a member of the organisation might obtain permission, in a particular case, to impose import restrictions in promoting the development of a new industry.

The Havana Charter contained two parts: Chapters II to VI, which form in effect an extensive commercial convention, and Chapter VII, which is the constitution of the I.T.O. Chapter I explains the connection between these two parts, and Chapters VIII and IX are subsidiary. Chapter I contains a single article setting out the purpose and objectives. Chapter II (Articles 2–7) is headed Employment and Economic Activity and deals with the importance of the maintenance of domestic employment and fair labour standards and the relationship of employment to balance-of-payment difficulties; Chapter III (Articles 8–15) is headed Economic Development and is directed to the problems of the economically backward countries and international investment; Chapter IV(Articles 16–43) deals with Commercial Policy under six sections: Tariffs; Preferences and Internal Taxation and Regulations; Quantitative Restriction and Exchange Controls; Subsidies; State Trading; General Commercial Provisions which are largely concerned with the administrative aspects of trade, and special provisions, which deal with, *inter alia*, emergency action on imports of particular products, customs unions, and general exceptions. Chapter V (Articles 44–51) and Chapter VI (Articles 52–67) deal with restrictive business practices and intergovernmental commodity agreements, respectively. Chapter VII (Articles 68–88) forms the constitution of International Trade Organisation (ITO). Chapter VIII (Articles 89–92) sets out the procedure for

[15]A. K. Koul, supra note 1, p. 20.

the settlement of differences arising out of the application and operation of the Charter. Chapter IX (Articles 93–100) consists of general provisions.[16]

Thus, the ITO was intended to form, in conjunction with the IBRD and the IMF, a trio of multinational organisations pledged to further economic development of the contracting parties. More specifically, it was intended to put into place rules designed to discipline world trade while, in addition to implementing regulations relating to diverse areas such as, employment, commodity agreements, restrictive business practices, international investment and services.

4 GATT: A Historical Accident

The birth of GATT was essentially a historical accident. It happened like this. When the President of the United States refused to submit the Havana Charter to Congress for ratification, the Havana Charter and the ITO collapsed and there was a virtual head on collision between those who were wedded to the idea of free trade based on multilateralism, and those who placed the whole emphasis on state intervention and full employment policies on a national basis.[17] Embodying such opposition in a set of 'rules and counter rules', made the ITO, which was to administer the Charter, 'finally collapse of its own weight'. GATT was born out of this crisis.

As already described, the participants at the Geneva Conference had separately initiated tariff negotiations in 1947, while the Havana Charter was being drafted. These tariff negotiations culminated in the signing of the General Agreement on Tariffs and Trade (GATT 1947). The drafting of the articles of the GATT happened to be not only tortuous but circuitous also, as the preparatory conferences contained many statements, goals and objectives of the various national government representatives.[18] Little was it realised that the GATT a stop-gap arrangement was to develop in course of its future administration, as a means by which the commercial policy provisions of the Havana Charter would to a large extent survive. By the fortuity of historical and political circumstances, the GATT and the essence of multilateralism survived without many of the rigid rules that might have proved hard to bargain and were also of limited efficacy. It is true that GATT survived for its informality compared to that of ITO and proved to be the engine for growth of international trade through a multilateral international economic and legal order.

GATT 1947 applied provisionally not requiring legislative approval of the contracting parties, and it remained so in effect from January 1948 to January 1995 for almost five decades weaving international economic law jurisprudence. Finally

[16]For an account of ITO, see J. E. C. Fawcett: 'International Trade Organisation', XXIVBYIL 376–382 (1947).

[17]A. K. Koul, supra note 1, p. 22.

[18]For a full discussion of the preparatory conferences leading to the GATT, see John H. Jackson, supra note 11, pp. 42–57.

with the establishment of World Trade Organisation (WTO) in January 1995, the GATT 1947 was rectified, amended and modified as GATT 1994 which is legally distinct from GATT 1947 and is a part of the WTO dispensation.

5 GATT: An Overview

An overview of the GATT 1947 as revealed in its original thirty-five articles and subsequent addition of three more articles in 1965 as Part IV, conveyed a mix of immediate preoccupations of the industrialised countries in the post-World War Second period. This is did by setting up a framework for the exchange of tariff concessions and by establishing a code of rules on non-discrimination and unfair trading practices. GATT borrowed heavily from the Havana Charter and ITO, yet it took the form of contractual agreement rather than a standing organisation. Although GATT subsequently acquired a secretariat, yet it continued to serve primarily as a framework within which bargaining for the removal of trade barriers occurred. It was never ratified by its member countries and existed by force of a 'protocol of provisional application' which signified that any contracting party could withdraw from the GATT after giving sixty days notice to the Contracting Parties and GATT obligations were effective only to the extent 'not inconsistent with existing legislation of the Contracting Party'. Thus, GATT 1947 as a whole applied only provisionally.

The concept "non-inconsistent with existing" legislation meant the legislation as existed in 1947[19] and might include federal or sub- federal legislations and legislations which were by their terms or expressed intention of a mandatory character, i.e. it imposed on the executive authority requirements which could not be modified by executive action were exceptions to the above concept of non-inconsistent with existing legislation.

The membership and participation in the GATT 1947 took place in four ways. The first three ways were accession by member government by way of original protocol of provisional application Provided at the time when GATT was negotiated or by subsequent protocols drawn by the acceding member under Article XXVIII of GATT[20] or by directly accepting the GATT itself under Article XXVI (2) and acceding to GATT through a protocol.

The method of accession was typically centred on prior tariff negotiations which took several years. During that period, the participating member governments were given provisional accession to GATT or there were instances when special

[19]Ruling of C.P. on 11 August 1949, BISD, Vol. II, p. 35; see also, John H. Jackson, The Jurisprudence of GATT & The WTO, 24–34 (Cambridge University Press, 2000).

[20]Such a list can be found in GATT, Analytical Index to the General Agreement 155–156 (2nd revision, 1966). This includes 'Annecy Protocol'; see also John H. Jackson. The Jurisprudence of GATT & the WTO, supra note 19, at p. 30.

arrangements were drawn between GATT and the acceding member.[21] The fourth possibility of acceding to GATT was by opting a membership to 'customs territories in respect of which a contracting party had accepted this Agreement'; when such territory 'acquired full autonomy in the conduct of its external relations'.[22]

The Uruguay Round (1986–94) culminating in Marrakesh Treaty established GATT as part and parcel of WTO and accession procedure has changed completely. Once a country becomes a member of WTO, it automatically is bound to follow the GATT 1994. GATT 1947 has been substantially transformed in the GATT 1994.

6 GATT: The Basic Purposes

The basic purposes of the GATT are contained in its various articles and the text. The text is divided into four parts: Part I includes Articles I and II (i.e. the most-favoured-nations' clause and tariff schedules of the contracting parties). Part II comprises commercial policy regulations (including, *inter alia*, the provisions of freedom of transit, anti-dumping and countervailing duties, valuation, quantitative restrictions, non-discrimination, subsidies, governmental assistance to economic development, emergency action, security exceptions, consultation and nullification and impairment). Part III includes, *inter alia,* the provisions on territorial application, customs unions and free trade areas, joint action by the contracting parties, modification of schedules, amendments and withdrawals. Part IV was added in 1965, under the caption, 'Trade and Development'. It deals with the principles and objectives for helping less developing countries and delineates commitments and joint action to achieve the objectives of trade and development of the world at large in general and of the less developing countries in particular.

The preamble to the GATT is structured on the basis of comparative cost advantage and free market in the sense that the GATT was devised to show the way international economic and trade relations 'should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods'. These objectives were to be carried by entering into reciprocal and mutually advantageous arrangements directed towards substantial reduction of tariffs and other barriers to trade and towards elimination of discriminatory treatment in international commerce.

The above objectives in the preamble were illustrated in Part I in as the General Most-Favoured-Nations treatment (Article I), and Article II, the Schedule of Concessions.

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[21]See John H. Jackson. The Jurisprudence of GATT & the WTO, supra note 19, p. 31.

[22]Article XXVI (5)(c).

Article I, the Most-Favoured-Nations (MFN) treatment, is the cornerstone of GATT and various other international treaties. It obligates all contracting parties that customs duties, and charges of any kind imposed on or in connection with importation and exportation or imposed on the international transfer of payments for imports or exports, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. The MFN treatment is limited to the importation and exportation of products/goods only. Any concession granted by a contracting party to a product of another country 'shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'.

The exceptions to the MFN principle are contained in Article I itself as listed in Annex A to F (namely: preferences in force exclusively between two or more of the territories listed in Annex A; preferences in force exclusively between two or more territories which on 1 July 1939 were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D; preferences in force exclusively between the USA and the Republic of Cuba; and preferences in force between neighbouring countries listed in Annexes E and F).

The MFN principle in a nuanced manner has found expression in other Articles of GATT such as [Article IV, paragraph b]; internal mixing requirements; (Article III, paragraph 7), transit of goods; (Article V, paragraphs 2, 5 and 6), marks of origin; (Article IX, paragraph 1), quantitative restrictions (Article XIII, paragraph 1); (Article XVIII, paragraph 20), state trading; and (Article XX, paragraph j), [measures taken for products which are in short supply].

There are various exceptions either expressly carved in the GATT Articles or by waivers and exceptions granted by GATT to the MFN obligations under Article I. A brief list of such waivers, both as expressed in Articles of the GATT and as granted by waivers and exceptions, is given below:

(a) Waivers granted under Article XXV(5) under exceptional circumstances approved by a two-thirds majority of the votes cast and majority means more than half of the contracting parties—some 100 waivers were granted under this Article including the most important waiver granted to European and Steel Community of 1952 which later blossomed into European Economic Community.[23] The second important waiver was introduced in 1955 in favour of all agricultural products at the behest of the United States.[24] The waiver granted to the agricultural products has now been subjected to International Agreement on Agriculture in the WTO dispensation and phased out.

[23]Decision of 10 November 1952, GATT, BISD, 1 supp. 17 (1952).

[24]Decision of 5 March 1955. GATT BISD, 3 supp. 32 (1955).

(b) Security exceptions under Article XXI wherein the contracting parties are not to require furnishing information which the member nation considers contrary to its essential security interests … taking any action which the member country considers necessary for protection of its essential security interest. Some instances of security exceptions are:

(i) relating to fissionable materials or materials from which they are derived;
(ii) relating to traffic in arms, ammunition and implements of war and goods and materials … for the supply of military establishment;
(iii) taken in time of war or other emergency in international relations or to prevent contracting parties to take action to pursue their obligations under UN Charter for the maintenance of international peace and security. Though the Security exceptions have been resorted to, it is believed that some of the cases were essentially of political nature.[25]

(c) General exceptions under Article XX allow exceptions to measures which the contracting party feels necessary to protect:

(a) public morals;
(b) human, animal or plant life or health;
(c) trade in gold and silver;
(d) secure compliance of laws and regulations not inconsistent to GATT including laws for the purposes of customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVIII (Government Assistance to Economic Development) and the protection of Intellectual Property Rights such as patents, trademarks, copyright and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreements … not so disapproved;
(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic industry when the domestic price of such materials is held below the world price as part of the government stabilisation plan subject to certain conditions; and
(j) essential to the acquisition of products in general or local short supply. Article XX has been subjected to a critical scrutiny after the Tokyo Round and especially after the Uruguay Round, a recourse to paras. (d), (e), (g) and (h) of Article XX have been taken either to expand the nature of the obligations or to insert new issues, which have been discussed in the

[25]For the cases; see GATT, Analytical Index, Article XXI, 552–64 (1993).

relevant agreements established after the establishment of WTO. The new issues such as environment, core labour standards, competition policy are discussed in the subsequent chapters.

(d) Exceptions under Article XIV include exceptions for quantitative restrictions in case of balance-of-payments difficulties. As Articles XI (General Elimination of Quantitative Restrictions), XII (Restrictions to Safeguard Balance of Payments), XIII (Non-discriminatory Administration of Quantitative Restrictions), XIV (Exceptions to the Rule of Non-discrimination, and XV (Exchange Arrangements) are closely knit, the exceptions in Article XIV have to be read in conjunction with all these articles. All of them establish a scheme of control on the use of quotas (with certain exceptions) under Article XI. Article XII deals with exceptions to Article XI for balance-of-payments purpose, and in case exceptions are utilised and quotas applied, they must be applied non-discriminatory, i.e. on a MFN basis and in accordance with certain other rules. Exceptions to Article XIII are allowed in certain balance-of-payments cases. Article XV sets forth a relationship between the GATT and the IMF.

A perusal of Article XI reveals that all quantitative restrictions are prohibited, but it also permits contracting parties to impose restrictions on imports of any agricultural programme restricting production. Article XI(2)(c) provides that the permitted quotas shall not be such as will reduce the total imports relative to the total of domestic production, as compared with the proportion which might reasonably be effected … in the absence of restrictions. Article XII authorises a contracting party to impose import restrictions in order to safeguard its external financial position and its balance of payments. Article XIII provides that any quantitative restrictions on imports shall be applied on a non-discriminatory basis with provision for public notification to and consultation with interested suppliers. Article XIV in turn authorises limited exceptions to the rule of non-discrimination by less developing countries or in accordance with balance-of-payments restrictions.

(e) Article XXIV is an important exception as it allows contracting parties to enter into customs union and free trade areas subject to following conditions;

(i) that the arrangement must cover substantially all the trade between or among the parties;
(ii) that on the whole the tariffs and other trade barriers to trade be no higher or more restrictive than the average of tariffs of the constituent territories before the formation of a customs union or free trade area;
(iii) if the formation of the customs union leads to the unbinding of bound duties, there is an obligation to negotiate with the beneficiaries of the concessions, in order to re-establish the prior balance; and
(iv) if the customs union is to be phased in, there must be a plan and schedule to do so within a reasonable period of time.

There has been a proliferation of customs unions, free trade areas and regional arrangements starting from the European Economic Community in 1957, and GATT has tolerated a wide diversity of regional arrangements under it.

(f) Non-application of the Agreement between particular contracting parties: Article XXXV of the GATT states that this Agreement or alternatively Article II of this Agreement shall not apply as between any contracting party and any other contracting party if:

(i) the two contracting parties have not entered into tariff negotiations with each other, and
(ii) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

There has been many invocations of Article XXXV (Non-application of the Agreement between Particular Contracting Parties) against other contracting parties since inception of GATT and it has also been abused in some cases.[26] Article XXXV has been carried over to WTO with an understanding that a contracting party and a new party may enter into tariff negotiations with each other without thereby waiving the right to invoke Article XXXV against the other party.[27]

7 GATT Tariff Negotiations

The second objective of the GATT was to progressively reduce tariffs and other trade barriers. The methodology adopted by the contracting parties to achieve such an objective was to negotiate reduction of tariffs and trade liberalisation by developing ingenious methods of Tariff Rounds between various GATT contracting parties on a regular basis.[28] In all there have been ten rounds including the Bali Round, 2013. A brief description of each round is set out below (see Table 1) followed by a chart of GATT's progress historically (see Chart 1).

2001 Doha Ministerial Conference and Declaration, 2001(Doha Round)

- Doha Development Agenda.
- Negotiations of Agricultural subsidies with emphasis on reduction of and phasing out all forms of export subsidies for farm products and substantial reduction of trade-distorting domestic support schemes.
- Negotiations on industrial products so as to eliminate or reduce tariff and non-tariff of barriers including tariff peaks (spikes) on sensitive products like textiles.

[26]John H. Jackson supra note 11, at p. 621.

[27]15 states had invoked Art. XXXV against Japans' accession to GATT in 1955 which was later revoked; see Andreas f. Lowenfeld, International Economic Law 34 (Oxford, 2002).

[28]See Agreement Establishing World Trade Organisation (WTO) Article XIII, and the accompanying Understanding on the Interpretation of Article XXXV of GATT 1947.

Table 1 Chronology of the GATT rounds

Year	Round	Activities
1	2	3
1947	Geneva	• 23 founder contracting parties • 45,000 tariff concessions agreed covering US$ 10 billion in trade • Commitment to future negotiating 'Rounds'
1949	Annecy	• Contracting parties exchange some 5000 tariff concessions • Entry approved for 10 new GATT contracting parties
1951	Torque	• 8700 tariff concessions agreed leading to an overall tariff reduction of approximately 25% in relation to the 1947/48 level • Entry approved for four new GATT contracting parties
1956–60	Geneva	• US $2.5 billion of tariff reductions agreed • Single schedule of concessions agreed for the recently established European Economic Community, based on its common External Tariff
1961	Dillon round	• 4400 tariff concessions agreed covering US 34.9 billion of trade
1964	Geneva	• GATT membership now raised to 50 contracting parties, who accounted for 75% of world trade
1967	Kennedy	• Negotiations expanded from a product-by-product approach to an industry/sector wise method of cutting tariffs • A 50% cut in tariffs achieved in many areas. Tariff concession covered estimated total trade value of $40 billion • Separate agreements concluded on grains and chemical products. • Establishment of a Code on Anti-Dumping
1973	Geneva	• 99 countries participated
1979	Tokyo	• Tariff reductions and bindings agreed covering more than US $300 billion of trade • Average tariff on manufactured goods in the world's nine major industrial markets reduced from 7 to 4.7%. Agreements reached on technical barriers to trade; subsidies and countervailing measures; import licensing procedures; government procurement; customs valuation; trade in bovine meat, dairy products; civil aircrafts; and a revised anti-dumping code
1986	Geneva	• 125 countries participated • Substantial reductions in tariffs on trading goods
1993	Uruguay	• Revision and strengthening of GATT rules; GATT 1994 • For the first time trade-related investment measures, trade in services and intellectual property rights become the subject of multilateral negotiations resulting in specific agreements • Establishment of the WTO (equipped with a strengthened Dispute Settlement Mechanism)

- Service negotiations on (i) market access for financial, telecommunication and transport services and (ii) easing of immigration rules for workers employed on temporary contracts.
- Trade remedies which included negotiations as clarifying and improving disciplines on anti-dumping and countervailing duty as set forth in Article VI of the UR Agreement on Implementation of Article VI of GATT,

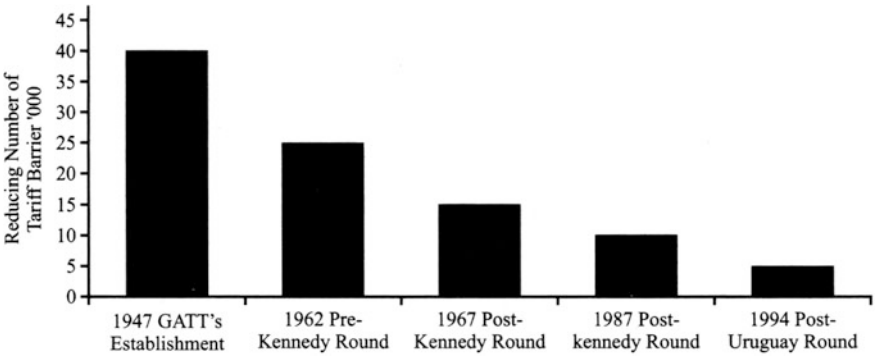


Chart 1 GATT's historical progress

1994 and the Agreement on Subsidies and Countervailing Measures (SCM) Agreement, 1994.

- Regional trade agreements so that the disciplines and procedures on customs unions and free trade areas are clarified and improved.

2003–11 Dead-locked Doha

- The Doha Round talks entered into yet another dormant stage the Geneva debacle of the summer of 2008. Although during September 2009 in Pittsburgh, the G-20 leaders pledged, yet again, to conclude the Doha Round by the end of 2010, no genuine breakthrough, such as an agreement on the modalities, had been made by October 2009. The Geneva Ministerial Meeting in December 2009 ended without any substantial progress, merely reaffirming the 2010 deadline. All in all, the Doha Round still remains a failure.

8 From Geneva to Tokyo

1. The original GATT Geneva round after Second World War in 1947 was attended by 23 original contracting parties. The negotiations covered roughly 45,000 tariff concessions worth US $10 billion of trade.
2. The Annecy Round, 1948–49 involved 34 countries. The Round was named after the place where the negotiations were conducted, Annecy, France. Roughly 5000 tariff concessions were exchanged.
3. The Torquay Round, 1950–51, involving 34 countries. The Round was named after the place where the negotiations were conducted, Torquay, England. About 8700 concessions were negotiated, resulting in tariff reductions of 25% compared to the 1948 level.
4. The Geneva Round, 1955–1956 involving 22 countries. US $2.5 billion of trade was concluded.

5. The Dillon Round, 1960–1962, involving 45 countries. About 4400 tariff concessions covering US $4.9 billion of trade negotiation. The Round conducted in Geneva was named in honour of US under-secretary of State Douglas Dillon, who had proposed the Round.
6. The Kennedy Round, 1964–1967, involving 48 countries and US $40 billion of trade. The Round was named after the late president Kennedy of US and took place in Geneva.
7. The Tokyo Round, 1973–1979, involving 102 countries and US $300 billion of trade. This round launched in Tokyo was the most ambitious and concluded in Geneva.
8. The Uruguay Round of MTN, 1986–1994 involving 124 countries and US $3.7 trillion of trade. It was launched in Punta-del-Este, Uruguay, and easily eclipsed the Tokyo Round as the most far reaching and complex. Most of the negotiations occurred in Geneva. The major outcome of the Uruguay Round has been the establishment of World Trade Organisation and amended GATT 1994 and various multilateral and Plurilateral Agreements.

A ninth Round, the Millennium Round was to have been launched at Seattle during the third WTO Ministerial Meeting from 30 November to 3 December 1999 but did not materialise for the opposition and acrimony shown during the negotiations at Seattle by various groups and NGOs representing a wide range of concerns allayed by environmental, labour, human rights and consumer protection issues. There were even violent protests and demonstrations. A new round of trade negotiations was approved at a Ministerial Conference of Doha, Qatar, in November 2001, followed by Cancun Summit of 13 September 2003 and Hong Kong, China (2005).

The Doha Ministerial Conference got converted into the Doha Development Agenda which was scheduled to last up to 1 January 2005; however, the Doha Development Agenda and its negotiations continued to allude the WTO members. The Cancun Ministerial Conference was followed by Hong Kong Conference of 2005 to carry forward the Doha Development Agenda and in some respects put the Doha negotiations back on track after a period of hibernation. Meanwhile, the General Council of the WTO adopted July package on August I, 2004 to conclude successfully the negotiations launched at Doha. In 2006, the negotiations were suspended but were resumed in 2007. By the end of 2008, a lot of progress was made in agriculture and non-agriculture market access negotiations although the agenda spreads over twenty disparate items.

It can be safely concluded that the ingenious method of conducting tariff and non-tariff negotiations through these rounds has led to (a) involvement of large number of countries; (b) covering of a greater volume of world trade; and (c) international trade becoming a fundamental ingredient of international trade law.

These tariff negotiations and rounds can be traced to GATT Articles XXV and XXVIII which is supplemented by a brief mention in Article III: 2 of the WTO's supporting role. However, these articles do not provide legal mechanisms or procedures for conducting negotiations.

The process of tariff negotiations at Geneva in 1947 was on the basis of selective product-by-product negotiations leading to the reductions of tariffs and founding of GATT. The two succeeding rounds (Annecy, 1949 and Torque 1950–1951) combined modest tariff cuttings with negotiations of the conditions of accession of new entrants.

The Geneva Round, 1955–1962 focused upon product-by-product method in accordance with 'principal supplier rule', which meant that 'principle supplier' of a particular product was expected to entertain the possibility of offering concessions only on a product for which another country that was also a major supplier of that product had requested concession. Thus, negotiations were held by and among principal suppliers. Other countries had access to these negotiations and could participate these negotiations with the result that the tariff negotiations were extended to a broad spectrum of countries. Once concessions on a product had been agreed upon on a principle of mutually advantageous basis between the principal suppliers, the deal would become multilateral as the MFN obligations in Article I of GATT would apply. The new lower tariffs would become bound under Article II of GATT. Typically, each pair of countries would exchange 'request list and subsequently offer exchange lists'. After the lists were exchanged, they were made available to all the participants, which would take them into account in their own bilateral negotiations and preparation of revised list. If two countries might benefit from a proposed concession, the importing country might make its offer subject to being 'paid' by both the potential beneficiaries.

Although Geneva Round 1955–1956 had a limited success[29] yet the liberalisation of trade in agricultural sector and the needs of less developing countries were recognised in a report, Trends in International Trade, commonly known as Haberler Report (1958), pursuant to which three committees were established.[30] Committee I focused on agenda for the next round, Committee II reviewed the domestic agricultural policies of each contracting party, and Committee III addressed to the economic needs of the less developing countries (LDCs) in the world trading system.

The Dillon Round, 1960–1962 was negotiated in the background of the threat of EEC's common external tariff which to some countries meant trade distortion. The EEC tariff for the purposes of GATT, Article XXIV: 6 amounted to large scale external tariff negotiations by the EEC to compensate individual contracting parties for any imbalance that would result when the EEC replaced the variegated tariffs of each EEC member with a single external tariff. EEC's Common Agricultural Policy was also considered as threat and Committee III had already drawn attention to this trade-distorting agricultural policy. The Dillon Round therefore provided opportunity for discussing the threats to international trade and without much fuss EEC was integrated into the GATT. On balance, the results of Dillon Round were

[29]The reason being that the US administration did not offer greater reductions under the Trade Agreements Act of 1955, 65 stat. 162 (1955).

[30]Haberler Report, GATT, Trends in International Trade (Sales No. GATT/1958).

modest, nothing was done to combat non-tariff barriers and tariff cuts were very small. EEC proposed across-the-board adjustments as it had used the method for elimination of duties *interse* its partners, but the proposal was not accepted.

The Kennedy Round negotiations (1964–1967) were not only complex but ambitious too. They were complex because the negotiating method from the earlier product-by-product approach was replaced by 'across-the-board' or 'linear method'. But the US Congress limited the American negotiators to engage in 'across-the-board' reductions by excluding products worth 12% US imports from the scope of negotiating authority. Thus, the Kennedy Round saw some 'product-by-product', and 'sector-by-sector' tariff negotiations.

The 'linear method' would have presupposed that all countries would reduce the tariffs by the prescribed *percentage* on all items. Certain countries decided that they could not participate on a linear basis and were permitted to participate on 'product-by-product' basis. The linear approach was abandoned so far as agricultural goods were concerned. It is not surprising, therefore, to find efforts to liberalise trade in agriculture in the subsequent Tokyo and Uruguay Rounds. The timetable for concluding the round was set back, and finally exceptions on industrial goods were tabled which proved more expensive than anticipated.

Various subgroups were established to study the increasing importance of non-tariff barriers in international trade but in the end only a few major ones were put into the agreement. Two principal non-tariff barriers on which agreement was reached during the Kennedy Round were anti-dumping and the American selling price (ASP) method of valuing certain benzoic chemicals for customs duties.[31]

The participation of the LDCs in the Kennedy Round through the mechanism of GATT 'Trade and Development Committee' reinforced the belief that developed countries are obligated to give high priority to reducing their trade barriers to products of importance to LDCs and eschew the erection of new barriers against such products. Article XXXVI: 8 of GATT indicate that developed countries do not 'expect reciprocity' from less developing and least developed countries which need 'special and differential treatment'. The LDCs until date are asking for special and different treatment as there is no level playing field for them, and this continues to be a key issue in international trade negotiations.

The results of Kennedy Round so far as industrial sector was concerned, tariffs were reduced so low that they became inconsequential as trade barriers. However, a plethora of ingenious non-tariff barriers were not only causing complaints and pressures for retaliation among nations, but were eagerly sought by protectionist forces.[32] The efforts to reduce the non-tariff barriers and to find remedies for them continued.

The Tokyo Round (1973–1979) was held in the backdrop of earlier rounds and also in the face of the fact that the 1950–1975 international merchandise trade had grown at an average rate of 8% annually, more progress was needed on reducing

[31]See, John H. Jackson, The World Trade and the Law of GATT, supra note 11, pp. 225–226.
[32]Ibid, pp. 228–229.

tariff barriers on agricultural goods, extending the special and differential treatment to LDCs and most importantly combating the spread of non-tariff barriers. Further the political trends in some developed countries, especially the international monetary crisis of USA in 1971 which led to the abandonment of fixed exchange rate systems of currencies as established by IMF in 1944 for floating rates, gave impetus to broaden the scope and coverage of Tokyo Round. As a result, over US $300 billion of trade were covered by tariff reductions and bindings phased in a seven-year period.

During this period, the weighted average tariff on manufactured goods from nine major industrial countries indeed declined from 7 to 4.7%, causing a 34% decrease in customs duties collected. This cut was similar to that achieved during the Kennedy Round, and even developing countries lowered tariffs of $3.9 billion on their imports. The comprehensive package that emerged from the Tokyo Round was adopted by ninety-nine countries.[33]

To combat non-tariff measures, the following major agreements were reached at the negotiations in the Tokyo Round.

1. Agreement on technical barriers to trade;
2. Agreement on government procurements;
3. Agreement on interpretation and application of Articles VI, XVI and XXIII; (Countervailing duties and subsidies)
4. Agreement regarding Bovine Meat;
5. International Dairy Agreement;
6. Agreement on implementation of Article VII (customs valuation);
7. Agreement on import licensing procedures;
8. Agreement on trade in civil aircraft;
9. Agreement on implementation of Article VI (anti-dumping); and
10. Framework agreements relating to

    (i) Differential and more favourable treatment, reciprocity and fuller participation of developing countries;
    (ii) Declaration on trade measures taken for balance-of-payments purposes;
    (iii) Safeguard action for development purposes; and
    (iv) Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

The negotiations of the above Agreements brought GATT at the fulcrum of history for two reasons. First, GATT implicitly acknowledged these Agreements as side Agreements and second, these Codes/side Agreements could not be automatically implemented, but obligated only those nations who signed and ratified them. Also the first seven codes had sufficiently precise obligations to be called as ‘codes’, whereas the others tended to confine their terms to the development of

[33]See generally, Robert E. Hudec, Enforcing International Trade Law: The evolution of the Modern GATT Legal System (1993).

consultation mechanisms, statement of objectives and only a few weak provisions which actually provided no binding obligations.[34]

From the perspective of LDCs, the Tokyo Round proved beneficial as 'enabling clause' was agreed not only to grant preferential treatment, to LDCs but Generalised Scheme of Preferences (GSP) was accorded a permanency.[35]

The international economic landscape which was brightened by the earlier tariff negotiations, witnessed just after the Tokyo Round, sluggish economic growth, rapid inflation and high unemployment—economic stagflation. The USA followed by many other developed countries resorted to discriminatory quantitative restrictions circumventing Tokyo Round disciplines and also started resorting to voluntary export restraints with the result that the benefits which could have accrued to international trade by Tokyo Round codes were nullified. As a result, many developing countries rejected these codes. Also as already said some of these codes required municipal legislations to be implemented. The developed countries brought in their municipal legislations devices so that the non-signatory did not have a free ride on the benefits of the codes while eschewing the obligations as set out in these codes. However, one has to realise that the Tokyo Round Codes made the non-tariff barriers visible if not eliminated and also decreased the uncertainties generated by governmental interventions in the markets as well as stabilised the international trading environment.

9 The Uruguay Round Negotiations

The Uruguay Round of Tariff Negotiations (1987–1994) had its origin in the partial failure of the earlier trade rounds including the Tokyo Round as the non-tariff protectionist measures were not fully addressed. The GATT as an institution had also developed chinks in its authority as the non-discrimination principle was undermined by the failure to resolve the safeguard issue and by increasingly restrictive application of the GATT Multifibre Arrangement providing alternative safeguard regime for trade in textiles and clothing.

Developed countries, especially USA, were looking for solutions to problems in particular industries by negotiating trade restrictive agreements entirely outside the framework of GATT rules. Voluntary export restraints across the developed country economic spectrum especially the one involving Japanese self-limitation of automobile exports to the USA had further escalated the non-tariff barriers. GATT as an institution had acknowledged that a lack of consensus on the implementation of various Agreements was beyond the scope of GATT as they had become too

[34]John H. Jackson, et al., Legal Problems of International Economic Relations, Cases, Materials and Text, 316–317, 3rd ed. (1995).

[35]Notwithstanding the provisions of Article I of the GATT, contracting parties may accord differential and more favourable treatment to LDCs without according such treatment to other contracting parties (GATT Doc). L/4903 (3 December 1979); BISD (26 sup.) 203–04 (1980).

wide in scope and too important in terms of national policy 'to be dealt with effectively by the semi-judicial procedure' of GATT. Agricultural exporters continued to feel that GATT had failed to address their problems.[36]

The cynicism of the developing countries as partners in international trade obviously grew from the frustrations of not seeing the fruition of "New International Economic Order" and all other negotiations for financial and trade problem initiative brought in the United Nations in the then North-South Dialogue.[37] The developing countries continued to be disillusioned although some palliatives in the form of GSP for helping them to find markets of their products in developed countries were unilaterally accepted and introduced by the developed countries. However, on balance no substantial gains had accrued to the LDCs by such and other palliatives. The LDCs continued to remain outside the periphery of GATT and could not substantially and effectively influence the multilateral tariff and non-tariff negotiations at the GATT counter.

Noting the above disparate and varied concerns of developed countries and LDCs, it was widely recognised that international trade is a serious business and needs to be addressed in a composite and holistic manner wherein the interests of both developed countries and LDCs need to be addressed within a framework of formal, legal and institutional framework.

As a prelude to the Uruguay Round, the diversity of interests in the international trade essentially centred on how best the developed countries can fashion international trading rules so that the LDCs do not continue to be free riders on the GATT system with least commitments. The free riding was in fact damaging the economies of LDCs by excluding healthy competition. The move by developed countries was in turn supported by Newly Industrialised developing Countries (NICs) as these NICs had opted for liberalisation, globalisation and of course, international competition of free market economy.

The LDCs continued to harp on their concern for heavy debt services obligations to IMF, Multifibre Arrangement on Textiles and Clothing as being protectionist, easy access of tropical products, agricultural goods and non-ferrous metals in developed country markets, and also removal of voluntary export restraints and a preferential treatment for their exports in foreign markets. The LDCs still kept hopes in the NIEO and palliatives for their economic development as brought about by the United Nations from 1974 onwards and resisted any future negotiations on trade issues in GATT.[38]

As the developed countries were suffering from recession, they too were anxious to open up their exports and avoid protectionist measures adopted over the years. The agricultural sector which was excluded from the GATT was being considered

[36]John Croome, Reshaping the World Trading System, A History of the Uruguay Round, Kluwer Law International 3–4 (1999).

[37]See generally, A.K. Koul, The North South Dialogue and The NIEO, Indian Journal of International Law, 385–404 (1986).

[38]See generally, A.K. Koul, supra note, 37.

the major culprit in accentuating the protectionism in international trade and thus, needed to be liberalised especially in its subsidies sectors, domestic and export. The discussions on international trade as a serious subject got centred on EEC and the USA. EEC initially showed little interest as it had developed and expanded its markets by wrapping up a number of LDCs under the various Lome Conventions. Initially, it showed little interest in GATT initiatives. However, the Reagan Administration of USA, in 1981, showed great enthusiasm and inclination for negotiating not only the old issues in GATT but also in seeking liberalisation of world agricultural trade, a new basis for relations between developed and LDCs, free market principle in international trade, and an open attack on barriers to investment, trade in services and intellectual property.

The initial trade negotiations for the final Uruguay Round (1986–94) had a tedious and circuitous beginning from 1982 when GATT contracting parties in its thirty-eighth session adopted a Ministerial Declaration that 'that multilateral trading system of which GATT is the legal foundation is seriously endangered'.[39] The Declaration explained certain shortcomings in the functioning of GATT system and acknowledged that differences of opinion regarding the appropriate balance and implementation of rights and obligations of the contracting parties contributed to GATT's institutional difficulties. In particular, disagreements regarding (i) GATT rules and degree of liberalisation in agriculture, (ii) safeguard measures, and (iii) textiles were recognized as threatening to the stability of international trading system.[40] Therefore, GATT acknowledged that existing measures were to be made GATT consistent, resist protectionist pressures, avoid distortions on limiting international trade, and avoid restrictive trade measures for reasons of non-economic character not consistent with GATT.

During 1982–1985, GATT Council held special meetings to review the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of the Tokyo Round as well as to consider the 'Leutweiler Report' of 1985. The Report was given by a panel established in November 1983 by the Director General of GATT to identify the problems besetting international trading system. The review suggested that 'Voluntary Export Restraints (VER)' and 'Orderly Marketing Arrangements (OMAs)' taken outside the GATT purview had undermined GATT system. It proposed a new round of trade negotiations in the face of the fact that trading rules were avoided and disregarded by numerous contracting parties.

In 1985, a preparatory committee for the Uruguay Round was established by the contracting parties[41] to determine 'objectives, subject matter, modalities for the participation in the upcoming round of multilateral negotiations'. The preparatory

[39]Ministerial Declaration adopted on 29 November 1982, GATT Doc. No. I/5424; BISD 29 September at 9 (1983).

[40]Ministerial Declaration adopted on 29 November 1982, GATT Doc. No. I/5424; BISD 29 September at 9 (1983).

[41]Decision of 28 November 1985 on Establishment of the Preparatory Committee, GATT Doc. No. L/5925; BISD 32 suppl. 10 (1986).

committee in its various meetings discussed topics as diverse as agriculture, subsidies, tariffs, non-tariff measures, dispute settlement, safeguards, MTN agreements and arrangements, etc.

In April 1986, the US representative suggested that there was an urgent need (i) to liberalise trade and (ii) to strengthen the multilateral trading system. On the first suggestion, consensus had developed for strong commitment to a standstill and rollback protectionist measures. On the second, the US delegate emphasized the need to improve existing GATT disciplines such as safeguards, agriculture, dispute settlement and non-tariff measures as well as expanding the scope of the GATT into areas of growing economic concern such as services, intellectual property rights and investment.[42]

10 The Uruguay Round—Punta-Del-Este and Beyond

The Ministerial Meeting at the Special Session of the Contracting Parties at Punta-del-Este, Uruguay, launched a new and very broad round incomparable to any earlier Rounds of multilateral trade negotiations (The Uruguay Round).[43] Punta-del-Este Declaration can be summarised as follows:

I. First Section on trade in goods consisting of a preamble and seven sections. Preamble—to negotiate, halt and reverse protectionism, remove distortions to trade, preserve GATT and develop a more open, viable multilateral trading system Multilateral trading system to promote growth and development—relevance of the round to international finance, money and debt—strengthening the trade and other economic policies, improvement in the functioning of IMF and flow of finance and investment to LDCs.
II. Second Section-General Principles of Negotiations—to be treated as a single undertaking-transparency the main focus—to avoid unwarranted cross-sectoral demands.
III. Third Section-On the statement of principles to govern the participation of LDCs standstill and rollback not allowing the countries to improve their negotiating positions against other countries—No GATT inconsistent trade restrictions to be introduced—Rollback calls for either phasing out by the end of the round all trade restrictions or distorting measures inconsistent with GATT, or for the countries to be brought into conformity with post Uruguay Rules.

[42]Preparatory Record of Discussions of 14–16 April, GATT, Doc. No. PREP. CON (186)SR/5,1 (June 19 1986).

[43]A comprehensive history of the Uruguay Round through 1992, including the principal documents, is found in The Uruguay Round: A Negotiating History (1986–92), Terence P. Stewart (ed.), 3 vols. (1993).

IV. Thirteen subjects were settled for negotiation: tariffs, non-tariff measures, tropical products, natural resource products, textiles and clothing, agriculture, GATT Articles, safeguards, the MTN Agreements and Arrangements (i.e. codes negotiated in the Tokyo Round), subsidies, and countervailing measures, dispute settlement, trade-related aspects of intellectual property (including trade in counterfeit goods), and trade-related investment measures and functioning of the GATT system.
V. Two sections were devoted to participation in the negotiations on Goods and organisational matters—open to GATT members and provisional members and those who by April 1987 had applied for membership—more than 100 countries participated—no opening to Soviet Union—non-members would have to get GATT conformity—the results achieved for LDCs were to be assessed.
VI. The other proposals, i.e. problems in the areas of commodities, natural resource-based products and tropical products were referred to the Trade Negotiating Committee Trade Negotiating Committee (TNC).
VII. Other issues lacking consensus included export of hazardous substances, commodity arrangements, and restrictive business practices and workers rights.

The above negotiations led to the establishment of Trade Negotiating Committee, the Group on Negotiations of Goods, and the Group on Negotiations on Services, commonly known as TNC, GNG and GNS. Also fifteen subjects were identified for further negotiations with a surveillance body set up to review the performance of standstill and roll-back commitments. By 1987, most of these groups had met and by December 1988 an agreement was said to have been reached on 11 of the 15 topics being negotiated but agreement could not be reached on four subjects, i.e. agriculture, textiles, protection of intellectual property and safeguards. As a result, doubts began to be voiced about whether the Uruguay Round would lead to fruition.

11 Negotiations of Key Elements—A Brief Review

The negotiations up to December 1988 can be characterised as national interests versus international legal controls in the areas of access to markets, tariffs, non-tariff measures, natural resource-based products, tropical products, rulemaking, safeguards, subsidies and countervailing measures, the Tokyo Round Codes, anti-dumping, standards, import licensing, customs valuation, government procurement, GATT articles, balance-of-payments provisions, state trading, security exceptions, regional arrangements, waivers, *de facto* status of GATT, renegotiations of tariff concessions, non-application of GATT, textiles and clothing, agriculture, services, trade-related intellectual property, trade-related investment measures, institutions, dispute settlement and functioning of the GATT system.

So far as market access is concerned the negotiations centred around to what extent the developed countries should allow entry of the semi-manufactured and manufactured goods from other countries into their markets especially from the LDCs as the tariff escalation in sectors such as textiles, clothing and agricultural products had increased barriers in international trade in these sectors to the disadvantage of the exports of many developed and developing countries. The other area of market access concerned the avoidance of GATT by perpetuating 'voluntary export restraints' (VER) . However, all such efforts to achieve market access were interrelated with the other GATT areas like safeguards, subsidies and dumping.

The negotiations on tariffs revolved around, as to which of the formulas, of Tokyo Round or Kennedy Round should be accepted. This was because the end outcomes of the formulas at both had given varied outcomes. Also, should tariff reductions be given to all the commodities including agriculture in an autonomous manner, was a question hotly debated.

The negotiations on non-tariff measures were hackneyed as there was an inventory of non-tariff measures collected by GATT during 1983–86 and in the face of proposals by various countries which were contradictory to each other, the negotiations left the question of dealing with non-tariff measures wide open.

The Punta-del-Este Declaration called for 'the fullest liberalisation of trade in natural resource-based products, processed and semi-processed with the aim of reducing or eliminating tariff and non-tariff measures', a separate group was established to handle natural resource-based products. However, no substantial progress was made in this sector.

As regards to tropical products, the objectives of the Uruguay Round as set out in the Punta-del-Este were almost identical to those of the natural-based products with a difference that they were of great importance to LDCs and as such needed special consolidation, consultations continued to be held among a broad spectrum of countries. LDCs identified difficulties such as tariffs, quantitative restrictions, internal taxes holding down the consumptions in the developed countries, and other regulatory measures. In the proposals submitted by various interest groups of countries, viz. EEC and USA, nothing substantial was achieved.

Rulemaking under GATT in pursuance of Punta-del-Este was basically to simplify the language of GATT articles and also to clarify Article VI (anti-dumping) of the GATT. Also safeguard or escape clause provisions of Article XIX needed more clarification along with Tokyo Round Codes.

The safeguard provision negotiations under Article XIX were specifically emphasised in the Punta-del-Este Declaration as to be clarified in terms of transparency, criteria for action, concept of serious injury and its criteria, removal of safeguards, structural adjustment and compensation and retaliation.

On subsidies and countervailing measures, the Punta-del-Este Declaration required that negotiations should review Article XVI (subsidies) of the GATT as well as Article VI and the code on subsidies and countervailing measures of the Tokyo Round. As the negotiations in this area were tough in nature and concept of subsidies was controversial, a traffic light approach was finally adopted with a blend of prohibited (red), undecided (amber) and authorised (green) categories.

The nine Tokyo Round Codes were also further negotiated (commonly known as MTN codes). The Punta-del-Este called for improved, clarified and expanded codes. The negotiations witnessed highly technical and varied proposals. The negotiations on anti-dumping code essentially centred on further clarification of GATT, Article VI and Tokyo Round Code (Agreement on Implementation of Article VI), which are interconnected. The acrimony in the debates essentially was between USA and EEC as these two countries were prone to use anti-dumping measures.

The negotiations on technical barriers to trade commonly known as the 'Standards Code' or TBT were perhaps the most successful of the Tokyo Round agreements. There was hardly any controversy with regard to further explaining the TBT Code.

Import licensing and the Agreement on Import Licensing Procedures negotiated in 1979 were intended to ensure that the necessary administrative tools of licensing should not themselves become a trade policy measure, and in particular do not hamper or distort trade. The Agreement's provisions require that import licensing procedures be applied neutrally and fairly, and procedures are simple with an adequate notice of requirements and time limits for processing applications.

About customs valuations, the thinking was that they can seriously distort trade, because they determine the impact that import duties and other charges will have on a particular shipment. Although the valuations in Article VII of the GATT were supplemented by the Tokyo Round Valuation Code, the LDCs were reluctant to accept the presumption that they should use the transaction value, because they believed that importers frequently undervalued their shipments so as to reduce the duties payable, or overvalued them, with the collision of shippers as a means of illegally moving money out of the country.

For the government procurement code as developed in the Tokyo Round, there were very few takers as the code essentially provided a set of rules under which signatories opened up to traders of other signatories the possibility of bidding for purchasing contracts of various government-owned bodies. Far reaching negotiations to expand the coverage of the code took place during the Uruguay Round and a final agreement was signed in Marrakesh, Morocco.

The Punta-del-Este Declaration suggested that participants shall review GATT articles, provisions and disciplines as requested by interested contracting parties, and, as appropriate, under trade negotiations. As GATT negotiations as a whole were confusing, the issues surrounding some of the GATT articles were taken up. The schedules of concessions in GATT, Article II were asked to include all ordinary customs duties and that full coverage of bindings is shown in the schedules.

As related to the balance-of-payments provisions, the four relevant Articles, XII, XIV, XV and XVIII of GATT, were subjected to great scrutiny. Articles XII and XVIII are of primary importance, the first setting out the basic ground rules of using trade restrictions in balance-of-payments difficulties, and the second (in its section B) offering an easier set of provisions that are available to LDCs. Some LDCs had resorted to Article XVIII (B) to limit imports. Tokyo Round had clarified such

misuse by saying that restrictive trade measures are in general an inefficient means to maintain or restore balance-of-payments equilibrium. But on balance, the LDCs used Article XVIII (B) as one of the methods to impose restrictions on imports, the USA, EEC and Canada suggested proposals to do away with the use by LDCs of Article XVIII (B) under circumscribed conditions.

For state trading, it was suggested at the Punta-del-Este Declaration that GATT Article XVII on state trading needs a fresh look as disputes over the exact coverage of the Article, and its notification procedure was the most misused article under GATT.

Article XXI of the GATT overrides all other Articles of GATT in recognising what has been described as the first duty of any state: to protect national security.

There were proposals that as Article XXI have been resorted to by some contracting parties for political purposes; the article needs to be tightened in its scope.

Regional Agreements under Article XXIV of the GATT were subjected to negotiations. As the Article rules were believed to be complicated as customs unions and free trade areas are two separate entities and only 70 of some of the regional arrangements developed over the years were examined and explicitly recognised by GATT, it was felt that regional agreements should get GATT conformity.

Article XXV of GATT essentially provides for the basic authority to member countries to act together to further the Agreements purposes, and in fact it is the basis on which further negotiations have been launched. Paragraph 5 of the Article is the waiver provision which allows individual countries to be relieved of the GATT obligations provided it is agreed by a two-thirds majority including at least half of the GATT members. However, Article XXV: 5 does not specify the conditions for waivers and in the face of waivers granted to the USA to maintain import restrictions on some agricultural products many countries believed that waivers should be granted under strict conditions.

De facto status under GATT (Article XXVI) applies to the dependent territories which become independent, retained de facto status and quite a few of them even after independence continued to remain such without implementing the full GATT obligations. From 1997 onwards, as most of the countries joined GATT, the *de facto* status is no more relevant.

Renegotiations of tariff concessions are laid down in Article XXVIII. Paragraph I of the Article requires that a country wishing to raise bound tariffs negotiates appropriate compensation, normally by lowering other tariffs with the country with which it originally negotiated the binding, and also with a country with which it has 'principal supplying interest'. A supplier is recognised as having a principal supplying interest if it holds, or recently held, a bigger share of the market for the product concerned than that of the country which originally negotiated the concession. In practice, the greater weight in world trade of the larger countries means that they tend to be the principal suppliers, and are the only countries which can usually claim negotiating rights when someone else has sought to raise bound tariffs, with the result that small suppliers have no say in the matter, even if the exports threatened by an increase in tariffs are relatively much more important to them than they are to the principal supplier.

Non-application of the GATT under Article XXXV provides that a country cannot be forced to maintain GATT relations with another, provided it so declares when it or the other country concerned, signs the General Agreement, it can regard the rights and obligations of the GATT as simply not applying in its relations with that country. This article in earlier years was widely invoked by the countries which did not wish to have trade relations with some specific country. Article XXXV made this right conditional on the two countries provided they have not entered into tariff negotiations with one another.

The Grandfather Clause or the Protocol of Provisional Application raised issues such as signatory countries could maintain some measures inconsistent with Part II of the GATT, provided legislation at that time required to do so and the GATT had never achieved the status of an international treaty, therefore, it was considered necessary, to get rid of the grandfather clause and make GATT an international institution in a legal technical sense.

Textiles, clothing and agriculture presented peculiar problems besetting the trade in these sectors. Textiles and clothing primarily were subjected to varied tariffs to protect domestic industries of importing countries as well as MFA negotiation of 1973, renewed after every four years, was providing 'quotas' and other restraints to the imports of countries having comparative advantage in these sectors in the markets of developed countries. GATT, on the other hand, allowed only safeguard actions that were applied equally against imports from all sources, and provided for compensation for the trade damage done. The MFA specifically permitted restrictions that affected only one supplying country. Therefore, the negotiations were centred on the modalities as to how trade in textiles and clothing should be brought under the GATT umbrella.

The negotiations in agriculture were very complex for the fact that agriculture remained outside the purview of GATT from 1955. Uruguay Round Preparatory Committee 1982 had a mandate to examine all matters affecting trade, market access, and competition and supply in agricultural products and spent two years for forwarding recommendations on how trade in agriculture products might be liberalised. The recommendations foresaw action on two fronts: clearer definition of how GATT rules on quantitative restrictions and subsidies should limit the trade effects of agricultural policies; and more effective special treatment under GATT for LDCs. The negotiations witnessed polarisation of interests between USA and Cairns Group on one hand which sought to liberalise trade in agriculture by getting rid of import restrictions, subsidies and other trade distortions and the European Community, on the other hand, emphasising the need for more balanced and stable world markets. The EC put forward proposals for step-by-step liberalisation of agricultural production and trade. The EC was not ready to leave agriculture entirely to the play of market forces, without support and aid.

Services, investment and intellectual property were completely new subjects introduced in the Punta-del-Este negotiations and were highly contentious till their final adoption in the Marrakesh Treaty, 1994. International trade in services was

highly attractive to developed countries as they had not only monopoly but also comparative advantage in services, such as banking and insurance, management, know-how, shipping and air transport, advanced communications and other technology. The developed countries used these services as bargaining chips against LDCs for extending market access and tariff reductions to the textiles and clothing in which LDCs had a comparative advantage.

Intellectual property negotiations raised many difficulties. First and foremost was to protect the intellectual property rights in the form of patents, copyright, trademark, integrated circuits, know-how and brand names throughout the world. Second, if any package of Uruguay Round had to materialise, trade-related intellectual property rights could not be left out of the package.

Trade-related investment measures, again a new subject, were negotiated in Punta-del-Este without much acrimony. However, the polarisation of interests on North-South divide sufficiently existed during its negotiations.

The functioning of the GATT system and settlement of disputes are closely related. The GATT 1947 was never intended to be an international treaty, yet over the years functioned so well through the settlement of disputes procedures that at Punta-del-Este negotiations, all countries were interested in strengthening the GATT as an institution for settlement of disputes.

From December 1988 to the final conclusion of the Final Act of Uruguay Round on 15 April 1994, the Uruguay Round negotiation saw many ups and downs including the comprehensive final draft (The Dunkel Draft 1991) in which major compromises of the conflictual interests of the negotiating countries had been largely settled along with certain objections from both developed and developing countries. By 1993, it had become certain as put in the words by Peter Sutherland, the then Director General of GATT that 'the world has chosen openness and co-operation instead of uncertainty and conflict … important new areas of world economy have been brought under multilateral disciplines, and added together, the achievements amount to a major renewal of the world trading system' .[44]

The Uruguay Round Ministerial Meeting met on 15 April 1994 at Marrakesh and adopted the Marrakesh Declaration establishing World Trade Organisation (WTO) on 1 January 1995. It also established twenty separate Uruguay Round Agreements. Sixteen of the Agreements are multilateral and four are plurilateral. The multilateral Agreements are binding on all members of WTO—countries which are signatories to the WTO are known as Members—previously GATT signatories were known as 'Contracting Parties', whereas the Plurilateral Agreements, although administered by the WTO, are binding only between their signatories.

[44]See GATT News of the Uruguay Round, 21 December 1993, I.

Uruguay Round Agreements

Multilateral	Plurilateral
1	2
1. Agriculture	1. Public procurement
2. Sanitary and phytosanitary measures	2. Trade in civil aircraft
3. Textiles and clothing	3. International dairy products [Terminated in Sept.1997]
4. Technical barriers to trade	4. International bovine meat [Terminated in Sept.1997]
5. Trade-related investment measures ("TRIMS")	
6. Anti-dumping	
7. Customs valuation	
8. Pre-shipment inspections	
9. Rules of origin	
10. Import licensing procedures	
11. Subsidies and countervailing measures	
12. Safeguards	
13. General agreement on trade in services ("GATS")	
14. Trade-related intellectual property rights ("TRIPs")	
15. Dispute settlement	
16. Trade policy review agreement	

12 From Uruguay to Doha and Beyond

With the establishment of WTO in 1995 and the subsequent six ministerial conferences such as Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001), Cancun (2003) and Hong Kong (2005) and the packages submitted by various groups of countries, number of issues have come to the negotiating table of WTO. Some of these issues pertain to the needs of less developing and least developed countries for special and differential treatment besides issues such as labour standards, competition policy, government procurement, environment, investment, and fine-tuning the already negotiated agreements such as Agriculture, Services, Intellectual Property Rights. The Singapore Conference set the agenda by establishing three working groups, on trade and investment, trade and competition policy and transparency in government procurement in addition to conduct a study on trade facilitation. The Singapore Conference reiterated the importance of integration of less developing countries in the multilateral trading system and the differential and more favourable treatment conferred on them under the WTO dispensation and the complexities both legislative and procedural involved in complying with the commitments of the less developing countries for which the less developing

countries require technical support. For least developed countries, a specific agenda by way of a Plan of Action was agreed which included *inter-alia*, duty-free access on an autonomous basis for their exports, enhancing investment opportunities and providing predictable and favourable market access for LDCs products and to foster an integrated approach in association with UNCTAD and International Trade Centre.[45]

The Geneva Conference and its declaration (Adopted on 20 May 1998) carried forward the Singapore issues. However, no new initiative or policy statement for less developing or LDC was entertained. The Seattle Ministerial Conference of 1999 collapsed on account of stiff opposition by non-governmental organisations and other representatives of civil society representing labour, environment and other interests to the very foundation of WTO and its agenda which led the conference to keep the agenda open ended. In respect of special and differential treatment for less developing countries, the Seattle Conference reiterated the importance of generalised, non-reciprocal and non-discriminatory preferences in favour of less developing countries as encompassed in the Enabling Clause. Further, it asserted that the significant role played by the existing preferential trading arrangements and agreements between developed and developing countries needs to be strengthened and waivers granted wherever feasible were also agreed upon.

The Doha Ministerial Conference and Declaration (November 2001) turned out to be important in two respects. One, Doha Development Agenda included, *inter alia*, negotiations of (a) agricultural subsidies with emphasis on reductions of and phasing out all forms of export subsidies for farm products and substantial reduction in trade-distorting domestic support schemes; (b) industrial products so as to eliminate or reduce tariff and non-tariff barriers including tariff peaks (spikes) on sensitive products like textiles; (c) services negotiations on (i) market access for financial, telecommunication, and transport services and (ii) easing of immigration rules for workers employed on temporary contracts; (d) trade remedies which included negotiations as clarifying and improving disciplines on anti-dumping and countervailing duty as set forth in Article VI of the UR Agreement on Implementation of Article VI of GATT, 1994 and the Agreement on Subsidies and Countervailing Measures (SCM) Agreement, 1994; (e) regional trade agreements so that the disciplines and procedures on customs unions and free trade areas are clarified and improved; (f) trade-related intellectual property (TRIPs) should be interpreted in a way that Members should not be prevented from taking measures to protect public health and should be understood and enforced in a way 'supportive of WTO' members right to protect public health and, in particular, to promote access to medicines for all; (g) geographical indications which includes negotiations on certain foods (namely cheese, ham and rice) and on the establishment of registering and notifying geographical indications on wines and spirits, with the possibility of

[45]For the text of the Singapore Ministerial Conference and Ministerial Text, see, the WTO, ministerial, Singapore 1996, Ministerial Text.

extending the system to cover other items (such as cheese, ham and yogurt); (h) extended deadline for phasing out export and import substitution subsidies under Article 27.4 of the SCM Agreement; (i) the four Singapore issues such as investment, competition policy, trade facilitation and transparency in government procurement to be further negotiated if there is explicit consensus; (j) environment, the negotiation of which includes, *inter alia*, (i) relationship between WTO obligations and multilateral environment agreements (MEAS) (e.g. between TRIPs and U.N. Convention on Biodiversity, or between various WTO obligations and the Cartagena Biosafety Protocol for Genetically-Modified Organisms), (ii) information exchange between the WTO and MEA Secretariats and (iii) reduction on trade barriers to environmentally–friendly goods and services. Second, the special and differential treatment for the less developing countries was recognised in all the items of the Doha Development Agenda. More specifically, in the item on intellectual property rights the concerns of the less developing countries for compulsory licensing and parallel imports were recognised in addition to allowing members to protect public health and other concerns.

The Cancun Ministerial Conference (September 2003) and the Hong Kong Conference (2005) carried forward the Doha Development Agenda and one significant achievement was the allowance of access of essential medicines for the countries which do not have capacity to manufacture drugs crucial for addressing public health crises and also the use of compulsory licensing provisions of the TRIPs Agreement and parallel imports. For the LDCs the time for implementing the TRIPs Agreement was extended up to the year 2016.[46]

13 The Demise of the 2008 Geneva Ministerial Conference

The Hong Kong Ministerial Declaration included some meaningful numbers, such as deadlines for getting rid of agricultural export subsidies (2013) and cotton export subsidies (2006), as well as a developmentally critical commitment that the exports of least developed countries (LDCs) enjoy duty- and quota-free access, at least up to 97%, by 2008. The positive view of the Hong Kong deal is that it put the Doha Round 'back on track' with a 'rebalancing in the favour of developing countries'. At the same time, however, the negative view of the deal was that it failed again to deliver the long-awaited deal on modalities for the agricultural and non-agricultural market access (NAMA) sector. Negotiators simply deferred resolving this controversial issue and agreed that they would establish the modalities by 30 April 2006.

Yet these deadlines lapsed and were replaced by another one (set for the end of June 2006), which also lapsed without meaningful development. On 28 July 2006, upon the Director General's recommendation, the WTO General Council suspended the negotiation due to irreconcilable differences among negotiators over three major

[46]Session (Doha), 9–14 November 2001, Ministerial Declaration, WT/MIN (01).

trade barriers: farm subsidies, farm tariffs and industrial tariffs. Without of the announcement of any future negotiation schedule, the Doha Round's future had plunged into uncertainty.

Pascal Lamy declared the resumption of the stalled negotiation in February 2007 after trade ministers from major WTO members informally gathered at the Davos World Economic Forum in January 2007 and recommitted themselves to further negotiations. As the year 2008 dawned, the agricultural negotiation emerged with some significant developments as the Chair improved the agricultural modalities text with each new draft, although the NAMA negotiation proved to be a tougher process. Chairs in both the agricultural sector, Crawford Falconer, and NAMA, Don Stephenson, issued a series of drafts in February, May and July of 2008 which identified areas of convergences and divergences. These drafts were to provide negotiators with simplified options for modalities.

When the WTO's head, Pascal Lamy, summoned trade ministers to Geneva in the summer of 2008, negotiators felt compelled to complete the Doha Round in the foreseeable future, especially considering the global financial turmoil.[47] Nonetheless, once the actual negotiation began, the general pace turned out to be rather slow-going. After days of negotiation, no clear signs of progress emerged. At long last, on the sixth day, a ray of hope shone over stalemated negotiation. On the verge of collapse in the talks, Lamy managed to persuade negotiators to continue by presenting the critical 'package of elements', which might have been coined the Lamy Draft. This deal-salvaging package was nothing more than a deliberate compromise proposal based on the most recent draft modalities on agriculture and NAMA.

What Lamy did was to present some concrete headline numbers on several major sticking issues, such as farm subsidies and industrial tariffs, in an articulated fashion out of the intense consultations among the seven key negotiating parties (USA, the EU, Australia, Japan, China, Brazil and India). According to the Lamy Draft, The USA would cut the current bound level of farm subsidies ($48 billion) to $14 billion (which was still much higher than the actual spending in the previous year of $7 billion), and the EU would cut its farm subsidies by 80%, to approximately 22 billion. As to the market access, the Draft called for a 70% reduction for the highest farm tariffs (above 75%) of developed countries. At the same time, the Draft allowed developed countries to designate 4% of their agricultural tariff lines as "sensitive products" which are exempt from the aforementioned tariff cut.[48]

Under the Draft, developing countries were also allowed to shelter 12 per cent of all covered products (special products) from the normal tariff reduction. As to the special safeguard mechanism (SSM), developing countries could use it only when an import surges by more than 40% in volume. As to NAMA, coefficients, the maximum level of tariffs, would be 8% for developed countries and 20, 22 or 25%

[47]World Trade Organization, Day 1: Ministers begin final effort to agree blueprints of deal, July 21 200 http://www.wto.org/english/news_e/news08_e/meet08_summary_21july_e.htm.

[48]WTO Mini-Ministerial Evades Collapse, As Lamy Finds 'Way Forward', BRIDGES DAILY UPDATE (Int'l Ctr. For Trade and Sustainable Dev.), July 26 2008, at 1, available at http://ictsd.org/downloads/2008/07/daily-update-issue-6-template.pdf.

for developing countries, depending on three different 'flexibility mechanisms'. Developing countries could choose from these flexibility mechanisms to protect some of their strategic products more than others within these limits. Finally, the Draft proposed to hold the Services Signalling Conference to gather voluntary commitments in service-sector liberalisation from developing countries in an effort to give some comfort to developed countries.

Frustratingly, this rather 'unexpected momentum' soon evaporated as the USA wrangled with India and China over the SSM and cotton. India maintained a recalcitrant stance against tightening the eligibility of the SSM, while China severely criticised the USA for pressuring it to open its cotton market as a condition to cut the US cotton subsidies. On the ninth and final day of the talks, the core negotiating group (Australia, USA, EU, Japan, China, India and Brazil) and the G-33 bloc of food-importing developing countries (India, China, Indonesia, etc.) failed to close their gaps in some details of the SSM. Other than this holdup, the deal was close to completion because negotiators had managed to reach a consensus on nearly all other sticking points.[49]

Jagdish Bhagwati blamed the USA as the 'central spoiler' of the 2008 Geneva Ministerial Conference. According to Bhagwati, the USA refused to significantly reduce its trade-distorting farm subsidies which are 'universally recognised as intolerable', while it attacked India for requesting enhanced safeguards for its mostly subsistent, rural farmers. Ironically, US Trade Representative (USTR) Susan Schwab, at the time, probably did a service to the WTO since any deal sealed in Geneva but killed later in Washington might have dealt a more severe blow to the WTO.

The Doha Round talks entered into yet another dormant stage the Geneva debacle of the summer of 2008. Although during September 2009 in Pittsburgh, the G-20 leaders pledged, yet again, to conclude the Doha Round by the end of 2010, no genuine breakthrough, such as an agreement on the modalities, had been made by October 2009. The Geneva Ministerial Meeting in December 2009 ended without any substantial progress, merely reaffirming the 2010 deadline. All in all, the Doha Round still remains a failure.[50]

14 Ninth Ministerial Conference and Bali Package and Revival of Doha—2013 to 2014

In the run up to 2011 ministerial conference and in the face of continuous impasse in the talks, Director General Pascal Lamay asked members to focus on mini package as a down payment to rebuilt trust and generate momentum for the

[49]World Trade Organization, Day 9: Talks collapse despite progress on a list of issues, July 29 http://www.wto.org/english/news_e/news08_e/meet08_summary_29july_e.htm [hereinafter WTO, Day 9].

[50]Jagdish Bhagwati, The Selfish Hegemon Must Offer a New Deal on Trade, FIN. TIMES, 20 August 2008, at 11.

completion of the broad agenda. The proposal ultimately failed. At the conference itself, ministers called for a change of approach to overcome the Doha deadlock and pleaded that members should focus on those elements of Doha that allow members to reach consensus or provisional agreement than the full conclusion of the single undertaking. Surprisingly, negotiating groups indicated that a small package for the ninth ministerial in Bali build around trade facilitation—an issue originally not a part of the Doha mandate, but one of the fastest moving areas of the negotiations in recent years is suitable for negotiations—some elements of agriculture and some issues of particular concern to least developed countries could also be negotiated. In September 2013, Pascal Lamay was replaced by Roberto Carvalho de Azevedo as Director General of WTO who was in great hurry to see the negotiations succeed in Bali and immediately launched an intensive study of series of consultations aimed at narrowing the gaps ahead of the global trade negotiations.

Director General Azevedo was responsible for expediting the conclusion of the Bali Agreement as he was conscious of the fact that if Bali fails to arrive at an agreement it would be fatal not only to WTO but also to the whole spectrum of international trade rules and law. It was also a challenge to the leading trading partners to reinvent and show faith in multilateralism failing which autarchy in international trade would have resurfaced. However, the delegates were aware that Bali Package would not solve the Doha Development issues. After a long and hectic negotiation, ministers finally signed off their first multilateral agreement since the creation of the WTO.

The final agreement begins with a three-page ministerial declaration, acknowledging the accession of Yemen and the decisions on ten texts regarding the three pillars of the Bali Package; Trade Facilitation; some issues of Agriculture; and selected developments—focused provisions of WTO. It also features a series of decisions submitted by the General Council in areas such as e-commerce and TRIPs non-violation and situational complaints; as well as other items at WTO ministerial.

Trade Facilitation Agreement 2013 (TFA) is believed to reduce the cost of trading, smooth customs procedures, reducing red tape and enhance efficiency and transparency. The Agreement makes it obligatory on the developed countries to assist the developing and the least developed countries to update their infrastructure and train customs officials for any cost associated with implementing the Agreement. The Agreement is in furtherance of the mandate imposed by the three articles of GATT 1994 such as Article V involving freedom of transit; Article VIII dealing with border fees and formalities and Article X dealing with publication and administration of regulations.

There are various estimates of economic gains flowing from trade facilitation; some believe that the agreement could increase global GDP by one trillion USD; others believe that the reforms in this area of international trade would reduce costs by 14.5% for low-income countries and 15.5% for lower middle-income countries and 13.2% for upper-middle countries. However, the agreement is conceived to simplify custom procedures and lower transaction costs. There have been various concerns expressed by developing countries as to how to implement the trade facilitation measures conceived in TFA in the face of technological, scientific and

economic constraints, therefore the final text of the agreement is divided into two parts: the first describes specific commitments countries will have to make to improve their custom procedures (Section 1): the second involving special and differential treatment for developing countries (Section II). Achieving a balance between foreign commitments in Section 1 and technical assistance and capacity building in Section II was the measure stumbling block.

In order to reconcile the above objectives, the final agreement contains provisions allowing for flexibility in the scheduling and sequencing of implementation, and linking commitments to acquired capacity resulting from technical assistance. There is a marked departure from the usual WTO practices that developing countries and least developing countries are allowed to self-define their implementation period within three categories of implementation modalities: Category A includes those provisions that are implemented immediately upon the agreement entering into force: Category B includes those commitments that will be implemented after a 'self-selected' transition period: Category C involves those commitments that will require both self-selected transition period and technical assistance. In the last category, the mechanism ensures that assistance arrangements be notified by donor countries before least developed countries would be obligated to notify their definitive implementation date, thereby linking implementation obligations to the provision of technical assistance and capacitive building. All these provisions in a great measure change the current approach to special and differential treatment for developing countries creating a new and innovative template for future solutions.

So far as agriculture negotiations are concerned Bali package concentrated on reform of farm trade of developed countries: export subsidies and tariff rate quotas. During the negotiations, concern was expressed by India that public food stock holding by India should not be considered as an infringement to the obligations of either under the WTO Agreement on Agriculture or any other WTO commitments as food security programs are essential for sustaining the poor and vulnerable sections of society. The WTO members gave two-year concessions to India and all other countries having similar programmes and the General Council of WTO was asked to find a solution to India's and similar such food security programs.

The other issues such as Development and Least Developed Countries concerns were the weakest component of the Bali package. However, it was agreed in principle that least developed countries would be extended the duty-free, quota-free market access. The Bali package has established a monitoring mechanism on special and differential treatment which will serve as a focal point within the WTO for analysing and reviving all aspects of the implementation of *S&D* treatment provisions. In case the review faces problems, the monitoring mechanism may put forward recommendations and possible negotiations would ensue in the relevant WTO body.

One of the elements of the Bali package deals with Rules of Origin which has been conferred to the products traded internationally. In the context of trade preferences granted to least developed countries, i.e. duty free, quota free, the rules of origin would define how much processing must take place locally before goods are considered to be of an least developed origin and may therefore get the benefit of

preferential treatment; further the rules of origin should be transparent, simple and objective. It also mandates that every country has freedom to choose the methods to make rules of origin transparent and objective.

So far as least developed countries trade in services is concerned, the Bali ministerial agreed that WTO Council for Trade in Services shall initiate a process aimed at promoting the expeditious and effective operationalisation of the least developed countries services waiver.

In the area of duty-free, quota-free market access for least developed countries, the Bali package decided that duty free, quota free is an obligation on the developed countries members and the developed countries members should provide much more coverage for duty-free, quota-free access to the products of the least developed countries. There has not been any substantial change so far as Cotton is considered as a symbol of the development dimension, as discussion on Cotton remained inconclusive as Bali recognised that WTO has yet to deliver on the Cotton initiative and as such members requested to continue the negotiation in this sector. Tenth Ministerial Conference was held in Nairobi, Kenya from 15 to 19 December 2015. It culminated in Nairobi Package, a series of Ministerial Decisions on Agriculture, Cotton and issues related to least developed countries. It was decided that developing countries will have right to take recourse to special safeguard mechanisms (SSM) as envisaged in paragraph 7 of the Hong Kong Ministerial Meeting and to pursue negotiations in the subsequent meetings on Agriculture. With regard to Cotton, the members agreed that from 1 January 2016 developed and developing countries subject to their capacities of doing so shall grant duty-free, quota-free access to the cotton produced by the developing countries.

Chapter 2
World Trade Organisation (WTO): The Structural Dimensions

1 General

The establishment of the World Trade Organisation (WTO) in January 1995 was the culmination of international efforts over the past five decades to establish a truly international trade organisation which would cater to the growing needs of international economic community. The world trade had witnessed substantial and enormous multifaceted phenomena especially of protectionism, regionalism and interdependence. Therefore, there was an urgent need to substitute the aborted ITO of Havana Charter with a new international organisation plugging the weaknesses of the GATT 1947, which had served the cause of the international trade on a loose footed way. The WTO can, therefore, be characterised as completing the unfinished agenda of ITO and strengthening the GATT 1947 which was established by way of accident and substituting it by GATT 1994.

The Marrakesh Agreement, establishing the WTO, consists of a Preamble and XVI Articles, four Annexures and Declarations, Decisions and Understanding. Annex IA, and GATT 1994 which consists of the revised GATT 1947 with new understandings, twelve side Agreements and the vast schedule of tariff concessions that make up the large bulk of pages in the official treaty text. There are a number of side Agreements, some originating from the Tokyo Round Results and revised by the Uruguay Round. These are: (i) Agreement on Agriculture; (ii) Agreement on Application of Sanitary and Phytosanitary Measures; (iii) Agreement on Textiles and Clothing; (iv) Agreement on Technical Barriers to Trade; (v) Agreement on Trade-Related Investment Measures; (vi) Agreement on Implementation of Article VI of GATT 1994; (vii) Agreement on Pre-shipment Inspection; (viii) Agreement on Implementation of Article VII of GATT 1994; (ix) Agreement on Rules of Origin; (x) Agreement on Import Licensing Procedures; (xi) Agreement on Subsidies and Countervailing Measures; and (xii) Agreement on Safeguards.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_2

Annex IB consists of the General Agreement on Trade in Services (GATS), which also incorporates a series of schedules of concession. Annex IC consists of Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).

Annex II deals with Dispute Settlement Rules which are not only obligatory on all members of the WTO, but are also unitary dispute settlement mechanisms covering all the Agreements listed in Annexes I, II and IV.

Annex III established the Trade Policy Review Mechanism (TPRM) for the purpose of reviewing trade policy measures of all members of the WTO on a periodic and regular basis and also to report on those policies to the General Council of the WTO.

Annex IV contains the four Plurilateral Agreements which are optional in nature. These are Agreements on Government Procurement; Agreement on Trade in Civil Aircraft; Agreement on International Dairy Products; and Agreement on International Bovine Meat.

2 The Objectives of WTO

The objectives of the WTO as reflected in its Preamble 'in parenthesis' are:

(a) That international economic relations should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand;
(b) Expanding the production of trade in goods and services; and
(c) While allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, seeking both to preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The preamble recognises the less advantageous position of less developing and least-developed countries in international trade and economic welfare, so that there is a need for positive efforts on the part of international community of securing a share for them in the growth of international trade commensurate with their developmental needs.

The above-said objectives are to be achieved by entering into reciprocal and mutually beneficial arrangements, which are directed to the substantial reduction of tariffs and non-tariff barriers and the elimination of discriminatory treatment in international trade relations.

WTO accordingly is set to develop an integrated, more viable, and durable trading system encompassing the GATT 1947, the results of the past liberalisation efforts, and of the results of the Uruguay Round Multilateral Tariff Negotiations preserving the basic principles of the earlier negotiations and the objectives underlying multilateral trading system. The members of the Uruguay Round have therefore agreed to the establishment of WTO (Article I of the WTO) and its institutional structure along with the commitments as agreed in various WTO Annexes.

The preamble reflects the objectives of the GATT 1947 with three more additional objectives, i.e. production of trade in goods and services, seeking to preserve and protect environment and sustainable development, and securing a share of less developing and least-developed countries in international trade commensurate with the needs of their economic development. The declared means of achieving these objectives are exactly the same as laid down in GATT 1947, i.e. reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade.

The scope of the WTO[1] is basically to provide a common institutional framework for the conduct of trade relations among its members in matters related to the Agreement and associated legal instruments commonly referred as MTA's, Plurilateral Trade Agreements and the GATT 1994.

So far as the environment issues are concerned the preamble recognises a link between trade and environment but only to the extent as recognised in the various Agreements covered under WTO or GATT.[2]

WTO members have a large measure of autonomy to determine their own policies on the environmental objectives and the environmental legislation they enact and implement. But their autonomy is circumscribed only by the need to respect the requirements of the WTO and other agreements having bearing on issues pertaining to environment.

The cases brought before the Dispute Settlement Mechanisms of WTO in which the preamble was subjected to interpretations, have reaffirmed the importance of the coherent, universal and international character of WTO to facilitate, administer and operate and to further the objectives of Agreements concluded under the WTO and the GATT 1994.[3] For nearly fifty years, international community has sought to fulfil, first in GATT and now in the WTO, the objectives reflected in the WTO Preamble of conducting trade relations with a view to raising the standards of living worldwide.[4]

3 Functions of WTO

Article III of the WTO delineates five functions for it. The first and broader function is, 'to facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and also to provide framework for the implementation, administration and operation of the

[1]Article II.

[2]US—Standards for Reformulated and Conventional Gasoline, Appellate Body Report, WT/DS2/AB/R, DSR1996: I, p. 30.

[3]India—Quantitative Restrictions on Imports of Agricultural, Textiles and Industrial Products. Appellate Body Report, WT/DS22/AB/R; DSR 1999: V; Brazil—Measures Affecting Desiccated Coconut, Appellate Body Report, WT/DS22/AB/R; DSR 1997: I; US—Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII.

[4]Singapore Ministerial Declaration, 13 Dec. 1996; WT/MIN(96) Dec, para. 2.

Plurilateral Agreements'. The members of the WTO are under a direct obligation under the Multilateral Agreements but for Plurilateral Agreements the obligations are subject to the accession of the countries to such Agreements.

The second WTO function is of a negotiating type. A distinction is made between negotiations for which WTO shall provide the forum and for those for which it may provide *a* forum. WTO providing the forum is exclusively meant for multilateral negotiations on matters dealt with in the Annexes to the Agreement, i.e. on the subjects already covered by the GATT and Uruguay Round. WTO may provide *a* forum for further negotiations concerning multilateral trade relations as may be decided by the WTO Ministerial Conference should such negotiations take place. WTO can also provide the framework for putting their results into effect. The third and fourth functions of WTO are to administer the arrangements in Annexes II and III for the settlement of disputes (Annex II—Understanding on Rules and Procedures Governing the Settlement of Disputes and Annex III—Trade Policy Review Mechanism) that may arise between members and for the review of trade policies. Finally, the WTO is to coordinate with IMF and IBRD for achieving greater coherence in global policy-making. WTO is a forum for trade negotiations and liberalisation on a rule-based system having the power to assess the trade policies of the members in terms of commitments under the WTO. Further, it has the power of reviewing the ongoing negotiations and examines the developments in world trade and address the challenges of an evolving world economy.

4 Structure of WTO

The structure of WTO which has been formally endowed with legal personality and legal capacity as an international organisation,[5] is wide enough with a nucleus of Ministerial Conference, which is composed of representatives of all WTO Members and meets at least once every two years. The General Council, as another governing body is the chief decision and policy-making body which meets as appropriate and is composed of all WTO members.

The Ministerial Conference has the authority to take decisions on all matters under any of the MTA's in accordance with specific requirements in the Agreement establishing WTO and in the relevant MTA's. The General Council is conceived to oversee the operation of the Agreement and ministerial decisions on a regular basis. The General Council also discharges the functions of two important subsidiary bodies, namely, the Dispute Settlement Body (DSB) and Trade Policy Review Mechanism (TPRM). In addition, there are specialised councils and committees that report to the General Council, namely, a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade in Intellectual Property Rights (TRIPs).[6]

[5]Article I and VIII.

[6]Article IV: 5.

These Councils have power to establish committees or subsidiary bodies as required.[7] The Ministerial Conference has established a Committee on Trade and Development, a Committee on Balance of Payments, a Committee on Budget, Finance and Administration,[8] and by a special action on 14 April 1994, a Committee on Trade and Environment. There are additional Councils and Committees to oversee the Plurilateral Trade Agreements who report to the WTO General Council.[9]

The Ministerial Conference in addition to the above powers has specific powers listed in other Articles of the WTO Agreement, including the power to appoint a Director General, to adopt an authoritative interpretation of the MTA's, to grant a waiver, to adopt amendments and to decide on accessions. Under certain conditions, the Ministerial Conference has power to establish certain procedures concerning balance-of-payments restrictions.[10] Under Article 64.3 of the TRIPs Agreement, the Ministerial Conference has the power to extend non-application of non-violation complaints to the TRIPs Agreement on a recommendation of the Council for TRIPs. The Ministerial Conference and the General Council on behalf of the Ministerial Conference have established working parties to carry out its functions, namely: (a) Working Group on the Relationship between Trade and Investment; (b) Working Group on the Interaction between Trade and Competition Policy; (c) Working Group on Transparency in Government Procurement; (d) Working Party on Accession; (e) and Working Party on Pre-shipment Inspection.[11]

The General Council acting as the Dispute Settlement Body (DSB) discharges the express responsibilities of the Understanding on Dispute Settlement Undertaking (DSU), including the authority to establish panels, to adopt panel and appellate body reports, to maintain surveillance of implementation of rulings and recommendations and authorise suspension of concessions and other obligations under the covered Agreements.[12]

The Council for Trade in Goods has the task of overseeing the functioning of MTA, namely: (a) Understanding on the Interpretation of Article XVII of GATT 1994 which includes the functioning and status of state trading enterprises, (b) Agreement on Textiles and Clothing which includes reviewing of the Agreement before the end of each stage of integration process,[13] (c) Agreement on Trade-Related Investment measures which includes the transition period of elimination of TRIMs by LCDs[14]; Customs Valuation Agreement and (d) Agreement on

[7]Article IV: 6.

[8]Article IV: 7.

[9]Article IV: 8.

[10]Article XII of the GATS.

[11]For all these working parties, see WT/MIN (96)/DEC.

[12]Articles 2.1, 6, 16, 21 and 22 of the DSU.

[13]Article 8.11 and 8.12.

[14]Article 5.3.

Safeguards which includes disapproval or suspension of substantially equivalent concessions.[15]

The Council of Trade in Services has to oversee the functioning of General Agreement on Trade in Services and has power to make recommendations to parties to economic integration as conceived in the Agreement.[16] The Council for Trade in Services has established subsidiary bodies namely Committee on Trade in Financial Services, Committee on Specific Commitments, Working Party on Domestic Regulation, Working Party on GATT's Rules and Professional Services, Negotiating Groups on Basic Telecommunication and Maritime Transport Services and Movement of Natural Persons, etc.

The Council for Trade in Intellectual Property Rights (TRIPs) has to oversee the functioning of the Agreement of TRIPs which includes: (a) power to monitor the operation of the Agreement and members compliance there under;[17] (b) power in respect of international negotiations on geographical indications under Article 24.2 of the Agreement; (c) rationalisation of the burden of notifications to the WIPO and WTO pursuant to Article 63.2; and (d) the power to grant extensions of their implementation period to LDCs under Article 66.1.

The Council for Trade in Goods has established further subsidiary bodies namely: (a) working groups on state trading, notification obligations and procedures and various regional trade agreements besides various committees on Market Access, Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-Dumping Practices, Customs Valuation, Rules of Origin, Import Licensing, TRIMS and Safeguards.

The WTO under Article VI has established arrangements with UN, WIPO, IBRD, IMF, Office International des Epizooties and International Telecommunications Union. The WTO has a secretariat located in Geneva and presided over by a Director General, who is appointed by the Ministerial Conference.[18] The Ministerial Conference sets the powers and terms of office of the Director General and the Director General has the power to appoint the staff and direct the duties of the WTO Secretariat. Neither the Director General nor the members of the Secretariat may seek or accept instructions from any national governments, and both must act as international officials.

The budget is prepared by the Director General and Committee on Budget, Finance and Administration, which is finally approved by the General Council. The General Council adopts the financial regulations and the annual budget by a two-thirds majority comprising more than half of the members of the WTO. Each member of WTO is under an obligation to promptly contribute to the WTO its share apportioned to it in the budget.

[15]Article 5.3.

[16]Article V of GATS.

[17]Article 68 of TRIPs.

[18]Article VI.1 of the WTO Agreement.

5 Decision-Making

Decisions in the WTO is to be arrived at by consensus as followed in GATT 1947. Where decisions are not arrived by consensus, the matter at issue has to be decided by voting. At the Ministerial Conference, and the General Council, each member of the WTO has one vote. Where European Communities exercise their right to vote, the member states of the European Communities have a number of votes equal to the number of their members, which are members of the WTO. Decisions of the Ministerial Conference and General Council are to be taken by majority of the votes cast unless otherwise provided in the Agreement or the MTA's.[19]

Ministerial Conference being representative of all the members of the Marrakesh Treaty and the General Council, a permanent representative of the Ministerial Conference being representative of all the members of the Marrakesh Treaty and the General Council, a permanent representative of the Ministerial Conference has the exclusive authority to adopt interpretations to the Agreement and the MTA's. The Ministerial Conference and the General Council are empowered to exercise their authority on the basis of recommendations of the individual councils overseeing the functioning of the Agreement. The decision to adopt an interpretation has to be taken by a three-fourth majority of the members.[20]

The obligations created and imposed by the Agreement on the members can be waived on the recommendations of three-fourth of the members and the request for waivers has to be submitted to the Ministerial Conference for consideration pursuant to the practice of decision making by consensus. Such a request has to be disposed of within a period of ninety days.

In case consensus is not achieved, any decision to grant a waiver has to be taken by three-fourth of the members. A request for waiver concerning the MTA's shall be submitted to the councils of MTA's. Waivers granted for more than one year are to be reviewed by the Ministerial Conference after every year of such waiver and the Ministerial Conference will review whether the exceptional circumstances still prevail or not. Decisions on Plurilateral Agreements shall be governed by the provisions of those Agreements.[21]

The above-said decision-making process is quite different from the IMF, IBRD and the GATT. Neither the weighted voting of IMF nor the reserved voting of IBRD and near absence of voting in GATT is provided in WTO, rather the WTO voting process for decision making is really democratic and every member of WTO has been assured one vote. Therefore, there is least possibility of converting the WTO as a forum for one or the other group of countries or individual members to promote the group or individual interests. Further, the Ministerial Conference and

[19]Article IX: I.

[20]Article IX. 2.

[21]Article IX: 3 & 4.

General Council have exclusive authority to adopt interpretations of the WTO Agreement under Article IX: 2.[22]

WTO is a single undertaking, meaning that all agreements under negotiations are part of a whole and indivisible package and cannot be agreed separately, preventing member states from adopting only the items corresponding to their interests.

Article IX: 2 of the WTO Agreement sets out specific requirements for decisions that may be taken by the Ministerial Conference or the General Council to adopt interpretations of provisions of the Multilateral Trade Agreements. Such multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content. Article IX: 2 emphasises that such interpretations 'shall not be used in a manner that would undermine the amendment provisions in Article X'. A multilateral interpretation should also be distinguished from a waiver, which allows a Member to depart from an existing WTO obligation for a limited period of time. It is accepted that a multilateral interpretation pursuant to Article IX: 2 of the WTO Agreement can be linked to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31(3)(a) of the Vienna Convention, as far as the interpretation of the WTO agreements is concerned.

6 Amendments to Agreements[23]

Any member can initiate a proposal to amend the provisions of the WTO Agreement, or the MTA's by submitting such a proposal to the Ministerial Conference. The Councils for Trade in Goods/Services and TRIPs can also submit proposals to the Ministerial Conference to amend provisions of the MTAs which they oversee.

Once an amendment proposal has been made to the Ministerial Conference, a decision has to be made on whether to submit the proposal to the members for acceptance. If at all possible, that decision should be made by consensus and a period of ninety days, longer if the Ministerial Conference so decides is allocated for this purpose. If the consensus is reached, then the Ministerial Conference will immediately submit the proposed amendment to the members for acceptance. However, if no consensus is reached at the Ministerial Conference within the set period of time, the Ministerial Conference decides by a two-thirds majority vote whether or not to submit the proposed amendments to the members for acceptance.

Amendments to the Multilateral Goods Agreements, as well as to GATS and TRIPs, will take effect upon their acceptance by two-thirds of members subject to

[22]See Japan alcoholic Beverages II case in which the Appellate Body disagreed with the Panel's findings that Panel Reports adopted by DSB constitute 'subsequent practice' within the meaning of Article 31 of the Vienna Convention on the Laws of Treaties; Appellate Body Report; DSR, 1999: I, p. 13. Appellate Body Report; US—Wool Shirts and Blouses, pp. 19–20.

[23]Article X.

certain exceptions. The exceptions, namely any alteration to MFN treatment or to the WTO decision-making regulation, require acceptance by all the members. Amendments to TRIPs Agreement which merely serve to increase IPR protection already in force under other Agreements can be adopted by the Ministerial Conference.

7 Membership, Accession and Withdrawal[24]

The original WTO Membership consists of all GATT contracting parties as of the entry into force of the WTO Agreement on 1 January 1995. The European Community and other countries which have accepted the WTO Agreement and MTA's and Schedules of Concessions and Commitments are annexed to GATT 1994 and Schedules of Specific Commitments are annexed to GATS shall become original members of the WTO. The LDCs recognised as such by the United Nations are only required to undertake commitments and concessions commensurate with their individual development, financial and trade needs or their administrative and institutional capabilities.[25]

Accession to the WTO is open to any sovereign nation on terms to be agreed between the nation and the WTO. All decisions on accession to the WTO are to be taken by the Ministerial Conference or General Council. The procedure for a country seeking to accede to the WTO takes the following steps. The first step is that the applicant makes a formal request to the General Council of the WTO stating its desire to become a member. The General Council as a second step debates the matter and establishes working party to examine the application in detail. The third step is that the applicant provides the Accession Division of the Secretariat (which assists the Working party) with a full dossier of information concerning all its trade and economic policies (the so-called Trade Memorandum) that may have a bearing on the MTA's. The Working Party by way of a fourth step carries out a detailed examination of the proposed accession on the information provided to the Secretariat. Whilst the Working Party is carrying out its duties, the applicant country by way of fifth step should engage itself in bilateral negotiations with other members with a view to achieving a mutually agreed level of concessions and commitments for goods and services.

This process enables existing members to judge the benefit of permitting the applicant to join the WTO. Once the Working Party examination and the bilateral negotiations have been completed, terms of accession are drawn by the Working Party by way of a sixth step. Finally, the Working Party's report, along with a draft accession Agreement (including an attached schedule of concessions/commitments)

[24]Articles XI to XV.

[25]As on 30 September, 2011, the WTO had 153 Members, 123 original and the other 30 by way of accession. India is the original member of WTO.

is presented to the Ministerial Conference or General Council for adoption. A two-third majority of members is required to approve the accession. The successful applicant accedes to the WTO, after having ratified the accession Agreement in its national legislation.

Accession to Plurilateral Trade Agreements is governed by the provisions contained in those Agreements.

So far as LDCs beneficial accession to WTO is concerned, they are only required to undertake commitments and concessions to an extent that is consistent with their individual development, financial and trade needs.

Any member may withdraw from the WTO. Such withdrawal applies to both the WTO and the MTA's, by sending formal written notice of withdrawal to the Director General of WTO. The actual withdrawal will take place six months after receipt of the notice.

8 Miscellaneous Provisions

Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director General of the WTO. In the event of conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

9 WTO and Global Economic Policymaking

The WTO Agreement sets forth a declaration on the contribution of the WTO to achieving greater coherence in global policy-making as part of the WTO dispensation. This declaration that globalisation of the world economy has been responsible for the ever growing interactions between the economic policies pursued by

the individual countries including the structural, micro-economic, trade and financial and development aspects. Although the governments are free to take economic decisions yet there is a link between domestic policies and international economic decisions and as such Uruguay Round has recognised the contributions which liberal trade and policy can make to the healthy growth of both, the national and international economy.

Successful cooperation in the areas of greater exchange rate stability, based on more orderly underlying economic and financial conditions is *sine-qua-non* for sustainable growth and development and for correcting external imbalances. The Uruguay Round recognises the need for adequate and timely flow of concessional and non-concessional financial and real investment resources to the LDCs which are important to address their debt problems and development goals. The Uruguay Round further recognises that the liberalisation forms an increasingly important component in the success of the adjustment programmes that many countries have undertaken, often involving transitional social costs. That makes the role of IMF and IBRD important in supporting these structural adjustment programmes and trade liberalisation including their support for net food importing LDCs facing short-term costs from agriculture trade reforms. The positive outcome of the Uruguay Round has been to the contribution of coherent and complementary international economic and commercial policies—ensuring an access to markets as well as strengthening multilateral disciplines in trade.

Uruguay Round obligates the member nations to conduct their trade policies in a transparent manner with greater awareness for domestic competitiveness of an open trading environment, strengthening multilateral trading system with a central focus of providing an improved forum for trade liberalisation and effective surveillance with strict observance of multilaterally agreed on rules and disciplines. Trade policy of a country plays a substantial role in enhancing global economic policy making. For effective policymaking and implementation the WTO may face difficulties which may fall outside the trade field, the Uruguay Round underscores those difficulties. The WTO is meant to pursue and develop cooperation with international organisations such as IMF and IBRD to achieve greater coherence in global economic policy-making.

The global economic recession (2006–2009) and the meltdown of the developed countries economies, especially the US and EEC have affected the international economy significantly which in return has put greater responsibility on the WTO to provide effective and strategic global policy responses to overcome the recession.

10 WTO and Trade Policy Review

Paragraph A of Trade Policy Mechanism as Annex 3 of the Marrakesh Agreement establishing WTO, members of WTO have agreed to subject themselves to trade policy review mechanism which contributes to improved adherence by all members

to rules, disciplines and commitments made under the Multilateral Trade Agreements (MTAs) and where applicable, the Plurilateral Trade Agreements. This adherence of members of WTO to rules, disciplines and commitments enhances smoother functioning of the multilateral trading system and achieves greater transparency in and understanding of the trade policies and practices of members. Trade policy review mechanism also enables the regular collective appreciation and evaluation of the full range of individual member's trade policies and practices and their impact on the functioning of the multilateral trading system. However, trade policy review mechanism is not intended to serve as a basis for the enforcement of specific obligations under the WTO Agreements or for Dispute Settlement Procedures or to impose new policy commitments on members. The review mechanism and the assessment carried out under it, takes place, to the extent relevant, against the backdrop of the wider economic and development needs and objectives of the member(s) concerned as well as of its external environment. The main function of the review mechanism is to examine the impact of a member's trade policies and practices on the multilateral trading system.

WTO Trade Policy Review Mechanism (TPRM) can be traced to GATT 1947 when it established in 1989 the TPRM 'to contribute to improved adherence by all contracting parties to GATT rules, disciplines and commitments by achieving greater transparency in and understanding of the trade policies and practices of CP'. WTO TPRM enables the regular periodic appreciation and evaluation of individual members' trade policies and their impact on the functioning of the multilateral trading system (paragraph A).

(a) **Domestic Transparency**

Paragraph B of Annex 3 of the Marrakesh Agreement obligates members of WTO to recognise the inherent value of domestic transparency of government decision-making on trade policy matters for both members' economies and the multilateral trading system. WTO members also agree to encourage and promote greater transparency within their own system, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each member's legal and political systems.

(b) **Procedures for Review**

Paragraph C of Annex 3 of the Marrakesh Agreement establishes the Trade Policy Review Body (TPRB) to carry out trade policy reviews. TPRB has the competence to subject to periodic review the trade policies and practices of all members. The impact of individual members on the functioning of the multilateral trading system, defined in terms of their share in world trade in a recent representative period, will be the determining factor in deciding on the frequency of reviews. The first four trading entities so identified (counting the European Communities as one) shall be subject to review every two years. The next sixteen shall be reviewed every four years. Other members shall be reviewed every six years, except that a longer period may be fixed for least-developed members. Annex 3 further states that the review of entities having a common external policy covering more than one member shall cover all components of policy affecting Trade including relevant policies and

practices of the individual members. Exceptionally in the event of changes in a member's trade policies or practices that may have a significant impact on its trading partners, the member concerned may be requested by the TPRB, after consultation to bring forward its next review. The discussions in the meetings of the TPRB are to be governed by the objectives set forth in paragraph A. The focus of these discussions invariably has to be concentrated on the member's trade policies and practices, which are the subject of the assessment under the review mechanism.

The important facet of the TPRM is that TPRB has to establish a basic plan for the conduct of reviews. It may also discuss and take note of updated reports from members. The TPRB shall establish a programme of reviews for each year in consultation with the members directly concerned. The Chairman may choose discussants who, in their own personal capacity, shall introduce the discussions in the TPRB in consultation with the member or members under review. The TPRB shall base its work on the following documents:

(a) a full report, referred to in paragraph D, supplied by the member or members;
(b) a report to be drawn up by the secretariat on its own responsibility, based on the information available to it and that provided by the member or members concerned. The Secretariat should seek clarification from the member or members concerned about their trade policies and practices. The reports by member under review and by the secretariat together with the minutes of the respective meeting of the TPRM shall be published promptly after the review. These documents will be forwarded to the Ministerial Conference, which shall take note of them.

Although TPRM is formally established by paragraph C (1) of the TPRM, yet its composition and rules of procedure are based on Article IV: 4 of the WTO Agreement. Article IV: 4 provides that 'the General Council shall convene as appropriate to discharge the responsibilities of the TPRB for in the TPRM. The TPRB may have its own Chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of these responsibilities'. From 1995 onwards, TPRB has been adopting its rules of procedures in conformity with the General Council rules of procedure.[26]

The review has covered 149 of 161 members representing 89% of world trade and 97% of the trade of members of the 32 least-developed members of the WTO, 28 have been reviewed by the end of 2010.[27]

(c) **Reporting**

Under paragraph D of Annex 3 of the Marrakesh Agreement establishing WTO, and to achieve fullest possible degree of transparency it is obligatory that each member should report regularly to the TPRB. Full reports shall describe the trade

[26]As of 30 September, 2011, the TPRB have conducted 334 reviews since its formation in 1989 at 250 review meetings.

[27]WT/TPR/Rev. 1 (2005) and Rev. 2 (2008) & WT/TPR/269, para. 20/Rev. 4 (2014) & WT/TPR.

policies and practices pursued by the member or members concerned, based on an agreed format to be decided upon by the TPRB. This format shall initially be based on the outline format for Country Reports (established by the Decision of 19 July 1989 [BISD 365/406-409]) amended as necessary to extend the coverage of reports to all aspects of trade policies covered by the Multilateral Trade Agreements in Annex I of WTO and, where applicable, the Plurilateral Trade Agreements. This format may be revised by the TPRB in the light of experience. Between reviews, members shall provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to agreed format. Particular account shall be taken of difficulties presented to least-developed country members in compiling their reports. The Secretariat shall make available technical assistance on request to developing country members, and in particular to the least-developed country members. Information contained in reports should to the greatest extent possible be coordinated with notifications made under provisions of the MTAs and where applicable, the PTAs.

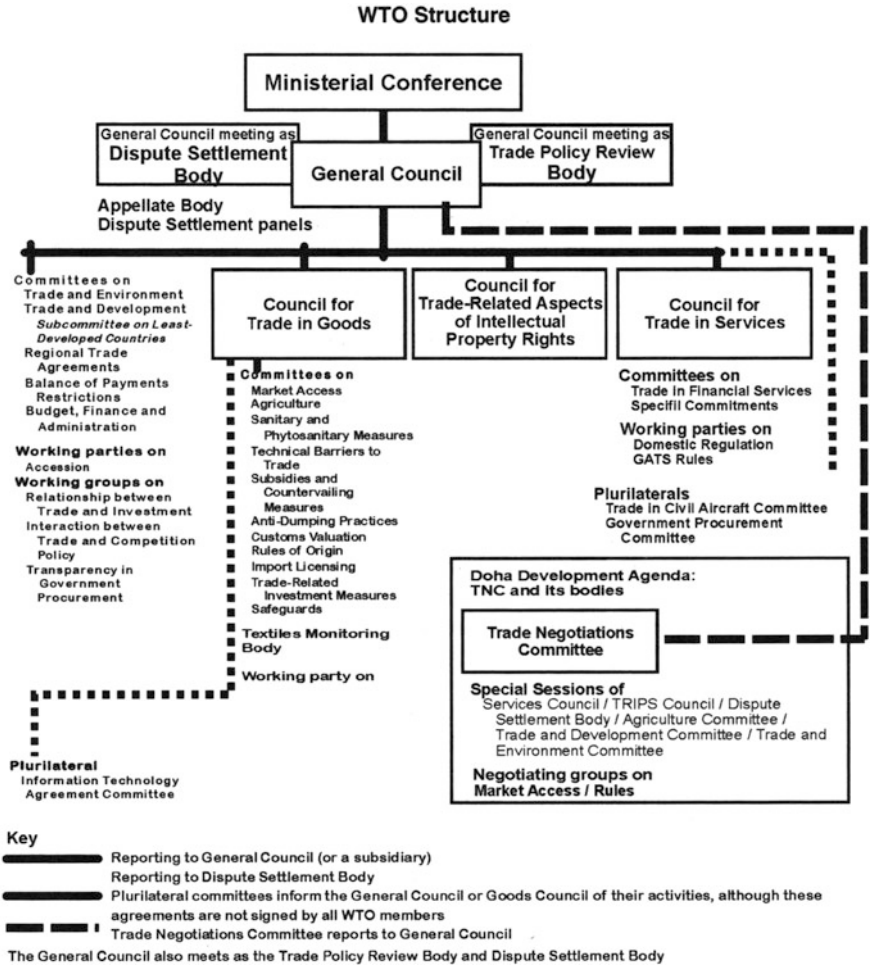
(d) **Relationship with the Balance-of-Payments Provisions of GATT 1994 and GATS**

Paragraph E of Annex 3 of the Marrakesh Agreement establishing WTO describes the relationship between balance-of-payments provisions of GATT and GATS with TPRM. It says that 'Members recognise the need to minimise burden for government also subject to full consultations under the balance-of-payments provisions of GATT 1994 or GATS'. To this end, the Chairman of the TPRB shall in consultation with the member or members concerned, and with the Chairman of the Committee on Balance-of-Payments Restrictions, devise administrative arrangements that harmonise the normal rhythm of the trade policy reviews with the timetable for balance-of-payments consultations but do not postpone the trade policy review by more than 12 months.

(e) **Appraisal of Mechanism**

The TPRM shall undertake an appraisal of the operation of the TPRM not more than five years after the entry into force of the Agreement Establishing WTO. The results of the appraisal will be presented to the Ministerial Conference. It may subsequently undertake appraisals of the TPRM at intervals to be determined by it or as requested by the Ministerial Conference. An Annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaking in view of the mandate in paragraph G of Annex 3 of the WTO by the TPRB. The overview is to be assisted by an annual report by the Director General setting out major activities of the WTO and highlighting significant policy issues affecting the trading system. These reports are intended to be purely council also meets as the Trade Policy Review Body and Dispute Settlement factual reports and are issued under the sole responsibility of the Director General. It has no legal effect on the rights and obligations of members, nor does it have any legal implication with respect to the conformity of any measure noted in the report with any WTO Agreement or any provision thereof.

It may be noted that TPRB has conducted three appraisals of the TPRM. Each appraisal has affirmed the relevance of the TPRM'S mission and concluded that the TPRM has functioned effectively and its objectives are generally being achieved. These appraisals have provided guidance on priorities for operation of the TPRM; the second and third appraisals remitted in changes to the TPRB's of procedure.



Chapter 3
WTO Dispute Settlement System Mechanisms

1 Introduction

For global peace and prosperity, an open rule-based trading system, based on principles of non-discrimination, progressive liberalisation of tariffs and rule of law could be of great help. Obviously, once the international obligations and rights and duties of member states have been defined, the question of how those obligations, rights and duties are to be enforced especially in the arena of international trade, multilateral conventions and treaties needs to be addressed. In the Havana Charter.[1] ITO, the concept of balancing the rights and duties, was incorporated by providing for compensatory adjustment in case a member has not obligated itself of the rights and duties which it had agreed upon while acceding to ITO. After the ITO failed to come into existence, almost similar provisions were incorporated in Articles XXII and XXIII of GATT 1947. The management of disputes in the WTO is structured on the same basis of the Articles of GATT, and the rules and procedures as further elaborated and modified therein. Therefore, it will not be out of place to briefly survey the jurisprudence of settlement of disputes as developed in GATT 1947 up to the incorporation of an elaborate treaty of twenty-seven articles and four appendices known as Understanding on Rules and Procedures Governing the Settlement of Disputes as part of governing the settlement of disputes of the WTO dispensation commencing on 1 January 1995.

[1]Kenneth W. Dam. The GATT And International Economic Organisation 352 (1977).

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_3

2 Dispute Settlement in GATT 1947

The GATT 1947 in the legal technical sense did not conceive of a specific procedure or provision for the settlement of disputes nor did it provide legal norms as to when a breach or breaches would amount to violation of a rule so as to give rise to a dispute. The GATT was even silent for the establishment of a tribunal for resolving actual disputes or to promulgate authoritative interpretations on questions of interpretations, yet over the years the disputes with regard to breaches of substantive norms of GATT and its Articles as well as the questions of interpretations were a recurring phenomena and surprisingly enough GATT 1947 resolved many more disputes and evolved umpteen interpretations and interpretative techniques to make the GATT functional. To some extent, the Contracting Parties acting jointly under Articles XXV: I or under more specific provisions of GATT 1947 exercised the functions of a tribunal. As GATT 1947 is drafted on conventional terms, including a liberal use of prohibitory language, the remedy provisions are not drawn in terms of sanction. The organising principles as a whole are a system of reciprocal rights and obligations to be maintained in balance. Professor John H. Jackson, however notes that there are nineteen clauses in the GATT which obligates GATT Contracting Parties to consult in specific instances including the instances of customs valuation, and invocation of escape clause.[2] Such GATT Articles and Paragraphs are as follows:

II: 5; VI: 7; VII: 1; VIII: 2; IX: 6; XII: 4; XIII: 4; XVI: 4; XVIII: 12; XVIII: 16; XVIII: 21; XVIII: 22; XIX: 2; XXIII; XXIV: 1; XXVII; XXVIII: 1; XXVIII: 4; XXXVII: 2.

Also, there are seven different provisions for compensatory withdrawal or suspension of concessions. These are contained in Article II: 5; XII: 4; XVIII: 7; XVIII: 21; XIX: 2; XXIII; XXVII; XXVIII: 3; XXVIII: 4.

The GATT 1947, in Article X, provided to some extent a mechanism of due regard of the obligations of contracting parties *interse* themselves by requiring the publication of laws, regulations, periodical decisions and administrative rulings of general application pertaining to the treatment of products for customs duties. Such instruments are to be published promptly in a manner so that the governments and traders are conversant with them. Similarly, agreements 'affecting the publication of trade policy' in force between the government or a governmental agency of one contracting party and another contracting party, were also to be published.[3]

By 1979, GATT Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance further sets out the commitments of contracting parties

[2]See John H. Jackson, World Trade and the Law of GATT 164 (1969).

[3]See generally, A.K. Koul, Settlement of Disputes in International Trade, I. N.C.L.J. (46-48) (1996);—WTO Dispute Settlement Mechanisms: A Fresh Look, XXV, Delhi Law Review 47–102 (2003).

to notify such measures to the maximum extent possible notwithstanding whether those measures are consistent with the rights and obligations of the contracting parties under the GATT.

3 Article XXIII and the Role of Panels

Article XXII: 1 (Consultation) requires each contracting party to afford other contracting parties adequate opportunity for consultation with respect to any matter affecting the operation of GATT. Article XXII: 2 authorises the contracting parties acting jointly, at the request of a contracting party, to consult with other parties on matters which were not resolved through Article XXII: 1 consultations. Eventually, the consultations have become a basis for the generation of GATT's settlement procedures which was grounded in Article XXIII.

Under Article XXIII: I (Nullification or Impairment) a complainant must show that either (i) benefits accruing to him under the GATT are being nullified or impaired or (ii) attainment of any objective of the GATT is being impeded. In addition, the complainant must further show that such nullification and impairment is a result of (a) breach of obligations by respondent contracting party; (b) the application of any measure by the respondent contracting party, whether it conflicts with the GATT or not; or (c) the existence of any other situation.

If no satisfactory adjustment is made between the complainant and the respondent contracting parties within a reasonable period of time, or if the difficulties pertain to clause (c) of Article XXIII, then the complaining party is authorised to refer the matter to the Contracting Parties under Article XXIII: 2 who are required to investigate the matter and make appropriate recommendations. In an appropriate case, Article XXIII: 2 permitted the Contracting Parties to authorise the complaining party to suspend the application of tariff concessions or other GATT obligations to the party found to be acting inconsistent with its obligations under the GATT.

Over the years, especially in absence of specific procedures and formal settlement of disputes mechanism, the contracting parties laboured very hard and some semblance of formal dispute mechanism system was developed by evolving a system of panels for redressing grievances of the complaining contracting parties.[4] Some semblance of formality was added to the settlement of disputes process in 1979 when Tokyo Round adopted an 'Understanding on Notification, Consultation, Dispute Settlement and Surveillance' which included an annex setting out an

[4]For an overview on the developments in the dispute settlement mechanisms in GATT, See John H. Jackson, Legal Problems of International Economic Relations: Cases, Materials and Text, 327–371 (3rd ed. 1995); Robert Hudec, The GATT Legal System and World Trade Diplomacy, (2nd ed. 1990);—Enforcing International Trade Law: The Evolution of the Modern GATT Legal System (1993); Pierre Pescartore, The GATT Dispute Settlement Mechanism, 27 Journal of World Trade 6–20 (1993).

Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement. This Description noted, in part, that:

> 'Panels set up their own working procedure. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute'. Panels have heard the views of a contracting party having a substantial interest in the matter which is not directly a party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panels have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the GATT, especially on historical or procedural aspects. The secretariat provides the secretarial and technical services for panels.[5]

The above said provisions were further reaffirmed and elaborated by adding more detail including a requirement that 'The Contracting Party to which such a recommendation i.e., to bring a challenged measure into conformity with GATT has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendations or ruling by the Contracting Parties'.[6]

Panel system of settlement of disputes has played a very vital role, and by 1990, more than 140 cases were resolved by the use of panels under Article XXIII. The panel as already referred is an independent body of experts with 'three main tasks, *viz;* (a) to inquire into the facts of the case; (b) to assess all the relevant elements for a decision on the measures; and (c) to submit a proposal for such a decision.[7] The reports of the panels do not have legal force. The panel reports go to the GATT 'Contracting Parties' where mediating and political aspects are reconsidered and the panel report, if gets adopted, achieves legal force.

The complaints under Article XXIII: 1 (b) termed as non-violation complaints have raised questions of interpretation, and non-violation complaints have been successful only if the infringement of tariff benefits has been proved.

A survey of cases of violation of Article XXIII reveals that the panels adopted different and varying interpretations to the phrase 'nullification and impairment of benefits'. In early violation cases,[8] some sort of injury to the contracting party was considered necessary before involving Article XXIII. However, in subsequent cases, the concepts such as *prima facie* nullification and impairment were

[5]Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2); BISD 26S/215, 217.

[6]BISD 29S/13, 15.

[7]See GATT, Analytical Index prepared by E.U. Petermann (1989) of Article XXIII. Also see, Armin Von Bogdamdy, The Non-Violation Procedure of Article XXIII: 2, GATT: its Operation and Rationale, 29 Journal of World Trade 95–111 (1995).

[8]See cases referred in John H. Jackson, World Trade and the Law of GATT, 181–187 (1969).

introduced.[9] Nullification and impairment concepts have further been considered in the form of 'adverse effect' and 'frustration of reasonable expectation' and these two concepts have not necessarily been applied in a cumulative way but are applied separately.[10]

4 Dispute Settlement in GATT 1947 and Its Refinements

The phrase 'nullification and impairment of benefits' was subjected to varying and differing interpretations; therefore, the dispute settlement in GATT 1947 was suffering from an inbuilt mechanism of not contemplating a formal Dispute Settlement Body. Article XXIII at best was formally constituting 'Contracting Parties' as a dispute settlement authority but keeping in view the legal nature of GATT, any decision to modify, amend or interpret the GATT, required the consent of all the parties which *albeit* was in conformity with Article 40 of the Vienna Convention on the Law of Treaties. This meant that in practice a losing party in a dispute not only could refuse to agree and 'block' the adoption of an adverse panel, it could even refuse to agree to the very establishment of a panel, thereby avoiding the embarrassment of an adopted report altogether.

Panel reports, which were adverse to the contracting parties, were indeed blocked. However, in course of evolution of settlement of dispute mechanism from 1947 to 1992, the losing party eventually accepted the results of an adverse panel report in approximately 90% of cases.[11] Still, blocking was a problem and seemed in the 1980s to be occurring with increasing frequency.

This 'blocking' of the panel decision to some extent was overcome by 'Montreal Rules' adopted by the Contracting Parties in April, 1989 titled, *Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April, 1989.*[12] The 'Montreal Rules' became the basis of negotiating the WTO's Understanding on the Rules and Procedures Governing the Settlement of Disputes.

The 'Montreal Rules' were applied on a trial basis from 1 May 1989 till the conclusion of Uruguay Round for the complaints brought under Article XXII or XXIII. The importance of the 'Montreal Rules' was in the fact that it placed time limits on consultations and provided for the automatic establishment of a panel. Once a process of consultation had started, the defending party was required to reply within 10 days and to agree to consultation in good faith in not less than 30 days. In case the agreement for consultation fails, the complaining party could directly request the 'Contracting Parties' for the establishment of a panel.

[9]See the case of US Taxes on Petroleum and Certain Imported Substances, 34th Suppl. BISD 136 (1998). Panel Report Adopted on 17 June 1987.

[10]See Armin Von Bogdamdy, supra at 7, p. 101.

[11]Hudec, Enforcing International Trade Law, supra note 4, at p. 27.

[12]BISD 36S/61 hereafter referred as 'Montreal Rules'.

If consultations failed to settle the dispute within 60 days of the request, the complaining party then could request for the establishment of a panel.[13]

'Montreal Rules' provided further that 'If the complaining party so requests, a decision to establish a panel or a working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise. This indirectly meant that panel would be established without fail, at the second meeting of the GATT Council after the request was put on the agenda, unless the Council decided otherwise. For the Council to decide 'otherwise' under GATT's process of decision by consensus, however, all parties including the complaining party would have to decide otherwise. This is being termed as 'negative consensus' system, a system that required consensus not to establish a panel as against the system which required positive consensus to establish a panel.

These and some other principles were adopted on a permanent basis in WTO. The other principles of 'Montreal Rules' which found place in WTO settlement of dispute mechanism deal with the terms of reference of panels, the composition of panels, procedures for multiple complaints and third-party participation, and time limits. Rules on sensitive topics of adoption of panel's reports were also included.

5 WTO, GATT 1994 and The Dispute Settlement Understanding

The settlement of disputes among any international organisations should be 'rule oriented' rather than 'power oriented'. The 'rule oriented system' brings stability and predictability and international trading system necessarily requires, 'rule based' system that has been introduced in a big way in the WTO in the Dispute Settlement Understanding (DSU).[14]

The DSU contains 27 Articles totalling 143 paragraphs plus four appendices. It is perhaps the most significant achievement of the Uruguay Round negotiations, often being referred to as jewel in the crown of WTO. Unique in public international law, the DSU confers compulsory jurisdiction on the Dispute Settlement Body (DSB) for purposes of resolving disputes. The interpretative role of the WTO dispute settlement system is made explicit in Article 3(2) of the DSU which provides that the system serves to 'clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public international law'.

[13]Ibid. 12.

[14]John H. Jackson, The Crumbling Institutions of the Liberal Trading System, 12 Journal of World Trade Law 98-101 (1978);—Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT, 13 Journal of World Trade Law 3–4 (1979);—The World Trading System, 111 (2nd ed. 1998).

The DSB has been busy with cases since its inception. In the first two years of its existence, more than 80 cases were filed, and up to the end of year 2008–2014, more than 480 cases were filed which implies that the international community has reposed trust and confidence in it. The profile of cases decided and filed shows how varying and conflicting political, economic and social interests of member countries are involved for settling the disputes which essentially may be trade oriented.

As provided in Article 3(2) of the DSU, the Appellate Body of the DSB in its various decisions has depended on Vienna Convention on Law of Treaties, especially its Article 31 as a rule of interpreting the DSU. Article 31 of the Vienna Convention on the Law of Treaties provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose'. This approach presumably 'is based on the view that the text of a treaty must be presumed to be the authentic expression of the intention of the parties'.[15] This represents a break from the GATT 1947 panel practices where negotiating history played a prominent role in ascertaining intention.[16] Under the Vienna Convention Rules, recourse to negotiating history, or preparatory work, can only be a supplementary means of interpretation to confirm a meaning already arrived at by the Article 31(1) rules, or where an interpretation in accordance with those rules leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.[17]

The Appellate Body has interpreted the WTO Agreements by reference to ordinary meaning of the words viewed in their context in the light of objects and purposes of the treaty. Although it has identified objects and purposes as part of the interpretative process,[18] it has also said that if the terms of the treaty are given their ordinary meaning, in context, should 'effectuate its objects and purposes'. Appellate Body, notwithstanding the fundamental rule of Article 31(1) of the Vienna Convention, has drawn on other interpretative mechanisms more specifically on 'effectiveness' which has been endorsed by the Appellate Body as 'fundamental tenet of treaty obligation'. Moreover, the Appellate Body in interpreting the language of a provision of one of the WTO Agreements can seek additional interpretative guidance as appropriate from the general principles of international law. In some cases, the Appellate Body has interpreted on 'case to case' basis, implying that meaning may change according to circumstances of the case. The practice of the Appellate Body shows that although Vienna Convention Rules on treaty obligations are the starting and guiding principles, yet the Vienna Convention does not

[15]Ian Sinclair, The Vienna Convention on the Law of Treaties, 115 (2nd ed. 1984).

[16]D.J. Kuyper, the Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law, 25. Netherlands YIL 227(1994).

[17]Article 32 of the Vienna Convention on the Law of Treaties.

[18]See, for example, EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998: 1, para. 165.

provide single and self-contained answers to all questions of interpretation of WTO Agreements.

6 DSU and Its Applicability

The central provisions pervading the settlement of disputes under the WTO are GATT Articles XXII and XXIII of 1947, incorporated *mutatis mutandis* in GATT 1994. The jurisprudence evolved around Articles XXII and XXIII of GATT 1947 has been described earlier. Suffice it is to say that Article XXIII did not provide specific procedures for settling disputes concerning matters arising out of GATT. Therefore, the DSU came into being only after the WTO Agreements came into force.

Article I of the DSU sets out the coverage and applicability pursuant to its consultation and dispute settlement provisions concerning the 'covered Agreements'. These are listed in Appendix 1 and are: the Agreement Establishing the World Trade Organisation; the 13 individual multilateral agreements on trade in goods; GATS; TRIPs; and the four Plurilateral Agreements. It encompasses measures affecting the operation of any covered agreement taken within the territory of a member, including measures taken by regional or local governments. It does not extend to other matters not falling within the four corners of GATT.

The rules of DSU with special modification have been applicable to other Agreements as listed in Appendix to DSU such as:

The above list of rules and procedures include provisions where only a part of the provision may be relevant in the context.

If there are disputes involving two or more covered agreements other than the DSU and in the event of a conflict in the special or additional rules and procedures contained in those agreements, Article 2.1 obligates the parties themselves to attempt to agree on the rules and procedures to apply. If they are unable to do so within 20 days of the establishment of the panels, the Chairman of the DSB, in consultation with the parties, shall determine the rules of procedures to be followed within 10 days of a request to do so by either party. The DSB Chairman should be guided by the principle that special or additional rules and procedures should be used wherever possible, with the DSU rules and procedures being used wherever necessary to avoid conflict.

In case there is no difference between the rules and procedures of the DSU and covered agreements, the rules of procedures of DSU apply together with the special or additional provisions of the covered agreements. However, a special or additional provision should only be found to prevail over a provision of DSU in a situation where adherence to one provision will lead to a violation of other provisions in the case of a conflict. An interpreter must, therefore, identify an

inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement before concluding that the latter prevails and that the provisions of DSU do not apply.[19]

7 Dispute Settlement Mechanisms

i. Dispute Settlement Body (DSB)

The DSU created three institutions to administer WTO dispute settlement mechanism. The first is the Dispute Settlement Body (DSB) established under Article 2 of the DSU for the purpose of administering rules and procedures as set out in the DSU, subject to the exceptions as provided in the covered agreements. The DSB has power to establish panels, adopt panel reports and Appellate Body Reports, supervise the implementation of recommendations and rulings, and authorise sanctions for failure to comply with dispute settlement decisions. The General Council of the WTO serves as the DSB, but the DSB has its own chairman and follows separate procedures for those of the General Council.

The DSB has the power to establish Appellate Body to review panel rulings.[20] The Appellate Body is a standing institution composed of seven persons appointed by the DSB for four year terms.[21] The members of the Appellate Body must be persons with demonstrated expertise in law and international trade who are not affiliated with any government. The Appellate Body membership must be 'broadly representative of membership in WTO'.[22]

The Appellate Body hears cases in divisions of three, but each member is required to stay abreast of the dispute settlement activities of the WTO. The WTO system continues the panel system of GATT 1947. Panels are composed of three (exceptionally five) persons, well-qualified governmental or non-governmental individuals, selected from a roaster of persons suggested by the WTO members. Panel members serve in their individual capacity and not as representatives of WTO members.[23]

(ii) Dispute Settlement Procedures
General Provisions

Article 3 of the DSU sets out the general provisions outlining mainly the objectives of the dispute settlement mechanism as enshrined in the DSU. These are summarised as under:

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[19]Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico, Appellate Body Report, WT/DS60/AB/R, DSR 1998: IX, para. 64.

[20]WTO Agreement, Article IV: 3.

[21]DSU, Article 17.

[22]Ibid Article 17.

[23]Ibid Article 8.

1. Adherence to the management principles applied under Articles XXII and XXIII of 1947 GATT as modified by the DSU;
2. DSU is meant for security and predictability of the multilateral trading system, to serve and preserve the rights and obligations of members under the covered Agreements. Recommendations of DSB should not add or diminish the rights and obligations of members of WTO;
3. Promptness of settling situations where a member considers that his benefits have been infringed, and to maintain proper balance between rights and obligations of the members;
4. DSB's aim should be achieving a satisfactory settlement of the disputes keeping in mind the rights and obligations of members;
5. Consultations and dispute settlement should be such that they are consistent with the covered agreements and do not nullify or impair benefits of members nor the objectives of the Agreements;
6. Matters formally raised under consultation and dispute settlement shall be notified to DSB and the relevant Councils and Committees where any member may raise any point relating thereto;
7. Solutions mutually agreed to a dispute are preferred. In the absence of mutually agreed solutions, the first objective of dispute settlement mechanism is to secure withdrawal of the measures concerned if found to be inconsistent with the provisions of the covered Agreements. Compensation should be resorted to only if the immediate withdrawal of the measure is impracticable. The last resort is the possibility of suspending the application of concession or other obligations under the covered Agreements on a discriminatory basis vis-à-vis the other member subject to authorisation by the DSB.
8. In cases where there is an infringement of the obligations assumed under a covered Agreement, it constitutes a case of nullification or impairment *prima facie*, i.e. presumption that rules have an adverse effect on other member in the covered Agreement and it is the responsibility of the other member to rebut the charge.
9. DSU provisions are without prejudice to members, and any member can have recourse to the authoritative interpretation of the covered Agreement through decision-making under the WTO Agreement or a covered Agreement which is a Plurilateral Trade Agreement.
10. The dispute settlement mechanism is not contentious, and members are supposed to act in good faith in resolving disputes. Complaints and countercomplaints should not be linked.
11. The concept of 'security and predictability' in Article 3.2 is central object of the dispute settlement system of DSU to protect the security and predictability of the multilateral trading system and DSU provisions must be interpreted in the light of this object and in a manner which would most effectively enhance it.[24]

[24]US 301-310 of the Trade Act of 1974, Panel Report, WT/DS152/R, Adopted 27 January 2000, para. 7.7.5.

The WTO rules are reliable, comprehensible and enforceable, and are not too rigid or inflexible as to leave room for reasoned judgments in conformity with endless and ever changing ebb of real facts in real cases in real world.[25]

12. With regard to 'nullification and impairment of benefits' under Article 3.8, the Appellate Body rejected the contention that USA has never exported a single banana to EEC, and therefore could not suffer any trade damage and held that the two issues of nullification and impairment and the standing of USA are closely related. The United States is a producer of bananas and a potential export interest by the United States cannot be excluded; the other is that the internal market of United States could be affected by the EEC banana regime and by its effects on world supplies and prices of banana…. They are relevant to the question whether the European Community has rebutted the presumption of 'nullification and impairment'.[26] In the case of Turkey-Textiles, the quantitative restrictions on imports of textiles and clothing from India were held to be in violation of WTO law. Turkey had argued that India had not suffered any 'nullification or impairment of benefits' within the meaning of Article 3.8 as imports from India had increased since Turkey imposed quantitative restrictions. The Panel rejected these arguments as Turkey had failed to rebut the presumption of 'nullification and impairment'.[27]

(iii) Consultations

Normally, an international trade dispute settlement commences with consultation between the member nations of WTO under Article XXII of GATT 1947, and as already noted, the consultation mechanism was further strengthened and reaffirmed in the Tokyo Round. The WTO, DSU affirms in the effectiveness of the consultation and provides that each member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultations regarding any representation made by another member concerning measures affecting the operation of the covered Multilateral Trade Agreements taken within the territory of the former. Such consultations occur regularly at the official level and can be raised at the Ministerial level as appropriate.[28]

The request for consultation is to be notified to DSB and to the relevant Councils and Committees. The Councils as already noted are Councils for Trade in Goods, for Trade in Services and for TRIPs. The committees are those which are concerned with different substantive areas of WTO Agreements, such as Committees on Anti-dumping, Technical Barriers to Trade, Subsidies and Countervailing Measures.

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[25]Japan—Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, para. 31.

[26]EC-Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R; DSR 1997:II, para. 5.1.9.

[27]Turkey—Restrictions on Imports of Textiles and Clothing Products, Panel Report WT/DS34/R, Adopted 19 November 1999.

[28]Article 4 of DSU.

The request for consultations should specify the articles of the relevant WTO Agreements under which consultations are sought. These normally would include Article 4 of the DSU, the corresponding provisions of other covered Agreements which are listed in footnote 4 of the DSU, and Article XXII or XXIII of GATT. Under footnote 4, the corresponding consultations are listed as under:

Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Pre-shipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

The complaining party should give reasons for the request including identification of measures at issue and the identification of legal basis for the complaint. It is necessary that the request for consultations should be broad in scope as far as possible, both in identifying the measure and in indicating the legal basis for such complaint, as these will limit the scope of any eventual panel request and that in turn, will limit the scope of the terms of reference of the panel.[29] A measure that is not subject of consultations cannot be referred to a panel.[30] Panels, in turn, may evaluate a measure only under the provisions of the covered agreements specified in the terms of reference, which incorporated the request for a panel.[31] Besides, that member has to satisfy himself that the action after consultation would be fruitful. The DSU in Article 4:3 sets deadlines for consultation procedures. A member receiving the request for consultation must respond to the request within 10 days of its receipt and must agree to enter with consultation within 30 days after receiving the receipt or within a time frame mutually agreed. If the receiving member does not reply within 10 days, or if it fails to consult within 30 days or within a period otherwise agreed, the member requesting consultation may proceed immediately to request the DSB to establish a panel. The complaining party may also request for the establishment of a panel during sixty-day period, provided both the parties jointly consider that the consultation has failed.

[29]United States—Denial of MFN Treatment as to Non-rubber Footwear from Brazil, BISD 39S/ 128, 147–148 (Adopted June 1992).

[30]USA—Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon, BISD 415/ 229, (30 November 1992) (Adopted on 27 April 1994).

[31]Japan—Taxes on Alcoholic Beverages, WT/D58/R, WT/DS/10/R; Adopted on 1 November 1996.

It is pertinent to mention here that the request for consultations and its field of reference that may be referred to a panel is crucial as any failure to raise an issue or to advance a particular objection to the impugned measure has resulted in the respondent's successful objections to its consideration by the Panel. A scrutiny of cases decided by GATT 1947 panels reveals that the non-identification of measures as well as field of reference may prove fatal. In EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong;[32] Canada—Administration of Foreign Investment Review Act;[33] and the United States—Denial of Most Favoured Nations Treatment as to non-Rubber Footwear from Brazil;[34] were the ill-conceived references which proved fatal.

Whenever a member of WTO other than the consulting member thinks that the member has substantial trade interests in consultations being held pursuant to Article XXII: 1, Article XXII: 1 of the GATS or the corresponding provisions in other covered Multilateral Trade Agreements, such interested member may notify the consulting member.

Consultations essentially are bilateral, confidential and without the involvement of the DSB, the panel or the secretariat of the WTO. As the consultations are confidential and no official records are kept, a panel which may be constituted in the event that consultations have failed does not know what was discussed during consultations. Therefore, there is nothing in the DSU that requires that a complainant cannot request a panel unless its case has been adequately explained in consultations. As a corollary to this, the panel request will itself set out the scope of the requested consultations and panel must assume that all the points contained in the request were subject of consultations.

All parties in the dispute settlement must be 'fully forthcoming' and that in consultations process facts must be freely disclosed, as the demands of due process implicit in the DSU make full disclosure of facts during consultations important, for the claims that are made and that the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent acts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact finding.[35]

[32]GATT, BISD, 30S/129 (1983).

[33]GATT, BIDS, 30S/140 (1983).

[34]GATT, BISD, 39S/128 (1991).

[35]India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, WT/DS50/AB/R, DSR 1998:1, para. 94.

8 Good Offices, Conciliation and Mediation

If the consultation fails, the members of WTO may avail themselves DSU's good offices, conciliation or mediation services. Article 5 of the DSU provides for the above services to be taken voluntarily by the members if the members to the dispute so agree and request for such services to any item of the dispute which can be terminated at any time. Good offices, conciliation or mediation are entered into within sixty days from the date of the request for consultation before requesting for a panel. Also, the complaining party may request a panel during sixty days if the parties to the dispute jointly consider that good offices, conciliation and mediation have failed to settle the dispute. Further, the Director General of GATT may provide such services in an effort to assist members to resolve a dispute.

9 The Establishment of Panels

To resolve the dispute within sixty days if the consultation fails (if a member to which a request for consultations is made agrees within 10 days to consult within 30 days, and does so, the complaining party may not ask for a panel until 60 days have elapsed from the date of original request, unless the parties agree that further consultations would not be productive), at the request of the complaining party, a meeting of the DSB shall be convened within 15 days provided at least 10 days advance notice of the meeting is given, and a panel may be established by the DSB to hear the dispute. In cases of urgency including those which concern perishable goods, members shall enter into consultations within 10 days of the request for consultations, and the complaining member may request a panel 20 days after the request if consultations have failed. The DSB is the sole judge of urgency of the matter.

The DSB may by consensus also decide not to establish a panel. The request for the establishment of a panel has to be made in writing, and such request shall indicate whether consultations preceded the request for panel; identify the specific measures at issue; and also provide a brief summary of the legal nature of the complaint and the problems clearly. Special terms of reference are also possible as alternatives to the above method of reference, provided the written request includes the special terms of reference.[36] The establishment of panel appears to be a matter of right with the complaining party.

The jurisprudence as evolved by the DSB on the interpretation of Article 6 is as follows:

(i) It is important that a panel request is sufficiently precise for two reasons; first it often forms the basis for the terms of reference of the panel; and second, it

[36]Article 6 of the DSU.

informs the defending party and the third parties of the legal basis of the complaint.[37]

(ii) The need for a 'legal interest' could not be implied in the DSU or in any other provisions of the WTO Agreement and that members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful' and no requirement for an economic interest is needed.[38]

(iii) The term 'measure' in Article XXIII: 1 of GATT 1994 and Article 26.1 of the DSU as elsewhere in the WTO Agreement refers only to policies and actions of governments, not those of private parties. But while the truth may not be open to question, there have been number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appears on their face to be private action may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions. The post GATT 1994 cases demonstrate connection to or endorsement of those actions.[39] The post GATT 1994 cases demonstrate the fact that an action taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement in it. It is difficult to establish bright line rules in this regard. As such, it needs to be examined on a case to case basis.[40]

(iv) To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified measure. The requirement of Article 6.2 would be met in case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified that the respondent party can reasonably be found to have received adequate notice of the scope of the cause of the complaining party. The two key elements, close relationship and notice, are interrelated only if a 'measure' is subsidiary or closely related to a specifically 'identified measure'.

(v) 'Measure' within the meaning of Article 6.2 of the DSU is not only measures of general application i.e., normative rules, but also can be the application of tariffs by customs authorities.[41]

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[37]Supra note 26, para. 7.13.

[38]Korea—Definitive Safeguards Measures on Imports of Certain Dairy Products, Appellate Body Report, WT/DS98/AB/R, para. 7.13.

[39]Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/ R Adopted 22 April, 1998; para. 10.52.

[40]Ibid , paras. 10.55–10.56.

[41]EC-Customs Classification of Certain Computer Equipment, Appellate Body Report, DSR1998: V, para. 65.

10 Terms of Reference of Panels

In order to avoid delays and also to clear the functioning of panel, the standard terms of reference are to be furnished within twenty days from its establishment. The panels are, to examine, in the light of the relevant provisions in [name of the covered Agreement(s) cited by the parties to the dispute], the matter referred to the DSB by (name of the party) in document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those Agreement/s. The DSB may authorise the chairman in establishing a panel to draw up the terms of reference of the panel in consultation with the parties to the dispute and such terms shall be circulated to all members.[42]

The terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective; they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[43] The *ellipses* in Article 7 indicate two things. One, that document number given to the complainant's request for the establishment of a panel will appear in the terms of reference. Second, as the request of the complaining party will have referred to the particular agreements at issue and also, the relevant provisions of those agreements, the panel's jurisdiction will be limited by these references. The panel, therefore, may not go beyond them to consider whether the measures or actions complained of are inconsistent with other agreements or other provisions of the agreement cited.[44]

About the relationship between terms of reference and submissions, there is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be submitted in a complaining party's first written submission. It is the panels terms of reference governed by Article 7 of the DSU, which sets out the claims of the complaining parties relating to the matter referred to DSB.[45] Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the working procedures in Appendix 3 unless the panels decide otherwise after consulting the parties to the dispute'. Nothing in the DSU gives a panel, the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are

[42]Article 7 of DSU.

[43]Appellate Body Report on Brazil–Desiccated Coconut Case; WT/DS22/AB/R, DSR 1997: 1, p. 21.

[44]Japan—Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/R, WT/DS10/R and WT/ DS11/R (11 July 1996), para. 65.

[45]Supra note 26, para. 7.57–7.58.

governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.[46]

11 Composition of Panels

Article 8 of the DSU provides that panels normally are composed of three panellists or five provided the parties to the dispute agree for the same within ten days after the establishment of the panel by the DSB. Panellists generally are present or former members of non-party delegation to the WTO or academics. They serve in their individual capacities, not as government representatives or representatives of other organisations. Members are generally required to permit their officials to serve as panellists and are prohibited from giving them instructions or seeking to influence them with regard to matters before them. If a dispute involves a developing country, at least one panellist shall be from a developing country if the developing country so requests.

It is the secretariat which proposes nominations for the panels to the parties to dispute, and the parties to the dispute are not expected to oppose nominations except for compelling reasons. If the parties do not agree within twenty days from the establishment of a panel, at the request of either party, the Director General of the WTO in consultation with the Chairman of DSB and the Chairman of the relevant council or committee may form the panel by appointing the panellists whom he or she considers most appropriate in accordance with any relevant special or additional procedure of the covered multilateral agreement, after consulting with the parties to the dispute. Accordingly, the chairman of the DSB may inform the members of the composition of the panel thus formed not later than 10 days from the date the chairman receives such request.

The Secretariat has to maintain a roster of panellists both governmental and non-governmental individuals possessing the qualifications of either having served or presented a case to a panel, served as a representative of a WTO member, or of a contracting party to the GATT 1947 or as representative to a council or committee of any covered Multilateral Agreement or its predecessor Agreement, or in the secretariat, taught or published international trade law or policy, or served as senior trade policy official of a member. These panel members are to be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

In cases of multiple complaints, where more than one member requests the establishment of a panel related to the same matter, a single panel is established taking into account the rights of all members concerned. Further, the single panel

[46]India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, WT/DS50/AB/R; DSR 1998: 1, para. 94.

has to organise itself in such a manner as if separate panels would have examined the matter in dispute. Written submissions by each of the complainants in a multiple complaint have to be made available to the other complainants.

The interests of third parties in a dispute have been recognised (Article 10 of the DSU) and any member having a substantial interest in a dispute (referred to in DSU as a third party) and having notified the DSB of that interest may be heard by a panel and may make written submissions to the panel. Third parties receive the first written submissions of the parties to the first meeting of the panel, but no provision is made for them to receive the second or subsequent submissions. A panel's decision whether to grant 'enhanced' participatory rights to third parties is a matter that falls within the discretionary authority of the panel. Such discretionary authority is not unlimited and is circumscribed, for example, by the requirements of 'due process'.[47]

12 Functions, Procedures and Responsibility of Panels

The function of the panel is to assist the DSB in discharging its responsibilities under DSU and the WTO Agreements (Article 11 of the DSU). A panel has to make an objective assessment of the matter, including the facts of the case and its conformity with the relevant covered agreements. It has also to make findings assisting the DSB in recommending or giving ruling. For that purpose, the panels have to consult the parties to the dispute regularly and give them an adequate opportunity for achieving satisfactory solutions.

The duty to make an objective assessment of the facts is, *inter alia*, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panels' duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with the objective assessment of the facts. 'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an 'egregious' error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or due process of law or natural justice.[48] The burden of proof normally falls on the party whether complaining or defending, who asserts the affirmative of a particular claim or defence. If a party adduces evidence sufficient to

[47]US—Anti-dumping Act of 1916, Complaint by the EC, WT/DS136/AB/R, paras. 138–150.

[48]Supra note 18, pp. 132–138.

raise a presumption that what is claimed is true, the burden then shifts to other party, unless it adduces sufficient evidence to rebut the presumption.[49]

Panels control the settlement of dispute process within the confines of the rules set out in DSB, establishing deadlines for written submissions establishing the schedule (Article 12 read with Annex 3 of the DSU). Normally, all the information is submitted by the parties. However, panels are not confined to parties for the source of information they need. They can seek information and technical advice from any sources they deem appropriate. Panels have the right to consult experts to obtain their opinions and, with respect to scientific and technical matters, may request an advisory report from an expert review group.[50]

The DSU rules provide time schedule for implementation of various stages in the panel process once it is established. Within one week the panel will consult with the parties and establish a time table for the proceedings.[51]

Receipt of first written submissions of the parties 1. Complaining party (plaintiff), 3–6 weeks; …Party complained (defendant), 2–3 weeks; (b) Date, time and place of first substantive meeting with the parties; third party session, 1–2 weeks; (c) Receipt of written rebuttals of the parties, 2–3 weeks; (d) Date, time and place of second substantive meeting with the parties, 1–2 weeks; (f) Receipt of comments by the parties on the descriptive part of the report, 2 weeks; (g) Submission of the interim report, including the findings and conclusions to the parties, 2–4 weeks; (h) Details for party to request review of parts of report, 1 week; (i) Period of review by panel, including possible additional meeting with parties 2 weeks; (j) Submission of final report of parties to the dispute, 2 weeks; (k) Circulation of the final report to the members, 3 weeks.[52]

The other provisions of panel procedures stress transparency and a legitimate approach for concluding the panel deliberations as well as expeditious disposal of the disputes brought before the panel. Specific provisions have been made to extend the more favourable and differential treatment to the LDCs which have been accorded to them by the Covered Multilateral Agreements in course of settling the disputes.[53]

[49]US—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Appellate Body Report, WT/DS33/AB/R.

[50]Article 13.2, DSU.

[51]Article 12.3, DSU.

[52]Article 12 read with Appendix 3, DSU.

[53]Article 12: 11, DSU.

13 Adoption of Panel Reports

The adoption of panel reports is quite different from the practice of adoption of panel reports as practiced under GATT 1947. The adoption of panel reports under GATT 1947 was faulty as the report had to be adopted by consensus and as such the panel reports were never accepted in their spirit and character and there were all possibilities of blocking the panel reports. On the other hand, the DSU has changed the procedure of adopting the panel reports significantly; first, by providing for interim review of *pros* and *cons* of the dispute after the parties have submitted their submissions to the panel and second, the parties to the dispute may ask for review of the interim report or its parts.[54] This procedure ensures against erroneous findings of fact and law as well as opportunity for the losing party to get the last chance of rectifying the mistake before the panel arrives at its final decisions.

Once the report has been finalised by the panel, it is submitted to the DSB, and the members are given twenty days before the DSB adopts the report. The members within ten days can raise objections to panel reports, and the party to the dispute shall have full right to participate in the consideration and deliberation of the report by the DSB. The DSB after the issuance of the panel report and within sixty days shall adopt the panel report at a meeting. If a meeting is not scheduled, a meeting of the DSB should be held unless one of the parties to the dispute formally notifies the DSB of its decisions to appeal or the DSB by consensus decides not to adopt the report. If a party has notified its intentions to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.[55]

14 Appellate Review and Standing Appellate Body

Under Article 17 of the DSU, the DSB has been empowered to establish a standing Appellate Body with seven members, three of whom shall serve any one case and shall hear appeals from panel cases. The standing Appellate Body is composed of persons of recognised authority, who have demonstrated expertise in law, international trade and the subject matter of the covered Multilateral Agreements. These members are not to be affiliated with any governments. The tenure of the persons appointed to serve on the standing Appellate Body is four years with the possibility of reappointment.

The standing of the Appellate Body is limited to considering, issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body proceedings are normally to be concluded within sixty days and in any event not to exceed ninety days, and the Appellate Body has to inform the DSB in writing of the reasons for extension of time. The report of the Appellate Body is

[54]Article 15, DSU.

[55]Article 16, DSU.

subject to the same automatic adoption rule as regular panel reports by the DSB unless the DSB decides otherwise by consensus within thirty days of circulation of the review to the DSB.

The DSB provides strict rule of confidentiality, and there is a prohibition of *exparte* communications with the panel or the Appellate Body with regard to matters for their consideration. Also any written submissions to the panel or Appellate Authority are treated most confidential. However, the members to the dispute have a right of access to the same. The Appellate Body may uphold, modify, or reverse the legal proceedings and conclusions of the panel.[56]

The Appellate Body Report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body Report within thirty days following its circulation to the members. The decision of the Appellate Body or a panel that a measure is inconsistent with a covered Multilateral Trade Agreement shall obligate the members to bring the measure into conformity with that Multilateral Agreement. The Appellate Body or panel can also recommend measures for bringing the measure in conformity with the rule or the Multilateral Trade Agreement.[57]

Finally, the time frame for DSB decisions from the date of establishment of a panel by the DSB until the date the DSB considers the panel or the Appellate Body Report shall not exceed nine months where the panel's report has not been appealed or twelve months where the report is appealed.

15 Surveillance of Implementation of Recommendations and Rulings

Article 21 of the DSU provides an elaborate mechanism of surveillance of implementation of recommendations and rulings of panels and Appellate Body Reports. Once a panel finds a complaint is justified, its report categorically recommends that the offending member should cease and desist from the violations of GATT rules by either withdrawing the offending measures or suitably amend the measures to bring them in conformity with the GATT rules or covered Multilateral Agreements.

Accordingly once the report is accepted, the DSB is empowered to monitor whether or not its recommendations have been implemented. The DSB is further empowered to keep vigil in respect of measures which a losing party has to take to remedy a violation of GATT or the covered Multilateral Agreement in pursuance of the recommendations of the panel within thirty days of the adoption of the panel or Appellate Body Report. If a member is not in a position to comply with the panel's recommendations immediately, a reasonable time may be granted to such member by the DSB or a mutually agreed time frame between the disputants within

[56]Article 18, DSU.

[57]Article 19, DSU.

forty-five days of the adoption of the recommendations and rulings by the DSB. If a member is still not in a position to implement the rulings, ninety days' time can be granted after the adoption of the recommendations and rulings of the DSB which can be determined through binding arbitration. In such arbitration, arbitrators are supposed to implement the panel recommendations and rulings within a period of fifteen months. In cases where the panel or the Appellate Body extends the time of providing its report pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, such time may be added to the total time of 15 months.

In case of disagreement between the disputants of the existence or consistency with a covered Multilateral Agreement of the measures taken to comply with the recommendations and rulings, such disputes are to be resolved by referring them to the settlement dispute mechanisms of the covered Agreements.

The DSB is further empowered to keep under surveillance the implementation of the adopted recommendations or rulings. Any member has a right to raise the issue of implementation of the panel recommendations at the DSB. The DSB shall keep on its agenda the implementation of the panel recommendations and rulings for a period of six months.

Under article 19 of the DSU if a measure is deemed to be inconsistent with a covered agreement, the panel or Appellate Body will recommend that the member concerned bring the measure into conformity with the agreement may also suggests ways to implement the recommendations. Therefore, the only legal obligation a member faces after violating a WTO rules is cease its violating conduct, whether it is an act or omission to fulfil its international obligations the violating member will be required to bring its measure into conformity with WTO rules before the expiry of reasonable period of time. Failure to do so will give the injured member the right to apply for authorisation to retaliate. Of course, the retaliation can be avoided if both parties mutually agreed on compensation. Compensation and retaliation are only temporary measures, and full implementation is preferred to bring the measure into compliance. In other words, compensation is not part of violating members' international obligations. Indeed like retaliation, compensation provides the means for the complaining member to induce compliance, reminding the violating country that breaking WTO rules comes at a cost. One possible explanation for this structure is that the negotiator of the WTO wishes to maintain the security and predictability of the multilateral trading system by placing emphasis on resolving breaches, rather than arguing about the economic loss due to such breaches.

16 Compensation and The Suspension of Concessions

If the recommendations are not implemented, the winning party may be entitled to seek compensation or the authority to seek to suspend concessions previously made to that member. However, neither compensation nor the suspension of compensation or other obligations is preferred to full implementation of a recommendation to

bring a measure into conformity with the covered Multilateral Agreements.[58] Article 21.1 of the DSU provides that prompt compliance with recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes to the benefit of all members.

It is noteworthy that Article 22.3 of the DSU catalogues the principles for suspending concessions and obligations after invoking the dispute settlement procedures as conceived in the DSU. These are briefly as under:

(a) Suspension with respect to same sector in which the nullification or impairment or violation has occurred.
(b) Suspension with same sector is neither practicable nor effective, suspension in other sectors under the same agreement.
(c) Suspension with other sectors is not effective or practicable, and the circumstances are serious enough and suspend concession or other obligations under another covered Multilateral Agreement.
(d) For applying the above principles, sectoral trade and how far it can compensate as well as broader economic elements related to the nullification or impairment and broader economic consequences of the suspension or other obligations are important considerations which a party has to take into account while suspending the concessions.

If a party requests authorisation to suspend concessions or other obligations pursuant to (b) and (c) set above, it shall state the reasons for the request which is sent to DSB. Such a request shall also be forwarded to the relevant council of the covered Multilateral Agreements. The level of suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.[59]

It is important to note that the DSB shall not authorise suspension of concession or obligations if a covered Agreement prohibits such suspension.[60]

Although as noted earlier the level of the suspension of concessions or other obligations authorised by the DSB has to be equivalent to the level of nullification or impairment, yet the DSB can under certain circumstances and by way of a protest by a complaining party refer the matter to arbitration. Such arbitration has to be carried out by the original panel if members are available or by an arbitrator appointed by the Director General of WTO. Such arbitration has to be completed within sixty days and concessions or other obligations negotiated earlier cannot be suspended during the course of the above said arbitration.[61]

The role of the arbitrator is limited as he cannot examine the nature of the concessions or other obligations to be suspended but is concerned only with examining whether the level of nullification and impairment is equivalent to the

[58]Article 22.1, DSU.
[59]Article 22.
[60]Article 22.4.
[61]Article 22.6.

level of injury incurred by the member. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered Multilateral Agreement. The arbitrator may further examine whether the principles required to suspend concession or other obligations (Article 22.3) have not been complied with and the decision of the arbitrator shall be communicated to the DSB promptly and the DSB upon request by a party may grant authorisation to suspend concession or other obligations.[62]

Arbitrators can exercise broad discretion in deciding what may constitute appropriate or commensurate compensation under SCM Agreement. For example, in Canada-Aircraft (WT/DS70/AB/R), the arbitrators decided to adopt the amount of subsidy as the basis for calculating the appropriate countermeasures and ruled that the net present value of the subsidy amounted to USD 206,497,305. The use of discretion is also exemplified in US-FSC as in this case the arbitrators refused to confine appropriate measures to offsetting the injurious effect of the persisting illegal measures of the complainant, the arbitrators reasoned that Art. 4 of the SCM Agreement should be regarded as different from other provisions that are purely effects oriented and subsequently approved the value of retaliatory measures proposed by the EC, which was based on the subsidy (decision by the arbitrators, US-FSC WT/DS108/AB/R (Art. 22.6-US) Paras. 5.41–5.42).

The goal of inducing compliance has been widely recognised by the arbitrators empowered by Art. 22.6 of the DSU in resolving disputes relating to retaliation. The arbitration award in EC-Bananas (DSR 1999: II) was the first to recognise the goals of retaliation in WTO dispute settlement as inducing compliance. In this case, the arbitrators stated that 'the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the member concerned… thus temporary nature indicated that it is the purpose of counter measures to induce compliance… there is nothing in Art. 22.1of the DSU, let alone in paragraph 4 & 7 of the Art. 22 that could be read as a justification for counter measures of a punitive nature. (EC-Banana II) arbitration decision (Art. 22.6-EC, para. 6.3)'.

Finally, DSU provides that the suspension of concessions or other obligations is by way of a temporary relief and is applicable till such time as the measure found to be inconsistent with a covered Multilateral Agreement has been removed, or the member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits or a mutually satisfactory solution is reached. It is incumbent on the DSB to continuously monitor the compliance of implementation of the adopted recommendations or rulings, including cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring the measure into conformity with the covered Agreements have not been implemented.[63]

[62]Article 22.6 and 22.7.

[63]Article 22: 87.

Further, the dispute settlement provisions of the covered Multilateral Agreements can be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a member. Whenever, the DSB rules that a member does not observe the provisions of a covered Multilateral Agreement, it is incumbent on the member to observe the provisions by taking reasonable measures necessary for such observance.[64]

17 Non-violation

As already explained in the beginning of this chapter, complaint under Article XXIII: 1(b) termed as non-violation complaints has raised questions of interpretation. Non-violation complaints have been successful only if the infringement of tariffs were proved. The DSU have incorporated the above said non-violation principles and have provided that whenever the provisions of Article XXIII: 1(b) of GATT 1994 are applicable to a covered Multilateral Agreement, a panel or Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the covered Multilateral Agreement is being nullified or impaired or any objective of that Multilateral Agreement is impeded as a result of the application by a member of any measure, whether or not it conflicts with the provisions of that Agreement.[65]

DSU rules further provide for a panel or Appellate Body to arrive at a decision whether a case concerns a measure that does not conflict with the provision of a covered Multilateral Agreement to which the provisions of Article XXIII: 1(b) of GATT 1994 are applicable. The DSU procedures of 1994 are applicable provided:

(a) The complaining party presents a detailed justification in support of her complaint relating to measures which does not conflict with the covered Multilateral Agreement.
(b) Where the measure has been found to nullify or impair benefits under or impede the attainment of objectives of the relevant covered Multilateral Agreement without its violation thereof, there is no obligation to withdraw the measure. However, in such cases the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment.
(c) The arbitration provided in the rules and as discussed above may upon request of either party determine the level of benefits which have been nullified or impaired, and the arbitration may also suggest ways and means of reaching a mutually satisfactory adjustment.
(d) Compensation may be part of a mutually satisfactory adjustment as final settlement of dispute.

[64]Article 22: 9.
[65]Article 26.1.

Where the provisions of Article XXIII: 1(c) of the GATT 1994 are applicable to a covered Multilateral Agreement, a panel may not only make rulings and recommendations where a party considers that any benefits accruing to it directly or indirectly under the relevant provisions of the covered Multilateral Agreement have been nullified or impaired or the attainment of any objective of that Multilateral Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of Article XXIII: 1(a) and (b) of GATT 1994 are applicable. Where and to what extent such party considers and a panel determines that the matter is covered by the above paragraph, the procedure of DSU applies only up to and including the point in the proceedings where the panel report has been issued to the members. For the consideration of adoption, and surveillance and implementation of recommendations and rulings, the procedure and rules contained in the decision of the GATT Council of Representatives of 12 April 1989 (BISD 365/61) apply. For such an application the following principles may be kept in mind, i.e., the complaining party should present a detailed justification in support of any argument made with respect to issues covered; and in cases involving above said matters, if a panel finds that cases also involve dispute settlement matters other than those covered under Article XXIII: 1(c) the panel should issue a separate report detailing with such matters.[66]

18 Jurisprudence of Litigating Process and Its Future

As already said that the DSU of the WTO is generally considered to be a jewel in the crown of the WTO trading system and the support of the DSU has been acknowledged universally transcending the developed and developing countries with euphoria and exuberance which is reflected and demonstrated by over five hundred cases have been brought before the DSB till end of 2016, a record of sorts as compared to any international adjudicating institution including the International Court of Justice (ICJ). However, from the very beginning there have been proposals submitted to the WTO for reform of its dispute settlement systems.[67]

Admitting the fact that dispute settlement mechanism of WTO has become detailed, integrated and transparent, particularly its timetable and clear structures set forth in the DSU are of immense value in settling complex international trade disputes in an age of globalisation and liberalisation, yet there appear flaws in the DSU, *inter alia*;

[66]Article 26: 2.

[67]In fact, the WTO and its Members never regarded the DSU as an unchallengeable discipline, and in early 1994, WTO members in Marrakesh Ministerial Conference had requested the review to be closed by 1 January 1997. In the Doha Ministerial Conference negotiations 20 November 2001, the sentiments of DSU reform were affirmed and negotiations for reform were to be settled by May 2003 which was further discussed in Cancun Ministerial Conference of 31 August 2003 extending the deadline for reforms to May 2004 and the deadline has been further extended.

(a) Contradiction that exists between transparency, participation and the prompt settlement of disputes;
(b) Non-existence of integrated mechanisms for the application of panel and Appellate Body decisions;
(c) Provisions for LDCs in the DSU are too general to promote effective enforcement; and
(d) Due to its strict rule-based system, the performance of DSB functions has been limited.

The WTO dispute settlement systems have proven to be effective not only in settling disputes but also in inducing the defendants to comply with the WTO disputes settlement rulings. Remedies under Article 22 of the DSU include voluntary compensation and authorised retaliation.

(i) Suggestions on the Implementation of Recommendations and Rulings and Suspension of Concessions

A large number of WTO members have suggested in a joint proposal that Article 21.2 of the DSU be reformed to address the sequencing problem.[68] The proposal foresees the creation of Article 21(b) is entitled 'Determination of Compliance' that would establish the following procedure. A complaining party may request the establishment of a compliance panel:

(a) Any time after the member concerned states that it does not need further time for compliance;
(b) Any time after the member concerned has submitted a notification that it has complied with the recommendations or rulings of the DSB;
(c) 10 days before the date of expiration for the 'reasonable period of time' to comply. While consultations between the member concerned and the complaining party are desirable, they are not required prior to a request for a compliance panel.

The compliance panel would comprise the members of the original panel, if its reports have not been appealed, or the members of the Appellate Body that considered the appeal if the report of the original panel has been appealed. The compliance panel would be required to circulate its report within ninety days of the date of its establishment after which any party to the compliance panel proceeding would be permitted to request a meeting of the DSB to adopt the panel within a period of ten days. The report would be subjected to negative consensus rule: it would be automatically adopted unless the DSB decides by consensus not to adopt.

Compliance panel reports would not be subject to appeal. If the compliance panel found that the member concerned has failed to bring its measures into compliance within the reasonable period of time determined by the original panel, the complaining party could request authorisation from the DSB to suspend the

[68]See Proposed Amendment of the DSU, WT/Min (99)8, submitted by the Government of Japan on behalf of co-sponsors Canada, Costa Rica and others.

application of concessions to the member concerned or to suspend other obligations under the covered Agreements.

The joint proposal also modifies Article 22.2 to entitle the complaining party to request authorisation to suspend concessions if a compliance panel report pursuant to Article 21 finds that the member concerned has failed to bring its measures into compliance with the ruling of DSB. If the member concerned objects to the level of suspension proposed, the proposal states that 'the matter shall be referred to arbitration'. The arbitration shall be completed, and the decision of the arbitrator shall be circulated to members within forty-five days after the referral of the matter. The complaining party shall not suspend concessions or other obligations during the course of arbitration.

In regard to final compensation, it would be useful to clarify that the term compensation used in Article 22 to include grant of financial compensation to the complaining party which have been found to be in violation of rules. Panels should be authorised to impose financial compensation in disputes between developed and developing countries where the panel finds that as a result of WTO inconsistent measures taken by the developed countries, the developing country has lost its trade in the affected product.[69]

With the advent of WTO, its legal refinements, DSU and its involvement in new fields that affect sovereign governments as well as individuals, it is time to move away from the idea of the GATT/WTO only as package of bilateral balance between governments and to take WTO as an universal trade treaty with a multilateral effect having settlement of disputes mechanism of universal application.

(ii) Suggestion on Appellate Body

There has been a lot of concern shown by the members on the role of Appellate Body of the DSU, in particular the extent to which it has gone beyond its mandate and undertaken the role to make rules through interpretations of WTO Agreements. The opposition to such an interpretation is that essentially it is WTO Members who should have the primary power to interpret, modify or change the WTO provisions including the DSU. Appellate Body is usurping these functions under the garb of interpreting law on the basis of contemporary developments. Therefore, there is no scope for the Appellate Body to take into account unsolicited information including *Amicus Curie* briefs from the private parties.[70]

Developing countries are insisting that Appellate Body interpretation powers are limited and decision to allow briefs from non-governmental organisations (NGO's) including *amicus curiae* brief being substantive one is beyond the purview of Appellate Body procedural powers. Non-governmental organisations are not accountable to sovereign members and, therefore, have no contractual rights and

[69]WT/GC/W/162.

[70]WT/GE/W/162.

obligations under WTO. In certain ways the Appellate Body has accorded more privileges to NGO's than to WTO members which is unfair.[71]

(iii) Need for Transparency

The procedural deficiency with the DSU is its lack of transparency. The Doha Ministerial Declaration commits ministers to promote a public understanding of the WTO and 'to making the WTO operations more transparent, including through more effective and prompt dissemination of information'. Yet, proposals for real transparency in the dispute settlement system are continuously opposed by many of the members. Numerous proposals in this area have already been made including the proposals in the Text of the Chairman.[72]

The Chairman's proposals include that Article 3(6) of DSU which sets out rules for solutions mutually acceptable to parties is not perfect as it fails to lay down a concrete time within which the parties should be notified and the information that should be contained in the notification. Therefore, the arguments under the covered Agreement and particular dispute settlement terms should definitely be included in the notification submitted.[73]

The Chairman's Text further suggests that the third-party interests as conceived in Article 10 of the DSU should include his/their presence at the substantive meetings of panels, receiving copies of the submissions made to panels, including interim report by the Appellate Body of its findings and conclusions.

In the final analysis, if the other international tribunals such as ICJ, International Tribunal for the Law of Sea, European Court of Human Rights and municipal courts of member countries are open to public, why WTO dispute settlement system should not follow the same as its outcome impacts the civil society.

(iv) Suggestions on Time Lines

The Chairman's Text tends to strengthen the surveillance of the implementation of recommendations and rulings of the DSB through definitely and acceptable situations, besides adding to Article 21 (6) such a subparagraph as '…the Director General will issue every six months/once a year a public report on the status of implementation and rulings that:

(i) When the member concerned considers that it has complied with the recommendations and rulings of the DSB, it shall submit to the DSB a written notification of the measures it has taken to comply.
(ii) If the member concerned has not submitted a notification under sub-paragraph (i) by the date of expiry of the reasonable period of time for implementation, the member concerned shall submit, at that date, a written notification of any measures it has taken to comply.

[71]World Trade Agenda, no 00/22, 4 December 2000, p. 1.

[72]See Annex to TN/DS/9 Chairman's Text, 28 May, 2003.

[73]Ibid. Ibid.

(iii) If the member concerned has not submitted a notification under sub-paragraph (i) or a final status report under sub-paragraph (ii) by the date that is forty five days before the date of expiry of the reasonable period of time, it shall, at the latest fififtеen days after the date, notify any measures that the member concerned has taken to comply and any measures that it expects to have taken by the expiry of the reasonable period of time.[74]

(v) Suggestions on Flexibility

Flexibility in the DSU is very important especially in terms of Article 6(i) of the DSU which provides that 'a Panel should be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda…'. In order to make it flexible the Chairman's Text provides that the establishment of a panel may be postponed to the second DSB meeting following that at which the request first appears as an item on the DSB's agenda in order to accommodate, the good offices, conciliation and mediation which may proceed the next DSB's meeting.

Should the Panel process be terminated, after the panel has been established? DSU is silent. The Chairman's Text accordingly provides two options:

"After the establishment of the Panel, and until the issuance of the interim report to the parties, the complaining party may notify the termination of the panel process to the DSB and where the panel has been composed, to the panel. If the panel process is terminated in application of this paragraph after the panel has been composed, the complaining party may not make a new request for the establishment of a panel in respect of the same matter without first requesting consultations under Article 4, unless parties agree otherwise".

"The parties may notify the termination of the panel process at any time before the circulation of the final panel report to the members. If the panel has been composed at the time of such termination, the panel's report shall be confined to a brief description of the case and to reporting that the panel process has been terminated".

(vi) Suggestions for the Protection of the Interests of Developing Country Members

In the Chairman Text, one subparagraph is added to DSU Article 4(10) as under: 'During consultations, members should give special attentions to the particular problems and interests of developing country members. When the party complained against is a least developed country member the possibility of holding consultations in the capital of that member shall always be considered'.[75] The Chairman Text accords differential and more favourable treatment to developing country members in Panel Reports:

[74]See Annex to TN/DS/9 Chairman's Text, 28 May 2003.

[75]See Annex to TN/DS/9 Chairman's Text, 28 May 2003.

(a) A developing country Member wishing to avail itself of any provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements should raise arguments on these provisions as early as possible in the course of the procedure;
(b) The submissions of any other party to the dispute that is not a developing country Member should address any such arguments which have been raised by a developing country Member party to the dispute;
(c) The Panel Report shall explicitly take into account and reflect the consideration given to any provisions on differential and more favourable treatment for developing country Member that form part of the covered Agreements which have been raised by a developing country Member party to the dispute".[76]

The other steps designed to improve the negotiating power and skills of developing countries in the dispute settlement mechanism are availability of qualified *legal experts to developing countries for which either WTO secretariat may be involved* or a trust fund may be created to finance the hiring of legal experts. The Advisory Centre on WTO Law (ACWL) came into existence in July 2001 and has assisted number of LDCs in settling their trade disputes.[77]

(vii) Suggestions for the Impartiality of Panels

The impartiality of panels and their independence has been on the agenda of DSU Reform both in terms of stripping WTO secretariat officials of their current dispute settlement functions and paying the panellists due compensation commensurable to their qualifications and work assigned to them. One way of improving the independence of panellist is to create a class of law clerks who should assist the judicial panels that are not regular WTO bureaucracy. Further, dissenting opinions should be published as it gives a viewpoint which may throw new light on the issues. It is imperative that panel and Appellate Body Reports should be brief and comprehensible which is not the case at the present moment.[78]

(viii) Amicus Curiae

One of the procedural aspects developed by the WTO that has attracted attention is its acceptance of amicus curiae brief submissions. The WTO is one of the first international economic institutions which apply open approach to amicus curiae and obviously is a natural source of inspiration for other international institutions to follow.

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[76]Ibid.

[77]The international treaty establishing the Advisory Centre on WTO Law (ACWL) was signed at WTO Ministerial Meeting in Seattle (1999).

[78]For a detailed analysis of the DSU Reform, see Raj Bhalla, et al.; Austin's Ghost and DSU Reform, 37 International Lawyer 651–676 (2003); John Ragosta, et al.; WTO Dispute Settlement; the System is Flawed and Must be Fixed, 137, International Lawyer 697–752 (2003); Xinjie Luan, Dispute Settlement Mechanism Reforms and Chinas Proposal, 37 Journal of World Trade 1097–1117 (2003), Bernanrd Hoekman et al. ed Development, Trade and the WTO—A Handbook; The World Bank, 2002.

Appendix

S. No.	Agreement	Rules and procedures
1.	Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
2.	Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
3.	Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex. 2
4.	Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
5.	Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex. II.2(f), 3, 9, 21
6.	Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex. V
7.	General Agreement on Trade in Services	XXII: 3, XXIII
	Annex. on Financial Services	4
	Annex. on Air Transport Services	4
8.	Decision on Certain Dispute Settlement Procedure for the GATS	1 through 5

Chapter 4
Legal Framework of GATT, 1994

In earlier chapters, while describing the chief characteristics of WTO, a brief history of the evolution of GATT 1947 was outlined and also the course of events leading to the conclusion of the Tokyo round of tariff negotiation (1973–1979) was described. The GATT 1947 has been now replaced by GATT 1994 and various agreements as a package of the Uruguay Round Negotiation (1986–1994). GATT 1947 laid down the principles of Most-Favored-Nations (Article I); Schedules of Concessions (Article II); National Treatment on Internal Taxation and Regulation (Article III); Special Provisions Relating to Cinematographic Films (Article IV); Freedom of Transit (Article V); Anti-dumping and Countervailing Duties (Article VI); Valuation for Customs Purposes (Article VII); Fees and Formalities Connected with Importation and Exportation (Article VIII); Marks of Origin (Article IX); Publication and administration of Trade Regulations (Article X); General Elimination of Quantitative Restrictions (Article XI); Restrictions to Safeguard the Balance of Payments (Article XII); Non-Discriminatory Administration of Quantitative Restrictions (Article XIII); Exceptions to the Rule of Non-Discrimination (Article XIV); Exchange Arrangements (Article XV); Subsidies (Article XVI); State Trading Enterprises (Article XVII); Governmental Assistance to Economic Development (Article XVIII); Emergency Action on Imports of Particular Products (Article XIX); General Exceptions (Article XX); Security Exceptions (Article XXI); Consultation (XXII); Nullification or Impairment (Article XXIII); Territorial Application-Frontier Traffic-Customs Unions and Free Trade Areas (Article XXIV); Joint Action by the Contracting Parties (Article XXV); Acceptance, Entry into Force and Registration (Article XXVI); Withholding or Withdrawal of Concessions Article (XXVII); Modification of Schedules (Article XXVIII); Tariff Negotiations (Article XXVIII bis); The Relation of this Agreement to the Havana Charter (Article XXIX); Amendments (Article XXX); Withdrawal (Article XXXI); Contracting Parties (Article XXXII); Accession (Article XXXIII); Annexes (Article XXXIV) and Non-Application of the Agreement Between Particular Contracting Parties (Article XXXV); Trade and Development Principles and Objectives (Article XXXVI); Commitments (Article XXXVII); Joint Action (Article XXXVIII) and

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various annexes. Since the WTO has taken over from the General Agreement 1947 as the basis for institutional co-operation and dispute settlement on trade matters, the core principles of GATT 1947 are still in place and Uruguay Round package cannot be understood in isolation and without reference to GATT 1947.

The Uruguay Round Agreements on Goods fall essentially into four groups. First is the GATT 1994. This is a modified version of GATT 1947 together with comparatively minor Agreements which interpret or bring up to date particular GATT provisions, and a legal text (The Marrakesh Protocol) that brings under the multilateral GATT umbrella, the individual tariff and non-tariff commitments made by the WTO members in Uruguay Round. The second group consists of two major Agreements that aim to bring trade in agriculture products and in textiles and clothing within the normal trading rules from which they have largely escaped. The third group is made up of five Agreements which go well beyond the original GATT 1947 rules in prescribing how particular aspects of policies affecting trade should be applied. And finally, a further group of six Agreements dealing with different aspects of traditional GATT concern to regulate and ease the necessary formalities of customs and trade administration.

The ninth Ministerial Conference held at Bali, Indonesia, in December, 2013, has provided Bali package, and in the package, the Trade Facilitation Agreement which came into force in 2007 is of great consequences besides other decisions which are discussed in the subsequent pages.

The Tenth Ministerial Conference took place in Nairobi in the month of December 2015, and some more decisions to supplement the Bali Ministerial Conference decisions were taken.

The GATT 1994 consists of:

(a) The provisions of GATT 1947 as rectified, amended or modified by the terms of legal instruments, which entered into force before January 1995, i.e., the date of entry into force of WTO. The GATT 1994 is the basic set of trade rules, largely taken over from the GATT 1947 with other Agreements in Annex IA to the WTO Agreement now represents the goods related obligations of WTO members.
(b) The provisions of the legal instruments that have entered into force under the GATT 1947 before January 1995, the date of entry into force of WTO such as:

    (i) Protocols and certifications related to tariff concessions;
    (ii) Protocols of accession [excluding the provisions (a) concerning provisional application and its withdrawal; and (b) providing that Part II, of GATT, shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol];
    (iii) decisions on waivers as granted under Article XXV of GATT 1947 and still in force on 1.1.95, the date of entry into force of WTO; and
    (iv) other decisions of the Contracting Parties to GATT 1947;

(c) The following understandings; on Article II: I(b); Interpretation of Article XVII); Understanding on Balance of Payments; Interpretation of Article XXIV; Interpretation of Article XXVIII; GATT 1994.
(d) the Marrakesh Protocol to GATT 1994.

GATT 1994 by way of explanation provides that reference to "contracting parties" in the provisions of GATT 1994 shall be deemed to read as "Member". The reference to "less developed contracting party" and "developed contracting party" shall be deemed to read as "developing country Member" and "developed country Member". The Executive Secretary shall be deemed to read as "Director General of WTO".

The explanation further provides that the references to the 'CONTRACTING PARTIES' acting jointly in Article XV: 1, XV: 2, XV: 8, XXXVIII, and the Notes Ad Articles XII and XVIII, and in the provisions on Special Exchange Arrangements in Articles XV: 2, XV: 3, XV: 6, XV: 7, and XV: 9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the contracting parties acting jointly shall be allocated by the Ministerial Council of WTO.

Although GATT 1947 is no longer in effect, its jurisprudence developed over the years is a guiding principle to understand GATT 1994 as most of the provisions of GATT 1947 are included by reference along with many other legal instruments adopted by the GATT contracting parties with some new understanding and explanatory notes.

Annex IA of the WTO consists of thirteen Covered Agreements. These are GATT 1994; Agreement on Agriculture (AOA); Agreement on Sanitary and Phytosanitary Measures (SPS); Agreement on Textiles and Clothing (ATC); Agreement on Technical Barriers to Trade (TBT); Agreement on Trade-Related Investment Measures (TRIMs); Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping Agreement); Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation); Agreement on Preshipment Inspection(PSI); Agreement on Rules of Origin; Agreement on Import Licensing Procedures (Licensing Agreement) and Agreement on Safeguards. All the above Agreements have been subjected to detailed separate analysis in the various chapters of this book; therefore, this chapter is exclusively devoted to GATT 1994 and only to those principles of law, which have not been covered by other Agreements.

PART-I

General Most-Favoured Treatment (Art I of GATT 1994)

The text of Article I (General Most-Favoured-Nation Treatment) is as under:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters

referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

   (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
   (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
   (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
   (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5, of Article XXV which shall be applied in this respect in the light of paragraph (**1**) of Article XXIX.
4. The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

   (a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured- nation and preferential rates existing on April 10, 1947;
   (b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraphs (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Ad Article I: Paragraph 1

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 (*b*) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

1. If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were 24 per cent *ad valorem*, the margin of preference would be 12 per cent *ad valorem*, and not one-third of the most-favoured- nation rate;
2. If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 per cent *ad valorem*;
3. If the most-favoured-nation rate were 2 francs per kilogram and the preferential rate were 1.50 francs per kilogram, the margin of preference would be 0.50 franc per kilogram.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

(i) The reapplication to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10 1947; and

(ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

1 General

The General Most Favored Nations Treatment (MFN) in Article I of the GATT 1947 incorporated in GATT 1994 with some modifications is the cornerstone of both GATT 1994 and the WTO. Although there is a long history of MFN treatment

dating back to 1417 in international commercial treaties and law, it was only in 1947 that the MFN treatment was given the status of a highly lofty ideal and complexity in GATT 1947. The interpretations and techniques of interpretations from GATT 1947 up to the GATT 1994 have been varied and sometimes complex but the basic strand of the

MFN treatment continues to be the guiding principle determining the obligations of the contracting parties, which have been carried over to the WTO and the various Agreements established under it including the GATT 1994.[1]

Article I describe first the scope of MFN obligations and enumerate those obligations as under:

1. Custom duties and charges of any kind imposed on or in connection with
   (a) Importation
   (b) Exportation
   (c) International transfer of payments for imports or exports
2. The method of levying such duties and charges
3. All rules and formalities in connection with
   (a) Importation
   (b) Exportation
4. All matters referred to in Article III, paragraph 2, and Article III paragraph 4 (which covers internal taxes and regulatory laws)
5. All the above apply to only products.

It will be noted that because of the Interpretative Note item (4) above is subject to the "existing legislation" clause of the Protocol of Provisional Application and subsequent similar protocols of accession. The rest of the Article applies without being subject to existing legislation. The scope of the Article I is also affected by a ruling made in the context of GATT dispute that held that "charges of any kind" included the "consular taxes".[2]

The obligation part of the article reads:

Any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately or unconditionally to the like product originating in or destined for the territory of all other contracting parties.

The above-said MFN treatment shall not require the elimination of any preference in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of Article I and which fall within the following description:

(a) Preferences in force exclusively between two or more territories listed in Annex A subject to conditions set forth therein.

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[1]For a history of MFN clause, See John H Jackson, World Trade and the Law of GATT, 249–246 (1969).

[2]John H. Jackson, ibid; p. 2.

(b) Preferences in force exclusively between two or more territories which on July 1 1939 were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein.
(c) Preferences in force exclusively between neighbouring countries listed in Annex E and F.
(d) The provisions of paragraph I shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on 24 July 1923 provided such preferences are approved under paragraph 5 of Article XXV which shall be applied in this respect in the light of paragraph I of Article XXIX.[3]

Annex E to F of Article I refers to various historical exceptions of preferential arrangements as exception to MFN treatment with specific dates as the date of reference for ascertaining the accepted preferences as exception to MFN treatment. However, overtime the scope and importance of these preferential arrangements have lost importance either by way of withdrawing the preferential scheme or by being transformed into a wide group of countries under one or the other custom unions EC) or being completely terminated.

The MFN principle in a nuanced manner has found expression in other Articles of GATT such as [Article IV, paragraph (b)], internal mixing requirement (Article III, paragraph 7), transit of goods (Article V paragraph 2, 5 and 6), marks of origin (Article IX paragraph I), state trading (Article XVIII paragraph 20) and measures for goods in short supply (Article XX paragraph J). There are various exceptions either expressly carved in the GATT Articles or waivers and exceptions granted by GATT to MFN obligation under Article I.[4]

The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of Article I but is not specifically set forth as a maximum margin of preference in the appropriate schedule annexed to this agreement shall not exceed:

(a) In respect of duties or charges on any product described in such schedule, the difference between the most-favoured nations and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for this purpose be taken to be that in force on April 10, 1947, and if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured nation and preferential rate existing on April 10, 1947.
(b) In respect of duties or charges on any product not described in the appropriate schedule, the difference between the most-favoured nation and the preferential rate existing on April 10,1947(Article I:4).

[3]Ibid., p. 265.

[4]For a brief list of such waivers, See Chapter 2, WTO, Its Birth and Background, of this book.

The obligations incorporated in paragraph I of Article I by reference to paragraph 2 and 4 of Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of Protocol of Provisional Application. The cross-reference in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of GATT, dated 19 September 14, 1948 (Ad Article I, paragraph I).

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product and not the proportional relation between those rates. As example:

1. If the most-favoured-nation rate was 36% *ad valorem* and the preferential rate was 24% *ad valorem*, the margin of preference would be 12% *ad valorem* and not one-third of the most-favoured nation rate;
2. If the most-favoured-nation rate was 36% *ad valorem* and the preferential rate was expressed as two-third of the most-favoured-nation rate, the margin of preference would be 12% *ad valorem*;
3. If the most–favoured-nation rate was 2 francs per kilogram and the preferential rate were 1.50 francs per kilogram, the margin of preference would be 0.5 francs per kilogram.[5]5

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margin of preference.

(i) The reapplication to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or was inoperative on April 10 1947; and
(ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947 in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.[6]

2 Interpretation and Application of Article I

Interpretation and application of Article I can be broadly characterized as under:

(i) The object and purpose of Article I is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of

[5]This paragraph has been added to GATT 1994.

[6]This paragraph has been added to GATT 1994.

discrimination serves as an incentive for concessions negotiated reciprocally, to be extended to all other members of WTO on a MFN basis.[7]

(ii) Although GATT 1947 applied to de-facto discrimination, since the establishment of WTO, it applies to *de-jure* discrimination also.[8]

(iii) To establish a violation of Article I, there must be advantage of the type covered under it, which is not accorded unconditionally to all like products of all WTO members. The expression "any advantage… of all other members" refers not to some advantages granted with respect to the subjects that fall within the scope of Article I but to any advantage not to some products, but to any product and not to like products from some other members, but to like products originating in or destined for all other members.[9]

(iv) The MFN treatment in Article I has both economic and political underpinnings. As a political measure it helps suppress aggression in international relations, promotes development of multilateralism and acts as a prophylactic against discrimination. As an economic measure it secures the benefits of bargain, ensures value of bilateral trade negotiation to a third country for the same exports wherein most efficient producers will have equal access to export markets regardless of country of origin.[10]

(v) The MFN treatment ensures removal of distortions that otherwise would hinder the operation of comparative advantages; it engenders free and fair competition; it is a corollary of the principle of sovereign equality of nations, regardless of their size and importance; it protects against corruption and the ability to buy special favours; it prevents retaliatory cycles of discrimination and consequent animosity between nations and multiplier effect i.e., through its operations, negotiated trade concessions are given multilateral effect and above all it protects the value of trade concessions against gradual "erosion" through favours granted to some.[11]

The MFN treatment as enshrined in Article I is treated in the following pages in its various clauses.

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[7]Appellate Body Report on Canada—Certain Measure Affecting the Automotive Industry, WT/DS/ 139/AB/R, WT/DS/42/R, para. 84.

[8]Ibid., para.

[9]Appellate Body Report on Canada—Certain Measure Affecting the Automotive Industry, WT/DS/ 139/AB/R, WT/DS/42/R, para. 79.

[10]Raj Bhalla, International Trade Law: Theory And Practice 260–270 (2 ed. 2001).

[11]Mitsu Matsushta, et al, ed; 144 (Oxford University Press, 2003).

3 Customs Duties and Charges Imposed on or in Connection with Importation or Exportation or the International Transfer of Payment for Imports or Exports

(a) Unbound Tariffs

The Panel on "Spain-Tariff Treatment of Unroasted Coffee" ruled that, having noted that Spain had not bound under the GATT its tariff rates on unroasted coffee, Article I: I equally applied to bound and unbound tariff items.[12]

(b) Charges of Any Kind

The principle of non-discrimination in Article I, includes consular taxes as charges of "any kind" as Article VIII (Fees and Formalities Connected with Importation and Exportation) deals with magnitude of such taxes in relation to cost of services rendered.

Consequently the application by Cuba of a 5% consular tax on certain countries, but only 2% to others was violative of Article I.[13] Similarly, the Panel on "United States Customs User Fee" found the merchandise user fee was a charge imposed on or in connection with importation within the meaning of Article I: I and was violation of Article I.[14]

(c) Import Surcharges

Import surcharges which were levied by United States,[15] United Kingdom[16] and Danish Governments[17] temporarily at one or the other time were subjected to GATT's scrutiny and the various working parties of the GATT were of the opinion that surcharges may be justified but an exception should be made in favour of developing countries if they are the principle suppliers of the goods on which the developed countries are levying the import surcharges. Further in view of the consensus to respect multilateral principle responding to the needs of countries experiencing severe balance of payment difficulties, the possibility of focusing trade actions on such countries would depend on the choice of products for which a particular country is a principal market, or on the choice of specific measures which would particularly benefit that country, it being understood that the implementation

[12]L/5135, Adopted on 11 June 1981 28S/102/111, para. 4.3.
[13]II/12, CP.2/SR.11, pp. 7–8.
[14]L/6264, Adopted on 2 Feb 1988; 35S/245/289–290, paras. 122–123.
[15]L/3573, Adopted on 16 September 1971.
[16]L/2676, Adopted on 17 November 1906.
[17]L/3648, Adopted on 12 January 1972.

of each particular measure would be consistent with the multilateral principle of Article I.[18]

(d) **Variable Levies**

The question of variable levies was subjected to scrutiny by the Contracting Parties. However, the GATT panel held that the imposition of variable levies raises serious question but did not examine whether it was compatible to Article I of GATT.[19]

(e) **Any Advantage, Favour, Privilege or Immunity Granted by Any Contracting Party**

On the question of duty wavier which was conditional on certification by a particular government such as EC-Import of Beef from Canada which provided for levy-free tariff quota for high quality grain-fed beef (these regulation made suspension of the import levy for such beef conditional on production of certificate of authenticity), the Panel held that the only certifying agency authorized to certify the meat… listed in Annex II of the EC commission regulation, was a United States Agency mandated to certify only meat from the United States, "and concluded the EC Commission Regulation

(EC) No. 2972 179… had the effect of preventing access of like products from other origin than the United States", which is inconsistent with the MFN principle in Article I of the GATT.[20]

In the export price monitoring scheme as contemplated in Japan-Trade in Semi-Conductors, the Panel examined the argument of the EC that the system of "third country monitoring system" instituted by Japan-US Agreement on Trade in Semi-conductors was inconsistent with Article I since it was only applied to Japanese exports to 16 countries, 14 of which were contracting parties of GATT. EC argument was that Japan granted immunity to all but the 14 contracting parties and the EC did not benefit from the advantages granted to those countries to which the system did not apply, the Panel found the Japanese measure inconsistent with Article XI:I and held that once the measure has been found inconsistent with GATT, the issue of whether or not the measure was non-discriminatory does not arise.[21]

In the case involving exemption from charges, especially the merchandise processing fee under the US Omnibus Budget and Reconciliation Act, 1986, the Panel held that merchandise fee was a charge imposed on or in connection with importation within the meaning of Article I:I and exemptions fell within the category of

[18]A 1984 statement by the Chairman of the Committee on Balance of Payments Restrictions, C/125, dated 13 March1984, Adopted by the Council on 15/16 May, 1984/C/M/178p.267,31 S/56–60, para. 13.

[19]L/1923, Adopted 16 Nov. 1962 11S/95,100, para. 17.

[20]L/5099, Adopted on 10 March 1981, 28S/92,98 para. 4.2–4.3.

[21]L/6309, Adopted on 4 May 1988 35S/116,159, para. 122.

advantage, favour, privilege, or immunity which Article I:I required to be extended unconditionally to all other contracting parties. Such preferential exemption, therefore, constituted a breach of the obligations of non-discrimination.[22]

In reference to allocation of tariff quotas, the EC-Bananas-III case, the imports of bananas from certain countries qualified for allocation of the tariff quota only if they fulfilled requirements which differed from those imposed on importers of bananas from other countries. The Appellate Body of the WTO while accepting the Panel findings that the procedural and administrative requirement of the activity function rules for importing third country and non-traditional ACP differ from, and go significantly beyond those required for importing from traditional ACP bananas, held that the method is discriminatory as the rules discriminate among like products originating from different Members and are violative of Article I:I of the GATT 1994.[23]

(f) Any Product Originating in or Destined for any Other Country

A Panel report which was not adopted was concerned with the "United States Restriction on Imports of Tuna" and examined, inter alia, the labelling provision of US Dolphin Protection Consumer Information Act (DPCIA) which provided that when a tuna product is exported from or offered for sale in the USA bearing the label "Dolphin Safe" or any similar label indicating it was fished in a manner not harmful to dolphins. The tuna product may not contain tuna harvested on the high seas by a vessel engaged in driftnets fishing or harvested in the Eastern Tropical Pacific Ocean (ETP) by a vessel using a purse-seine net unless certain facts are certified under penalty of law. The use of such labels was not a requirement but was voluntary. The Panel examined Mexico's argument that these provisions were inconsistent with Article I: I. The Panel noted that the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practiced only in ETP because of the particular type of association between dolphins and tuna observed only in that area. As the labelling requirements were applied to all countries in the ETP whose vessels fished in that geographical area, it did not distinguish between products originating in Mexico and products originating in other countries. The provisions of DPCIA were not inconsistent with the obligations of the United States under Article I: I of the GATT 1947.[24]

The DSB in EC-Bananas III[25] had the occasion of discussing the essence of Article I: I and held while reviewing the Panel's finding that EC import regime for bananas was inconsistent with Article XIII of GATT 1994 in that the EC allocated

[22]L/6264 Adopted on 2 Feb. 1988, 35S/245.

[23]European Communities-Regime for the Importation, Sale and Distribution of Bananas, Panel Report, WT/DS 27/R, Adopted 25 September 1997 as modified by the Appellate Body Report WT/DS27/AB/ R, DSR1997: II para 206.

[24]DS21/R (unadopted) dated 3 September 1991, 39 S/155, 203–204, para. 5.43–5.44.

[25]Supra note, 23.

tariff quota shares to some members without allocating such share to other members. It also pointed out that there were two separate EC import regime for bananas, the preferential regime for traditional ACP bananas and *erga omens* regime for all other imports of bananas that the like products should be treated equally irrespective of their origin, as bananas are like products, the non-discrimination provision apply to all imports of bananas, irrespective of whether and how a member categorises or subdivides these imports for administrative or other reasons. If by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a member could avoid the application of non-discrimination provision to the imports of like products from different members, the object and purpose of non-discrimination would be circumvented.[26]

(g) Shall be Accorded Immediately and Unconditionally

A panel report on "Belgian Family Allowances" interpreted the clause …any favour shall be granted immediately and unconditionally to like products originating in the territories of all contracting parties. As Belgium had granted exemption from the levy to products purchased by public bodies which had originated in some countries such as Luxemburg, France, Italy, Sweden and UK, it was clear that the exemption would have to be granted to all other contracting parties. The legality of the Belgian law within its domestic law is not relevant and the Belgian law would have to be amended in so far as it introduced discrimination between countries having a given system of family allowances and those, which had either a different system or no system at all.[27]

In 1978 Panel report on EEC-Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables,[28] the Panel examined the provision for an exemption from the levying of the additional security with the minimum import price of tomato concentrate in relation to the obligations of the Community under Article I: I. The Panel noted that Article 10 of EEC Council Regulation No. 5/6/77 stated that the levying of such additional security shall not be required for products originating in non-member countries which undertake and are in position to guarantee that the price on imports into the Community shall be not less than the minimum price for the product in question and that all deflection in the trade would be avoided. The USA argued before the Panel that it amounted to conditional MFN treatment, which is inconsistent with Article I: I of GATT 1994. The EEC on the other hand argued that the above-said law did not make any distinction based on economic system or any other factor between third suppliers and was open to all unconditionally.

[26]Supra note, 23, para. 190.

[27]G/32 Adopted on 7 Nov. 1952, 1S/59,60, para. 3.

[28]L/4687, Adopted on 18 Oct. 1978, 25S/68, 106.

The panel held that regardless of whether a guarantee was necessary for all importers from all potential third country suppliers there would be no discrimination under Article I: I of GATT.[29]

A 1992 panel report considered the "United States-Denial of MFN treatment as to non-rubber footwear from Brazil, and held that Article I: I does not permit balancing more favourable treatment under some procedures against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the MFN treatment in one case in respect of one contracting party on the ground that it accords some favourable treatment in some other case in respect of another contracting party which would defeat the MFN obligation under Article I: I.[30]

The DSB in Indonesia—Autos had the occasion of considering the exemption of import duties and sales taxes to those automobiles which met certain origin-neutral requirement. This was held inconsistent with Article I: I as the car produced locally was subjected to less sales tax than the cars imported from other countries (in this case, the taxes were far less for Korea). The Panel held that in GATT/WTO, the right of the members cannot be made dependent upon, conditional or even affected by, any private-contractual obligations in place which per se is violative of Article I: I of GATT 1994.[31]

The panel noted that Indonesian Car Programme, 1966, was by way of granting customs duty benefits to parts and components provided they are being used in the assembly in Indonesia of a national car. The granting of tax benefits was conditional and limited only to local company producing national cars, meeting certain local content targets. Under all these car programmes, custom duty and tax benefits were conditional on achieving certain local content value for the finished car. All these conditions were held to the inconsistent with Article I: I.

It was further held that the 1966 Car Programme of Indonesia introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves as well as introduced discrimination between imports in allocation of customs duty benefits based on various condition and other criteria not related to imports and are violative of Article I of GATT 1994.[32]

The DSB in Canada—Autos examined the exemption of import duties granted by Canada on motor vehicles entering Canada from certain countries and the exemption was granted only where an exporter of motor vehicles was affiliated with a manufacturer/importer in Canada that had been designated, contingent on compliance with some other requirements. The Appellate Body held that it is apparent that the customs duty imposed on or in connection with importation… Canada has

[29]Ibid., para. 4.19.

[30]DS/8/R, Adopted 19 June, 1992, 39S/128, 151, para. 6.10.

[31]Indonesia—Certain Measures Affecting the Automobile Industry, Panel Report, DSR 1998.

[32]Indonesia—Certain Measures Affecting the Automobile Industry, Panel Report, DSR 1999 paras. 14.145–14.147.

granted an 'advantage' to some of products from some members that Canada has not accorded 'immediately and unconditionally' to like products originating in or destined for the territories of all other members and as such is violative of Article I: I of GATT 1994.[33] Explaining the scope of Article I: I the Panel in Canada—Autos clarified that the word 'unconditionally' in Article I: I does not pertain to the granting of an advantage per se, but to the obligation to accord to like products of all members an advantage which has been granted to any product originating in that country. The obligation to accord 'unconditionally' to third countries which are members of WTO an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to situations or conduct of those countries, and without discriminations to origin. An advantage can be granted subject to conditions without necessarily implying that it is not accorded unconditionally to like product of other members.[34]

In US—Certain EC Products case in which the USA had increased bonding requirements on imports from the EC countries in order to secure the payment of additional import duties to be imposed to offset certain EC measures, the Panel held that as the bonding requirement was applicable only to imports from EC, although identical products from other WTO members were not subjected to such requirements, the measure is violative of Article I: I as the measure was not based on any characteristics of the product but depended exclusively on the origin of the product targeted exclusively on the imports of EC.[35]

4 Like Product

The phrase 'like product' has been the subject of different and varying interpretations as the GATT is a legal instrument primarily concerned with products, and it is not surprising that problems of identifying product similarities as well as problems of classifying and describing products are encountered with some frequency.[36] The interpretation of the phrase 'like product' gets muddled up as the phrase has been used in the GATT terminology in varying ways such as "like commodity" (Article VI:7) or "like domestic products" [Article II: 2 (a); VI: I(a), VI: I(b); XI: 2(c); XIII: 1, and XVI: 4)] "like merchandise" (Article VII: 2) and "like competitive products" (Article XIX). In several cases decided by GATT Panels, uniform criteria as to what 'like product' conveys is lacking.

[33]Canada—Certain Measures Affecting the Automobile Industry, Panel Report, WT/DS 139/R, WT/ DS 142/R, Adopted 19 June, 2000 as modified by Appellate Body Report, WT/DS/39/AB/R, WT/DS142/AB/R, para. 85.

[34]Ibid., paras. 10.22–10.25.

[35]United States—Import Measures on Certain Products from the European Communities, Panel Report, WT/DS192/R, Adopted on 10 Jan. 2001, para. 6.54.

[36]John H. Jackson, supra note I at p. 261.

In United States-Denial of MFN Treatments to Non-Rubber Footwear from Brazil, the Panel held that Article I in principle permits a contracting party to have different countervailing duty laws and procedures, for different categories of products or even to exempt one category of products from countervailing duties altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is not in principle inconsistent with the MFN treatment of Article I: I. However, this provision clearly prohibits a contracting party from according an advantage to a product originating in another country while denying the same advantage to a like product originating in the territories of other contracting parties.[37]

On the issue of what constitutes 'like product', a report of the Working Party on The Australian Subsidy on Ammonium Sulphate examined a claim by Chile that Australian government had formerly subsidized the distribution of both imported and domestic ammonium sulphate and imported sodium nitrate fertilizers and had ceased to subsidize distribution of imported sodium nitrate; the subsidy on ammonium sulphate was maintained because its users were subject to price ceiling while the agricultural producers who used most of the sodium nitrate were not. The Working Party reported that 'like products' and directly competitive or substitutable products are distinguishable. Article I: I of GATT is applicable to 'like products' whereas Article III: 2 is applicable to "directly competitive or substitutable products".[38]

The claim of the United States that as proteins added to animal feeds should be considered to be "like products" in EEC-Measures on Animal Feed Proteins, the Panel considered whether all products used for the same purpose of adding protein to animal feed should be considered to be "like products" held that these various protein products could not be considered as "like products" as these products are carrying different duty rates and tariff bindings.[39]

The lack of definition to the expression "like product" was again discussed by a Panel while considering a claim by Brazil against Spain which under a royal decree had divided unroasted coffee into five tariff classifications: "Columbia Mild", "Other Mild", "Unwashed Arabica", "Robusta" and other. The first two were duty free, and the latter three were subjected to 7% *ad-valorem*; the tariff on raw coffee was unbound. The Panel held that although there was no obligation under GATT to follow any particular system for classifying goods and that a contracting party had the right to introduce in its customs tariff new positions or sub-divisions, yet on examination the Panel found that unroasted, non-decaffeinated coffee beans in the Spanish Customs

[37]DS18/R, Adopted 19 June, 1992, 39S/128, 151, para. 6.11.

[38]GATT/CP4/39, Adopted on 3 April 1950, II/188,198, para. 8.

[39]L/4599 Adopted on 14 March 1978 25S/49-63 para. 4.1–4.2.

Tariff should be considered as "like products" for the purposes of Article I: I. Further the Panel held that Brazil exported to Spain mainly "unwashed Arabica" and as they were like products, tariff regime was violative of Article I: I of GATT.[40]

A Panel on Canada/Japan-Tariff on import of Spruce, Pine, Fir (SPF) Dimension Lumber examined Canada's claim that Japan's application of 8% tariff on imports of SPF "dimension lumber" was inconsistent with Article I: I because SPF dimension lumber and dimension lumber of other type which benefited from a zero duty rate were "like products" within the meaning of Article I. The Panel while rejecting the Canadian claim of irrational differentiation of "like product" by Japan held that GATT gave wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure. Even though under Harmonized System of Classification of Goods for Customs Purposes has brought some harmonization but that system does not amount to a legal obligation; and going beyond the harmonized system is legitimate. The contracting party which claims to be prejudiced by an unfair classification needs to prove the harmful effect of such a classification as trade differentiation is a legitimate means of trade policy.[41]

The price discrimination may on occasions be violative of MFN treatment as these measures may be of the quantitative or tariff type in which special customs valuation methods levied for imports at lower prices or specific duties or surtaxes are replaced by *ad-valorem* rates.[42]

MFN treatment is subject to some major and continuing exceptions, which can be catalogued as under:

(i) Waivers granted under the provision of paragraph 5 of Article XXV such as Generalized System of Preferences of June 25, 1971, in pursuance of the implementation of "generalised non-reciprocal and non-discriminatory preference as agreed at the Second UNCTAD" (1968);
(ii) Anti-dumping and countervailing duties in Article VI of the GATT and the 1994 Anti-dumping Code;
(iii) Frontier traffic and customs union under Article XXIV of GATT 1994; and
(iv) A decision of contracting parties of 28 November 1979 (Understanding) in so far as it provides for departures from Article I of GATT for according preference for and among developing countries.

[40]L/5135, Adopted on June 11, 1981, 28S/102, 111–112, para. 4.4–4.10 passim.
[41]L/6470, Adopted on 19 July, 1989, 36S/167, 180, para. 3.19–3.20, 3.37–3.39.
[42]L/4679, Note by the GATT Secretariat on 'Modalities' of Application of Article XIX, para. 45.

Chapter 5
Schedules of Concessions (Article II)

The text of Article II (Schedules of Concessions) is reproduced as under:

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
   (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.
   (c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_5

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
   (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
   (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI; and
   (c) fees or other charges commensurate with the cost of services rendered.
3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.
4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.
5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.
6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charge margins of preference may be adjusted to take account of such reduction; provided that the

CONTRACTING PARTIES (i.e., the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

Ad Article II

Paragraph 2 (a)

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.

Paragraph 2(b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

1 General

Article II of the GATT schedules of concessions is the second core principle of GATT in so far as the commitments of members wherein they undertake to impose maximum level of import duty or other charges or restrictions on imports of specified types of goods. These commitments or 'bindings' may result initially from bilateral negotiation in which (for instance) the government of the member has agreed to another member's request that it reduce the imports duties on certain products. However, the commitments are then recorded in national schedule which through the provision of Article II become part of each country's obligation under the GATT and because of operation of MFN rule apply to imports from any member.

The provision of Article II, combined with technical rules in Article XXVIII (modification of schedules) provides the basis under which most of the developed

countries took part in successive rounds of GATT negotiation to reduce their tariffs, binding their results in progressively more constraining schedules. Developing countries to a great extent stood aside from this process, and many had no schedule of bindings at all. However, under the WTO all members are required to have schedules, and the proportion of products subject to binding is generally much higher than before. The Articles II and XXVIII rules will continue to guide negotiation under the WTO for the reduction of barriers to trade in goods.

Article II and the Understanding of the Interpretation of Article II: 1(b) of the GATT 1994 obligates the member countries to accord to the commerce of other members of WTO no less favourable treatment than that provided for in the appropriate part of the appropriate schedule annexed to GATT[Article II: 1(a)].

The products described in part I of the schedule relating to any member, which are the products of territories of other members, shall on their importation into the territory to which the schedule relates and subject to terms and conditions or qualification set forth in that schedule be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other charges or duties of any kind imposed on or in connection with the importation in excess of those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date [Article II: 1 (b)]. Further by way of the understanding on the interpretation of Article II: 1(b) of the GATT 1994 and in order to ensure transparency to the legal rights and obligations deriving from paragraph I(b) of Article II, the nature and level of any other duty or charges levied on bound tariff items as referred to in Article II, shall be recorded in the "Schedules of Concessions" annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties and charges". The date at which "other duties or charges" are bound for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the schedules at the level applying on this date. At each subsequent re-negotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of incorporation of the new concession in the appropriate schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1994 shall also continue to be recorded in column 6 of the loose leaf Schedule [Understanding II: I(b)(1)(2)].

The "Understanding" goes further and reiterates that "other duties or charges" shall be recorded in respect of all tariff bindings. Where a tariff item has previously been the subject of a concession the level of "other duties or charges" recorded in the appropriate schedule shall not be higher than the level obtaining at the time of the first incorporation to the concession in that schedule. It will be open to any member to challenge the existence of any "other duty or charge" on the ground that no such "other duty or charge" existed at the time of original binding of the item in question as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the date into force of the WTO Agreement or after the date of deposit with the Director

General of WTO of instrument incorporating the schedule in question into GATT 1994 if that is a later date; (paragraph 3 and 4 of the Understanding).

The recording of "other duties or charges" in the Schedule is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4 as referred above. All members retain the right to challenge at any time the consistency of any "other duty or charge" with such obligations (Understanding, paragraph 5).

For the purposes of the 'Understanding', the provision of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the DSU shall apply for settling any dispute arising there under.

'Other duties or charges' omitted from a schedule at the time of deposit of the instrument incorporating the schedule in question into GATT 1994, until the date of entry into force of the WTO Agreement, the Director General of the Contracting Parties to GATT 1947, or thereafter with the Director General of the WTO shall not subsequently be added to it and any 'other duty or charge' recorded at a level lower than that prevailing on the applicable date shall be restored to that level unless such addition or changes are made within six months of the date of deposit of the instrument. The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken earlier (BISD 27S/24).

2 Scope and Application of Article II

The broad parameters of legal obligation that attach to a GATT schedule of 'concessions' are basically that once tariffs have been bound the value of concessions is protected from encroachment by other governmental measures such as "other charges" which after 1994, have to be specifically recorded in the schedules of concession. "New methods of calculations", "reclassification of goods" and "currency revaluation" limit the protection that can be afforded by use of an import monopoly (Article II, paragraph 4) and a GATT interpretation that new subsidies granted on products covered in a nation's schedule are in effect a *prima facie* "nullification" for purposes of Article XXIII.[1]

Tariff concessions are normally made in tariff conferences on the principle of reciprocity, only in return for reciprocal concessions from other members of GATT. Once a tariff concession is made on a particular item that item is bound against increase above the agreed level. An item may be bound at any level, but since the purpose of tariff negotiations is to reduce tariffs, the level of bindings will normally be below the rate therefore applied. Just as a tariff on bound item may be raised

[1]John H. Jackson, World Trade and the Law of GATT, 205 (1969).

above the level of binding, so a contracting party making a tariff concession is committed except as otherwise specifically provided, not to impose other duties or charges that would tend to undercut that concession (Article II). The tariff concessions negotiated and made bound in the tariff schedule of members are to be extended and applied to other members on a MFN basis.

Tariffs in the historical perspective of GATT were considered essential revenue collecting measures of governments of sovereign nations and need to be reduced over time whereas other measures such as quotas, subsidies, state trading and customs duties needed other solutions commensurate with their nature and technicalities. The GATT has achieved a substantial success in tariff reduction through its nine rounds of tariff reduction rounds and the results of the Uruguay Round have been equally encouraging. In the first of five tariff rounds, the tariffs were reduced on "item by item" basis and the last two rounds turned to a "linear cut approach".

In the first five GATT tariff negotiating rounds, i.e. before the Kennedy Round (1962–1967), the procedure for negotiation was followed on an item-by-item basis. Each country tabled with each other country that had a potential to import from it, a "request list" of products and tariff concessions desired. Under the supervision of GATT Negotiating Committee and the Secretariat, the two countries negotiators' would meet to negotiate reciprocal concessions. And once the agreement on concessions between the two countries was agreed upon, each country would then try to obtain other concessions from other contracting parties that would benefit from the agreed concessions as these concessions are to be applied on MFN basis. The linear basis of tariff concession was introduced in the Kennedy Round (1962–1967) and under that procedure most industrial countries (other than developing countries and a few primary producing nations) were required to make their initial "offer" and across the board cut in tariff of 50% for non-primary products (expect agricultural products). Each nation was allowed to table 'exceptions list', which had to be defended in the negotiating committee. The advantage of this procedure was that the negotiation focused primarily on the 'exception' and not on every item of the tariff schedule. The Kennedy round resulted in an average of 35% tariff reductions.

The Tokyo round besides giving birth to Codes on Subsidies and Countervailing Duties, Dumping, Government Procurement, Technical Standard, Customs Valuation and Import Licensing followed the linear method of tariff negotiations which resulted in 35% cut in tariff for dutiable industrial products reducing weighted average tariff to about 6.3%.

The results of tariff reduction of the Uruguay Round are substantial both in terms of coverage and the participants. One hundred twenty-five countries participated and average tariff reduction achieved was from zero to 5% on weighted average besides the inclusion of TRIMs, TRIPs, Trade in Services as multilateral treaties, and the tariff commitment being applicable to all WTO members.

3 Classification and Valuation for Custom Purpose

For the purposes of denominating a product for assessing its customs duty it has always been difficult to classify the imported products to ascertain what tariff level will apply. The tariff schedule, which classifies the products for the purposes of import duties, cannot be scientific, although the national authorities of member governments try to arrange products in a classification, which apparently may look simple and easy. But to distinguish the product for the purposes of varying custom duties there has always been disputes arising out of the characteristics of the product which may defy a scientific classification. The difference between a 'work of art' and 'toy' may not always be obvious to a customs authority but for the purposes of customs duties it can make a big difference between a tariff free treatment and 25% duty. As the GATT obligates member nations to publish regulations and provide fair and judicial procedures (Article X) for clarifying doubts, if any, in the customs classification as well as the circumstances under which a classification could undermine the value of classification (Article II: 5, Compensatory Adjustment), the classification of product for tariff purposes assumes importance.[2]

In order to avoid some of these difficulties, the International Customs Cooperation Council adopted a Brussels Tariff Nomenclature for the classification of Goods commonly known as Brussels Tariff Nomenclature (BTN), 1976 and many countries have in the past used the classification for tariff purposes.[3] However, some countries especially United States continued to use its own classification system known as Tariff Schedules of the United States.[4]

However, in 1983, some of the GATT members in order to make the classification of products for custom purposes more scientific, negotiated a Harmonized Commodity Description and Coding system, 1984 which has been ratified by a number of GATT members, the Harmonized system has been incorporated in the WTO also.[5]

The WTO in the "Declaration on Trade in Information Technology Products (1996)" binds and eliminates custom duties and other duties and charges of any kind within the meaning of Article II: 1(b) of GATT 1994 with respect to the following:

(a) All product classified (or classifiable) with Harmonized System (1996) (HS) headings listed in Attachment A to the Annex to this Declaration; and

[2]John H. Jackson, supra note I, p. 151.

[3]For the text of the Brussels Tariff Nomenclature, See Custom Cooperation Council Nomenclature For The Classification Of Goods In Customs Tariffs (5th ed., 1976).

[4]See generally, John H Jackson, et al., Legal Problems of International Economic Relations (St. Paul:West, 3rd ed., 1995).

[5]The Convention on the Harmonized Commodity and Coding System was Approved by Custom Cooperation Council on 14 June, 1983; GATT, BISD 34 supp. 5(1988), WT/GC/M/65, para. 69.

(b) All products specified in Attachment B to the Annex to this Declaration whether or not they are included in Attachment A; through equal rate reductions of customs duties beginning in 1997 and concluding in 2000.[6]

The valuation for customs purposes earlier to Tokyo Round was used by the customs authorities of member nations in such a way that given the two rates, specific and *ad-valorem*, the authorities would use *ad-valorem* instead of specific duties to offset the inflation. Further the valuation methods differed from country to country and were cost intensive leading to unnecessary delays. The Tokyo Round of Customs Valuation Code as revised in the Uruguay Round as WTO Code on Customs Valuation tries to plug the loopholes in the customs valuation and bind the WTO members.

The Code on Customs Valuation after setting out the basic principles in the interpretative notes, which clarifies the structure of the Code and the relationship between Articles, emphasizing the importance of consultation between the customs authorities and the importer, provide for six alternative methods of valuing goods for customs purposes. They are to be applied in strict hierarchy; only if customs value cannot be determined under the first method, may the authorities use the second method; only if this second method is inapplicable may move to the third method and so on.

The starting point for valuation—the priority method—bases customs value on the "transaction value", the price actually paid for the goods when sold for export to the country of importation. The successive alternatives establish the valuation instead by the transaction values of identical or similar goods by looking at sales price or production costs or finally by a fall back method which gives greater flexibility but excludes several possible approaches to valuation. The other aspect notably "origin of goods" has a bearing on the valuation for customs purposes as it has serious ramification with customs laws of many nations requiring identification of the country of origin for imported goods. With the proliferation of free trade areas, customs unions and preferential arrangement, the rules of origin for customs purposes have added some more dimensions for the purposes of customs valuation.

4 Maintenance of Treatment Versus Modification of Concession

The fundamental importance of the security and predictability of tariff binding, which is a central obligation in the GATT system, was acknowledged and even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries such as the conversion of a specific to an *ad-valorem* duty without an increase in the protective effect of the tariff rate in

[6]WT/MIN (96)16, para. 2.

question, require renegotiation.[7] In case of alteration in tariff nomenclature, by the introduction of Harmonized System of Tariff Classification, renegotiation under Article XXVIII becomes necessary.[8]

Article II permits contracting parties to incorporate into their schedules acts yielding rights under the GATT 1947 but not acts diminishing obligations under the Agreement. This interpretation is confirmed by paragraph 3 of the Marrakesh Protocol which provides:

> 'The implementation of the concession and commitments contained in the schedules annexed to this protocol shall, upon request be subject to multilateral examination by the members. This would be without prejudice to the rights and obligations of members under Agreement in Annex IA of the WTO agreement.[9]

The DSB in Canada-Diary case interpreted the phrase "subject to" in the Article II: 1(b) that market accessions concession granted by a member which are concessions which are without prejudice to and are subordinated to and are qualified by any "terms, conditions or qualifications" inscribed in a member's Schedule. The phrase "terms and conditions" is a composite one which in its ordinary meaning denotes the imposition of qualifying restrictions or conditions. Therefore, a strong presumption arises that the language which is inscribed in the member's schedule under the heading "other conditions and terms" has some qualifying or limiting effect on the substantive context or scope of the concession or commitments.[10]

5 Conclusion

Tariff negotiations are a process of reciprocal demands and concessions of 'give and take'. It is only normal that importing members define their offers (and their ensuing obligation) in terms which suit their needs. On the other hand, exporting members have to ensure that their corresponding rights are described in such a manner in the schedules of importing members that their export interest as agreed in the negotiation are guaranteed. In Uruguay Round special procedures were followed and a process of tariff verification ensued which lasted from 15 Feb. to 25 March, 1994. It allowed Uruguay Round participants to check and control through consultations with their negotiation partners the scope and definition of tariff concessions. Indeed the fact that member's schedules are an integral part of the GATT 1994 indicate that

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[7]L/5680-Panel on Newsprint examined the claim of Canada concerning the Application of a Tariff Concession on Newsprint Established by EC-Adopted on 20 Nov, 1984, 31S/114, 131–132, paras. 50.

[8]L/5470Rev.1.30S/17, 18–19, para. 3.1.

[9]Appellate Body Report on EC—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, DSR1997: II para. 1.

[10]Panel Report, WT/DS 103/RW, Reversed By The Appellate Body Report, WT/DS103/AB/RW, paras. 134–136.

while each schedule represents the tariff commitment made by one member they represent a common agreement among all members.[11] Further the Uruguay Round tariff negotiations were held on the basis of Harmonized System of Tariff Nomenclature and request for and offer of concessions were normally made in terms of this nomenclature.[12] The prior practice in tariff classification is relevant to the extent of establishing the common intention of parties provided the practice has been followed by more than one importing member and should not be inconsistent.

A tariff binding in a member's schedule provides an upper limit on the amount of duty that may be imposed and a member is permitted to impose a duty that is less than that provided for in the schedule. As discussed earlier, the principal obligation in the first sentence of Article II: 1(b), requires a member to refrain from imposing custom duties in excess of those provided for in that members schedule. However, the text of Article II: 1(b) first sentence does not address whether applying a type of duty different from the type provided for in a members schedule is inconsistent in itself, with that provision. The Appellate Body held that the application of a duty different from the type provided for in a member's schedule is inconsistent with Article II: 1(b), first sentence of GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that member's schedule.[13]

In the Argentina-Textile and Apparel case, the measure at issue was a minimum specific import duty (the so-called DIEM) imposed by Argentina on footwear, textiles and apparel. Argentina's schedule included a bound rate of duty of 35% *ad-ad valorem* with respect to the above mentioned goods. However, in practice, textiles and apparel were subject to higher of either (i) 35% ad-valorem duty or (ii) the minimum specific duty.

The Panel found the Argentina specific duty to be in violation of Article II for the reason that Argentina had acted inconsistently with Article II by virtue of applying a different type of import duty than set out in the schedule and minimum specific duty in certain cases exceeded the bound 35% *ad-ad valorem* duty and the Panel finding was upheld by the Appellate Body.[14]

[11]Appellate Body Report on EC—Custom Classification of Certain Computer Equipment, WT/DS26/AB/R, WT/DS48/AB/R; DSR1998: I, para. 8.60.

[12]Ibid., para. 89.

[13]Appellate Body Report in Argentina—Measures Affecting Imports of Footwear, Textiles Apparel and Other Items, WT/DS56/AB/R/; DSR1998:III, para. 46.

[14]Panel Report,WT/DS56/R/Adopted on 22 April, 1998 and Modified by Appellate Body Report, WT/ DS121/AB/R.

Chapter 6
National Treatment on Internal Taxation and Regulation (Art. III)

The text of Article III dealing with "National Treatment on Internal Taxation and Regulation" is reproduced as under:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph I.
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on 10 April, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligation of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges,

A. K. Koul, *Guide to the WTO and GATT*,
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which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions, which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulation in a manner contrary to the principles set forth in paragraph 1.
6. The provision of paragraph 5 shall not apply to any internal quantitative regulations in force in the territory of any contracting party on July 1 1939, April 10, 1947 or March 24, 1948 at the option of that contracting party: Provided that any such regulation which is contrary to the provision of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.
7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.
8. (a) The provision of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
   (b) The provision of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payment to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provision of this Article and subsidies effected through governmental purchase of domestic products.
9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.
10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirement of Article IV.

Interpretative Note Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph I which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation is nevertheless to be regarded as an

internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term 'reasonable measures' in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorising local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and the spirit of Article III, the term 'reasonable measures' would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirement of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Paragraph 5

Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

1 General

Article III contemplates avoidance of protectionism in the application of internal tax and regulatory measures, and the purpose of Article III is to ensure that internal measures should not be applied to imported or domestic products so as to afford protection to domestic production. Towards this end, Article III obligates members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. The intention of the drafters of the Agreement was

clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs.[1] Article III on national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production and extends to products not bound under Article II. Trade laws generally, and Article III in particular, focus on the promotion of economic opportunities for importers through the elimination of discriminating governmental measures which are fair in international trade as against competition or antitrust law which focuses on firm practices or structural modification which may prevent or restrain or eliminate competition.

The rights of the contracting parties to adopt measures which are necessary to foster their economic development or protect a domestic industry is indefensible, provided such measures are permitted by the GATT. The protection given to domestically agricultural machinery (in this case tractors by way of credit facility) was not permissible under Article III as the Article does not differentiate quantitative and qualitative regulation to which the goods were subjected with respect to sale or purchase on the domestic market.[2] Further, the national treatment obligation of Article III do not apply to foreign firms or persons but applies to imported goods and serves to protect the interest of producers and exporters in the territory of any contracting party.[3]

The basic purpose of Article III is to ensure that internal taxes and other internal charges and laws, regulation and requirement affecting the internal sale, purchase, transportation, distribution or use of products… should not be applied to imported or domestic products so as to afford protection to domestic producers (Article III: I). This means that contracting parties are prevented from using their fiscal and regulatory powers for purposes other than to afford protection to domestic producers. Specifically, the purpose of Article III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic producers. The treatment of imported and domestic products as 'like product' may have significant implication for the scope of obligation under GATT and for the regulatory autonomy of contracting parties with respect to their internal tax laws and regulation. Once products are designated as 'like product', a regulatory product differentiation, i.e., for standardization or environmental purposes becomes inconsistent with Article III, even if the regulation is not applied …so as to afford protection to domestic producers. Therefore 'like product' differentiation has to be made in such a way that it should not unnecessarily infringe upon the regulatory authority and domestic policy options of

[1]Appellate Body Report, Japan—Taxes on Alcoholic Beverages II, WT/DS8/AB/R, 1996, p. 16.

[2]Panel Report on 'Italian Discrimination Against Imported Agricultural Machinery', L/833, Adopted on 23 October 1958, 75/60, para. 6.

[3]Panel Report on Canada—Administration of Foreign Investment Review Act, 1984-L/5504, Adopted 7 February 1984, 30S/140, 167, para. 6.5.

contracting parties under Article III of GATT.[4] The distinction between import duties and internal charges is of fundamental importance as the GATT regulates ordinary customs duties and other import charges and internal taxes differently. The ordinary customs duties are allowed for the purposes of protection unless they exceed tariff bindings. All other charges or duties of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (Article II: 1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the item concerned is bound (Article III: 2).

2 Relevance of Trade Effects

The relevance of trade measures having a bearing on Article III: 2 was discussed in a Panel report on 'United States—Taxes on Petroleum and Certain Imported Substances (1987)' in which the Panel found, *inter alia*, that an excise tax on petroleum imposed at a higher rate on imported products than on "like domestic" products was inconsistent with Article III: 2. The Panel examined the argument of the USA that the tax differential of 3.5 US cents per barrel was so small that it did not nullify or impair benefits accruing to Canada, the EEC and Mexico under the GATT. The Panel held further:

> An acceptance of the argument that measures which have only an insignificant effect on the volume of exports do not nullify or impair benefits accruing under Article III: 2 first sentence, implies that the basic rationale of this provision – the benefit it generates for the contracting parties is to protect expectations on export volumes. That however is not the case. Article III: 2 first sentences oblige contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects. The majority of the members of the Working Party on the 'Brazilian Internal Taxes' therefore correctly concluded that the provisions of Article III: 2, first instance, 'were equally applicable, whether imports from other contracting parties were substantial, small or non-existent' (BISD Vol. II/185). The working party also concluded that a contracting party was bound by the provisions of Article III whether or not the contracting party in question had undertaken tariff commitment in respect of the goods concerned (BISD Vol. II/182). In other words, the benefit under Article III accrue independent of whether there is a negotiated expectation of market access or not. Moreover, it is conceivable that a tax consistent with the national treatment principle (for instance, a high but non-discriminatory excise tax) has a more severe impact on the exports of other contracting parties than a tax that violates that principle (for instance a very low but discriminating tax). The case before the Panel illustrates this point: the United States could bring the tax on petroleum in conformity with Article III: 2 first sentence, by raising the tax on domestic products, by lowering the tax on imported goods or by fixing a new common tax rate for both imported and domestic products. Each of these solutions would have different trade results, and it is therefore logically not possible to determine the difference in trade impact between the present tax and one consistent with Article III: 2, first sentence, and hence to determine the trade impact

[4]Panel Report on USA—Measures Affecting Alcoholic and Malt Beverages, Adopted on 19 June 1992, DS 23/R, 39 S/206, 276, para. 5.71-5.72.

> resulting from the non-observance of that provision. For these reasons, Article III: 2, first sentence cannot be interpreted to protect expectation on export volumes; it protects expectations on the competitive relationship between import and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III: 2, first sentence, has no or insignificant effect would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under the provisions had not been nullified or impaired even if such a rebuttal were in principal permitted.[5]

The 1992 Panel Report on 'United States—Measures Affecting Alcoholic and Malt Beverages' examined an argument that since only 1.5% of domestic beer in the USA was eligible for a reduction in the excise tax on beer and less than one per cent of domestic beer benefited from the tax reduction 'the federal excise tax neither discriminated against imported beer nor provided protection to domestic production'.

The Panel noted the USA argument that the total number of barrel currently subject to lower federal excise tax rate represented less than one per cent of total domestic beer production; that over 99% of USA beer was subject to the same federal excise tax as that imposed on imported beer; and that therefore the federal tax neither discriminated against imported beer nor provided protection to domestic production. The Panel further noted that although Canada did not accept the USA estimate that the tax exemption applied to only one per cent of US production, it pointed out that this figure nonetheless equalled total Canadian exports of beer to the USA. In accordance with the previous Panel report adopted by the CONTRACTING PARTIES, the Panel considered that Article III: 2 protects competitive condition between imported and domestic products but does not protect expectation on export volume. In the view of the panel, the fact that only approximately 1.5% of domestic beer in the USA is eligible for the lower tax rate cannot justify the imposition of higher internal taxes on imported Canadian beer than on competing domestic beer. The prohibition of discriminatory taxes in Article III: 2, first sentence is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard….Thus in the view of the Panel, the fact that only approximately 1.5% of domestic beer in the United States is eligible for the lower tax rate does not immunize this United States measure from the national treatment obligation of Article III.[6]

The same Panel examined a similar argument with respect to paragraph 4 of Article III.

> With respect to Vermont and Virginia, the Panel noted that certain imported wines cannot be sold in state-operated liquor stores whereas the like domestic wine can. The Panel recalled the United States argument that the number of state-operated sales outlets was relatively small compared to the number of private outlets. The Panel considered that although Canadian wine has access to most of the available sales outlets in these states, it is

[5]L/6175, Adopted 17 June 1987, 34S/136, 158, para. 5.1.9.

[6]DS23/R, Adopted 19 June 1992, 39S/206, 270–271, para. 5.6.

still denied competitive opportunities accorded to domestic like products with respect to sales in state-operated outlets. Therefore, the Panel considered that the Vermont and Virginia measures are inconsistent with Article III: 4.[7]

In 1994, the Panel on 'United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco' noted in relation to an argument regarding a difference in the amount of non-refundable marketing assessment termed 'budget deficit assessment' (BDA) charged on imported tobacco and on domestically produced tobacco:

The Panel …recalled the US argument that the discriminatory impact of the BDA differential was as small as to be of no commercial consequence. Here, the Panel noted that previous Panels had rejected arguments of *de- minimis* trade consequences and had found that the size of the trade impact of a measure was not relevant to its consistency with Article III.[8] THE CONTRACTING PARTIES had recognised that Article III protected expectations on the competitive relationship between imported and domestic products, not export volumes. In accordance with these past Panel rulings, the Panel considered that it was not permissible to impose higher internal taxes on imported products than on like domestic product, even where the difference was minimal or of no commercial consequences.[9]

3 Application of Article III to Regional/Local Government/State Trading Monopolies

As the Ad Article III: I, provides that the application of Paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV and adds certain qualifying conditions, the Panels in cases such as 'Canada—Import Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies[10] and United States Measures Affecting Alcoholic and Malt Beverages,[11] observed that national treatment provisions require contracting parties to accord to imported products treatment no less favourable than that accorded to any like domestic product, whatever the domestic origin. Consequently, Article III requires treatment of imported products no less favourable than that accorded to the

[7]DS23/R Adopted 19 June 1992, 39S/292, para. 5.65.

[8]The footnote to this sentence in the panel report provides: 'see e.g., Report of the Panel on United States—Taxes on Petroleum and Certain Imported Substances Adopted on 17 June 1987. BISD34S/345/136, 155–159; Report of the Panel on United States—Sect. 337 of the Tariff Act of 1930 adopted on 7 November 1989, BISD36S/345, 386–387'.

[9]The footnote to this sentence in the panel report refers to the panel report on 'United States—Taxes on Petroleum and Certain Imported Substances' Adopted on 17 June 1987, BISD34S/136.

[10]DS17/R, Adopted 18 Feb. 1992, 39S/27, 75, para. 5.4 applying Article III: 4.

[11]DS23/R, Adopted 19 June 1992, 39S/206, 274, para. 5.17.

most-favoured domestic products. With regard to the state trading monopolies the Panels in the cases such as Canada-Import, Distribution and Sales of Alcoholic Drinks by Canadian Provincial Marketing Agencies[12] and Thailand-Restriction on Importation of and Internal Taxes on Cigarettes[13] held that Article III applies to the state trading monopolies also. In the Thailand case, the Panel examined how Thailand might restrict the supply of cigarettes in manner consistent with the GATT. The Panel noted that 'contracting parties may maintain governmental monopolies on the importation and domestic sale of products. The Thai government may use the monopoly to regulate overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitment assumed under a schedule of concession'.[14]

4 Measures Imposed at the Time or Point of Importation

The interpretative Note Article III, which was added at Havana while ITO was being negotiated, mandates that an internal charge or regulation collected or enforced for imported products at the time of importation could amount to an internal tax or other internal charges subject to Article III obligations. Therefore the system of bonding requirement, pursuant to Sect. 337 of the US Tariff Act of 1930 which was applicable to imports and not to like domestic products was held inconsistent with the requirements of Article III: 1 and 2.[15] In Argentina—Hides and Leather, the Panel addressed the question whether Argentina's fiscal provisions concerning prepayment of a value-added tax, applied to imported goods at the time of their importation were nevertheless to be considered 'internal measures' within the meaning of Article III: 2, in particular Note Ad Article III, which sets forth that a measure applied to a product at the time of importation is nevertheless an internal measure within the meaning of Article III as this measure is also imposed on the like domestic products; 'RG3431 (the value-added tax measure applicable to imported goods) applied to definitive import transaction but only if the products imported were subsequently resold in the Argentina market'.

> In other words, RG3431 provided for the prepayment of the tax chargeable to an internal transaction. It should also be pointed out that the fact that RG3431 was collected at the time and point of importation did not preclude it from qualifying as an internal tax measure.[16]

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[12]L/6304 Adopted 24 March 1988, 355/37, 90.

[13]DS10/R Adopted on 7 November 1990, 37S/200.

[14]Ibid.

[15]Panel Report on United States—Imports of Certain Automotive Spring Assemblies, Adopted on 14 March 1978, L/4599, 25S/64, para. 4.4.

[16]Panel Report on Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS155/R and corr. Adopted 16 Feb. 2001.

On the question of whether any import licensing requirement is within the scope of Article III: 4, the Appellate Body in the case of EC-Bananas held that the EC licensing procedures and requirements which included operator category rules under which 30% of the import licensing for third country and non-traditional ACP bananas were allocated to operators that marketed EC or traditional ACP bananas, and the activity function rules under which category A and B licences were distributed among operators on the basis of their economic activities as importers, customs clearers and ripeness went far beyond the mere import licensing requirement needed to administer the tariff quotas for third country and non-traditional ACP bananas or Lome Convention requirement for the importation of bananas. These rules were intended to cross-subsidise distribution of EC (and ACP) bananas and ensured that EC bananas obtain a share of the quota rent. Therefore, these rules affect the internal sale, offering for sale, purchase …within the meaning of Article III: 4.[17]

WTO members are free to pursue their own domestic goals through internal taxation or regulation so long as they do so in a way that does not violates Article III or any of the other commitments they have made in the WTO Agreements.

5 Article III—an Analysis

A. Paragraph 1: 'the Contracting Parties Recognise that Internal Charges, Laws and Regulations… Should not Be Applied to Imported or Domestic Products so as to Afford Protection to Domestic Production'

Paragraph 1 of Article III was subject of interpretation in EEC—Measures on Animal Feed Proteins, wherein the EEC scheme required domestic producers or importers of oilseeds, cakes and meals, dehydrated fodder and compound feeds and importers of corn gluten feed to purchase a certain quantity of surplus skimmed milk powder held by intervention agencies and to have it denatured for use as feed for animals other than calves. The Panel held that the EEC regulation was an internal quantitative regulation in the sense of both Article III: I and Article III: 5. The Panel concluded that the measures provided for by the EEC regulation with a view to ensuring the sale of a given quantity of skimmed milk powder protected this product in a manner contrary to the principles of Article III: I and to the provisions of Article III: 5 s sentence.[18]

The terms of Article III must be given their ordinary meaning in their context and in the light of the overall objects and purpose of the WTO Agreements. The proper interpretation of the Article is first of all a textual interpretation. Therefore,

[17]Appellate Body Report on EC-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, DSR1997: II, para. 211.

[18]L/4599, Adopted 14 March 1978, 22S/49, 64-65, para. 4.6–4.8.

Article III: 1 contains 'general principles' and Article III: 2 provides for specific obligations regarding internal taxes and internal charges. Article III: 1 articulates a general principle that internal measure should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III: 1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III: 2 and in other paragraphs of Article III, while respecting and not diminishing in any way the meaning of the words actually used in the texts of those other paragraphs. In short, Article III: 1 constitutes part of the context of Article III: 2 in the same way that it constitutes part of the context of each of the other paragraphs in Article III.[19]

B. Paragraph 2 of Article III: Internal Taxes or Other Internal Charges of Any Kind

The members of GATT are free within the outer bounds as defined by the provisions of Article III: 2 to administer and collect internal taxes as they see fit. However, if such tax measures take the form of internal charge and are applied to products, it must be in conformity with Article III: 2. Tax measures cannot be excluded from the ambit of Article III: 2, as it would create a potential for abuse and circumvention of the obligations contained in Article III: 2. Moreover, the applicability of Article III: 2 is not conditional upon the policy purposes of a tax measure.

Excise taxes, indirect taxes and consumption taxes are subject to national treatment requirement of Article III: 2. A type of charge outside the scope of Article III is customs fee concerning expenses incurred in assessing duties, inspection and validation of documents. These charges are subject to the discipline of Article VII of the GATT. Article VII limits such charges to the approximate cost of services rendered.

The first sentence of Article III: 2 forms part of the context" of the term 'like product' as a subset of 'directly competitive or substitutable product'. All 'like products" are by definition directly competitive or substitutable products, whereas not all directly competitive or substitutable products are 'like products'. The notion of 'like products' must be construed narrowly, but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within Article III: 2 first sentence, imperfectly substitutable products can be assessed under Article III: 2, second sentence.

The question whether income tax exemption from income tax and credits against income tax was subject matter of discussion in cases such as Australian complaint against Italy,[20] United States Temporary Import Surcharges,[21] and EEC complaint

[19]Japan—Taxes on Agricultural Beverages, Appellate Body Report, WT/DS8/AB/R, DSR1906: I pp. 17–18.

[20]L/875.

[21]L/3575.

against US Income Tax Legislation passed in 1986[22] but no specific answer was given. However, it is submitted that if the income tax and other taxes are discriminatory on the imports or exports, Article III: 2 is violated.

Border tax adjustment is generally believed to be Article III: 2 consistent, provided the border tax imposed on imported products meets the national treatment requirement of Article III: 2 first sentence, as this provision permits the imposition of an internal tax on imported products provided the like domestic products are taxed directly or indirectly, at the same or higher rate. Such internal taxes may be levied on imported products at the time or point of importation (Note Ad Article III). Paragraph 5 of Article III, therefore, clarifies that a tariff concession does not prevent the levying of a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of 'like domestic product' or 'in respect of an article from which the imported product has been manufactured or produced in whole or in part'.

The US Superfund Legislation provided that 'with respect to the tax on certain imported substances that importers would be required to provide sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed, otherwise a penalty tax would be imposed in the amount of five per cent *ad valorem* or a different rate to be prescribed by the Secretary of Treasury which would equal the amount that would be imposed if the substance were produced using the predominant method of production'. The Panel examining this penalty rate held as follows:

> According to the Superfund Act, the tax on certain imported substances will however not necessarily be equal to the tax on the chemicals used in their production. If an importer fails to furnish the information necessary to determine the amount of tax to be imposed, a penalty tax of 5% of the appraised value of the imported substance shall be imposed. Since the tax on certain chemicals subjects some of the chemicals only to a tax equivalent to 2 per cent of the 1980 wholesale price of the chemicals, the 5 percent penalty tax could be much higher than the highest possible tax that the importer would have to pay if he provided sufficient information… The imposition of a penalty tax on the basis of the appraised value of the imported substance wouldn't conform with the national treatment requirement of Article III: 2, first sentence, because the tax rate would in that case no longer be imposed in relation to the amount of taxable chemicals used in their production but the value of the imported substance.[23]

In the 1990 Panel Report on 'EEC-Regulation on Imports of Parts and Component', the Panel examined the application of Article 13:10 of the EEC's Anti-dumping Regulation (Council Regulation No. 2176/84), under which anti-circumvention duties were levied on products assembled or produced in the EEC. Having found that the anti-circumvention duties were not customs duties within the meaning of Article II: 1(b), the Panel examined them in the light of the first sentence of Article III: 2.

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[22] L/6153.

[23] L/6175 Adopted on 17 June 1987, 34S/136, 160–163, para. 5.2.3, 5.2.4, 5.2.7, 5.2.8.

The Panel noted that, in the cases in which anti-circumvention duties had been applied, the EEC followed subparagraph(c) of the anti-circumvention provisions, according to which the amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete products on the c.i.f. value or materials imported. The Panel held that 'like' parts and material of domestic origin are not subject to any corresponding charge. The Panel, therefore, found that the anti-circumvention duties on the finished products subjected imported parts and materials indirectly to an internal charge in excess of that applied to like domestic products and that they are consequently contrary to Article III: 2, first sentence.[24]

The expression 'or other internal charges of any kind' is all comprehensive and in cases where tax on foreign exchange allocated for the payment of imports is a multiple currency practice, such matters fall within the jurisdiction of IMF and also under Article XV: 4 of the GATT and should not constitute a frustration of the provisions of Article III.

The phrase "in excess of those applied directly or indirectly to like domestic products", is not conditional on a trade 'effects test' nor is it qualified by a *de-minimis* standard.[25] In assessing whether there is a tax discrimination, account is to be taken not only on the rate of applicable internal tax but also of the taxation methods (e.g., different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production and of the rules for the tax collection (e.g., basis of assessment).[26] Article III: 2 first sentence infringement must be seen on the basis of an overall assessment of the actual tax burdens imposed on imported products on the one hand, and like domestic product, on the other hand, and is applicable to each individual import transaction. It does not permit members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances;[27] it also prohibits tax burden differentials irrespective of whether they are of limited duration.[28]

In order to determine whether an internal tax measure is inconsistent with Article III: 2 s sentence, three separate issues need to be answered:

1. The imported products and the domestic products are directly competitive or substitutable products which are in competition with each other.
2. The directly competitive or substitutable imported and domestic products are not similarly taxed.

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[24]L/6657 Adopted on 16 May 1990 37S/132, 139, para. 5.9.

[25]Appellate Body Report on Japan—Taxes on Alcoholic Beverages WT/DS8/AB, DSR1996: para. 11.143–11.144.

[26]Panel report on Japan—Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS/10/R Adopted 1 November 1996, para. 5.8.

[27]Panel Report on Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS155/R and corr. I, Adopted 16 February 2001, para. 11.260.

[28]Ibid., para. 11.245.

3. The dissimilar taxation of the directly competitive or substitutable imported domestic products is 'applied so as to afford protection to domestic producers'.

Each of the above issues must be established separately by the complainant to find that a tax measure is inconsistent with Article III: 2 s sentence.[29]

The directly competitive or substitutable products mean looking at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be directly competitive or substitutable as well as examining elasticity of substitution as a means of examining those relevant markets. Further, directly competitive or substitutable relationship must be present in the market at issue; however, the evidence or the consideration of consumer behaviour in other countries and markets, which display characteristics similar to the market at issue, may have some relevance to the market at issue.[30] The term 'directly competitive' or 'substitutable' does not prevent taking into account evidence of latent consumer demands as one of the ranges of factors to be factors when assessing the competitive relationship between imported and domestic products under Article III: 2, second sentence.

To give due meaning to the distinction in the wording of Article III: 2, first sentence, and Article III: 2 s sentence, the phrase 'not similarly taxed' in the Ad Article to the second sentence must not be construed to mean the same thing as the phrase 'in excess of' in the first sentence. On the face of it, the phrase 'in excess of' in the first sentence means any amount of tax on imported products in excess of the tax on domestic 'like products'. The phrase 'not similarly taxed' in the Ad Article to the second sentence must therefore mean something else. In any given case, there may be some amount of taxation on imported products that may well be 'in excess of' the tax on domestic 'like products' but may not be so much as to compel a conclusion that 'directly competitive' or 'substitutable' imported and domestic products are 'not similarity taxed' for the purposes of the Ad Article III: 2 s sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic 'directly competitive or substitutable products' but nevertheless not be enough to justify a conclusion that such products are 'not similarly taxed' for the purposes of Article III: 2 s sentence.

The term 'like domestic products' occurs sixteen times throughout the GATT and has raised problems of interpretation. Some criteria were suggested for determining on a case-to-case basis whether the product is similar; the product's end uses in the market: consumer tastes and habits which change from country to country; the product's properties, nature and quality.[31]

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[29]Supra note 23, para. 24.

[30]Appellate Body Report on Korea—Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, DSR1999: I, para. 137.

[31]Working Party Report on 'Border Tax Adjustment' L/3464, Adopted on 2 December 1970, 18S/97, 102, para. 18. See also Panel Report on United States—Taxes on Petroleum and Certain Imported Substances wherein tax on petroleum, applied at US $-0.082 per barrel for 'crude oil received at a US refinery, and US $-0.117 per barrel for petroleum products entered into the USA

The text of the first sentence of Article III: 2 clearly indicates that the comparison to be made is between internal taxes on imported products and 'those applied… to like domestic products'. The wording 'like products' (in the French text: 'products similarities') has been used also in other GATT Articles on non-discrimination in the sense not only of 'identical' or 'equal' products but covering also products with similar qualities.

The context of Article III: 2 shows that it supplements within the system of the General Agreement the provisions on the liberalization of customs duties and of other charges by prohibiting discriminatory or protective taxation against certain products from other GATT contacting parties. This context had to be taken into account in the interpretation of Article III: 2. For instance, the prohibition under GATT Article I: I of different tariff treatments for various types of 'like products' could not remain effective unless supplemented by the prohibition of different internal tax treatment for various types of 'like products'. Just as Article I: 1 was generally construed in order to protect the competitive benefits accruing from the reciprocal tariff bindings, as prohibiting 'tariff specialization' discriminating against 'like products', only the literal interpretation of Article III: 2 as prohibiting 'internal tax specialization' discriminating against like products could ensure that the reasonable expectation, protected under GATT Article XXIII, of competitive benefits accruing under tariff concession would not be nullified or impaired by internal tax discrimination against like products.

The drafting history confirms that Article III: 2 was designed with the intention that internal taxes on goods should not be used as a means of protection. It also conforms with the broader objective of Article III to provide equal condition of competition once goods have been cleared through customs and to protect thereby the benefits accruing from tariff concession. This object and purpose of Article III: 2 of promoting non-discriminating competition among imported and like domestic products could not be achieved if Article III: 2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products.

Subsequent GATT practice in the application of Article III further shows that past GATT Panel reports adopted by the CONTRACTING PARTIES have examined Article III: 2 and 4 by determining, firstly, whether the imported and domestic products concerned were 'like' and, secondly, whether the internal taxation or other regulation discriminated against the imported products. Past GATT practice has clearly established that 'like' products in terms of Article III: 2 are not confined to identical products but cover also other products, for instance, if they serve substantially identical end uses.

The language of Art. III; I and 4 of GATT has been interpreted in several GATT and WTO cases. In Japan—Alcoholic Beverages II (WT/DS10/AB/R, WT/DS11/

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for consumption, use or warehousing. The panel concluded that the imported and domestic products are 'like products' for the purposes of Article III: 2, L/6175 Adopted on 17 June 1987, 34S/136, 154–155, para. 5.1.1.

AB/R, adopted 1 November 1996) declared that the basic purpose of Article is to prohibit protectionism in the application of internal taxes and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures are not be applied to domestic and imported products so as to afford protection to domestic production. It also rejected the aims and effects test approach to the obligation of national treatment, at least as a search for subjective intent. It is not necessary for a Panel to sort through many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish regulatory or legislative intent. Further, it is possible to examine objectively the underlying criteria used in particular tax measure, its structure and its overall application, to ascertain whether it is applied in a way that affords protection to domestic producers.

C. Paragraph 3 of Article III: Existing Internal Tax Inconsistent with Paragraph 2

Paragraph 3 of Article III applies only to the situation in which a contracting party may maintain discriminatory internal taxes on a particular item, but cannot simply transfer the discriminatory element into an import tariff because the tariff on the item, in question, is bound in a bilateral trade agreement that was in existence on 10 April 1947 the opening date for the second session (at Geneva) of the Preparatory Committee for the Havana Conference, Paragraph 3 permits maintenance of the internal tax discrimination until the contracting party in question can obtain a release from its bilateral obligations with respect to the tariff.

D. Paragraph 4 of Article III: Treatment no Less Favourable

For a violation of Article III: 4 to be established, three elements must be satisfied; that the imported and the domestic products at issue are 'like products'; that measure at issue is a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use; and imported products are accorded 'less favourable' treatment than that accorded to like products.[32] Article III: 4 does not specifically refer to Article III: I, therefore a determination whether there has been a violation of Article III: 4 does not require a separate consideration of whether a measure affords protection to domestic industry or not.[33]

In determining the relationship of Article III: 4 with other paragraphs of Article III, the Appellate Body has held that Article III: 2 constitutes part of the context of Article III: 4, but it is Article III: 2 which has a particular contextual significance for the interpretation of Article III: 4. Article III: 2 contains two separate sentences each imposing distinct obligations; it lays down obligation in respect of 'directly competitive or substitutable products'. By contrast Article III: 4

[32]Appellate Body Report in Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, 2001, para. 133.

[33]Appellate Body Report on EC—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R DSR1997: II para. 216.

applies only to 'like products' and does not include a provision equivalent to the second sentence of Article III: 2.[34]

The words 'like products' in Article III: 4 are to be interpreted to ensure 'equality of competitive conditions', and as products are in competitive relationship in the marketplace, they could be affected through treatment of imports less favourable than the treatment accorded to domestic products and therefore the word 'like' in Article III: 4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of 'likeness' in Article III: 4 is fundamentally a determination about the nature and extent of competitiveness between and among products. The scope of 'like' in Article III: 4 is broader than the scope of 'like' in Article III: 2, first sentence, but is not broader than the combined Article III: 2.

To arrive at a decision whether the product is a 'like products' for the purposes of Article III: 4, besides all pertinent evidence, four criteria may be used:

1. The properties, nature and quality of the products;
2. Their end use;
3. Consumer tastes and habits; and
4. Tariff classification of the products.[35]

The expression "affecting the internal sale, offering for sale, purchase…" has been subjected to interpretation by the Appellate Body in the case of EC-Regime for Importation, Sale and Distribution of Bananas,[36] Canada-Certain Measures Affecting the Automobile Industry,[37] and other cases. In EC-Bananas case, the issue was whether any 'import licensing procedures and requirement for the distribution of import licenses for imported bananas among eligible operators within the European Communities are within the scope of Article III: 4. These rules go far beyond the mere import licence requirements needed to administer tariff quota for third country and non-traditional ACP bananas or Lome Convention requirements for importation of bananas. They were intended among other things to cross-subsidise distributors of EC (and ACP) bananas and to ensure that EC bananas ripeners obtain a share of quota rent. These rules affect the sale offering for sale within the meaning and scope of Article III: 4

In the Canadian-Auto case,[38] the Panel found that the Canadian value-added requirements, which stipulated that the amount of the Canadian value added in the manufacturer's local production of motor vehicles must be equal to or greater than the amount of Canadian value added in the production of motor vehicles by the

[34]Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing products, WT/DS135/AB/R DSR 1997: II para. 95–96.

[35]Ibid., para. 101.

[36]Appellate Body Report, WT/DS 27/AB/R, DSR1997: II.

[37]Appellate Body Report, WT/DS139/AB/R, Panel Report, WT/DS139/R, Adopted 19 June, 2000.

[38]Appellate Body Report, WT/DS139/AB/R, Panel Report, WT/DS139/R, Adopted 19 June 2000, para. 10.149.

same manufacturer during an earlier reference period, were violation of Article III: 4 of GATT 1994.

The expression 'no less favourable' in Article III: 4 has been interpreted to mean an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products under the most-favoured-nation standard or to domestic products under the national treatment standard of Article III. The words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulation and requirement affecting the internal sale, etc. This clearly sets a minimum permissible standard as a basis.[39]

A complaining member must establish that the measure accords to the group of 'like' imported products 'less favourable treatment' than it accords to the group of 'like' domestic products. The term 'less favourable treatment' expresses the general principle in Article III: I that internal regulation 'should not be applied so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is conversely 'protection' of the group of 'like' domestic products. However, a member may draw distinction between products, which have been found to be 'like' without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products.[40]

The less favourable treatment criterion involves part of an 'effects test'. In Korea —Various Measures on Beef, the Appellate Body reversed the Panel, which had concluded that a regulatory distinction based exclusively on the origin of the product necessarily violated Article III. The Appellate Body emphasised the fact that 'differential treatment' may be acceptable, so long as it is no less favourable. Article III only prohibits discriminatory treatment, which modifies the conditions of competition in the relevant market to the detriment of imported products. (Appellate Body Report, Korea—Various Measures on Beef, WT/DS161/AB/R.

In EC—Asbestos, the Appellate Body held that a complaining Member must still establish that the measure accords to the group of 'like' imported products 'less favourable treatment' than it accords to the group of 'like' domestic products. The term less favourable treatment expresses the general principle, in Article III: I, 'that internal regulations should not be applied… so as to afford protection to domestic production'. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to group of 'like' domestic products. A formal difference in treatment between imported and like domestic products is neither necessary nor sufficient to show a violation of Article III: 4. Whether or not imported products are treated less favourably than like domestic products should be assessed instead by examining whether a measure

[39]Panel Report on Japan—Measure Affecting Consumer Photographic Film and Paper, WT/DS44/R Adopted 22 April 1998, DSR 1998: IV par.

[40]Appellate Body Report, supra note 34, para. 100.

modifies the conditions of competition in the relevant market to the detriment of imported products. A different treatment is neither sufficient nor necessary to prove less favourable treatment.

E. Paragraphs 5, 6 and 7: Internal Quantitative Regulations

Scope of paragraph 5 requires that a regulation requiring a product to be composed of two or more materials in specified proportions, where all the materials in question are produced domestically in substantial quantities and where there is no requirement that any specified quantity of any of the materials be of domestic origin, is not intended to be covered by Article III. The opposite case of 'mixing regulation' …is where the regulation requires that a certain percentage of a product's origin is used in the production of another product (e.g. that 25% domestic wheat is used in making flour). Such a regulation would limit the use of the like foreign products and hence would under any interpretation be contrary to Article III: 5.

In the 1994 Panel report on 'United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco', the Panel examined a claim that the US Domestic Marketing Assessment (DMA) was inconsistent with Article III: 5. The DMA legislation required each 'domestic manufacturer of cigarettes', as defined in the legislation, to certify to the Secretary of the U.S. Department of Agriculture (USDA) for each calendar year, the percentage of domestically produced tobacco used by such manufacturer to produce cigarettes during the year. A domestic manufacturer that failed to make such a certification or to use at least 75% domestic tobacco was subject to penalties in the form of a non-refundable marketing assessment (i.e. the DMA) and was required to purchase additional quantities of domestic burley and flue-cured tobacco.

As to the applicability of Article III: 5 first sentence to the DMA, the Panel considered that it first had to determine whether the USA had established an 'internal quantitative regulation relating to the mixture, processing or use of products inspecified amount or proportion…'. The Panel noted the following in this respect:

(a) First the DMA was established by an Act of the US Congress, Sect. 1106(a) of the 1993 Budget Act, and was implemented through regulation of USDA. The effective date for the DMA was 1 January 1994. It thus constituted a regulation within the meaning of Article III: 5.
(b) Second, the Panel noted that the opening sentence of the DMA legislative provisions Sect. 1106(a) of the 1993 Budget Act stated: 'CERTIFICATION. A domestic manufacturer of cigarettes shall certify to the Secretary for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that is produced in the United States'. The DMA was thus an internal regulation imposed on domestic manufacturer of cigarettes.
(c) Third, the Panel noted that the second subparagraph of the DMA legislative provisions stated: 'PENALTIES. Subject to subsection (f) [exception for crop losses due to natural disasters], a domestic manufacturer of cigarettes that has

failed, as determined by the Secretary after notice and opportunity for a hearing to use in the manufacture of cigarettes during a calendar year a quantity of tobacco grown in the United States that is at least 75 percent of the total quantity of tobacco used by the manufacturer or to comply with subsection (a) [certification requirement], shall be subject to the requirement of sub-sections (c), (d) and (e) [penalties in the form of a non-refundable marketing assessment and required purchase of additional quantities of domestic, burley and flue-cured tobacco]'.

The DMA was thus a quantitative regulation in that it set a minimum specified proportion of 75 per cent for the use of US tobacco in manufacturing cigarettes.

(d) Fourth, the DMA was an internal quantitative regulation relating to the use of a product in that it required the use of US domestically grown tobacco.

The Panel then found that the DMA was an 'internal quantitative regulation relating to the… use of products in specified amounts or proportions…' within the meaning of the first part of the first sentence of Article III: 5.

The Panel then turned to a consideration of whether the DMA requires directly or indirectly any specified amount or proportion of any products which is the subject of the regulation must be supplied from domestic sources as provided in the second part of the first sentence of Article III: 5. The Panel noted the following in this respect:

(a) The DMA required each domestic manufacturer of cigarettes to certify to the Secretary of USDA, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that was produced in the USA.
(b) Subject to an exception dealing with crop losses due to disasters, a domestic manufacturer that failed to make the required certification or to use at least 75% domestic tobacco was subject to penalties including the required purchase of additional domestic tobacco.

The Panel thus concluded that the DMA was an internal quantitative regulation relating to the use of tobacco in specified amounts or proportion which required, directly or indirectly that a minimum specified proportion of tobacco be supplied from domestic sources, inconsistently with Article III: 5 first sentence.[41]

Paragraph 6 'existing mixing regulation and their alteration' means that a member would be free to alter the details of an existing regulation provided that such alteration does not result in changing the overall effect of the regulation to the detriment of imports.

Paragraph 7 essentially secures non-discrimination as between foreign suppliers with respect to products subject to internal mixing regulations.

F. Paragraph 8 (a): Procurement by Government Agencies GP Agreement, 1994

[41]DS44/R, Adopted on 4 October 1994, para. 67–68.

Purchases by 'government agencies of products purchased for governmental purposes' are exempt from national treatment obligations under GATT. As the governments in some economies increase its role of procurement of products, the notion of government, governmental agencies and governmental purposes created problems of definition. As a result, an Agreement on Government Procurement was negotiated in the Tokyo Round (1979). The Uruguay Round led to the creation of a new Agreement on Government Procurement 1994 which is a plurilateral Agreement that is binding only on those WTO members that have accepted it. This agreement has been revised in 2012 and has come in force since 2014 and its essentials are as under:

The basic rules adopted by the Government Procurement Agreement are as under:

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the parties, treatment no less favourable than:

   (a) that accorded to domestic products, services and suppliers; and
   (b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each party shall ensure:

   (a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership;
   (b) that its entities shall not discriminate against locally-established supplier on the basis of country of production of the goods being supplied, provided that the county of production is a Party to the Agreement in accordance with the provisions of Article 4.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, and other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.

The Uruguay Round Agreement on Government Procurement 1994 contains detailed rules on how to implement national treatment and non-discrimination. For this purpose, the Agreement contains rules of origin, technical specifications, tendering procedures, qualification of suppliers, invitation to participate, selection procedures and negotiations. Special provisions are crafted for information and transparency and for developing countries.[42]

[42]For the text of the Agreement, see WTO, The Legal Texts: The Results of Uruguay Round of MTN383, Article IV (1999).

The Government Procurement Agreement entitles a foreign bidder to obtain a statement of reason as to why his bid was rejected and impartial review by a court or an independent review body. The Agreement also established a 'Committee on Government Procurement' for consultations among the members to the Agreement. Further, the disputes arising under the Government Procurement Agreement are to be settled by the WTO Dispute Settlement Mechanism. The scope of the Government Procurement Agreement is limited both by its coverage and by its threshold values of contract. Also, the broad exception for national security and national defence impinge upon the scope of the Agreement.[43]

Paragraph 8 (b): Payment of Subsidies

Paragraph 8(b): Payment of Subsidies exclusively to domestic producers was subject matter of dispute in United States—Measures Affecting Alcohol and Malt Beverages,[44] where in the US tax measures provided a credit against excise taxes for small US producers of beer and wine which was not made available for imported beer and wine.

The Panel besides declaring that such a measure was not covered by Article III: 8(b) as this tax law operated to create lower tax rates on domestic beer and wine than on like imported products held that the ordinary meaning of the text of Article III: 8(b) especially the use of the words 'shall not prevent' suggests that Article III does not apply to subsidies and clarifies that product-related rules in paragraph 1 through 7 of Article III *shall not prevent the payment of subsidies exclusively to domestic producers* (emphasis added). The words 'payment of subsidies' refer only to direct subsidies involving a payment, not to other subsidies such as tax credits or tax reductions. The specific reference to 'payments… derived from the proceeds of internal taxes are applied consistently with the provisions of this Article' relates to after-tax collection payment and also suggests that tax in 'proceeds of internal taxes applied consistently with… this Article' is not covered by Article III: 8(b).

This textual interpretation is confirmed by the context, declared purpose and drafting history of Article III. The context of Article III shows its close interrelationship with the fundamental GATT provisions in Articles I and II and the deliberate separation of the comprehensive national treatment requirement in Article III from the subsidy rules in Article XVI. The MFN requirement in Article I and also tariff binding under Article II would become ineffective without the complementary prohibition in Article III on the use of internal taxation and regulation as a discriminatory non-tariff trade barrier. The additional function of the national treatment requirement in Article III to enhance non-discriminatory conditions of competition between imported and domestic products could likewise not be achieved as any fiscal burden imposed by discriminatory internal taxes on imported goods is likely to entail a trade-distorting advantage for import-competing domestic producers. The prohibition of discriminatory internal taxes in Article III: 2

[43]See Mitsou Matsushita et al.; The World Trade Organization, Law, Practice and Policy; 177–180 (2003).

[44]DS23/R, Adopted 19 June, 1992, 39S/206, 271–273.

would be ineffective if discriminating internal taxes on imported products could be generally justified as subsidies for competing domestic producers in terms of Article III: 8(b).

Article III: 8(b) limits, therefore, the permissible producer subsidies to 'payment' after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g. on tax exemptions or reductions, and subsidy rules make sense economically and politically. Even if the proceeds from non-discriminating product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitor, must pay the products taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.[45]

In the Canada-Periodical Dispute,[46] one of the measures at issue before the Appellate Body related to postal rates charged by the Canadian Post Corporation, a crown corporation controlled by the Canadian Government as the Canadian Post applied reduced rates to Canadian-owned and Canadian-controlled periodicals meeting certain requirements. These lower postal rates were funded by the Department of Canadian Heritage which provided funds to Canada Post so that this agency could in turn offer the reduced postal rates to eligible Canada periodicals. Canada argued that the reduced postal rate was exempted from the strictures of Article III: 4 by virtue of Article III: 8(b), because the reduced postal rate represented payment of subsidies exclusively to domestic producers. The Panel agreed with Canada and found that the funds provided by the Department of Canadian Heritage passed through Canada Post directly to the eligible Canadian publishers and therefore Canada's funded rate scheme on periodical qualified under Article III: 8(b).

The Appellate Body of the DSB reversed the Panel's finding and found that Article III: 8(b) applied only to the payment of subsidies, which involves the expenditure of revenue by a government.[47]

Special Provisions Relating to Cinematograph Films (Article IV)

The text of Article IV: Special Provisions Relating to Cinematographic Films is reproduced as under:

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

[45]DS23/R, Adopted 19 June 1992, 395/206, 271–273.

[46]Canada—Certain Measure Concerning Periodicals, Panel report, WT/DS31/R and corr. I, Adopted 30 July 1997 as modified by the Appellate Body Report, WT/DS31/AB/R; DSR1997: 1.

[47]Appellate Body Report, WT/DS31/AB/R: DSR.

(a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;
(b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
(c) Notwithstanding the provisions of sub paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;
(d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

6 General

The objections of nations that had domestic films quotas led the GATT draftsmen to except this product from the national treatment obligations, probably because its regulation was more related to domestic cultural policies than to economics and trade. Various attempts were made to blend the previsions of Article IV and its commitments within the GATT's central commitment of most favoured nation's treatment but failed.[48]

Freedom of Transit (Article V)

The text of Article V, Freedom of Transit runs as follows:

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article "traffic in transit".
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on flag of vessels, the place of origin, departure, entry, exit or

[48]John H. Jackson, World Trade and the Law of GATT, 293–294 (1969).

destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs, laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.
5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.
6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.
7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Ad Article 5

Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

Scope of Article V

The scope of Article V, 'freedom of transit' is confined to goods and means of transport only, since the transit of persons does not fall within the scope of GATT, and the traffic in persons is subject to immigration laws of the contracting parties.[49]49 Further, the operation of aircraft in transit is exempted as it is dealt with by the International Civil Aviation Organization (ICAO) but air transit in goods

[49]New York Report of the Draft Charter, p. 12 E PCT/C.II/54/Rev.I.

including baggage is covered by paragraph 7 of this Article.[50]50 Traffic in transit in paragraph 1 of Article V means a movement between two points in the same country passing through another country. Freedom of transit encompasses convenient routes for international transit as well as traffic in transit from one contracting party to another contracting party, without any distinction on the modes of transport and the method of running the transport facilities.

Austria has limited traffic of certain heavy trucks during night hours on certain Austrian roads which applied to trucks of all nationalities, including Austrian trucks. The Federal Republic of Germany retaliated by banning Austrian Lorries during night hours in its entire territory. The German measure was held inconsistent with Article V.[51] Paragraph 3 of Article V is essentially meant to address the smooth flow of international trade and transit by providing first the rights of contracting parties to subject the traffic through customs points and second avoiding the unnecessary delays and restrictions for the goods which are in transit to third countries. Paragraphs 3, 4 and 5 refer to charges which mean charges for transportation and should be reasonable and applied on a MFN basis. Paragraph 6 essentially covers the treatment to be given by a country to products cleared from customs within its territory after transit through any other member country on a MFN basis to be treated as 'like products'.

[50]Ibid.

[51]DS 14/I, CM/24/P. 29.

Chapter 7
Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping Agreement)

The text of Article VI, Anti-Dumping and Countervailing Duties, is as under:

1. The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

   (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
   (b) in the absence of such domestic price, is less than either

      (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
      (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

   Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.
3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_7

have been granted directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.
5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation.
6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidisation, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.
   (b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidisation which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.
   (c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.
7. A system for the stabilisation of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity

for export at a price lower than the comparable price charged for the like commodity to buyers in domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) The system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Interpretative Note: Ad Article VI from Annex I Paragraph 1

1. Hidden dumping by associated houses (i.e. the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.
2. It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidisation.
2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By 'multiple currency practices' is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this subparagraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

1 Scope and Application of Article VI

The scope and application of Article VI prior to the Uruguay Round was uneven and highly contentious. Dumping is, in general, a situation of international price discrimination, where the price of a product when sold to the importing country is less than the price of the same product when sold in the market of the exporting country. It is generally accepted in the multilateral trading system that if dumping takes place, it might result in unfair trade as the domestic industry of the importing country might suffer harm as a result of dumping. If this is the case, the authorities of the importing country may, if certain circumstances are met, take action against dumping. Anti-Dumping action can therefore only be taken if dumping is taking place, accompanied by consequent injury to the domestic industry.

The purpose of anti-dumping investigation is to ascertain whether dumping is taking place and causing injury to the domestic industry of the country importing the alleged dumped products. In other words, the process focuses on:

(a) establishing a normal value of the product when sold in the domestic market of the exporting country;
(b) establishing the export price of the product;
(c) comparing the export price with the normal value established; and
(d) ascertaining whether the domestic industry of the importing country is suffering injury as a result of dumped imports.

The rules of the multilateral trading system especially the WTO Agreement on Implementation of Article VI of GATT 1994 require that anti-dumping investigation be conducted with due cognizance taken of the principles of 'due process', i.e. that anti-dumping investigations have to be conducted in a transparent, objective and equitable way, with all interested parties given adequate opportunity to defend their interests.

On the face of it, it appears as if it is a simply a case of identifying dumping by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps as shown in the next chapter, to determine the appropriate export price and the appropriate price in the domestic market of the exporting country to make a fair comparison between the two prices to ascertain if dumping exists. Furthermore, a detailed analysis of the state of the domestic industry of the importing country has to be undertaken to ascertain whether it is suffering injury, and finding whether the alleged dumped imports are causing the injury. All this has to be done within the rules of the WTO Agreement on the Implementation of Article VI for which the provision of Article VI of GATT are 'enabling' one. The subsequent pages deal with methodologies and procedural issues of the anti-dumping and countervailing measures as well as substantive issues of anti-dumping and countervailing.

The three basic preconditions which have to be met before anti-dumping action can take place are set in Article VI of GATT 1994. In particular, the WTO members taking such measure must have determined:

(i) that imports in question are dumped;
(ii) that its own industry is materially injured or is threatened with material injury or that the establishment of a domestic industry is being materially retarded; and
(iii) that the injury under (ii) is being caused by the dumped imports.

Dumping may only be counteracted if all the three requirements are met.
Although all members of the WTO are also parties to the Anti-dumping Agreement, it is not mandatory for members to have in place a legal framework for anti-dumping action, or to take anti-dumping action when, or if injurious dumping occurs. However, the WTO Agreement on Anti-dumping specifies that if a member chooses to take anti-dumping action, such action must be consistent with the rules set out therein and shall proceed by the required investigation conducted on the basis of the provision of Anti-dumping Agreement. An anti-dumping measure according to Article I of the Anti-dumping Agreement 1994 'shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigation conducted in accordance with the provisions of this Agreement'.

Therefore for the WTO members, the imposition of anti-dumping measure is subjected to the following conditions.

(a) an investigation must have been initiated and conducted in accordance with the provision of the Anti-dumping Agreement 1994; and
(b) as a result of that investigation it must have been determined that the imports concerned are dumped, that the domestic industry is suffering material injury or a threat of material injury, or that the establishment of a domestic industry is materially retarded; and that injury being suffered by the domestic industry is causally linked to the dumped imports.

A detailed analysis of the agreement on anti-dumping and countervailing measures follows as under.

2 Anti-dumping and Countervailing Duties (Article VI) of GATT

Article VI of the GATT defines dumping as offering a product for sale in export markets at less price below its normal value. The normal value of a product is defined as the price charged by a firm in its home market in the ordinary course of trade. When circumstances are such that home market sales are so insignificant that it is difficult to make a price comparison, then the highest comparable price charged in third markets, or the exporting firms' estimated costs of production plus a reasonable amount of profits, administrative, sales and any other expenses are to be used to determine what normal value is. GATT permits the levying of an anti-dumping duty on goods only for a contracting party which has ascertained that the effect of dumping is such as to cause or threaten material injury to an established

domestic industry, or is such as to retard materially the establishment of a domestic industry.

Anti-dumping has been the cause of concern of the international community since the 1920's and in the post-World War-II years. Proposals for anti-dumping were included in ITO and GATT 1947 in Article VI. However, the provisions of Article VI lacked 'precision and specificity' and to eliminate the shortcomings, an Agreement on the Implementation of Article VI of the GATT, commonly known as Kennedy Round Code of 1967 was drawn which was not implemented at all.

The Kennedy Round Code 1967 had three functions: (1) to clarify and elaborate on the broad concepts of Article VI of the GATT; (2) to supplement Article VI by establishing appropriate procedural requirements for anti-dumping investigations; and (3) to bring all GATT contracting parties into conformity with Article VI.

The Kennedy Round Code 1967 was reconsidered in Tokyo Round and Tokyo Round Code 1980 like its predecessor contained rules and procedures about the conduct of anti-dumping investigations in a way that they were not used as unjustifiable impediments to international trade. Tokyo Round Code was optional to be implemented by the contracting parties. The non-contracting parties could escape from the obligations of the Code, yet could take the benefits of unconditional most-favoured-nation principle and other benefits of the Code without assuming the obligations of the Code. The Code also did not offer to anti-dumping authorities much more than general guidance and a few minimum standards. The Tokyo Round Code fell short in other areas also. It did not state whether below the cost sales could be excluded when determining the fair price of imports from dumping margin calculations. It also did not explain whether cumulative analysis could be used for determining injury.

The Uruguay Round Code, i.e. the Agreement on the Implementation of Article VI of the GATT 1994 is a lengthy and complex legal document. The Agreement contains 18 Articles with two Annexures along with Declarations on Anti-circumvention Measures.

3 The Uruguay Round Anti-dumping Code

A. **Principles**[1]

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of the Agreement. The provisions which follow govern the applications of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. The term 'initiated' as used in this Agreement means the procedural action by which a member formally commences an investigation as provided in Article 5 of the Agreement. The above

[1]Article 1.

language connotes in legal terms that the Code is '*lex specialis*' to Article VI of GATT 1994. The ordinary meaning of the phrase 'anti-dumping measures seem to encompass all measures taken against dumping and there are no explicit limitations on particular types of measures'.[2]

B. **Determination of Dumping**

Article 2 is one of the most important Article of the Code, dealing with the very essence of the subject: the determination of dumping. Product is being considered dumped when introduced into the commerce of another country or sold at less than normal value if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption into the exporting country.[3]

Unfortunately, the process of price-to-price comparison is seldom straightforward and may well be impossible or inappropriate. The 'like product' which has been defined in Article 2.6 as 'product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration', may not be sold on the home market of the exporting country at all or it may be sold on terms that do not reflect its costs, or in such small quantities that fair comparison is impossible. One compares the export price of the goods allegedly being dumped with the price at which the product is sold when exported to another country's market. The other uses for comparison, a constructed normal value, calculated by adding together the exporter's production cost for the product and a reasonable figure for administrative, sales, and other costs and for profit.[4]

The Agreement sets out detailed rules for when actual home market prices can be disregarded, and governing the calculation of constructed normal values. For example, 'a judgment on whether sales of the product in the exporter's own market were or were not in ordinary course of trade', and therefore disregarded in establishing home market selling price must be below permitted fixed and variable costs, plus administrative, selling and general costs. They must also be carried on within an extended period of time, (normally one year) and in substantial quantities and must not allow recovery of costs within a reasonable period of time.[5]

Moreover, the Agreement sets strict requirements on the sources of information to be used: costs, for instance, must normally be calculated on the basis of the records of the exporter or producer under investigation, and must take into account all available evidence on how fixed costs (such as depreciation charges and development costs) should be spread over the production of goods. Figures for

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[2]United States—Anti-Dumping Act of 1916—Complaint by the EC, Appellate Body Report, WT/DS136/AB/R: WT/DS162/AB/R, para. 19.

[3]Article 2.

[4]Article 2.2.

[5]Article 2.I.

administrative and selling costs should be reasonable, and based on actual data for the home market for the like product, or failing that, for similar products or of sales by another product in that market.[6]

A similar level of detail applies in the other rules designed to ensure that governments in importing countries can arrive at a fair basis for price comparison, while leaving out of account evidence that would tend to disapprove charge of dumping. For example, there may be doubts over the genuineness of a selling price that has been set between an exporter and an importer that are both part of the same firm. In this case the export price used for comparison may be 'constructed' either on the basis of the price at which the goods are first sold or to an independent buyer, or on some other reasonable basis.[7]

Price comparisons have to make allowances for differences in conditions of sale, taxation, levels of trade and other factors affecting price comparability. And when comparisons require currency conversions, fluctuations in exchange rates are to be ignored, and exporters are to be allowed at least 60 days to adjust their export prices to sustained changes in rates.[8]

A special problem while determining the home market price may arise if the exporter is non-market economy. An opaque provision in the Anti-Dumping Agreement, which affirms the continuing validity of a note to GATT, Article VI, in fact refers to this issue. The note says that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state, a strict comparison with domestic prices may not always be appropriate.[9] Countries applying anti-dumping measures have invoked this provision as a basis for using special methodologies to determine the normal value of imports from non-market countries.

The Committee on Anti-Dumping Practices established to oversee the implementation of the Agreement at its meeting of 4–5 May 2000, recommended regarding appropriate period of data collection with respect to original investigation to determine the existence of dumping and consequent injury as below:

1. As a general rule:

   (a) the period of data collection for dumping investigations normally should be twelve months and in any case not less than six months, ending as close to the date of initiation as is practicable;
   (b) the period of data collection for investigating sales cost, and the period of data collection for dumping investigations, normally should coincide in a particular investigation;
   (c) the period of data collection for injury investigations normally should be at least three years, unless a party for whom data is being gathered has existed

[6]Article 2:2.1 and 2:2.2.

[7]Article 2.3.

[8]Article 2.4.

[9]Article 2.7 and Annex. I, Second Note Ad. Article VI.I.

for a lesser period, and the period of data collection for the dumping investigation should be taken in its entirety;

(d) in all cases, the investigating authorities should set and make known in advance to interested parties the periods to be covered by the data collection, and may also set certain dates for completing collection or submission of data. If such dates are set, they should be made known to interested parties.

2. In establishing the specific period of data collection in a particular investigation, investigating authorities may, if possible, consider practices of firms from which data will be sought concerning financial reporting and the effect this may have on the availability of accounting data. Other factors that may be considered include the characteristics of the product in question, including seasonality and cyclicality, and the existence of special order or customised sale.
3. In order to increase transparency of proceedings, investigating authorities should include in public notices or in separate reports an explanation of the reason for the selection of a particular period of data collection if it differs from that provided in paragraph 1 of this recommendation, national legislation, regulation or established national guidelines.[10]
4. In determining whether dumping exists, Article 2.1 usually requires a comparison of the export price with the comparable price, in the ordinary course of trade, or the like product when destined for the consumption in the exporting country, whereas Article 2.3 authorises member to construct the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and the importer. Further Article 2.3 specifies that the export price may be constructed on the basis of price at which the imported products are first resold to an independent buyer. The price to the independent buyer is a starting point for the construction of an export price. It is not, however, itself the constructed export price. Nor does Article 2.3 itself contain any guidance regarding the methodology to be employed in order to construct the export price. The rules governing the methodology for construction of an export price are set out in Article 2.4 which provides that 'in the cases referred to in paragraph 3, allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made'.[11]

C. Sales in Ordinary Course of Trade

The term sales in 'ordinary course of trade' in Article 2 is a key phrase since Article 2.2.1 goes on to provide that sales in the domestic market of the exporting country, at prices below per unit (fixed and variable) costs of production plus

[10]G/A DP/6, para. 3.

[11]U.S.—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea-Panel Report, WT/DS24/R, Adopted 25 Feb. 1997, as modified by the Appellate Body Report, DSR 1997: I, para. 6.90–6.91.

administrative, selling and a general costs may be treated as not in the ordinary course of trade by reason of price and may be disregarded in determining normal value. Consequently, all export sales whether above or below total costs will be averaged to obtain export price, but only those domestic sales in the ordinary course of trade 'will be averaged to obtain normal value'. This skewing of the components of the average for export price and normal value may do much to diminish the fair comparison impact of Article 2.4.2's average to average and transaction to transaction comparison requirements.

D. Sales Below Cost

The 'sales below cost' in Article 2 is used to determine whether home market sales are 'in the ordinary course of trade', whereas Article 2.2.1 provides some specific rules governing the determination of sale below cost. Sales may be disregarded as being below cost, only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

E. Within an Extended Period of Time

In order to be disregarded, below costs sales would not have to occur throughout the entire period of time, only sometime 'within' it. However, if prices that are below cost at the time of sale are above weighted average per unit costs for the entire period of investigation, they will not be disregarded. Rather, they shall be considered to provide for recovery of all costs within a reasonable period of time.[12] As already stated, this 'reasonable period of time should normally be one year but shall in no case be less than six months'.

F. Substantial Quantities

Another important provision is footnote to Art 2.2.1, i.e. that sales below per unit costs are made in substantial quantities when it is established that the weighted average per unit costs or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value. This 20% requirement means that the below costs sales that occur only 'within' the extended period must be of some significance in overall volume.

G. Respondent's Records

Costs normally shall be calculated on the basis of records kept by the exporter or producer under investigation provided they are kept in accordance with generally accepted accounting principles of the country and provided further that they reasonably reflect the costs associated with the production or sale of the product. It was held that 'records kept by the exporter or producer under investigation' is alone

[12]Article 2.2.1.

applicable and not cost data prepared by an outside consultant on behalf of the producer.[13]

H. Start-up Costs

Several dumping determinations involving new facilities, subject to Tokyo Round Anti-dumping code 1980, proceedings, were criticised for not taking into account the startup nature of those new facilities. The Uruguay Round Code addressed the problem to a limited extent by providing that, 'costs shall be adjusted appropriately for those non-procuring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations'. This adjustment shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.[14]

I. Constructed Value

When there is no home market or third country sales on which to base a price comparison, constructed value are used. Value is 'constructed' from the materials and labour costs of the exported item, plus an amount for selling, general and administrative expenses (SG & A) plus profit. Calculation of SG & A and profit has been controversial. These calculations now are addressed in Article 2.2.2 which requires that 'they shall be based on actual data pertaining to production and sales in the ordinary course of trade by the exporter or producer under investigation'.

Use of the phrase under ordinary course of trade means that home market profit is calculated only from the 'actual data' pertaining to profits, paralleling their exclusion in the calculation of normal value.

The methodological options for calculating reasonable amount of profit as set out in the Code are as under:

(i) the exporter's profit and Particular General and Administrative Costs (G&A) on the same general category of products;
(ii) the weighted average amounts for others in the investigation; and
(iii) any other reasonable method.

The above three methods provide the alternative methods for calculating the profit amount which constitutes close approximation to the general rule set out in Article 2.2.2.

The production and sales amounts 'incurred and realised' have been interpreted such that sales not in the ordinary course of trade are excluded from the

[13]Panel Report on US Anti-Dumping Duty on Dynamic Random Access Memory Semi-conductors (DRAMS) of one Megabyte or Above from Korea, Panel Report, WT/D S99/R, Adopted 19 March 1999, DSR 1999: II, para. 6.66.

[14]Article 2.2.1.

determination of profit amount to be used in the calculation of a constructed normal value.[15]

J. Level of Trade

Article 2.4 mandates that 'the fair comparison' be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible at the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sales, taxation, levels of trade, quantities, physical characteristics and any other differences which are also demonstrated to affect price comparability.

The expression 'for differences affecting price comparability, including differences in terms and conditions of sales' was in question in US—Stainless Steel case. The USA treated export sales which had not been paid because the customer had gone bankrupt later, as 'direct selling expenses' and allocated these direct selling expenses over all US sales. The GATT Panel rejected US argument that the bad debts are expenses directly related to the payment terms of contract and the differences in conditions and terms of sale 'cannot be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales'. Further, 'Article 2.4 contains binding obligations regarding the scope of the permissible allowances that can be made in constructing an export price does not mean that equating allowances for differences which affect price comparability with allowances relating to the construction of the export price. Rather, the third sentence of Article 2.4 requires due allowance to be made for differences affecting price comparability, while that the fourth sentence provides that in the cases referred to in para. 3, i.e. when constructing an export price allowance for certain costs and profits should also be made. Finally, the fifth sentence of Article 2.4 makes clear that allowances relating to the construction of the export price could in fact reduce price comparability such that one of several compensating steps should be taken. For all these reasons, it is clear that allowances in respect of construction of export price are separate and distinct from allowances for differences which affect comparability and are governed by different substantive rules'.[16]

K. Exchange Rate

Article 2.4.1 of the Code requires that:

(i) any conversion of currencies necessary to make a comparison between normal value and export price be made using the exchange rate of exchange on the date of sale;
(ii) fluctuations in exchange rates be ignored;

[15]Appellate Body Report on EC-Anti-dumping Duties on imports of Cotton-type Bed Linen from India, WT/DS 141/AB/R, 12 March 2001, para. 80.

[16]US—Restrictions on Import of Cotton and Man-made Fiber Underwear, Panel Report, T/DS 24/R, Adopted 25 February 1997: I, as modified by the Appellate Body Report, WT/DS 166/AB/R.

(iii) hedging transactions directly related to the export sale be recognised; and
(iv) exporters be allowed at least sixty days to adjust prices to reflect sustained exchange rate movements.

Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule that conversion should be made using the rate of exchange on the date of sale and an exception to this general rule is for sales on forward markets. Article 2.4.1 establishes a principle that currency conversions are permitted only where they are required in order to affect a comparison between the export price and a normal value.[17]

L. **Zeroing**

In EC-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,[18] India challenged the European Communities practice of 'Zeroing' which has been summarised in the Report as follows:

First, the European Communities (EC) identified with respect to the product under investigation cotton-type bed linen certain number of different 'models' or 'types' of that product. Next, the EC calculated, for each of these models, a weighted average normal value and a weighted average export price. Then the EC compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was higher than export price; by subtracting export price from normal value from these models, normal value was lower than export price; by subtracting export price from normal value for these other models, the EC established 'negative dumping margin'. The 'negatives' and 'positives' of the amounts in this calculation are an indication of precisely how much the export price is above or below the normal value. Having made this calculation, the EC then added up the amounts it had calculated as 'dumping margins' for each model of the product in order to determine an overall dumping margin for the product as a whole. However, in doing so the EC conducted 'zeroing', i.e. any 'negative dumping margin' as zero. The consequences of this zeroing were an increase in the resulting dumping margin.

The panel held that the consequences of this 'zeroing' practice were inconsistent with the provisions of Article 2.4.2. The EC appealed this finding on the ground that the word 'comparable' in Article 2.4.2 indicates that, where the product under investigation consists of various 'non-comparable' types or models, the investigating authorities should first calculate 'margins of dumping' of each of the 'non-comparable' types or models, and then at a subsequent stage, combine those 'margins' in order to calculate an overall margin of dumping for the product under investigation. In the view of the EC, Article 2.4.2 does not provide any guidance as to how the second stage of this method, i.e. the combining of margins, should be put into practice. The Appellate Body stated with reference to the text of

[17]US Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and strip from Korea, Panel Report, WT/DS 179, Adopted 1 February 2001.

[18]Appellate Body Report, WT/DS 141/AB/R, Adopted 12 March 2001.

Article 2.4.2: 'From the wording of this provision, it is clear that the Anti-Dumping Agreement concerns the dumping of a product, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a product".[19]

Further, the Appellate Body disagreed with the EC argument that Article 2.4.2 can be read to refer to types or models of products and that it provides no guidance as to how to calculate an overall margin of dumping for the products under investigation. The 'existence of margins of dumping' for types or models of the product under investigation are not the concern of Article 2.4.2, rather all references to the establishment of 'the existence of margins' of dumping are references to the product that is subject of investigation.

Likewise, there is nothing to support the notion that in Article 2.4.2 in anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the Anti-Dumping Agreement, or to justify the distinctions the EC contends can be made among types or models of the same product on the basis of these two stages. Whatever the method used to calculate the margins of dumping, these margins must be, and can only be, established for the product under investigation as a whole.

The Appellate Body then examined the first method under Article 2.4.2 for establishing the existence of margins of dumping, i.e. the comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body found the EC practice of 'zeroing' inconsistent with this method.

The Appellate Body held that Article 2.4.2, first sentence, provides that 'the existence of margins of dumping' for the product under investigation shall normally be established according to one of the two methods. At issue in this case is the first method set out in that provision under which 'the existence of margins' of dumping must be established: '…on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions…'.

Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions. Article 2.4.2 speaks of all 'comparable export transactions'. When 'zeroing', the EC counted as 'zero' the 'dumping margins for those models where the 'dumping' margin was negative'. The EC for those models counted the 'weighted average export price to be equal to the weighted average normal value' despite the fact that it was, in reality, higher than the weighted average normal value. By 'zeroing' the 'negative dumping margins', the EC, therefore, did not take fully into account the entirety of the prices of some export transactions, namely those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found. Instead, the EC treated those export prices as if they were less than what they were. Thus, the EC did not establish 'the existence of margins of dumping for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted

[19]Appellate Body Report, WT/DS 141/AB/R, Adopted 12 March 2001, para. 51.

average prices of all comparable export transactions; that is, for all transaction involving all models or types of the product under investigation'. Furthermore, a comparison between export price and normal value that does not take into account the prices of all comparable export transactions such as the practice of 'zeroing' at issue in this dispute is not a fair comparison between export price and normal value as required by Article 2.4 and by Article 2.4.2.[20]

The word 'comparable' in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigation authorities to establish the existence of margins of dumping on the basis of 'a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions'.

The word 'comparable' in Article 2.4.2 relates to the comparability of export transactions; Article 2.4 deals more broadly with a 'fair comparison' between export price and normal value and 'price comparability'. Article 2.4 is also a useful context and the word comparable in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value.

Article 2.4.2 allows members in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the Anti-Dumping Agreement refers to dumping 'targeted' to certain 'models' or 'types' of the same product under investigation.

In US—Anti-Dumping Duty on Dynamic Random Access Memory Semi-conductor (DRAMS) of one Megabyte or above from Korea,[21] the Panel examined Korea's argument that Article 2.4.2 prohibits the following methods used by the US authorities:

(i) dividing a period of investigation into two subperiods corresponding to the pre- and post-devaluation periods;
(ii) calculating a weighted average margin of dumping for each subperiod; and
(iii) combining these weighted averages of margin of dumping, however, treating subperiods where the export price was higher than the average normal value as subperiods of zero dumping.

The Panel concluded that Article 2.4.2 requires a member to compare a single weighted average normal value to a single weighted average export price in respect of all comparable transactions. A member may, however, use multiple averages in cases where it has determined that non-comparable transactions are involved. In the context of weighted average to weighted average comparisons, the requirements that a comparison be made between sales made as nearly as possible at the same time require that as a general rule that the periods on the basis of which the

[20]Appellate Body Report, WT/DS 141/AB/R, Adopted 12 March 2001, paras. 55, 58.
[21]Panel Report, WT/DS 99/RW, 7 November 2000.

weighted average normal value and the weighted average export price are calculated must be the same.

The Panel in the above-cited case rejected the US argument that the 'same time' requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods, and stated:

'If the requirement to compare sales at 'as nearly as possible the same time', means that sales within an averaging period covering a 'period of investigation' are not comparable, then a member presumably would be obligated to break a 'period of investigation' into as many subperiods as possible. Yet to interpret the word 'comparable', when combined with the requirement that sales be compared, 'at as nearly as possible the same time', obligates members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Article 2.4.2 as authorisation to perform average to average comparisons out of the Agreement, leaving members with only the second option, the comparison of normal values and export prices on a transaction-by-transaction basis.

4 Determination of Injury

As already discussed, Article VI of the GATT provides that even if imports are being dumped, an anti-dumping duty may not be imposed against them unless their effect is to cause or threaten material injury to an established domestic industry or to 'retard materially' the establishment of a domestic industry. The Anti-Dumping Agreement provides in great details about how the government of the importing country has to decide whether injury has occurred or is threatened. Among the main points covered in the Agreement are the definition of 'domestic industry', whether the industry is being injured or threatened by injury, and whether the dumped imports are responsible for this injury. It is worth noting that the corresponding rules in the Uruguay Round Agreement on Subsidies and Countervailing Measures and procedural requirements are similar.

The Agreement prescribes that a determination of injury must be based on 'positive evidence' and involves an examination of both;

(a) the volume of the dumped imports and their effect on the prices in the domestic market for like products; and
(b) the consequent impact of these imports on domestic producers of like products.

So far as the volume of the dumped imports is concerned, the investigating authorities are to look at whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country.

The effect on prices may have to be studied by the investigating authority from several angles such as significant price cutting by the dumped imports; or are depressing price levels significant; or are preventing price increases that would have otherwise occurred.

Further, the combined impact of dumped imports coming from several supplying countries is expressly authorised. The investigating authority may cumulatively assess the effects of such imports from each country provided the margin of dumping on imports from each country included has been shown to be more than *de-minimis* as defined in paragraph 8 of Article 5 of the Agreement, and the volume of imports is not negligible. Dumping is *de-minimis*if it amounts to less than 2% of the export price. Imports are normally considered negligible if the supplying country accounts for less than 3% of the total imports of the product but if several countries with less than 3% a piece together account for more than 7% of the total import, their shares need not be regarded as negligible.[22]

The question of the impact of the dumped imports on the domestic industry demands a careful look at the state of the domestic industry. The Agreement provides a long, but nevertheless exhaustive list of factors to be considered. They include actual and potential decline in sales, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow; inventories; employment; wages; growth and ability to raise capital or investments; and also how large the margin of dumping is. The investigating authorities are also under an obligation to take into account factors other than the dumped imports which may be injuring the domestic industry and these factors include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[23]

The effect of the dumped imports is to be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of criteria such as; production process, producers sales and profits. In case the separate identification of that production is not possible, the effects of the dumped imports should be assessed by the examination of the production of the narrowest group or range of products, which includes the like products for which necessary information may be provided.[24]

The Agreement obligates a member that the determination of a threat of material injury must be based on facts and not merely on allegations, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

The investigating authority for determining the existence of a threat of material injury should consider, *inter alia*, such factors;

(i) whether there has been a significant rate of increase of dumped imports;
(ii) the capacity of the exporter to substantially increase dumped exports;

[22]Article 5.8.
[23]Article 3.5.
[24]Article 3.6.

(iii) the price of the imports which may have significant depressing or suppressing effect on domestic prices increasing the demand for further imports; and
(iv) inventories of the product investigated. Special care has to be taken by the authority when it is required to consider and decide the application of anti-dumping measures when injury is only threatened.[25]

The interpretation and application to Article 3 was laid by the Appellate Body in the Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland[26] as follows:

'Article 3 as a whole is concerned with obligations of members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a member's fundamental, substantive obligations. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Arts. 3.7 and 3.8).[27]

An injury determination conducted pursuant to the provisions of Article 3 of the Anti-Dumping Agreement must be based on the totality of that evidence. There is nothing in Article 3.1 which limits the investigating authority to base an injury determination only upon non-confidential information.[28]

In Guatemala-Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico,[29] Mexico claimed that Guatemala's investigating authority had violated Articles 3.1 and 3.2 by not considering at all, in its investigation, certain other cement imports. The Panel understood the Mexican claim to be that the Guatemalan authorities considered the type of cement under the not scrutinised imports as being 'unlike' the cement under the imports subject to investigation, an assessment which Mexico considered erroneous. Mexico further claimed that the erroneous exclusion of certain imports from the investigation resulted in the following consequences:

(i) the resulting volume of total imports of the product under investigation was lower;
(ii) the share of allegedly dumped imports in total imports of the product under investigation was artificially inflated;

[25]Articles 3.7 and 3.8.

[26]Panel Report, WT/DS 122/R, Adopted 5 April, 2001, as modified by Appellate Body Report, WT/DS 122/AB/R.

[27]Ibid., para. 106.

[28]Ibid., para. 107.

[29]Panel Report, WT/DS156/R, Adopted 17 November 2000.

(iii) the consideration of a faulty and incomplete figure for total imports of the product under investigation yielded a distorted figure for apparent domestic consumption; and
(iv) because of this incorrect figure for apparent domestic consumption, the relationship between the increase in dumped imports and consumption was ultimately incorrect.

The Panel considered that consequence (i) through (iv), if proven, would constitute a violation of Articles 3.1 and 3.2, in that an exclusion of the imports at issue from the figures for domestic consumption of the 'like product' affected the comparison that was made with the figures for volume of dumped imports relative to domestic consumption in the importing member. After reviewing the evidence submitted by Mexico and inconsistencies in Guatemala's replies in this regard, the Panel ultimately found that Mexico had established a *prima facia* case of inconsistency with respect to Articles 3.1 and 3.2.[30]

5 Definition of Domestic Industry

The definition of 'domestic industry' is important for the fact that dumping investigation could not normally be launched except in response to an application by or on behalf of the industry.[31]

> Article 4.1 provides that the term 'domestic industry' refers normally; 'to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products'.

There are two exceptions:

(i) producers who are related to exporters or importers, or who themselves are importers need not be included; and
(ii) in exceptional cases, the territory of a member may be divided into two or more competitive markets, and the producers in any single market may be treated as a separate industry.

Thus, injury to a regional industry is tantamount to injury to a national industry.

In exceptional circumstances, producers in a single regional market in the importing country are in effect largely isolated from the rest of the domestic producers, they may be dealt with separately but any anti-dumping measure taken should also be confined as far as possible to that region. When an injury has been found only on a regional basis, Article 4.2 specifies that anti-dumping duties may be levied only on goods destined for that region, unless the constitutional law of the importing member does not permit this. If there is a constitutional problem to limiting duties to the region, they may be levied nationally only if exporters have

[30]Panel Report, WT/DS156/R, Adopted 17 November 2000, paras. 8.269 and 8.272.
[31]Article 4.

been given an opportunity to cease exporting at dumped prices to the injured region, and only if duties cannot be confined to the products of specified producers which supply the region.

The Agreement requires further that when two or more countries in a regional trading arrangement covered by Article XXIV have reached the stage of being a single unified market, the industry of the entire area of integration shall be 'domestic industry' for the purpose of any anti-dumping investigation.[32]

6 Initiation and Subsequent Investigation

Article 5 of the Code provides for initiation of the proceedings to determine the existence, degree and effect of any alleged dumping by a written application by, or on behalf of the domestic industry. Such an application should include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 and (c) a causal link between the dumped imports and alleged injury. A government may also initiate an anti-dumping investigation in response to a request by a third country which claims that its own domestic industry is being injured.[33]

The Agreement requires that no investigation be started until the authorities are satisfied that the application is supported by the industry. The test for such industry support is that those in favour of an application:

(i) account for more than 50% of the total production of the product concerned by those domestic producers expressing views, either for or against the application; and
(ii) also account for at last 25% of total domestic production of the product.

The application for initiating the proceedings should contain information, *inter alia*, such as;

(i) the identity of the applicant, the description of the volume, and the value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application has been made as well as the description of the volume and value of the domestic production of the like product accounted for by such producers;
(ii) a complete description of the allegedly dumped product, the names of the country, or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin

[32]Articles 4.1, 4.2 and 4.3.
[33]Article 5.

or export (where appropriate information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing member; and

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry.

It is incumbent on the authorities to examine the accuracy and adequacy of the evidence provided in the application to justify an investigation. The Panel in a case[34] had the opportunity of interpreting and applying Article 5 of the Agreement. The Panel by examining Mexico's claim that Guatemala's authority in violation of Articles 5.2 and 5.3, had initiated the anti-dumping investigations without sufficient evidence to justify the initiation, and the Panel interpreted Article 5.2 with reference to Article 5.3, stating that evidence on the… elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2.

In considering what information regarding the existence of a causal link must be provided in an application pursuant to Article 5.2, the Panel on Mexico Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the USA[35] found that the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicants need only provide such information as is 'reasonably available' to it with respect to relevant factors. Such information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations. This information would generally be available to applicants.[36]

The appropriate legal standards under Article 5.3 were interpreted[37] to mean that the authority to examine, in making the anti-dumping determination, should examine the adequacy and accuracy of the evidence in the application. Adequacy and accuracy of the evidence are relevant to the investigating authority determination, whether there is sufficient evidence to justify the initiation of an investigation. It is however, the sufficiency of the evidence and not its adequacy and accuracy, *per se*, which represents the legal standards to be applied in the case of a determination whether to initiate an investigation.[38]

Article 5.8 requires that investigations should be terminated if dumping margins are *de minimis* defined as 2% of the volume of dumped imports, actual or potential, or the injury is negligible. The volume of dumped imports is regarded negligible if it is less than 3%, or collectively account for less than 7%.

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[34]Panel Report, WT/DS156/R, Adopted 17 November 2000.

[35]Panel Report, WT/DS/32/R and Corr. I, Adopted 24 February 2000.

[36]Article 7.3–7.4.

[37]Panel Report, WT/DS156/R, Adopted 17 November 2000.

[38]Ibid., para. 8.31.

An anti-dumping proceeding shall not hinder the procedures of customs clearance. Investigations should be concluded within a period of one year, except in special circumstances in which case the deadline is eighteen months.[39]

7 Evidence

Article 6 read with Annex I[40] and II,[41] provides for procedures and rules of evidence for an anti-dumping investigation.

Once the investigation is launched, public notice of such investigation has to be given. Interested parties, including the exporting WTO member and known exporters, must be supplied with the text of the application, with the exception of confidential information, and given adequate opportunities to submit information and make comments. The key element for gathering factual information is a questionnaire, to which exporters and foreign producers must be given at least 30 days to reply. All interested parties are to be allowed to see the substance of replies, again with the exception of confidential information. A further requirement that opportunities be provided, on request, 'for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered', is normally met by public hearings. The anti-dumping authorities may with the agreement of firms and member concerned carry out on the spot investigations or verification in other countries. If an interested party does not give information within a reasonable period of time, determination may be made on the basis of facts available. However, this right to use the best information available is circumscribed by a set of extra-rules designed to ensure that it is not abused. The authorities must warn that if information is not provided, they may act on the facts available; they should be reasonable in accepting information if the interested party has acted to the best of this ability, even if it is not ideal in all respects; they should give an opportunity to provide further explanations if they propose to use the 'best information' available rule, and should be particularly careful in using information drawn from secondary sources. Finally, the Agreement requires that domestic consumers, as well as producers, will have an interest in whether the imported product is subjected to anti-dumping duties. Industrial uses of the product, and consumer organisations, are to have the opportunity to provide information on the three questions of dumping, injury and causality.

A. Facts Available

As Article 6.8 authorises the use of 'facts available' when a party refuses access to, or otherwise does not provide, necessary information within a reasonable period of

[39]Article 5.10.

[40]Annex I—Procedures for on the Spot Investigations Pursuant to Paragraph 7 of Article 6.

[41]Best Information available in terms of paragraph 8 of Article 6.

time or when a party significantly impedes the process, Annex II to the Article places limitations on such a practice. Annex II provides that;

(i) respondents should be advised from the outset of the information required;
(ii) while computerised responses may be required, parties should not be required to use other than their own computers;
(iii) all information appropriately submitted should be taken into account in reaching decisions, and information that is less than 'ideal in all respects' should be used if the supplying party has acted to the best of its ability;
(iv) if information is not accepted, the supplying party should be informed of the reasons for rejection, and given an opportunity to provide further explanations within a reasonable time; and
(v) if information other than that supplied by a respondent is used, the authorities should check it against independent sources where practicable.

B. **Sampling**

Article 6.10 requires that 'as a rule' individual dumping margins be determined for each known exporter or producer. However, where the number of exporters, producers, importers or types of products involved is so large as to make calculation of individual dumping margins impracticable, a sample of exporters or types of products, 'statistically valid' on the basis of information available to the authorities at the time of selection may be used.

C. **Users and Consumers**

Interested parties in the Agreement have been defined to include;

(i) an exporter or foreign producer, or the importer of a product subject to investigation or a trade or business association, a majority of members of which are producers or importers of such product;
(ii) the government of the exporting member; and
(iii) producer of the like product in the importing member or a trade business association, a majority of members of which produce the 'like product' in the territory of the importing member.[42]

Where the investigated product is commonly sold at the retail level, industrial users and representatives of the consumer organisations be given an opportunity to provide information which is relevant to the investigation regarding dumping, injury and causality.

[42]Article 6.11.

8 Provisional Measures

Article 7 of the Agreement authorises provisional measures against allegedly dumped imports no sooner than sixty days after initiation of the investigation. These measures may take the form of a provisional duty, but preferably will be a security such as a cash deposit or bond. The application of provisional measures shall not exceed four months, unless exporters representing a significant percentage of the trade request a longer period which shall not exceed six months. However, if the authorities examine the issue of whether a lower duty than the margin of dumping would be sufficient to remove the injury, these periods may be extended to six and nine months, respectively.[43]

9 Price Undertakings

The Agreement offers, but does not impose, the possibility of settling an anti-dumping case by a voluntary 'price undertaking' by which an exporter agrees to revise his prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. No such undertaking can be sought or accepted unless a preliminary determination of dumping and consequent injury has been made. An important reason for these limitations is to discourage return through the back door of the 'voluntary export restraints' now banned under the Uruguay Round Agreement on Safeguards.[44]

10 Imposition and Collection of Anti-dumping Duties

It is not mandatory to impose final measures once an affirmative final determination of dumping, injury, and causality has been made. Nor is it mandatory to impose a final measure at the level of full margin of dumping. In fact, it is desirable that the imposition of measures be permissive and that measures be imposed at a lesser level than the margin of dumping if such a lesser duty would be adequate to remove the injury.[45]

Accordingly Article 9.1 of the Agreement provides: 'The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are

[43]Article 7.

[44]Article 8.

[45]Article 9.

decisions to be made by the authorities of the importing member. It is desirable that the imposition is permissive in the territory of all members, and the duty is less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry'.

Thus Article 9.1 makes it clear that the duties need not be imposed in every investigation, even if all the requirements are satisfied and encourage the imposition of duties in amounts or rates lower than the dumping margins but sufficient to offset injury.

When applying a final anti-dumping duty, it is necessary that members must follow the crucial requirement that the duty must not exceed the margin of dumping, and shall be imposed on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except on imports from sources from which price undertakings have been accepted.[46]

Article 9.3 also imposes time-limits on the retrospective review process. It calls for determination of the final duty liability as soon as possible, normally within twelve months, and in no case more than eighteen months after the review begins.

Final duties may not, with one exception, be applied retroactively (i.e. to goods that entered the country before the provisional measures were taken). The exception permits the duties to be applied to goods which entered during the 90 days prior to the imposition of preliminary measures (but not before the date of initiation) if two criteria are met, viz

(i) there has been a history of injurious dumping, or the importer was or should have been aware that the goods were dumped and would cause injury; and
(ii) 'massive dumped' imports have created a situation likely to undermine the effect of the final duty.[47]

There is no requirement, however, to impose a duty, even if dumping, injury and causality have all been demonstrated, and members are encouraged to impose a duty no greater than is needed to remove the injury to the domestic industry.

11 Duration and Review of Anti-dumping Duties and Price Undertakings

According to Article 11, an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Further, Article 11 calls for two kinds of reviews that differ from periodic reviews to recalculate dumping margins. First, after a reasonable time has elapsed since the imposition of the definitive anti-dumping duty, an interested party shall have the right to request that the authorities examine whether the continued imposition of

[46]Article 9.3 and Article 9.2, respectively.
[47]Article 10.6.

duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.[48]

Second, Article 11 provides for a new and possibly significant 'sunset review', pursuant to which definitive anti-dumping duties shall be terminated after five years:

> '…unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury'.

It is important to note that members whose legislation contains anti-dumping provisions are required to maintain independent 'judicial, arbitral or administrative tribunals' to permit prompt review of administrative actions concerning final anti-dumping determination and the need to maintain anti-dumping duties.[49]

Article 11 has been interpreted by the DSB as follows:

(i) The anti-dumping duties 'shall remain in force only as long as and to the extent necessary' to counteract injurious dumping, as a 'general necessity requirement'.
(ii) The relationship between Articles 11.1 and 11.2 by considering whether the terms of Article 11.2 preclude the continued imposition of anti-dumping duties on the basis that an authority fails to satisfy itself that recourse of dumping is not likely. The application of general rule in Article 11.1 is specified in Article 11.2.
(iii) Article 11.3 is particularly relevant in giving support for, and reinforcing, its interpretation of Article 11.2 regarding the issue whether Article 11.2 precludes an anti-dumping duty being deemed 'necessary to offset dumping'. Where there is no present dumping to offset, an interpretation of Article 11.2 which renders part of Article 11.3 meaningless is contrary to the customary or general rules of treaty interpretation and thus should be rejected.[50]

12 Public Notice and Explanation of Determination

Once the authorities are satisfied that there is sufficient evidence to initiate an anti-dumping investigation, a public notice of the same has to be given to the member or members the products of which are subjected to such investigation and all other interested parties having interest in such investigation. Such a public notice must contain, *inter alia*, name of the exporting country and the product, the date of the investigation, the basis on which dumping is alleged, or summary of factors on

[48] Article II.

[49] Article 13.

[50] Panel Report, WT/DS156/R, Adopted 17 November 2000.

which the allegation of injury is made, the address of the authorities to which reply by the interested parties could be provided and the time limits to the interested parties for making their views known.

Also, if there is any preliminary or final determination, whether affirmative or negative, or a decision to accept an undertaking under Article 8 of the Agreement, a public notice of the same should be given setting forth in sufficient detail the findings and conclusions reached on issues of law and fact which in return should be forwarded to the member or members, the products of which are subject to anti-dumping investigation.

In case the authorities have decided to impose provisional measures, in pursuance of the preliminary determinations on dumping and injury, again the authorities have to issue a public notice which should, *inter alia*, contain the names of the suppliers, or supplying countries; a description of the product which is sufficient for customs purposes, the margin of dumping and the explanation and methodologies used for arriving the same, other considerations relevant for determining injury under Article 3 and the main reasons leading to the determination.

In case of an affirmative determination, providing for the imposition of a definitive duty or the acceptance of a price undertaking, a public notice as described above has to be given and the same is true with regard to termination or suspension of an investigation following the acceptance of an undertaking in pursuance of Article 8 of the Agreement.[51]

13 Anti-dumping Action on Behalf of a Third Country

Article 14 permits but does not require, members to initiate anti-dumping investigations at the behest of third countries, and such an application by the authorities of the third country alleging dumping must place on record detailed information to show that alleged dumping is causing injury to the domestic industry in third country. In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry as a whole in the third country. The injury shall not be assessed in relation to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.[52]

[51]Articles 3 and 8.

[52]Article 14.

14 Developing Country Members

There is no provision in the Anti-Dumping Agreement that specifies different rules for the treatment of imports from the developing countries. However, Article 15 contains the WTO's mandatory obeisance to the 'special situation of developing country members'. It speaks of 'special regard' and 'constructive remedies' and 'essential interests' to be taken into account where the application of anti-dumping duties would affect their essential interests.[53]

15 Committee on Anti-dumping

The Committee on Anti-dumping practices is established under Article 16, which is composed of representatives of each of the members and has the responsibility assigned to it by the Agreement or by the members of the Agreement for which the WTO Secretariat acts as a secretariat of the Committee. The Committee may set up separate bodies as it deems appropriate. The Committee is generally responsible for supervising the operations of the Agreement and receives reports of anti-dumping actions taken.[54]

16 Consultation and Dispute Settlement

Basically, so far a dispute settlement is concerned, dumping itself cannot be a matter of complaint, since dispute action can only involve the member governments, and dumping by definition is an action of individual exporters. However, in cases where the members believe that an anti-dumping action taken by another member is not in conformity or inconsistent with the provisions and requirements of the Agreement on Dumping, such a complaint may be handled by the DSU of the WTO.[55]

Article 17.6 of the Agreement provides 'standard of review' which a dispute panel is to apply when examining a member's handling of an anti-dumping dispute. The provisions of Article 17.6 require that panels should defer the factual situations reached by the authorities if the establishment of facts was proper and the evaluation was unbiased by the authorities even though the panel has rightly reached a different conclusion. Moreover, if the panel finds that a provision of the Agreement admits of more than one permissible interpretation, it must accept a measure that rests on one of these interpretations. The panel shall interpret the relevant

[53]Article 15.

[54]Article 15.

[55]Article 17.

provisions of the Agreement in accordance with customary rules of interpretation of public international law.

Once the DSU is put to motion, the DSB at the request of the complaining party, has to establish a panel to examine the matter based upon; (i) a request indicating how the benefits directly or indirectly accruing to the disputant member have been nullified or impaired or the objectives of the Agreement are impeded; and (ii) facts alleged are in conformity with the domestic procedures of the authorities of the importing member. Accordingly, the procedure of the DSU of the WTO will be applied to the above situations.

In the case of US—Anti-Dumping Act of 1916-Complaint by the EC and Japan,[56] it was held that Article 17 of the Anti-Dumping Agreement addresses dispute settlement under the Agreement. Just as Article XXII and XXIII of the GATT 1994 create a legal basis for claims in disputes relating to provisions of GATT 1994, so also Article 17 establishes the basis for dispute settlement claims relating to the provisions of the Anti-Dumping Agreement. In the same way, Article XXIII of the GATT 1994 allows a WTO member to challenge legislation as such. Article 17 of the Anti-Dumping Agreement is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such express exclusion is found in Article 17 or elsewhere in the Anti-Dumping Agreement.[57]

17 Final Provisions

No specific action against dumping of exports from another member can be taken except in accordance with the provisions of GATT 1994 as interpreted by this Agreement. No reservations can be entered in respect of any of the provisions of this Agreement without the consent of the other members. Since this would have to be a unanimous requirement, consent of the members is not likely. As the Code applies only to investigations and reviews initiated on or after the date of entry into force of the WTO Agreement, accordingly actions taken after the Code came into force, but action taken prior to that time, are not subject to the Code, as a result of large number of investigations initiated prior to the effective date of the Code are beyond its coverage, even though the determination of those proceedings have been made after the Code came into force.

[56]Panel Report, WT/DS/36/R and Corr. I, Adopted 26 September 2000 as upheld by Appellate Body Report, WT/DS/36/AB/R, WT/DS/62/AB/R.

[57]Ibid., para. 62.

18 Anti-circumvention

The Agreement on Anti-Dumping is altogether silent on an issue which was discussed at length in the Uruguay Round of Tariff negotiations, both the legitimacy or otherwise of the anti-circumvention action. Suppliers have sometimes been accused of attempting to avoid the imposition of anti-dumping duties which would otherwise be payable by shifting the source of supply of a product, or by carrying out final assembly of the product in the importing country or a third country. Importing countries have responded by imposing duties on the parts and components to be assembled, or by other means. Therefore, a Ministerial Decision adopted in Marrakesh recognises that uniform rules on anti-circumvention action are desirable and calls for the Anti-Dumping Committee to resolve the matter.[58]

[58]Decision on Anti-Circumvention, Adopted in Marrakesh, 15 April 1994.

Chapter 8
Agreement on the Implementation of Article VII of GATT 1994 (Customs Valuation Agreement)

Valuation for Customs Purposes (Article VII)

The bare provisions of Article VII (valuation for customs purposes) are reproduced as under:

1. The contracting parties recognise the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties' reports on steps taken by them in pursuance of the provisions of this Article.
2. (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.
   (b) 'Actual value' should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_8

(c) When the actual value is not ascertainable in accordance with subparagraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.
4. (a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognised by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.
   (b) Where no such established par value and no such recognised rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.
   (c) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the CONTRACTING PARTIES, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.
   (d) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amount of duty payable.
5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

Interpretative Note Ad Article VII from Annex I

Paragraph 1

The expression 'or other charges' is not to be regarded as including internal taxes or equivalent charges imposed on or in connection with imported products.

Paragraph 2

1. It would be in conformity with Article VII to presume that 'actual value' may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of 'actual value' and plus any abnormal discount or other reduction from the ordinary competitive price.
2. It would be in conformity with Article VII, paragraph 2(b), for a contracting party to construe the phrase 'in the ordinary course of trade… under fully competitive conditions', as excluding any transaction wherein the buyer and seller are not independent on each other and price is not the sole consideration.
3. The standard of 'fully competitive conditions' permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.
4. The wording of subparagraphs (a) and (b) permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.

1 General

The principles of valuation for customs purposes are important not only from the point of view of fairness among importers, but have an added protective impact on cases where tariffs are bound. The differing customs valuations of member countries of WTO may either erode the tariff concession or escalate the tariffs with the result the tariff negotiations may lose much of their importance. Also, there are economic arguments which lead to the conclusion that any uncertainty in customs tariffs, its valuation or customs delay, amounts to non-tariff barriers. Hence, there has been a long history of obtaining an international co-operation to reduce if not eliminate the inefficiencies and the protectionist incidents of customs valuation and its administration and formalities.

Article VII of GATT 1947 read with WTO Agreement on Implementation of Article VII of GATT 1994 not only recognises the importance of customs valuation in international trade but also provides uniformity and certainty while applying the customs valuation rules. Further, the WTO Agreement on Implementation of Article VII of GATT 1994 recognises the need for fair, uniform and neutral system for valuation of goods for customs purposes, as well as the valuation procedures should not be used to combat dumping. The WTO Agreement on Implementation of Article

VII (Customs Valuation) 1994 is a detailed agreement covering major aspects of customs valuation such as methods of actual transaction value and identical goods, similar goods, hierarchical rules, methods of deducted and computed values, standards of data, exchange rate calculations, royalties and license fees etc.

GATT 1994 established five obligations in respect of customs valuation for member countries:

(a) Validity of valuation principles which are obligatory on member nations of GATT;
(b) Obligation of each member of GATT, to review at the request of another member, the operation of its customs valuation methods;
(c) Outer limits for the permissible method of valuation which should be fair, uniform and neutral;
(d) Where the conversion of currency is necessary for the determination of customs value, the rate of exchange to be used shall be duly published by the competent authorities of the country of importation concerned; and
(e) The methods as incorporated in the Agreement on Customs Valuation 1994, the members choosing any of them must give sufficient publicity and to maintain those methods with a reasonable degree of certainty.

It is also obligatory on the member nations of GATT 1994 that the value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

Where it is necessary for the purposes of determining actual value for customs purposes of imported merchandise to convert it into its own currency price expressed in the currency of another country, the conversion rate of exchange shall be that of par value as determined by the IMF.

The WTO's promotion of unified customs valuation is an important aspect of its mandate to foster more efficient international trade by establishing worldwide standards of fairness, consistency and non-discrimination. Enhanced co-operation among national customs administration is needed in particular in this area of globalisation. If customs administrations are to meet the challenges of the new global environment, they must co-operate effectively on a worldwide level. Early in the 20th century, various groups interested in promoting international trade began to study ways of replacing the diverse and arbitrary national practices of customs valuation with an international system that would be neutral in its effects on competition as well as on trade policy. Several initiatives were organised under the auspices of the League of Nations, but they all proved futile. It was not until 1947 that the first agreement on general principles of customs valuation was reached and embodied in Article VII of the General Agreement on Tariffs and Trade (GATT), 1947. Article VII of the GATT, provides that the customs valuation of goods;

- should be based on the actual value of the goods;
- should not be based on the value of goods of national origin or arbitrary or fictitious values; and
- should be the price at which such or similar goods are sold in the ordinary course of trade under fully competitive conditions.

Article VII of the GATT permitted a choice between notional and positive concepts of customs valuation, but the general principles it established afforded no specific guidance on how these principles were to be applied in practice.

The Brussels Convention of 1950, which was the next major advance in international co-operation, set forth a definition of dutiable value deemed suitable for worldwide adoption, the so-called 'Brussels Definition of Value' (BDV). The BDV was the first truly international system of customs valuation, but it was not regarded as fully satisfactory. It left too much of discretion to national customs administration leading to uncertainty in application. The BDV had adopted a truly artificial and purely theoretical approach to valuation, divorced from the concrete realities of business practices. It also lacked precision which led to the lack of uniformity in applying the BDV. It failed to achieve universal acceptance as USA and Canada never accepted it. It failed to adapt to new developments in international trade for the reason that it contained a rigid procedure for its amendment.

Agreement on Customs Valuation Code as negotiated in the Tokyo Round (1973–79) was non-starter. However, during the Uruguay Round, the Code was re-examined, principally to see whether some adoption, without changing its basic principles, might make it more attractive to developing countries. The outcome was a minimally revised new agreement, supplemented by two Ministerial Decisions designed to ease developing- countries fears that the rules would not fully meet their needs. In this Round, the European Community, the USA, Canada and Australia all supported the 1979 Agreement. Only the developing countries opposed. The Customs Valuation Agreement as it emerged from the Uruguay Round was unchanged in all its essentials.

The principal difference between the 1979 and the 1994 Agreement is that whereas only some countries had joined the Tokyo Round Customs Valuation Code, all member states of the WTO (as well as any future members) are now bound by the 1994 Code under the integrated GATT/WTO system, and that the WTO Dispute Settlement Mechanism is expressly made applicable to controversies concerning customs valuation.

2 Administration of the WTO Customs Valuation Code

The methods and criteria of valuation set forth in the Code make it predictable that certain recurrent problems must be dealt with by countries which adopt and implement its system. The technical nature of the agreement is clear at a glance: it's Annex I, consisting of interpretative notes to guide the user, occupies as much space

as the 24 Articles of the Agreement itself. This degree of detail is in fact what gives the Agreement its authority, since it reduces the opportunity for arbitrary valuation. The basic principles underlying the valuation systems are set out by the General Introductory Commentary, which clarifies the structure of the Agreement and the relationship between its articles, and also emphasises the importance of consultation between the customs administration and the importer.

Six alternative methods of valuing goods for customs purposes are set forth by the Code. They are to be applied in a strict hierarchy; only if customs value cannot be determined under the first method may the authorities use the second method; only if this second method is inapplicable may they move to the third, and so on. The starting point for valuation-the priority method—bases customs value on the transaction value, the price actually paid for the goods when sold for export to the country of importation. The successive alternatives establish the valuation instead by the transaction values of identical or similar goods, by looking at sale prices or production costs, or finally by a fallback method which gives greater flexibility but excludes several possible approaches to valuation.

The scope of the Code is limited to the valuation of goods for the purpose of levying *ad-ad valorem* customs duties on imports. This is not as strict a limitation as it may appear. Most countries levy few, if any, duties on exports and by definition no valuation is required for the comparatively small proportion of duties that are levied on a specific basis (for instance, according to the quantities or weight of the imported goods). Although the rules are not formally applicable to valuation for tax purposes or foreign exchange control, there is nothing to stop them from being used for such purposes, if national administrations so decide.

3 Method of Actual Transaction Value[1]

The primacy of transaction value as the valuation method is made clear in Article 1 of the Agreement, whose opening words, 'The customs value of imported goods shall be the transaction value that is the price actually paid or payable for the goods when sold for export to the country for importation'. These words are qualified by a number of provisions, which may in fact make it necessary to move on to the second valuation method, but the preference for the transaction value is clear. Royalties and license fees not actually included in the price paid or payable should be added. Other adjustments are also permitted. Article 1 is to be read together with Article 8 which provides, *inter alia*, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are required by the buyer but are not included in the price actually paid or payable for imported goods.[2]

[1]Article 1

[2]Article 8.

However, certain circumstances listed in Article 1 may justify the customs authorities in doubting whether the transaction value of the goods can be used as a fair basis for levying duties. These may include the absence of an actual sale, restrictions attached to a sale, conditions or considerations whose value cannot be established, or arrangements by which some part of the proceeds of resale will be passed back to the original seller.

One source of possible concern is a situation in which the buyer and seller are related, a situation which in fact arises frequently, since much of international trade takes place between different elements of the same company under one agreement. The fact that the buyer and seller are related is not in itself a ground for regarding the transaction price as unacceptable, what matters is that the relationship does not influence the price. If the customs authorities have doubts on this point, they must give the importer an opportunity to demonstrate that the price is fair, by showing that it is close to a previously accepted price for identical or similar goods.

A. Method of Transaction Value of Identical Goods[3]

If and only if the customs authorities conclude, on the basis not only of Article 1 but also of interpretative notes, that the transaction price of the goods cannot be used as the basis of valuation, they may move to the second valuation method. In applying Article 2, the customs administration shall, wherever possible use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:

(a) a sale at the same commercial level but in different quantities;
(b) a sale at a different commercial level but in substantially the same quantities; or
(c) a sale at a different commercial level and in different quantities.

Having found a sale under anyone of these three conditions, adjustments will then be made, as the case may be, for;

(a) quantity factors only;
(b) commercial level factors only; or
(c) both commercial level and quantity factors.

A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustments, e.g., valid price lists contain prices referring to different levels or different quantities. If more than one price for identical goods is found, the lowest of these prices must be used for valuation.

[3]Article 2.

B. Method of Transaction Value of Similar Goods[4]

The third method, for use if the second cannot be used, is almost the same but bases valuation on the transaction value of the most closely similar, rather than identical goods. Similar goods need not be 'alike' in all respects to the goods being valued, but they will have like characteristics and component materials, which allow them to perform the same functions and be commercially interchangeable, and will have been produced in the same country (and normally by the same producer) as the goods being valued. Once again, there are lengthy interpretative notes on such matters as the adjustments that they may have to be made to allow for the quantities or commercial factors being different in the case of the sale of the similar goods from those of the goods being valued.

C. Exception to Hierarchical Rule[5]

The sole exception to the strict hierarchy of valuation methods concerns the fourth and fifth alternatives. Article 4 of the Code provides that if the customs value of the imported goods cannot be determined under the provisions of transaction value or similar or identical provisions then the customs value shall be determined according to the provisions of Article 5 or when the customs value cannot be determined under that Article, under the provisions of Article 6. But if the importer so requests fifth method may be tried before the fourth.

D. Method of Deductive Value[6]

Under the deductive value method, valuation is based on the resale price of the goods being valued or similar goods sold in the same country of importation at or about the same time to persons unrelated to the seller who have exported the goods. The resources required for application of the deductive value method reflect the fact that this method entails making appropriate deductions necessary to reduce the price to relevant customs value at the point of importation or exportation as the case may be.

The profit and general expenses under this method should be taken as a whole. This figure should be determined on the basis of information supplied by or on behalf of the importer unless the importer's figures are inconsistent with those obtained in sales in the country of importation of imported goods of the same class or kind. Where the importer's figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.

The question whether certain goods are of the same class or kind as other goods must be determined on a case by case basis by reference to the circumstances involved taking into account the commissions or the usual profits and general expenses. Sales in the country of importation of the narrowest group or range of

[4]Article 3.

[5]Article 4.

[6]Article 5.

imported goods of the same class or kind, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purpose of deductive method, goods of the same class or kind include goods imported from the same country as the goods being valued as well as goods imported from other countries.

Deductions made for the value added by further processing shall be based on objective and quantifiable data relating to the cost of such work. Accepted industry formulas, receipts, method of construction and other industry practices would form the basis of calculations. The deduction value would normally not be applicable when, as a result of the further processing, the imported goods lose their identity.

E. **Method of Computed Value**[7]

In order to determine a computed value, it is necessary to examine the costs of producing the goods being valued and other information which has to be obtained from outside the country of importation. In most of the cases, the producer of the goods will be outside the jurisdiction of the authorities of the country of importation. The use of the computed value method is generally limited to those cases where the buyer and seller are related and the producer is prepared to supply the authorities of the country of importation the necessary costing and to provide facilities for any subsequent verification which may be necessary.

F. **Fallback Method**[8]

Only if none of the above five methods can be applied may the customs authorities fall back on the other means of establishing the value of the goods being imported. Article 7 of the Agreement requires that the value be determined 'using reasonable means consistent with' the Code and GATT Article VII, and on the basis of data available in the importing country.

Customs value shall not be determined under this method on the basis of—

(a) the selling price in the country of importation of goods produced in such country;
(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
(c) the price of goods on the domestic market of the country of exportation;
(d) the cost of production other than company values which have been determined for identical or similar goods in accordance with the computed value;
(e) the price of the goods for export to a country other than the country of importation;
(f) minimum customs value; or
(g) arbitrary or fictitious value.

[7]Article 6 of the Agreement.
[8]Ibid.

4 Guidelines on 'Objective and Quantifiable Data' and on Accounting Standards[9]

The Customs Valuation Code's preferred use of the actual transaction value method is conditional on the availability of objective and quantifiable data from the importer to substantiate additions required to be made under Article 8 of the Code. This means

that even if an importer has truthfully declared the actual value of imported goods, the value declared will not be acceptable to the customs authorities under the actual transaction value method if no data has been submitted to substantiate additions to the price included in the declared value. However, the Code provides no concrete and specific definition of the term 'objective and quantifiable data'. To ensure fairness and uniformity in administration, customs officials need to be furnished with a guideline that sets out a practical definition on which they can rely in decision making.

One approach of defining 'objective and quantifiable data' is to treat this expression as meaning information sufficient to demonstrate the truth and accuracy of the value declared by the importer. Even if an importer submits information which tends to substantiate the basis for the declared value, a calculation of value will not be acceptable to the customs administration under the actual transaction value method if it is not prepared in accordance with generally accepted accounting principles in the country of importation.

In other words, even if the declared value corresponds to 'objective and quantifiable' evidence, it may nevertheless be regarded as an 'inaccurate' or 'untrue' value, unless the data in question conforms to generally accepted accounting principles, by which is meant rules and interpretations of accounting established by recognised consensus of the accounting profession within the county of importation at that particular time.

5 Exchange Rates[10]

Other rules in the code concern the exchange rates to be based for currency conversions involved in establishing customs value. Article 9 of the Code provides that the rate of exchange to be used should be duly published by the importation country in respect of the period covered by such document of publication. Article 10 of the Code further provides that all information which is confidential in nature shall be treated confidential in strict sense of the term.

[9]Article 8.

[10]Article 6.

If, in the course of determining the customs value of the imported goods, it becomes necessary to delay the final determination of such customs value, the importer can withdraw the goods, if he/she can provide sufficient guarantee in the form of surety.

6 Customs Valuation for Related Party Transactions

One of the most difficult matters in customs valuation practice is how to appraise dutiable value in transactions between related parties, especially in international sales between different entities under the common control of a single multinational enterprise. For the purpose of this Code Article 15.4 provides that following persons shall be deemed to be related only if;

(a) they are officers or directors of one another's business;
(b) they are legally recognised partners in business;
(c) they are employer and employee;
(d) any person directly or indirectly owns, controls or holds five per cent or more of the outstanding voting stock or shares of both of them;
(e) one of them directly or indirectly controls the other;
(f) both of them are directly or indirectly controlled by a third person;
(g) together they directly or indirectly control a third person; (h) they are members of the same family.

The mere fact that the importer and exporter are related companies within the meaning of Article 15.4 of the Code does not in itself suffice for the customs administration to reject the declared transaction value. Even though the customs administration may presume or suspect that the relationship between the parties probably influenced pricing, the burden of proof to demonstrate that the price is not an 'arm's-length' value rests upon the customs administrations. In the event that the customs administration has no objective evidence tending to prove that the relationship influenced price, the importer may successfully challenge the valuation in litigation and a court may summarily rule against the customs administration in the absence of proof.

If any of the following elements is disclosed in the factual details of a related-party transaction based on the information and documents submitted by the importer, then there would be some reason to suspect that the relationship between the parties had influenced the price:

(i) the price is determined in a manner different from the ordinary way in which prices are determined between unrelated parties;
(ii) the amount of profit or general selling expenses incurred by an importer in a related party transaction is considerably higher than in similar transactions between unrelated parties; or

(iii) the declared import price is uniformly low in comparison to prices observed in on-going transactions in the same items between unrelated parties.

However, there also exist situations in which a declared transaction value is acceptable between related parties. This is the case when the importer can demonstrate that the declared value closely approximates one of the following, taken at or about the same time:

(a) the transaction value in sales to unrelated parties in the same country of importation of identical or similar goods;
(b) the customs value of identical or similar goods as determined under the deductive value method; or
(c) the customs value of identical or similar goods under a computed value method.

In applying the above tests, due account is to be taken of demonstrated differences in commercial levels, in quantities, in the elements enumerated in Article 8 of the Code and in costs incurred by the seller for sales to unrelated parties which are not incurred in sales to related parties.

7 Calculation of Profit and General Expenses

Calculation of an accurate figure for commissions, profit or general selling expenses in the country of importation for goods of the same class or kind can pose manifold problems for customs authorities. The Interpretative Notes to the Code indicate that 'sales of imported goods of the same class and kind should be examined and clarifies that imported goods include not only similar goods imported from the same country as the goods under valuation, but also goods imported from third countries. Such investigations are not easy to conduct. Therefore, customs administration conduct the calculations based on a range of values rather than on specific figures.

8 Royalties and License Fees

If the money paid for goods includes payment not only for goods themselves, but also for a right that is closely related to the goods such that the additional payment is a condition of importation, then the customs value will include all relevant payments in the total price of the goods. The price actually paid or payable for goods includes all payments or performances of value passing from the buyer to the seller.

Article 8.1(c) of the Code provides 'royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable'.

9 Burden of Proof

The allocation of the burden of proof between the customs administration and importers is an important requirement, given that they have often been accused of arbitrarily shifting the burden of proof to importers based on unreasonable presumptions, abuses of discretion or ambiguous regulations. Once an importer has met the burden of producing some evidence, it will be incumbent on the customs administration to come forward with other evidence to rebut the submitted evidence. The options available to a customs administration are;

(i) to make no specific regulation regarding burden of proof, leaving it for judicial determination in each case;
(ii) to adopt provisions along the lines of GATT Ministerial Decision Regarding Cases Where Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value; and
(iii) to incorporate into the national customs law a strict provision suiting the burden of proof in customs valuation cases to the importer.

10 Special Provisions for Developing Countries[11]

The economies of the developing countries are fundamentally different from those of developed ones. The attitude of both to the Code differs, even though the aim of the Code is to facilitate international trade in principle and to bring benefits globally. The developing countries face many problems like shortages of foreign exchange, substantial foreign debt, inadequate infrastructure, high import volumes and excessively low level of exports.

Although developing countries recognise that in theory the Code achieves a balance between their interests and those of industrialised countries, they do not believe that a balance is achieved in practice as well. Technically, the provisions of the Code which most of the developing countries are not willing to administer are those concerned with related parties, identical or similar goods, computed value and royalties and license fees.

Although the Agreement Establishing WTO requires every country to accept all multilateral agreements negotiated in the Uruguay Round, the Code provides the developing countries a total period of five years to implement the provisions, i.e., till 1 January 2000. By the end of this period, 51 developing countries have evoked the five year delay period. In order to facilitate the changeover to this Code, the Code calls on the developed countries and international organisations and World Customs Organisation to provide technical and training assistance in the preparation of implementation measures by the developing countries.

[11] Article 20.

In addition, the developing countries who were not the members to the Tokyo Round Code can delay the application of the counted value methodology over and above the period not exceeding three years following the application of all provisions of this Agreement.

11 The GATT Ministerial Decision Regarding Cases Where Customs Administration Have Reasons to Doubt the Truth or Accuracy of the Declared Value

During the Uruguay Round negotiations, the concerns of developing countries were given serious attention and their request that the burden of proof be shifted to importers led to a compromise formula which was subsequently embodied in the GATT Ministerial Decision Regarding Cases Where Customs Administration Have Reasons to Doubt the Truth or Accuracy of the Declared Value. This Decision recognises that customs authorities may need to request additional information from importers when there is a reasonable basis for doubting a declaration and it authorises the customs authorities to reject the declared transaction value if this is not forthcoming or if doubts persist after further information is produced.

Another positive aspect of the Decision is that it eliminates minimum values. Some countries were employing certain ‘standard values’ or ‘minimum values’ in order to make systematic adjustments of values irrespective of the price actually paid for imported goods. To justify such practices, the need to combat fraud was invoked. In fact as long as the burden of proof is shared by the importer, customs authorities will be in a position to reject obvious cases of false invoicing and instead use the transaction value of identical goods or similar goods, or other valuation methods authorised in the Code.

When a declaration has been presented and where customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration, the customs administration may ask the importer to provide further explanation, including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8 of the Code. If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may, bearing in mind the provisions of Article 11 of the Code be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1 of the Code. Before taking a final decision, the customs administration shall communicate to the importer, in writing if requested, the grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond. When a final decision is made the customs administration shall communicate to the importer in writing its decision and the grounds therefore.

12 Administration, Consultations and Dispute Settlement[12]

Like many other WTO Agreements, the Customs Valuation Agreement is served by a committee established for the purpose. It is open to all WTO members. A special feature of the Code, however, carried over from the earlier Tokyo Round Code, is that it also has a Technical Committee which operates outside the WTO. This Committee is established within the World Customs Organisation with the task of ensuring that the agreement is interpreted and applied in the same way by all WTO members. This involves studying specific problems that may arise, advising on solutions to them, studying valuation laws, procedures and practices and giving advisory opinions.

The Dispute Settlement Understanding of the WTO is applicable to consultations and settlement of disputes under the Code. If any member considers that any benefit under the Code is being nullified, it may consult the other members regarding it. The other members have to oblige the complaining member sympathetic consideration. In the event that a dispute nevertheless reaches the stage of being referred to a WTO panel for solution, the Technical Committee may be asked to report on questions that require technical considerations.

In US-Certain EC Products Case13 the Panel examined whether increased bonding requirements imposed by USA on certain products imported from the European Communities were consistent with, among others, Article II of GATT 1994 and certain provisions in the DSU. The USA put forward Article 13 of the Customs Valuation Code as a defence arguing 'that the non-compliance of the European Communities (with a certain DSB recommendation) created a risk, which allowed the United States to have concerns over its ability to collect the full amount of duties which might be due' and that the increased bonding requirements were consistent with that Article. The Panel held that in the present dispute, there is no disagreement between the parties on the customs value of the EC listed imports. Article 13 of the Customs Valuation Code allows for a guarantee system when there is uncertainty regarding the customs value of the imported products, but is not concerned with the level of tariff obligations as such. The Panel held further that Article 13 of the Customs Valuation Code does not authorise changes in the applicable tariff levels between the goods arrived at a US port of entry and a later date once imports have entered the US market. The applicable tariff must be one in force on the day of importation, the day the tariff is applied. In other words, Article 13 of the Customs Valuation Code is of no relevance to the present dispute.

As a matter of interpretation, the Panama successfully complained against Columbia that the latter's use of indicative unit prices or estimated prices for its customs valuation of certain imported products was inconsistent with its obligations under Customs Valuation Agreement to apply the method of valuation prescribed

[12]Part-II of the Agreement.

therein.[13] Further, the EU requested consultations with Thailand in 2008 for what it alleged were arbitrary customs valuation given to alcoholic beverages imported from the EU breach of the Customs Valuation Agreement permitted customs methodologies.[14]

13 Reservations and Review of the Code

Any member can declare certain reservations to the Code subject to the provisions that such reservations cannot be entered into effect if the consent of other members has not been taken earlier.[15]

The Technical Committee shall keep a vigil on the operation of the Code. This committee reviews annually the implementation and operation of the Code taking into account the objectives thereof. The Committee annually gives a report to the Council for Trade in Goods regarding the developments during the whole year.

14 Conclusions

The importance of customs valuation practice in facilitating international trade and in coping with violations of law by traders should not be underestimated. Currently, number of countries has implemented the Code and their number is increasing day by day. For developing countries, there is an urgent need for formation of a task force to peruse the implementation of the Code on the domestic level. Such a task force should be composed of experts with substantial experience in the relevant fields, accounting and international trade practices. The developing countries should also recognise that the administration of customs valuation is an important area with a potentially major impact on the process of importation. It is also a domain of significance for policing illegal activities of traders. Thus, the governments of less developing countries ought to give due priority to this aspect of customs administration, even if collection of import duties does not constitute a primary source of state revenue and even if implementation of the Code is expected to gradually diminish the total revenues from import duties. By October 2005, 72 countries (G/L750 dated 25.10.2005) had notified that their national legislations conform to the provisions of the Agreement.

[13]Columbia—Indicative Prices and Restrictions on Ports of Entry (WTO/DS366).

[14]Thailand—Customs Valuation of Certain Products from the EU (WTO/DS370).

[15]Article 21.

Fees and Formalities Connected with Importation and Exportation (Article VIII)

The text of Article VIII (Fees and Formalities connected with Importation and Exportation) is as under:

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or taxation of imports for fiscal purposes.
   (b) The contracting parties recognise the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).
   (c) The contracting parties also recognise the need for minimising the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.
2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulation in the light of the provisions of this Article.
3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

   (a) consular transactions, such as consular invoices and certificates;
   (b) quantitative restrictions;
   (c) licensing;
   (d) exchange control;
   (e) statistical services;
   (f) documents, documentation and certification;
   (g) analysis and inspection; and
   (h) quarantine, sanitation and fumigation.

Interpretative Note: Ad Article VIII from Annex I

1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs I and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance-of-payments reasons with the

approval of the International Monetary Fund, the provisions of paragraph 9 (a) of Article XV fully safeguard its position.

2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.

Scope of Article VIII

Article VIII: 1(a) states a rule applicable to all charges levied at the border, except tariffs and charges which are to equalise internal taxes. It applies to all such charges; whether or not there is a tariff binding to the product in question. It prohibits all such charges unless they satisfy the three criteria listed in that provision;

(a) the charge must be limited;
(b) it must not represent an indirect protection to domestic products; and
(c) it must not represent… a taxation of imports… for fiscal purposes.[16] Article VIII expressly addresses to 'fees, charges, formalities and requirements relating to all customs matters and includes various aspects of the customs process such as 'consular transaction', 'statistical services', 'quantitative restriction', 'licensing', 'exchange control', 'documents', 'documentation and certification', 'analysis and inspection' and 'quarantine, sanitation and fumigation'.

Further, the customs-related governmental activities such as 'services rendered' are not to be taken in economic sense as these services are not desired by the importers nor are they adding value to the goods in any commercial sense. Whatever the governments may choose to call them, they should not amount to 'taxes' as they are simply and technically services rendered in the process of customs entry.

Article VIII, is often read with Article II of the GATT 1994 as Article II provides that products bound in GATT schedule shall be exempt from duties and charges in excess of those imposed on or therein, and shall also be exempt from all other charges or duties of any kind imposed on or in connection with the importation in connection of those imposed on the date of 1994 Agreement, or otherwise required to be imposed by legislation of the importing country.

In the EEC Programme of Minimum Import Prices, Licenses and Surety Deposits of Certain Processed Fruits and Vegetables,[17] the Panel examined the EEC system under which the issue of an import certificate for the goods in question was

[16]The Panel on 'United States—Customs user Fee' examined complaints by Canada and EC concerning the 'merchandise processing fee' levied by the US Customs Service. This ad-valorem charge was imposed for the processing of Commercial merchandise entering the USA, and the receipts from the fee were used to fund certain 'commercial operation' of the customs service. L/6264, Adopted on 2 February 1988, 35S/245, 273, para. 69.

[17]L/4687, Adopted on 18 Oct. 1978, 27S/68, 96–97, para. 4.3–4.4.

conditional on the lodging of a security to guarantee that imports would take place during the period of validity of the certificate.

The Panel noted the argument by the US representative that, when a security was forfeited because importation did not take place within the seventy-five day validity of the certificate, this forfeiture should be considered as a 'charge in connection with importation' in violation of Article VIII: 1(a), since the importation would likely take place later under a new license. The panel further noted the argument by the US representative that forfeiture of all or partly of this security imposed substantial penalties for minor 'breaches of customs regulation or procedural requirements' in violation of Article VIII: 3. The Panel considered that such forfeiture could not logically be accepted as a charge 'in connection with importation' within the meaning of Article VIII: 1(a), since no importation had occurred, but only as a penalty to the importer for not fulfilling his obligation to complete the importation within the seventy-five-day time limit. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality 'in connection with importation' within the purview of Article VIII. As a result, Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of the security associated with the import certificate could not be inconsistent with the obligation of the EEC under Article VIII.

The Panel noted that the importer, when applying for the certificate, must agree to complete the importation within the seventy-five-day validity limit of the certificate and to import the quantity stated on the certificate plus or minus 5 per cent. The Panel further noted that the importer was not required to obtain an import certificate when a contract was signed, but could wait until the product was approaching the Community frontier. The Panel considered that these obligations, which had to be assumed by the importer, were not onerous enough to violate Article VIII.[18]

The same Panel also examined the aspects of the EEC programme which provided for a minimum import price, and enforced this price by making the issuance of an import certificate conditional on the lodging of an additional security to guarantee that the duty-paid c.i.f price of the goods would be greater than or equal to the minimum price; the security would be forfeited in proportion to quantities imported below the minimum price. The Panel concluded that the minimum import price and associated additional security system for tomato concentrates was inconsistent with Article XI and concluded that the interest charges and costs associated with the lodging of the

additional security associated with the minimum import price for tomato concentrate were inconsistent with Article II: 1(b).[19]

The provision in Article VIII: 1(a) that 'fees and charges… shall be limited to the amount to the approximate cost of services rendered' was subject of a Panel Report

[18]Ibid., para. 4.15.

[19]L/4687, Adopted on 18 Oct. 1978, 27S/68, 96–97, para. 4.3–4.4. 5.

in the case USA—Customer user Fee[20] wherein the US merchandise processing fee in the form of *ad-valorem* charges without upper limit was challenged with the 'cost of service' limitation of Article II and VIII. The main challenge was that the US fee was exceeding the average cost of processing an individual entry. Also calculating the *ad-valorem* rate fee by dividing the total costs of customs processing by the imports processed, the fee will, when imposed without upper limits, automatically exceed the average cost of processing whenever it is applied to entries of greater than average value. In other words, the cost of services rendered should be interpreted to mean the cost of customs processing activities (services) actually rendered to the individual importer with respect to customs entry in question, or at least the average cost of such processing activities for all customs entries of a similar kind. The Panel concluded that the term cost of services rendered in Articles II: 2(c) and VIII: 1(a) must be interpreted to refer to the 'cost of customs' processing for the individual entry in question and accordingly the *ad-valorem* structure of the US merchandise processing fee was inconsistent with the obligations of Article II: 2(c) and VIII: 1(a) to the extent that it caused fees to be levied in excess of such costs.[21]

Article VIII have been buffeted by the Code of Standard Practices for Documentary Requirements for the Importation of Goods[22] and Customs Co-operation Council is also active in the area of customs formalities and has adopted a number of recommendations.

[20]Supra note 15, 276–279.

[21]Ibid., para. 78–82, 84–86.

[22]GATT, 1st supp1, BISD, 100, 104 (1953).

Chapter 9
WTO Agreement on Rules of Origin, 1994

The text of Article IX of GATT 1994 (Marks of Origin) is reproduced below:

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.
2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.
3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.
4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value or unreasonably increasing their cost.
5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.
6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such request or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

A. K. Koul, *Guide to the WTO and GATT*,
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1 Scope of Article IX

Article IX of GATT 1994 has been supplemented by the WTO Agreement on Rules of Origin, 1994.

The basic thrust of the marks of origin in Article IX is the request of each country to prohibit the import, export and transit of foreign goods falsely marked as being produced in the country in question. It was considered to be covered primarily by the words deceptive practices (i.e. Article XX: d). Article IX: 1 precludes WTO members from discriminating against articles of certain countries with respect to country of origin marking requirements. These requirements should be reduced to a minimum to avoid difficulties and inconveniences caused to the commerce and industry of exporting countries. Due regard should be given to the protection of consumers' interests against fraudulent or misleading indications (Article IX: 2). In order to protect the tariff concessions, the WTO members should permit required marks of origin to be affixed at the time of exportation (Article IX: 3). Article IX: 4 provides that compliance with the requirements should not result in serious damage to, or material reduction in value or unreasonable increase in the cost of the foreign article. Article IX: 6 is designed to protect by way of co-operative efforts of WTO members to prevent the use of trade names in such a manner as to misrepresent the true origin of product, to the detriment of such distinctive or geographical names of products of a territory of a member as are protected by its legislation.

The marks of origin (Article IX) were considered not satisfactory on account of vagueness of obligations of members contemplated in the Article as well as no special duties or penalties could be imposed for failure to comply with the obligations (Article IX: 5) of marking requirements prior to importation 'unless corrective marking is unreasonably delayed or deceptive marks' have been affixed or the required marking has been intentionally omitted. Further Article IX has been carved as an exception to Article III of national requirement and the complexity of the marks of origin in international trade, as acknowledged by the International Chamber of Commerce and International Customs Co-operation Council, has led the WTO to frame the Agreement on Rules of Origin, 1994.

2 Marks of Origin (Article IX of GATT 1994 and WTO Agreement on Rules of Origin, 1994)

Rules of Origin are a key factor intervening in the application of several trade policy instruments under GATT 1994 such as most-favoured-nation (MFN) treatment (Articles I, II, III, XI, XIII), anti-dumping and countervailing duties (Article VI), safeguard measures (Article XII), origin marking (Article IX), discriminatory quantitative restrictions, tariff quotas or public procurement.

The main purpose of WTO Agreement on Rules of Origin is to increase transparency of laws, regulations and practices concerning rules of origin so as to ensure

that these rules are applied in an impartial, clear, consistent, predictable and neutral manner. The harmonisation of rules of origin was considered necessary because rules of origin applied by major world trading countries leave room for interpretation with very uncertain origin determination by government agencies and differ substantially; besides a large number of developing countries have no legislation for non-preferential rules of origin. The rise of multinational corporations and the corresponding globalisation of the means of production through the manufacturing of goods in multiple stages, using parts produced in different places around the world, made it more difficult to determine the origin of a good, because there is no single, correct or even easily ascertainable definition of origin for a goods produced from parts and materials gathered from around the world. The origin of such a product depends on the formulation and application of the applicable rules, a non-transferable process that, until recently, had not drawn much scrutiny because of the complex, technical nature of the rules of origin and the popular misconception that their formulation and application result from a technical, objective process.

As the GATT 1947 and GATT 1994 in Article IX refer to marks of origin and each country is required of extending the most-favoured-nation treatment to all WTO members with regard to marks of origin, there is no universally accepted standard of what constitutes origin. Article IX of GATT 1994 acknowledges that the member nations of WTO may face difficulties and inconveniences in adopting and enforcing laws and regulations relating to marks of origin for their exports which should be reduced to a minimum keeping in view the necessity of protecting consumers against fraudulent and misleading indications. Article IX makes it obligatory on the part of member nations of GATT that laws and regulations relating to the marking of imported products should be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their value, or unreasonably increasing their costs. Also, as a general rule, no special duty or penalty should be imposed by any member for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marking has been affixed or the required marking has been intentionally omitted. Further, the member nations of WTO should prevent the use of trade names in such a manner that it should not misrepresent the true origin of goods and products to the detriment of distinctive regional or geographical names of products protected by the legislation of the member nations.

3 Rules of Origin in International Trade

Rules of Origin in international trade promote differentiating mechanism in determining whether a particular arrangement will be applied to a given product and are divided into preferential and non-preferential rules. In the case of preferential rules of origin, they are used to determine whether a product originates in a preference-receiving or trading area and hence qualifies to enter the importing country on better

terms than products from the rest of the world. As the preferential rules of origin allow governments to discriminate between similar products from different countries, the preferential trading arrangements and liberalised trade through the creation of free-trade areas make the rules of origin of specific importance.[1] Non-preferential rules of origin are used for all other purposes, including the enforcement of product- and country-specific trade restrictions that increase the cost of, or restrict or prevent, market entry.[2] While the application of non-preferential rules of origin results in determination of the origin of the goods, the application of preferential rules does not always so result because, if the goods are found not to be from the preference-receiving country or area, no further origin determination is necessary unless another country from which the good may come is also a beneficiary under a preferential trading agreement with the importing country. Both types of rules of origin can be used as effective barriers in international trade.

Rules of Origin that require more than substantial transformation of the goods may deny trade preferences to products that last underwent substantial processing in a favoured country or trading area by defining the product as not having originated in the favoured country; or the application of such rules may extend product- and country-specific restrictive measures of trade to products otherwise exempt from them by considering the products, even though they last underwent substantial processing in a third country, as having originated in a disfavoured country. Conversely, definitions and applications of non-preferential rules of origin that require less than a substantial transformation of the goods may extend product- and country-specific restrictive measures to products otherwise exempt from them by attributing their origin to the disfavoured country, even though the goods were not substantially transformed there.

Preferential rules of origin may differ from non-preferential ones because they are designed in theory, to minimise trade deflection. Trade deflection may happen when a company undertakes minimal processing or assembly in a preference-receiving country to take advantage of preferences. Thus, preferential rules establish criteria to ensure that a product is substantially transformed in a preference-receiving country or trading area to justify ,allowing it to benefit from

[1]Reciprocal trading agreements confer the same trade preferences on goods from any and all member countries. An example is an agreement creating a free-trade area, such as the North American Free-Trade Agreement (NAFTA) between the USA, Canada and Mexico. No reciprocal trading agreements give trade preferences to goods from the beneficiary country, but not to those from the country 'donating' the preference. The agreements are designed to promote the development of certain less developed countries, as to the Generalised System of Preference (GSP) and the Caribbean Basin Initiative. For GSP, See A.K. Koul, The Legal Framework of UNCTAD in World Trade (A.W. Sijthoff, N.M. Tripathi, 1977, Chap. IV).

[2]Examples of potentially restrictive trade practices that require the application of non-preferential rules of origin include most-favoured-nations treatment, quantitative restrictions, imposition of countervailing duties, voluntary export restraint agreements, national government procurement requirements, imposition of anti-dumping duties (including issues of third-country circumvention and complaints by domestic producers), country-or-origin marking requirements, drawback programme and economic sanctions.

the preference. However, prevention of trade deflection sometimes appears to be no more than a pretext for using preferential rules of origin as a barrier to trade and as an incentive for foreign investment.

By varying the extent of the required transformation and allowing different degrees of cumulation on a regional, donor or global basis, preference-granting countries use preferential rules of origin to control the degree of preference given to different recipient countries. When rules of origin are more restrictive than necessary to prevent trade deflection, they give producers an incentive to increase the intermediaries and final manufacturing, processing and assembly within the preferential area at the expense of facilities in other countries which would otherwise have a comparative advantage. This distortion of manufacturing and purchasing decisions results in inefficient allocation of world resources.

The restrictive rules of origin may also divert trade and investment depending on how companies assess the difficulty of complying with the rules, the size of the market affected, the degree of technical skill needed to comply with the rules, the level of education of the workforce and the 'penalty' for failing to comply with, the preferential agreement.

Multinational corporations will have greater incentive to locate manufacturing assembly operations within an area if the 'penalty' for not complying with the preferential rule is substantial such as the loss of significant tariff preferences or of access to an important market, rather than if the penalty is minimal such as a low tariff on goods sold to a small market. Alternatively, if the preference or tariff is minimal, the market small, or the goods destined for several countries, the firm may ignore the preferential agreement. Preferential rules of origin can serve as a traditional barrier to trade, i.e. to protect domestic producers of final goods, when the rules are so administratively or technically difficult to comply with that firms will not seek to take advantage of the preference. Often the restrictive rules of origin in preferential trade agreements are not designed to protect producers of final goods, but, rather to increase the investment in the production and assembly of intermediate goods and to protect and enhance the position of intermediate producers. As the rules of origin are applied only to imported goods, if the goods are produced and sold domestically, no origin determination is necessary. Therefore, if one member's market is much larger than the other's, firms have an incentive to locate factories in the country where most of the final goods are to be sold, evading rules of origin. This protection of intermediate producers results in inefficient diversion of trade and investment and is the focus of non-member resentment of preferential trading agreements. Furthermore, over time, the domestic intermediate producers may be replaced, or crowded out of the market, by foreign producers that relocate to the protected area.

4 Rules of Origin as a Factor of Production

As already seen the rules of origin play an essential part in the application of the country-specific or trading group-specific preferences or restrictions, these rules have a significant impact on the strategic planning of firms. It is imperative, therefore, on the

firms to analyse the different rules of origin, quantify their cost and treat them as a factor of production in determining where to place their investments, purchase their raw materials, produce or purchase intermediate materials and assemble their final products.

Given raw or intermediate materials of equal quality, a firm will purchase the cheapest one, regardless of where it is found. Because trade restrictions and preferences affect the cost of goods and may even restrict their entry into a country, a firm should determine the origin of the raw material or intermediate part it is considering using and its impact on the origin of the final goods to see whether any trade restrictions or preferences apply. If the raw material or the intermediate part from a certain country or trading group is subject to a quota or like measure, it is less likely to be used because, once the limit of its importation is reached, the firms continued production of the final product would be questioned. If the goods are subject to a tariff or similar measure, the firm should include the tariff in its cost calculations in determining where to buy or produce the material.

A firm should consider the origin of the final goods in each of its destined markets before determining the site of its manufacturing and assembly operations.

The firm would prefer to locate the manufacturing and assembly operations in a country that will receive the most beneficial treatment for the finished product from the country or countries. Where the product will be sold, a firm could minimise the trade restrictions and maximise the trade preferences attached to that goods.

The failure to harmonise rules of origin on a global or even national level has impeded efforts of firms to take origin into account in planning their purchasing, investment and manufacturing strategies. Countries often apply different rules of origin, resulting in inconsistent determination, and sometimes determinations appear to have been manipulated to achieve trade-restrictive results. The creation of clearly stated, globally harmonised rules of origin that could be consistently applied would significantly benefit firms engaged in international trade. The goal of any harmonisation of rules of origin should be to distinguish between substantial and insubstantial transformation in a consistent and objective manner so that the rules of origin can be applied in a manner that similar results occur regardless of where, when and how they occur.

5 Methods of Determining Origin

When a product is wholly obtained and produced in a single country, it is relatively easy to determine its origin. Difficulties arise when a product is manufactured, assembled or made from materials originating in more than one country. In the latter case, there are at least four different methods or criteria for determining origin:

(a) the rule of last substantial transformation;
(b) the *ad-valorem* percentage test;
(c) a test involving specific manufacturing or processing operations that confer or do not confer origin upon the goods; and
(d) the requirement of a specified change in tariff classification.

All these methods of determining origin are designed to prevent simple assembly and packaging operations from conferring origin.

(a) Last Substantial Transformation Test

The last substantial transformation rule means that for a product to be from a particular state or trading area, it must be substantially transformed into 'a new and different article, having a distinctive name, character or use from that of the original article or good'. To prevent a product from having multiple countries of origin, the rule attributes the goods to the country where it last underwent substantial transformation. Although apparently the rule appears simple and convenient, the courts and custom authorities tend to look beyond the form of transaction to see if 'substantial transformation has taken place by taking into account variety of factors, including whether the article was changed from a producer goods to consumer goods, the amount of value added to the good, the complexity of the processing operation and whether the good underwent a change in tariff classification which often leads to unpredictable and arbitrary results that undermine the certainty of the rule and confusion'. The inconsistent and arbitrary results of the application of the rule partly can be explained when the rule is applied for different purposes. For instance, the USA applies the rule differently for different purposes.[3]

The substantial transformation rule has many advantages including its flexibility and development through application to specific facts in an adversarial situation. These advantages outweigh its disadvantages, viz. inconsistent application, and lack of certainty, discretionary nature and high costs of the resulting origin determination. At the same time, there is need to transform substantial transformation rule so as to avoid its misuse.

(b) Value-Added Percentage Test

The value-added test defines the degree of transformation required to confer origin on the goods in terms of minimum percentage of its value that must come from the origin country or the maximum amount of its value that may come from the use of imported parts and materials.[4] If the floor is not reached or the ceiling exceeded, the last production process will not confer origin. While the value-added method is often praised for its simplicity and precision, in practice it is unsatisfactory because it generates substantial compliance costs and uncertainty for companies. As the test

[3]See, Koru N. Am. V. USA, 701F, 229, 223 (ct. In't Trade 1988) stating that in ascertaining origin, the court must look to the purpose of the particular legislation involved. National Juice Prods. Ass'n, 628 F. Supp. at 988-89 n 14 (noting that although the language of the tests applied under the three statues tariff preferences, duty drawback, and country of origin marking) is similar, the results may differ where differences in statutory language and purpose are pertinent.

[4]The European Community uses the domestic content method as a test for non-preferential purposes and the USA uses it for preferential purposes. The parts value test is used by the European Community in some product-specific origin regulations as a subsidiary test when the 45% value-added test is not met.

ignores the exchange rates risk and fluctuations into the price of raw materials and intermediary goods, the status of goods for the customs purposes may vary from time to time. The attribution of origin of identical goods may vary with each importing country, depending on the exchange rate between the importing country currency and that of the processing country. In borderline cases where the rule requires 50% local value added to confer origin, a good with 49% value added will be denied origin, resulting in a difference of only one per cent local value added between it and a good considered to originate there.

The value-added test is further compounded as the countries may determine the amount of value added on the basis of different methods of calculation, different sales prices and the qualification of different costs as local value added. Value-added rules of origin may be circumvented by the use of transfer pricing, which is especially prevalent when the parties are related. For example, to increase the amount of local value added to ensure that the good qualifies as originating in the country of assembly, related parties could reduce the price of the imported materials used in the finished product. To limit or prevent this manipulation of 'value added', the rules of origin often require the related parties to show that their price is similar to prices reached in arms-length transactions.

The value-added test penalises low-cost production operations, though they may be more efficient than high-cost facilities. It also penalises labour-intensive facilities in countries with low labour costs, few facilities in countries with low capital costs and resource-intensive facilities in countries with low resource costs. Also, as there is a greater range in the costs of labour and raw materials than in the cost of capital, which is more mobile than labour or raw materials, the value-added test discriminates against less developed countries whose primary comparative advantage is inexpensive labour and raw materials.

(c) Specified Processes Test or Technical Test

The specified process test of origin, also referred to as technical test, prescribes certain production processes that may (positive test) or may not (negative test) confer originating status. The specified process test serves as a useful supplemental test of origin because it can easily be tailored to meet a specific situation in a clear, precise manner. However, it is not a satisfactory primary test of origin as it is extremely difficult, if not impossible, to define process test for each of the enormous array of products on the international market and to update these rules as new products and technological innovations and advances in production are made quickly and fast. Further, the process test becomes highly susceptible for defining origin as the test would be framed in technical terms, its content would be hidden from public view, and the drafters and administrators of the rule would therefore have to rely on industry for information. For example, the European Commission's Regulation 288/89 provides that origin be conferred on an integrated circuit whenever it undergoes diffusion, even though diffusion is followed by assembly and testing, processes that are more labour intensive and may add more value than diffusion. This product-specific technical rule allegedly was used because EC producers of integrated circuits performed the diffusion in Europe and then had the

testing and assembly done in third countries, while Japanese producers of integrated circuits had them tested and assembled in Europe. Therefore, this conferred EC origin on goods produced by EC manufactures while denying EC origin to goods produced by Japanese manufactures, thereby allowing the European companies to trade their integrated circuits on better terms than the Japanese.

Because negative technical tests only delineate which processes do not confer origin, they are easily targeted at a particular foreign company. For example, European Commission Regulation 2071/89, on determining the origin of photocopiers, stated that the incorporation of an optical system into a photocopying apparatus will not confer origin, but it did not explain which operations would confer origin. This regulation was allegedly designed to deny US origin to Ricoh copiers assembled in the USA by a Japanese corporation. These copiers contained Japanese optical systems and according to rules of origin were 'Japanese'. As anti-dumping duties had been imposed on Ricoh copiers from Japan, these copiers, despite having been assembled in the USA, were also subject to those duties.

(d) Change in Tariff Classification

This method specifies the change in tariff classification required to confer origin on a good under the Harmonised Commodity Description and Coding System (Harmonised System). The Harmonised System was implemented by the International Convention on the Harmonised Commodity Description and Coding System, 14 June 1983 which was developed and is administered by the Customs Corporation Council. The Harmonised System has been adopted for customs tariff and trade statistical purposes by countries representing 90% of world trade, and by 1993, 121 countries had adopted the system for customs tariffs and trade statistical purposes which makes it one of the most basic and widely applied laws in international trade. It provides a uniform, hierarchical nomenclature to be used in defining origin determination for all products in international trade.

The Harmonised System is divided into twenty-one sections, each representing a broad industrial grouping; ninety-six chapters, each representing a more narrow industrial sector; and 1241 headings, each representing a narrow industrial section. Therefore, because a change in the level of classification of a product at the heading level often suffices to confer its origin on the country where that changes last occurred. This way of determining origin is also called the change-in-tariff-heading method.

The hierarchical framework of the Harmonised System, its division by industry and its systematic arrangement of headings by ascending degrees of technical sophistication and economic effort provide an easy-to-use underlying structure for origin determination. This structure also gives drafters of rules of origin the flexibility to define classification changes precisely, including the incorporation of exceptions and special rules, without sacrificing objectivity, certainty or identity.

As the Harmonised System is a means for tariff classification and was primarily designed for the dual purposes of categorising commodities and compiling statistics, and was not designed to be used for origin determination, changes in classification under the system are not always an appropriate or effective test of origin.

An origin scheme based on change in tariff classification must, therefore, be supplemented by exceptions that describe when a sufficient transformation has occurred despite the lack of change in tariff classification when a change in classification is not a sufficient transformation and which processes are not sufficient to confer origin even though they lead to a change in classification.

6 WTO Agreement on Rules of Origin: An Analysis

The WTO Agreement on Rules of Origin consists of nine Articles and two Annexes.

The Preamble to the Agreement seeks to harmonise the non-preferential rules of origin used by WTO members into a single set of international rules professed to clarity, predictability, facilitating international trade and also to ensure that the rules do not create unnecessary obstacles nor do they nullify or impair the rights of other members. It states that it is desirable to provide transparency of laws, regulations and practices regarding rules of origin. The preamble further recognises that consultations under Article XXII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding of WTO as well the procedures for the speedy, effective and equitable resolutions of disputes under the provisions of Article XXIII of GATT, 1994, as elaborated and applied by the Dispute Settlement Understanding, apply to the WTO Rules of Origin.

The Rules of Origin Agreement do not harmonise the preferential rules of origin as Article 1(1) expressly excludes rules of origin 'related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of most-favoured-nations status'. Rules of origin include all rules of origin used in non-preferential commercial policy instruments such as the application of most-favoured-nations treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994, safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They also include rules of origin used for government procurements trade statistics.[5]

Article 2 of the Agreement on Rules of Origin provides rules to be followed during the transition period as the harmonisation process is set out in Part IV of the Rules of Origin Agreement. The Agreement on Rules of Origin conceives a two-step process. First, it anticipates three-year transition period[6] during which the harmonised rules will be drafted and adopted by the Technical Committee on the Rules of Origin. The Committee on Rules of Origin will periodically consider

[5]Article I (2).

[6]Article 9(2)(a).

the results with a view to endorsing such interpretations and opinions.[7] Each party has a right to be represented on the Technical Committee.[8] Additionally, trade organisation representatives are allowed to attend meetings of the Technical Committee as observers.[9] As the rules have been drafted in multilateral settings, the WTO will use them for all non-preferential purposes; therefore, the quest for any one country to draw up its own rules in a politically motivated fashion will be limited. Once the harmonisation programme is completed by the GATT Ministerial Conference it will adopt the results of the harmonization work programme, together with a time frame for its entry into force.[10]

The Technical Committee of the Agreement on Rules of Origin has been empowered to develop a detailed harmonised definition for determining the goods when goods are wholly obtained in one country and a harmonised list of minimal operations or processes that do not themselves confer origin on goods.[11] The Technical Committee will define when the last substantial transformation of goods produced in more than one country occurs, primarily through application of the change-in-tariff-classification method at the heading or subheading level. The Technical Committee will use the Harmonised System (HS) as the underlying nomenclature, and when supplementary tests or criteria are necessary, it may resort to the value added and specified processing methods.[12] The Agreement on Rules of Origin provides that origin will be conferred where the last substantial transformation has occurred, not where the most significant one occurred. This rule, per se, increases certainty of application and simplifies the determination of origin because the customs authorities can disregard previous operations.

Article 2(f) of the Rules of Origin provides further safeguard that during and after transitional period, the member countries are forbidden from applying negative rules, because negative provisions state only what will not constitute a substantial transformation. Article 9(1)(d) provides further that during the transition period, each member country will apply its own non-preferential rules, subject to the limitation that, notwithstanding the measure or instrument of commercial policy to which they are linked, the rules of origin are not to be used as instruments of commercial policy to which they are linked, and the rules of origin are not to be used as instruments to pursue trade objectives directly or indirectly. The rules of origin should not themselves create restrictive, disrupting or distorting effects on international trade. The rules of origin should not impose unduly strict requirements or require the fulfilment of a certain condition not relating to manufacturing or processing as a prerequisite for the determination of the country of origin. However, costs directly related to manufacturing or processing may be included for purposes

[7]Article 9(3) and (2) (b).
[8]Annex I.
[9]Annex I, (6).
[10]Article 9(4).
[11]Article 9 (I) (b) and 9(2)(c)(i).
[12]Article 9 (1) (b) and 9(2)(c)(iii).

of the application of an *ad-ad valorem* percentage criterion. Rules of origin should be administered in a consistent, uniform, impartial and reasonable manner.

Once the transition period ends, the harmonised rules of origin will be applied for all non-preferential purposes by the member nations. As the harmonised rules will be defined in terms of change in tariff classification and also in terms of specified value-added requirements and specified technical processes, they will replace vague, discretionary concepts such as substantial transformation, or last substantial process with more mechanical, clearer tests that will enhance the capacity of firms to plan their production, purchasing and investment strategies. This will further curtail the discretionary powers of the customs authorities of member nations as they will not be able to adapt the rules of changes in technological or manufacturing processes or attempts at circumvention.

Although the preferential rules of origin have been excluded from the harmonised process under the Agreement on Rules of Origin, ostensibly on the assumption that preferential trade agreements or voluntary restraint agreements are voluntarily agreed and entered upon by the countries of such agreements and as such may require different and special rules of origin for trade preferences and to prevent trade distortions. Yet Annex II to the Rules of Origin Agreement imposes limitations on the preferential rules of origin. These limitations, *inter alia*, are as follows:

(i) in cases where the criterion of change of tariff classification is applied, such a preferential rule of origin, and any exceptions to the rule, must clearly specify the headings or subheadings within the tariff nomenclature that are addressed by the rule;
(ii) in cases where the *ad-valorem* percentage criterion is applied, the method for calculating this percentage shall also be indicated in the preferential rules of origin;
(iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers preferential origin shall be precisely specified.

The Members agree to ensure that their preferential rules of origin are based on a positive standard. Preferential rules of origin that state what does not confer preferential origin (negative standard) are permissible as part of a classification of a positive standard or in individual cases where a positive determination of preferential origin is not necessary.

7 Procedural Reforms

The Agreement on Rules of Origin imposes a variety of procedural safeguards on the formulation and application of rules of origin in the hope of creating more transparent, law-like system for applications of the preferential rules and non-preferential rules of origin.

Article 2(h) provides for advance ruling procedure during transitional period, and Article 3(f) provides for the same ruling procedure after transitional period, and Annex II provides the same advance ruling procedure for preferential rules of origin. It is also obligatory on the part of members acceding to the WTO membership to publish the rules of origin and any application of them and not to apply any changes in the rules retroactively.[13] The Agreement on Rules of Origin allows any interested person to request an assessment of origin, which may be made in advance of trading, and require the member country customs administrators to respond by issuing and publishing, within 150 days of the request, a binding assessment of origin that clearly and precisely states what requirements must be met to confer origin.[14] The assessment of origin will be binding in all comparable situations for a period of three years. The administrative authorities are under an obligation while ruling on the rules of origin to protect any confidential information, unless the person or government providing it specifically permits its disclosure, or judicial procedure requires its disclosure.

Any administrative action taken with regard to the determination of origin for either preferential or non-preferential purposes may be promptly reviewed by an independent, administrative or arbitral tribunal, which has the authority to modify or reverse the determination. Such a recourse will lead to a system closer to one based on rule of law and would serve to increase the transparency, neutrality, consistency and legitimacy for origin determination, because the intervention of an independent body would decide the correctness of their applications after hearing both the sides, and once the determination is binding in all comparable situations for three years, the Agreement on Rules of Origin may exert considerable pressure on customs authorities to explain their reasoning.

The Committee on Rules of Origin in conjunction with the World Customs Organisation's Technical Committee on Rules of Origin is pursuing the work on the harmonisation of non-preferential rules of origin. The harmonisation work could not be finalised within the foreseen deadline of July 1998. The Committee continued its work of harmonisation under the mandate from General Council. The pace of harmonisation accelerated during 2001 and 2002 as the Committee resolved more than three hundred issues during the period. The major stumbling block in the progress of harmonisation is the so-called implications issue, i.e. the implications of the harmonised rules of origin upon other WTO Agreements. In July 2003, the General Council set July 2004 as the new deadline for completion of the 94 core policy issues. The Council at the same time also mandated the Committee, following resolution of the core issues, to complete its remaining technical work by December 2004.

[13]Article 2(g) and Article 2(1).

[14]Article 2(a) states that the administrative determination must clearly specify the subheadings or heading, when using the criterion of change in tariff classification; must indicate the method of calculating the percentage when using the percentage criterion; and must 'precisely specify' the prescribed operation when using a technical criterion.

On 27th July 2005, the General Council set July 2006 as the new deadline for the completion of the 94 core policy issues and 31st December 2006 as the new deadline for completion of technical work (G/L/747 dated 04.10.2005). The final resolution will have a bearing on quotas, anti-dumping actions as well as regional trade agreements.

On the issue of paternity of goods, India prefers a regime where it can assemble the goods or garments at home and then export it to the other country. India has taken the stand that origin should go to the place where the article first acquired its essential character. This is in keeping with the Harmonised System Residual Rules of Classification. The origin depends on a case-to-case basis. The question whether a collar is an essential characteristic of a shirt? The answer changes according to the interests of the parties in the case.

8 Conclusion

In conclusion, the Agreement on Rules of Origin essentially affects the purchasing and manufacturing strategies of firms in international trade. The firms would have necessarily to take into account the origin rules as a factor of production while planning their production strategies. The Agreement on Rules of Origin thus has taken a major step towards this goal by harmonising the non-preferential rules of origin and attempting to create a more transparent, technical and predictable process for all determination of origin. However, so long as the countries continue to treat similar imported goods differently, on the basis of each goods origin, rules of origin will remain a controversial, necessary but inefficient device in international trade.

Chapter 10
Publication and Administration of Trade Regulations (Art. X)

The text of Article X 'Publication and Administration of Trade Regulations' is reproduced below:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or government agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this article.
   (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action

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relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers: *Provided that* the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

1 Purpose of Article X

The basic purpose of Article X is that secrecy of trade rules amounts to non-tariff barriers, and if nations are allowed to keep trade regulations covered in their cupboards, there is every likelihood that the objectives of GATT and WTO, i.e. transparency, predictability and uniformity, would be infringed. Article X, *ipso jure*, makes the GATT/WTO members cognizant of the information for policy options and decisions. Also the transparency of laws and regulations would help less developing countries a lot for their export performance through the GATT/WTO Trade and Development Center and make the members of GATT/WTO rules complaint and obligatory.[1]

Paragraph X: 1; Laws, Regulations, Judicial Decisions and Administrative Rulings of general application pertaining to the classification… enables governments and traders to be acquainted with them except the confidential information which would impede the law enforcement or is contrary to public interest or would prejudice the legitimate commercial interests of enterprises both public or private.

In US—Underwear case[2] the Appellate Body held that Article XI: 1 of GATT 1994 which uses the language of general application includes, administrative ruling also even if the measure was country specific. But if the restraint was addressed to a

[1]John H. Jackson, World Trade And the Law of GATT, 156 (1969).

[2]United State—Restriction on imports of Cotton and Man-made Fiber Underwear, Appellate Body Report, DSR 1997: 1.

specific company or applied to a specific shipment, it would not qualify a measure of general application. To the extent that the restraint affects an undefined number of economic operators, including domestic and foreign producers, the measure amounts to general application.[3] The above holding was upheld in EC-Poultry case[4] by the Appellate Body, which found that import licensing of EC on certain poultry products was not inconsistent with Article X for the fact that the information which Brazil claimed should have been made available, concerns a specific shipment which is outside the scope of Article X of GATT. In Japan-film case, Panel held that the Article X: 1 extends to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future case.[5]

Article X: 2 may be seen to embody a principle of fundamental importance—that of promoting full disclosure of governmental acts affecting members of WTO and private persons and enterprises, whether of domestic or foreign nationality—which is based on the principle of transparency and obviously has due process dimensions. The essential implication of Article X: 2 is that members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.[6]

Article X: 3 requires that GATT/WTO members should administer their trade laws in an impartial and reasonable manner and maintain an institute as practicable appropriate tribunals for this purpose with necessary impartiality and appeals. This would give impetus to the promotion of international trade as well as would not permit, in the treatment accorded to imported goods, discrimination based on country of origin, nor would permit application of one set of regulations and procedures with respect to some member and a different set with respect to others.[7]

The reading of Article X: 3 with other provisions of Article X makes it clear that Article X applies to; (a) publication of laws, regulations, decisions and rulings; (b) Article X: 3(a) calls for uniform, impartial and reasonable administration of trade-related regulation and for domestic review procedures relating to customs matters in which normally private traders are involved as against the obligations in Articles I, II and III of GATT; (c) Article X: 3(a) should be read as a broad anti-discrimination measure; and (d) a process aimed at assuring a proper classification of products but which inherently contains the possibility of revealing

[3]Ibid., para. 7.65.

[4]European Communities—Measures Affecting the Importation of Certain Poultry Products, Appellate Body Report, WT/DS 69/AB/R, DSR 1998: V, para. 269.

[5]Japan—Measures Affecting Consumer Photographic Films and Paper, Panel Report, WT/DS 44/R, Adopted 22 April 1998, DSR1998: IV, para. 10.388.

[6]Appellate Body Report on US—Underwear supra notes 2, p. 21.

[7]A Note by the Director General of GATT, 29 November 1969, L/3149.

confidential business information, in an unreasonable manner of administering the laws, regulations and rules identified in Article X: I are inconsistent with Article X: 3(a).[8]

In US—anti-dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, the Panel rejected Korea's claim that the US violated.

Article X: 3(a) by departing from its own established policy with respect to the determination of the prices of local sales which are to be compared to alleged dumping exports and held that Article X: 3(a) was not intended to function as a mechanism to test the consistency of members particular decisions or rulings with the member's own domestic law and practice.[9]

2 Notifications Provided for by Specific Provisions of the General Agreement Or Decisions of the Contracting Parties

The following table presents the provisions of the General Agreement, or decisions of the CONTRACTING PARTIES, which provide for notification of measures, either as such or in connection with requests made to the CONTRACTING PARTIES.

Tariffs	
Proposal on introduction of loose-leaf system for the schedules of tariff concessions[a]	Submission of consolidated schedules of tariff concessions
Decisions on integrated database[b]	Contracting parties should submit annually to the Secretariat, by tariff line, tariff data for unbound items and import data for all bound and unbound tariff items, in accordance with the IDB agreed format
Article II: 6(a)	Notification of adjustment of specific duties
Article XVIII: (a)	Notification of medication of withdrawal of concessions pursuant to Article XVIII: 7(a)
Article XXVII	Notification of withholding or withdrawal of concessions initially negotiated with a government that has not become, or has ceased to be, a contracting party

(continued)

[8]Appellate Body Report in EC-Bananas III, WT/DS 27AB/R, DSR1997: II, para. 200; Argentina —Hides and Leathers, Panel report, WT/DS155/R and corr. I, Adopted 16 Feb 2001; US—Stainless Steel, Panel Report, WT/DS/179/R, Adopted 15 Feb 2001.

[9]Panel Report, WT/DS 179/R, R, Adopted, 1 January 2001, paras. 6.50–6.51.

(continued)

Article XXVIII: 1	Notification of medication or withdrawal of concession to take place during 'open season' (not earlier that six months nor later than three months before the termination date of a preceding three-year period as referred to in Article XXVIII: 1)
Article XXVIII: 4	Request for authorisation by CONTRACTING PARTIES to enter into negotiations for medication or withdrawal of a concession at any time in special circumstances
Article XXVIII: 5	Notification during Article XXVIII1 'open season' reserving the right to modify or withdraw concessions during the subsequent three-year period

[a]Proposal by the Director General Adopted on 26 March 1980, C./107/Rev. 1, 27S/22
[b]Decision of 10 November 1987, L/6290, 34S/66, para. 3. See also IDB User Reference Manual dated 19 April 1994, IDB/URM/1

Quantitative restrictions and other measures affecting trade	
Article XII: 4 and XVII: 12[a]	Notification of introduction or intensification of all measures taken for balance-of-payments purposes
Questionnaire on import licensing procedures (L/5640)[b]	Notification of import licensing and similar administrative procedures maintained in and applied with respect to imports into the customs territories to which GATT applies
Database on quantitative restrictions and other non-tariff measures[c]	Biennial complete notification of quantitative restrictions; notification of details of changes in quantitative restrictions as and when these changes occur.
Inventory of non-tariff measures[d]	Notification by contracting parties of measures maintained by other contracting parties which affect their trade
Border tax adjustment[e] Marks of origin[f]	Notification of major changes in tax adjustment legislation and practices involving international trade Notification of changes in legislation, rules or regulations concerning marks of origin
Ministerial decision on export of domestically prohibited good[g]	Notification by contracting parties, to the maximum extent feasible, of any goods produced and exported by them but banned by their national authorities for sale on their domestic markets on grounds of human health and safety (circulated in DPG NOTIF/-series)
Streamlined mechanism for reconciling in interests of contracting parties in the event of trade-damaging acts[h]	Notification by importing contracting parties of measures restricting trade for the purpose of protecting human, animal or plant life or health

(continued)

(continued)

Decision concerning Article XXI of General Agreement[i]	Notification of trade measures taken under Article XXI

[a]As interpreted by 1979 Declaration on Trade Measures Taken for Balance-of-payment Purposes, 26/205
[b]Agreed at the Twenty-eighth Session of the CONTRACTING PARTIES; see Report of the Committee on Trade in Industrial Products. L/3756, para. 76; SR. 28/6
[c]Procedures established 1980, 27S/18; further format for notification adopted as part of Report (1985) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, Adopted on 28 November 1985, 32S/93
[d]Procedures established 1980, 27S/18; further format for notification adopted as part of Report (1985) of the Group on Quantitative Restrictions and Other Non-Tariff Measures, Adopted on 28 November 1985, 32S/93
[e]Procedures recommended in Report of the Working Party on 'Border Tax Adjustments' adopted on 02 December 1970, L/3464, 18S/97, 108 para. 40
[f]Recommendation of 21 November 1958 on 'marks of Origin' 7S/30, 33
[g]Ministerial Declaration adopted on 29 November 1982, 29S/19
[h]C/M/236, p. 6–7; 36S/67; for text see under Article XX(b)
[i]L/5426, 29S/3; for text of decision see under Article XXI

Quantitative restrictions and other measures affecting trade	
Programme of Work of Committee on Trade in Agriculture[a]	Notification of measures and policies affecting trade in agriculture (circulated in AG/FOR/REV/-series)
Exchange arrangements	
Article XV: 8	Notification by contracting parties not members of the International Monetary Fund, of national trade and financial data within the scope of Article VIII: 5 of the IMF Articles of Agreement
Subsidies	
Article XVI: 1[b]	Notification of any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, the territory of a contracting party. Full notification (response to questionnaire) every three years; annual notifications of changes in intervening years
State trading	
Article XVII: 4[c]	Notification of products imported into or exported from territories of contracting parities by state-trading enterprises or other enterprises which enjoy exclusive or special privileges. Full notification (response to questionnaire) every three years; annual notifications of changes in intervening years
Liquidation of Stocks[d]	Advance notification by any contracting party holding strategic of primary products accumulated as part of a national strategic stockpile for purposes of national defence and intending to liquidate a substantial quantity of such stocks

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Governmental assistance to economic development (Article XVIII: C and D)	
Article XVIII: C[e]	Notification of special difficulties which a contracting party falling under Article XVIII: 4(a) meets in achieving the objective in Article XVIII: 13; indication of specific measures which it proposes to introduce in order to remedy these difficulties
Governmental assistance to economic development (Article XVIII: C and D)	
Article XVIII: D[f]	Notification of special difficulties which a contracting party falling under Article XVIII: 4(a) meets in achieving the objective in Article XVIII: 13; indication of specific measures which it proposes to introduce in order to remedy these difficulties

[a]L/5563, 30S/100, 102
[b]Questionnaire at 9S/193; See also 11S/59
[c]Procedures for notifications established 1957, modified 1960 (6S/23, 9S/184). Questionnaire established 11S/58
[d]Resolution of 04 March 1955 on 'Liquidation of Strategic Stocks', 3S/51; see, e.g., notifications by Australia at L/3373, L/432, L/4018
[e]As modified by the Decision of 28 November 1979 on Safeguard Action for Development Purpose, 26S/209
[f]Questionnaire for guidance established 1958, 7S/85

Chapter 11
WTO Ninth Ministerial Conference and Trade Facilitation Agreement, 2013

1 Introduction

The WTO Trade Facilitation Agreement 2013 (TFA) has been endorsed by more than 160 members of the WTO by way of Ninth Ministerial Conference held at Bali on 2–6 December, 2013, and has come to effect from 2017. TFA is being taunted as feather in the future prosperity of the WTO especially in the backdrop of virtual demise of Doha Development Agenda and Doha Development Decade (2001). While approving the TFA, the General Council (GC) of WTO took note of the entire gamut of the Bali Package, i.e. trade facilitation, public stockings for food security and package of recommendations for the least developed countries. India initially stalled the TFA by resisting its ratification by demanding the simultaneous resolution of the contentious issue of importance concerning public procurement of food grains for food security. However, due to USA diplomatic endeavors India relented and TFA became a reality. At the same time, GC proposed that a permanent solution has to be found and till then the peace clause of Agreement on Agriculture (AOA) will continue to operate in this area. India was interested to find solutions to both the measures before it would sign the TFA.

As import tariffs have lost much of its economic significance, any international trade policy needs to concentrate on operational aspects that impact the costs of trade in transporting goods and services across the globe and inter-se the members of the WTO. Therefore, the Bali Ninth Ministerial Conference of WTO although repetitive of the Doha Development Commitments yet, *albeit,* is the WTO's first trade reform deal since its inception having reached agreement on a package of issues designed to improve trade efficiency, ensure food security in developing countries and enhance development generally. The Secretary General, Roberto Azevedo of the WTO lauded the TFA proclaiming that for the first time in history, the WTO has truly delivered. Bali package is a 'win-win' agreement for both developed and developing members of the WTO.

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However, there are differences of opinions and perspectives amongst legal scholars on the effectiveness of the FTA; some appreciate the Bali package while others denounce the package as mercantilist, pro-developed countries and anti-developing countries economic interests. On balance, it may turn out to be yet another rhetoric in WTO jurisprudence. India is at an edge as its commitments under AOA have far exceeded its limits of subsidy cap under AOA and yet craves for a new exemption limit for subsidies issued in connection with its food security programmes, notwithstanding the question whether the food security programmes of India really benefit the stake holders for whom the benefit is devised.

2 Economic Benefits of Trade Facilitation

In absence of a standard definition of the term 'trade facilitation', it may mean:

(a) Simplification and harmonization of international trade procedures including the activities, practices, formalities connected with the trade transacted across the countries; it may also mean formalities in presenting, communicating, and processing data and other information required for the movement of goods in international trade[1];
(b) It may also mean reduction of red tape in international trade, a term often used for trade facilitation as impediments to international trade in general and complex formalities in particular are concerned.
(c) It may also mean plumbing of international trade as shippers, merchants, and transporters face herculean task of fulfilling the customs procedures and the applicable law.
(d) Generally speaking there are several procedures (in UK more than 60 and India is not an exception) administered by so many government departments and specialized agencies which impose heavy costs on the transport of goods and merchandise[2];
(e) Various studies indicate that potential gains from trade facilitation reform conceived in WTO TFA could yield enormous increase in manufacturing and other trades.[3]
(f) It is also assumed that worldwide gain from improved trade facilitation could be comparable to full liberalisation of goods and services trade. Reduction of trade transaction costs through trade facilitation can bring significant welfare benefits and gains.

[1]Wilson, J.S.; C. Mann & Otsuki, T. Assessing the Benefits of Trade Facilitation: A Global Perspective, World Economy. 28, no. 6 (2005), 841–871.

[2]OECD, Overcoming Bottlenecks; The Costs and Benefits of Trade Facilitation, OECD, Trade Policy Studies, 2009.

[3]Grainer, A.; Supply Chain Security; Adding to a Complex Operational and Institutional Environment, World Customs Journal, 1, 12–29.

Some scholars have argued that trade facilitation measures as conceived in the TFA may be challenging for the developing and least developing members of the WTO, yet it is felt that the developing countries stand to gain from trade facilitation reform. It is believed that the reduction in trade transaction costs is always beneficial to importers and exporters and developing countries exports and imports will be cheaper.

Generally non-tariff measures are those measures which prohibit or restrict imports or exports of goods and services and are other than tariff measures. Non-tariff measures in international trade cover a wide variety of measures impacting trade and may include quantitative restrictions, fees and charges in connection with importation and exportation; import licensing procedures; technical regulations; standards and conformity procedures; and sanitary and phytosanitary measures[4], and therefore, it is conceived that the mite of non-tariff measures can be reduced to negligible levels by the TFA.

Some studies have indicated that the potential cost reduction of trade facilitation measures in TFA are estimated at 10% for the developed and 15% for the developing countries. These studies have also indicated that every 1% cost reduction worldwide in international trade transactions would increase income by more than US$60 billion, 60% accruing to the less developing countries. As a matter of fact, the TFA will result in GDP gains of nearly 1 trillion. It is perceived that TFA will allow small businesses to break into global markets and increase its export opportunities as the international trade may become simpler, faster and cost effective.[5]

According to Grainger, within UK meat import sector, the costs incurred by importers in clearing cargo through authorities and the port can be as high as 40–80% of the haulage rates from the port to their final destination.[6] These studies have shown further that the compliance with Art. V of GATT (Freedom of Transit) and Art. VIII (Fees and Formalities connected with Importation and Exportation) could yield USD 107 billion in manufacturing trade alone. Wilson assessing the compliance with Art. X of GATT (Publication and Administration of Trade Regulations) could yield a USD 83 billion increase in trade.[7]

However, the above-said economic upsurge and improvement in international trade may not benefit and would be illusory to developing and least developed countries taking into account their constraints scientific and otherwise in implementing TFA and reaping its benefits.

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[4]See generally; A.K. Koul, Guide to WTO, 4th Ed., Satyam International, 2013.

[5]Grainer, A.; 2007. Trade Facilitation and Supply Chain Management; A Case Study of the Interface Between Business and Government, Ph.D., Birkbeck University of London.

[6]Grainger, A.; Trade and Customs Procedures; the Compliance Costs for UK Meat Imports. Nottingham University; University of Nottingham, 2013.

[7]Wilso, supra note 1, 845.

3 Trade Facilitation Agreement—An Analysis

The preamble to the TFA, affirms the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and Annex D of the Decision of the Doha Working Programme, adopted by the GC of the WTO on 1 August 2004 as well as paragraph 33 and Annex E of the Hong Kong Ministerial Declaration. The preamble also clarifies that the TFA is in pursuit of clarifying and improving the relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods including goods in transit. Further, the TFA in its preamble recognizes the particular needs of developing and the least developed countries and requests the member countries to enhance assistance and support capacity building of the developing and least developed members.

Article V of GATT 1994 speaks of Freedom of Transit and stresses on freedom of transit through the territory of each contracting party, via, the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. Further, it ordains the member countries not to discriminate on the basis of flags of convenience, the place of origin, departure, entry or destination, or any circumstances relating to the ownership of goods, of vessels or other modes of transport. Paragraph 3 of this Article is essentially meant to address the smooth flow of international trade and transit by providing first, the rights of contracting parties to subject the traffic through customs points and second, avoiding the unnecessary delays and restrictions for the goods which are in transit to third countries. The other paragraphs of the Article concern with the charges for transportation which should be applied on *MFN* basis. Once the goods have been cleared from the customs, those goods should be treated goods of *like products.*

Article VIII of GATT 1994, concerns with Fees and Formalities with importation and exportation and refers to that all fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or taxation of imports for fiscal purposes. This Article obligates member countries to reduce the number and diversity of fees and charges of the type specified as above. This Article also obliges the member countries not to impose substantial penalties for minor breaches of customs regularization or procedural requirements. Further, the scope of Article VIII extends to fees, charges, formalities and requirements including consular transactions, quantitative restrictions, licensing, exchange control, statistical services, documentation. Article VIII has been buffeted by the Code of Standard Practices for Documentary Requirements for the Importation of Goods and Customs Co-operation Council is active in this area.

Article X of the GATT 1994, Publication and Administration of Trade Regulations, is conceived to oblige member countries to stick to the principles of transparency by publishing laws, regulations, judicial decisions and administrative

rulings of general application pertaining to the classification or the valuation of products for customs purposes, or rates of duty, taxes or other charges, or to requirements, restrictions, or prohibitions on imports and exports etc. Article X calls for uniform, impartial, and reasonable, administration of trade related regulation and for domestic review procedures relating to customs matters in which normally private traders are involved. The cumulative effect of the Article X in its three limbs makes it clear that besides the principle of transparency, the due process is also implied in this article.

Reading the three articles together and taking into account the general tenor of the case law decided by the WTO, it is clear that TFA is a further extension of providing more and explicit facilities for the developed countries commerce in international trade.

TFA comprises thirteen articles divided into two Sections, and some of these articles are of a technical character specifying amongst other issues: minimum benefits for trusted traders.

Section I and Art. 1 requires the member countries to publish trade and customs compliance requirements as well as well as customs fees on early accessible websites; establish national enquiry points; publishing of average release times, etc. Art. 2 commits the member countries to consultations with the private sector before implementing measures. Art. 2 stipulates advance customs rulings for tariff classification and origin and also recommends customs value, duty relief, and quotas. Art. 3 constitutes the procedure for right to appeal and Art. 5 distinguishes measures for enhancing impartiality, non-discrimination and transparency.

Art. 6 specifically deals with disciplines on fees and charges imposed on or in connection with importation and exportation, a highly contentious issue in imports and exports under Art. III of GATT, have been clarified. Art. 7 is the central article in the scheme of reducing impediments to international trade by clarifying some of the customs procedures. Art. 8 takes note of pre-arrival processing of customs declarations, electronic payments of duties, taxes and fees, adherence to risk based controls and post clearance audit by customs. It also provides measures for expedited clearance of air cargo and perishable goods. Art. 10 is dealing with implementation of the special customs procedures such as Inward Processing and Outward Processing Relief.

Art. 11 clarifies the notion of Freedom of Transit and stresses the fact that no voluntary restraints should be applied to goods which are in transit both inward and outward including the restraint as specified in WTO TBT Agreement, etc. Art. 12 stresses that TFA needs to be trader friendly and such members should encourage to share information on best practices in managing customs compliance through technical guidance for administrative compliance measures; exchange of copies of the import and export declaration as well as supporting documents such as commercial invoice and shipping documents and a mechanism of exchange of information between customs authorities is also conceived in Art. 12.

A Committee on Trade Facilitation is conceived under Art. 13 as part of WTO dispensation. This Committee is open to all members of TFA and this Committee has to maintain a close cooperation with other international organizations such as World

Customs Council. Member states are also under legal obligation to establish National Committees on Trade Facilitation or designated mechanism in their respective countries to facilitate both domestic coordination and implementation of TFA.

4 TFA and S&D Treatment for Developing and Least Developed Countries

Section II, Art. 13 of the TFA elaborates a complex process by which developing and less developed countries are supposed to submit their schedules of the substantive provisions of Section I that they would accept—allowing for three such 'schedules'; Category A, Category B, and Category C.

The categorisation is essentially meant to provide both breathing space and in some instances assistance depending upon the choice of the implementation provisions and the assistance likely to be provided by any or all the developed countries.

Category A contains provisions that a developing country member or at least developed country member designates for implementation upon entry into force of TFA.

Category B contains provisions that a developing country member or at least developed member designates for implementation on a date after the transitional period of time following entry into force of the TFA.

Category C contains provisions that a developing country member or at least developed country member designates for implementation on a date after a transition period of time following the entry into force of the TFA and requiring the acquisition of implementation capacity through the provision of assistance.

5 Categorisation—A Critique

TFA categorisation of developing and least developed countries into A, B and C for its implementation appears not only complex but muddled up also. So far as developed countries are concerned, they have no option but to accept the TFA in toto, whereas the developing countries categorisation leaves ample scope for countries to carve out all or any exceptions from implementing the TFA. China for instance has excluded the TFA provisions of co-operation with traders (Art. 12 of the TFA), other customs authorities, on request for information on verification, etc.; and customs treatment of temporary admission of goods for inward and outward transmission.[8] India has yet to submit its list of Categories.

[8]J.M. Finger; The WTO Trade Facilitation Agreement: Form Without Substance Again? V. 48, JWT, 1279 at 1285.

A plain reading of Category B makes its implementation and legal obligation uncertain. This Category allows different dates for its schedule of commitments; i.e., for the list of Section I, provisions would have to be provided at the date of entry into force of the TFA whereas the notifying member would have a year after that to notify when (i.e. dates) it would accept these provisions as a legal obligation is completely uncertain.

The WTO Trade Facilitation Committee is to oversee the implementation of the TFA and needs to be apprised of the difficulties faced by the developing and the least developed member countries in implementing the time lines as specified in Categories B and C so that further time can be granted. There appears to be a mismatch in the Category B and Category C, as it excludes reciprocity and mutual commitments between and amongst developing and least developed member countries.

For all intents and purposes Category C stipulates acceptance by developing country members for which they ask a phase in period and for assistance. Once TFA is implemented, each developing member would notify to the Trade Facilitation Committee as its category C schedule the Section I provisions, and it includes also information on assistance required. This notification is meant for transparency only—not a commitment to accept the provision as a legal obligation if this assistance is provided.

It is to be noted that TFA stipulates that within 18 months from entry into force, each member country along with donor member country who stepped forward would inform the Trade Facilitation Committee on the progress in the provision of assistance and support. The developing member countries would at the same time, notify the dates when it would accept its listed category C provisions as legal obligation. However, there is no definite date or limit as to how far in the future these dates would be.

The whole exercise of trade facilitation under the TFA appears to be a continuation of the recommendations of the UN CEFACT Recommendation No. 4 (UN/CEFACT, 2001) which laid stress on the establishment of National Trade Facilitation Bodies in the member countries for furthering the interests of private sector. TFA recognizes the importance of private sector in Art. 2 but does not specify how private sector should be involved in the consultations at the national trade facilitation exercise. The role of private sector in assuaging the economic interests of the member states is ambiguous. Further, the role of private sector in feeding back the WTO Committee on Trade Facilitation is missing which appears to be a serious loophole in the TFA and needs to be rectified.

As already said, the developed member countries have to accept the TFA in toto; the developing and least developed member countries have so many options under various categorisations that may create an ambiguous situation of allowing the developed countries to completely neglect the needs and assistance in implementing the trade facilitation measures in these countries and also allow the developed member countries pressurize these countries for some reciprocity under some other trade measures namely free-trade agreements which are the spice of the day in international trade.

The TFA appears to be one more exercise in WTO rhetoric as it is not grounded in terms of GATT's reciprocity nor does it provide a concrete mechanism of providing assistance to the less developing and least developed member countries for its implementation.

The categorisation as already said is muddled up and the categorisation makes the agreement a very weak instrument which at best is good for developed country private sector.

Chapter 12
General Elimination of Quantitative and Other Restrictions

A. General Elimination of Quantitative Restrictions

The text of Article XI (general elimination of quantitative restrictions) is reproduced as under:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party on the exportation or sale for export of any product destined for the territory of any other contracting party.
2. The provisions of paragraph 1 of this Article shall not extend to the following:
   (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
   (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
   (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
      (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
      (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_12

substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

Ad Article XI

Paragraph 2(c)
The term 'in any form' in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, Last Subparagraph
The term 'special factors' includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

Ad Article XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations.

1. General

The basic philosophy of Article XI is that quantitative restrictions (QRs) or quotas and import and export licences and any other measures essentially are trade restrictive and protectionist and thus need to be eliminated as compared to taxes, duties and other charges which can be negotiated under the tariff-negotiating

process of GATT/ WTO. These prohibitions extend to importation of any product of any member or exportation or sale for export of any product, and therefore, the prohibition of QRs forms one of the cornerstones of the GATT/WTO system. The GATT/WTO system acknowledges tariffs as preferred and acceptable form of revenue generations as well as mechanism of protection. Tariffs under the GATT 1994 are to be reduced through reciprocal concessions, to be applied in a non-discriminatory manner independent of origin of goods. As already discussed, Article I requires MFN treatment, and Article II specifies that tariffs must not exceed bound rates (Part I of GATT 1994). Part II of the GATT 1994 imposes obligation of national treatment and the prohibition against QRs. The prohibition against QRs is a reflection that tariffs are GATT's border protection of choice. Whereas QRs impose absolute limits on imports; tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, QRs usually have a trade-distorting effect, their application invariably is problematic and their administration may not be transparent.

Notwithstanding this broad prohibition against QRs, GATT-contracting parties from very early had imposed QRs in sectors such as agriculture, textiles and clothing. Certain contracting parties were even of the view that QRs had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restriction irrespective of the circumstances specific to each case. However, this argument has been rejected in a Panel Report in the case of EEC-Imports from Hong Kong.[1] Further, the Uruguay Round recognised the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measure. And towards that end, the Uruguay Round has devised mechanisms for phasing out QRs in the sectors such as textiles (Agreement on Textiles and clothing), agriculture (Agreements on Agriculture), GATT 1994 Understanding on Balance-of-Payments Provisions, and the Agreement on Safeguards.

2. **Article XI—An Analysis**

Paragraph 1 of Article XI conceives of prohibitions and restrictions on any product through quotas, import or export licences or other measures maintained or instituted on the importation of any product of the territory of any other contracting party, or on the exportation of or sale for export of any product destined for the territory of any other contracting party. It has been subjected to Panel and Appellate decisions under GATT 1947 and GATT 1994 and WTO.

The clause prohibitions and restrictions… on the importation of any product was subjected to Panel determination in the case of US—Shrimp, wherein the US

[1]EEC—QRs Against Imports of Certain Products from Hong Kong, Panel Report, Adopted 12 July 1983, BISD 30S/129.

statutory provisions expressly required the imposition of an import ban on imports from non-certified countries as well as by an order dated 1 May 1996, US Department of State prohibited the importation of Shrimp and Shrimp products wherever harvested in the wild with commercial fishing technology which may affect those species of sea turtles, the conservation of which was the subject matter of the above-said order. US argument was that the above-said ban continues till the country concerned has not been certified by the US authorities as USA has certain policy objectives to be achieved by such import ban. The Panel held that the US measures were violative of Article XI as they amounted to prohibition or restrictions.[2] In Argentina—Hides and Leather, the EC argued that Argentina's measure was inconsistent with Article XI:I as Argentina by authorising the presence of domestic tanners representing in the customs inspection procedures for hides destined for export operations was imposing a de facto restrictions on exports of hides which was upheld by the Panel.[3]

Although it is well established that governmental measures alone fall within the ambit of Article XI: 1, the fact that actions taken by private parties does not rule out the possibility for the purpose of QRs that it may be deemed governmental if there is sufficient governmental involvement in it to be examined on a case-by-case basis.

3. **Import or Export Licensing**

Import quotas have been examined by GATT Panels on number of occasions.[4] However, the Appellate Body in the case of India—Quantitative Restrictions[5] held that the ambit of Article XI is very broad, providing for a general ban on import or export restrictions, other than duties, taxes and other charges; it applies to import and export licensing including discretionary and non-automatic import licensing.[6] In a case involving a so-called SLQ regime, which concerned products' subject in principle to quantitative restrictions, but for which no quota amount had been set either in quantity or in value, it was held that permit applications being granted upon request by the 'SLQ' regime or was by way of import licensing which

[2]USA—Import Prohibitions of Certain Shrimp and Shrimp Products. Panel Report, WT/DS 58/R and Corr. I, Adopted 6 November 1998 Para. 7.16.

[3]Panel Report on Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS/55/R and Corr. I, Adopted 16 Feb 2001.

[4]Ibid., Panel Report on French Import Restrictions, L/1921, Adopted on 14 November 1962, 11S/94; Panel Report on Japan—Restrictions on Imports of Certain Agricultural Product, L/6263, Adopted on 2 Feb. 1988, 35S/163; USA—Restriction on the Importation of Sugar and Sugar-containing Products Applied under the 1955 Waiver, L/6631, Adopted on 7 November 1990, 37S/228.

[5]India—Quantitative Restriction on Import of Agricultural, Textiles and Industrial Products, Panel Report, WT/DS90/R Adopted 22 September 1999.

[6]Ibid., Paras. 5.129–5.130.

amounts to QRs unless it provides for automatic licensing. Export licensing practices leading to delays of up to three months in the issuing of licences which were non-automatic are violative of Article XI, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted.[7]

In the case of minimum price systems for imports or exports, the GATT 1947 Panels have held that import regulations allowing the import of a product in principle, but not below a minimum price level is violative of Article XI.[8]

4. **Restriction Made Effective Through State Trading**

Throughout Article XI, XII, XIII, XIV, and XVIII and the Note Ad to these Articles, the terms import restrictions or export restrictions include restrictions made effective through state-trading operations. However, the mere fact that imports are made through state-trading enterprises would not in itself constitute a restriction. For a restriction to be found to exist, it should be shown that the operation of state-trading entity is such that is results in restrictions.[9] In cases where state-trading enterprise possess an import monopoly and a distribution monopoly, any restriction it imposes on the distribution of imported product will lead to a restriction on importation of particular product over which it has a monopoly. The state-trading enterprises having effective control over both importation and distribution, and imposing restrictive measures, external and internal, will have an adverse impact on the importation of the product, and Ad Note to Article XI prohibits monopoly right of state-trading enterprise over both importation and distribution and from imposing any internal restriction against such imported products.[10]

The above principles were also laid down in the GATT 1947 Panels[11] and in the case of Republic of Korea—Restrictions on Imports of Beef-Complaint by the

[7]EEC—Quantitative Restriction Against Imports of Certain Products from Hong Kong, Panel Report, Adopted 12 July 1983, BISD 30S/129 para. 31.

[8]Panel Report on EC—Programme of Minimum Import Prices, Licenses and Surety Deposits of Certain Processed Fruits and Vegetables, L/4687, Adopted on 18 October 1978, 25S/68, 99; Panel Report on Japan—Trade in Semiconductor, L/6309, Adopted on 4 May 1988, 35S/116.

[9]India Quantitative Restrictions, supra note-5, para. 5.134, 5.135.

[10]Appellate Body Report on Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS/69/AB/R, para. 751.

[11]Report of the Working Party on Italian Restrictions Affecting Imports from the USA and Certain Other Countries, L/1468, Adopted on 16 May, 1961, 10S/117; Panel Report on Canada—Import, Distribution, and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, L/6304, Adopted on 22 March 1988; Panel Report on Japan—Restrictions on Imports of Certain Agricultural Products, L/6253, Adopted on 2 February 1988, 35S/163.

United States,[12] the Panel held that the rules of the GATT 1947 did not concern with the organisation or management of import monopolies but only with their operations and effects on trade, and the existence of a producer-controlled monopoly could not in itself be in violation of the GATT.

5. Exceptions to Article XI

Critical shortages of foodstuff in paragraph 2 of Article XI envision that export restrictions must be temporary or prevent or relieve critical shortage of foodstuffs or other products essential to the exporting member. Paragraph 2 of Article XI also allows a member to impose temporary export restrictions to meet a considerable rise in domestic prices of foodstuffs due to the rise in prices of other members.[13]

The other exception in Article XI: 2(b) is carved for the application of standards or regulations for the classification, grading or marketing of commodities in international trade. However, these standards and restrictions should not have an unduly effect on international trade.[14]

The third exception allows 'import restrictions on any fisheries or agricultural products, imported in any form, necessary to the enforcement of governmental measure' that meet certain standards enumerated in paragraph 2(c) which are in general restrictions of quantities of the product produced, measures usually attending price support programmes of those types of products. The negotiating history gives two reasons for incorporating this exception, (1) excess production in these sectors on account of capricious bounty of nature, and (2) phenomena peculiar to these products of having a multitude of small unorganized producers in these products, and therefore governments have to step in,[15] to provide domestic governmental measures necessitated by the special problems as referred above of these products.[16]

For invoking Article XI: 2(c)(i) and Article XI: 2(c)(ii), the measure on importation must constitute (a) an import restriction (and not a prohibition); (b) must be on agricultural or fisheries product; (c) the import restrictions and the domestic marketing or production restriction must apply to 'like products' in any form (or directly substitutable production of the 'like product'); (d) there must be governmental measures which operate to restrict the quantities of the domestic product permitted to be marketed or produced; (e) the import restrictions must be

[12]L/6503, Adopted on 7 November 1989, 36S/268, 301–302, para. 114–115.

[13]Havana Reports, p. 88, para. 14.

[14]Review of Working Party on QRs, L/332/Rev. I and Addenda, Adopted on 5 March 1955, 3S/170 189–190, para. 67.

[15]EPCT/A/PV/19, p. 42.

[16]Supra note 13, para. 16.

necessary to the enforcement of the domestic supply restriction; (f) the contracting party applying restriction on importation must give public notice of the total quantity or value of the product permitted to be imported during a specified future period; and (g) the restrictions applied must not reduce the proportion of total imports relative to total domestic production as compared with the proportion which might reasonably be expected to rule the two in absence of restriction.[17]

A survey of the GATT 1947 Panel decisions on the specifics of Article XI: 2(c) reveals that 'like product' differentiation depends on the context in which exceptions have been made under Article XI[18]; like products do not mean what they mean in other contexts—merely a competing product[19]; the term in any form covers the same product when in early stage of processing and still perishable, which would directly compete with the fresh product and if freely imported[20]; imported in any form in paragraph 2(c) means the product in the form in which it is originally sold by its producer and such processed forms of the product are so closely related to the original product as regards utilization that their importation would make the restriction on the original product ineffective[21]; the central requirement of the Note Ad Article XI: 2(c) was that the product processed from the fresh product was still in the early stage of processing[22]; and import restriction applied under Article XI: 2 (c)(i) cannot exceed those necessary for the operation of the domestic governmental measure concerned.[23]

Finally, the purpose of Article XI: 2(c)(i) is essentially to permit governmental action under defined circumstances to protect domestic producers but does not provide either for compensation to be granted by the member invoking it, or for compensatory withdrawal by member adversely affected by such invocation.[24]

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[17]Panel Report on Canada—Import Restrictions on the Ice-cream and yoghurt, Adopted on 2 February 1988, 355/163, 227, paras. 5.1.3.7.

[18]Panel Report on EEC—Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, L/4687, Adopted on 18 October 1978, 25S/68 101, para. 4.12.

[19]Panel Report on Canada—Import Restrictions on Ice-cream and Yoghurt, L/6568, Adopted on 5 December 1989.

[20]Panel Report on Japan—Restriction on Imports of certain Agricultural Products, L/6263, Adopted on 2 February 1988, 36S/163, 225 para. 5.1.3.4.

[21]Panel Report on Japan—Restriction on Imports of certain Agricultural Products, L/6263, Adopted on 2 February 1988, 36S/163, 225 para. 5.1.3.4.

[22]Panel Report on Thailand—Restriction on Importation and Internal Taxes on Cigarettes, DS10/R Adopted on 7 November 1990, 37S/200, 222, para. 70.

[23]Ibid.

[24]Panel Report on EEC Restriction on Imports of Dessert Apples—Complaint by Chile and EEC Restriction on Import of Apples—Complaint by the USA, L/6491 and L/6513, Adopted on June 1989, 36S/93 and 36/135, para. 12–10 and 5–10.

6. Notification Requirements

The Committee on Market Access of WTO adopted two decisions on Notification Procedures of Quantitative Restrictions and Reverse Notification on Non-Tariff Measures and adopted a format for the submission of notifications of quantitative restrictions.[25]

B. Restrictions to Safeguard the Balance of Payments (Article XII)

The Text of Article XII (Restrictions to Safeguard the Balance of Payments and Understanding on the Balance-of-Payments Provisions of The GATT 1994) is reproduced as under:

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.
2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

   (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or
   (ii) in the case of contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

   Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

   (b) Contracting parties applying restrictions under subparagraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that subparagraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that subparagraph.
3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognise that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

[25]G/MA/M/10, para. 3, For the text of the Format, see G/Ma/NTM/QR/2.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

(i) to avoid unnecessary damage to the commercial or economic interest of any other contracting party;

(ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

(iii) not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trademark, copyright, or similar procedures.

(d) The contracting parties recognise that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2(a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them, the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in subparagraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under subparagraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultation, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.

(f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balances of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organisation, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

Ad Article XII Notes from Annex I

Interpretative
The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.

Paragraph 3(c)(i)
Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4(b)
It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this subparagraph at the time envisaged, they may determine a later date; provided that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3, and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4(e)
It is agreed that paragraph 4(e) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restriction made effective through state-trading operations.

Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994

Members, Recognizing the provisions of Articles XII and XVIII: B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this understanding as the "1979 Declaration") and in order to clarify such provisions[26];

[26]Nothing in this understanding is intended to modify the rights and obligations of Members under Article XII or XVIII: B of GATT 1994. The provisions of Article XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding can be invoked with respect to

Hereby agree as follows:

Application of Measures

1. Members confirm their commitment to announce publicly, as soon as possible, time schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time schedule is not publicly announced by a Member, that Member shall provide justification as to the reason therefore.
2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as 'price-based measures') shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding.
3. Members shall seek to avoid the imposition of new quantitative restriction for balance-of-payment purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.
4. Members confirm that restrictive import measures taken for balance-of-payment purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimise any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term 'essential products' shall be understood to mean products which meet basic consumption

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any matter arising from the application of restrictive import measures taken for balance-of-payments purposes.

needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.

Procedures for Balance-of-Payments Consultations

5. The Committee on Balance-of-Payments Restrictions (referred to in this Understanding as the 'Committee') shall carry out consultations in order to review all restrictive import measures taken for balance-of-payments purposes. The membership of the Committee is open to all Members indicating their wish to serve on it. The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as 'full consultation procedures'), subject to the provisions set out below.
6. A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the member to hold such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.
7. All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII or under paragraph 12(b) of Article XVIII, subject to the possibility of altering the periodicity of consultations in agreement with consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.
8. Consultations may be held under the simplified procedures approved on 19 December 1972 (BISD 29S/47-49, referred to in this Understanding as 'simplified consultation procedures') in the case of least-developed country Members or in the case of developing country Members who are pursuing liberalisation efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases, the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.

Notification and Documentation

9. A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.
10. At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members who have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.
11. The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalise import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.
12. The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretarial document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The

technical assistance services of the Secretariat shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.

Conclusion of Balance-of-Payments Consultations

13. The Committee shall report on its consultations to the General Council. When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII and XVIII: B, the 1979 Declaration and this Understanding. In those cases in which a time schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendation by the General Council, the Committee's conclusion should record the different views expressed in the Committee. When simplified consultation procedures have been used, the report shall include a summary of the main elements discussed in the Committee and a decision on whether full consultation procedures are required.

C. Article XII

1. Scope

Article XI of the GATT 1994 as discussed earlier deals with the general elimination of quantitative restrictions or quotas that need to be eliminated in international trade, subject to express exceptions as maintained in Article XI. However, Article XII provides major exceptions to this prohibition and which when implemented are supposed to be non-discriminatory (Article XIII), but this obligation also is subject to major balance-of-payments exceptions (Article XIV). Another exception, limited to less developing countries, exists in Article XVIII, Section B.

Article XII and its drafting history have been full of controversies both economic and political having the central focus that quantitative restrictions for balance-of-payments are permissible in the face of the fact that some countries may require restrictions on imports for purposes of domestic employment, economic reconstruction or social policies which may result in the increase in imports and consequent decrease in monetary reserves.[27]

[27]John H. Jackson, World Trade and the Law of GATT 673–716 (1969).

Article XII's central focus is that members of GATT 1994 can restrict the quantity or value of merchandise to safeguard its external financial position and its balance of payments, provided these restrictions are necessary;

(i) to forestall the imminent threat of or to stop, a serious decline in its monetary reserves or,
(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.[28]

Quantitative restriction or quotas for balance of payments are essentially a hard economic judgement depending upon various tangible and intangible factors, as such Article XII lists some of these factors which members have to pay regard to, such as, special external credits or other resources available to it, including the need to provide for the appropriate use of such credits or resources.[29]

The balance-of-payments concept has the central core as to what constitutes a serious decline in the member's monetary reserves, or a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves. For the financial aspect and other matters of the members, the role of IMF and its findings are important for arriving at the findings for justifying the QRs for balance of payments under Article XII.[30]

Once restrictions under Article XII: 2(a) has been applied by members for balance-of-payments purposes in consultation with IMF, the members are under an obligation to do the following:

(i) Restrictions shall progressively be relaxed as conditions improve and the restrictions should not extend beyond the conditions as specified in Article XII: 2(a). QRs should be eliminated when conditions no longer exist for justifying them.
(ii) Members are under an obligation to carry out their domestic policies in such a way as to maintain or restore equilibrium in their balance of payments on a sound and lasting basis by avoiding uneconomic employment of productive resources.
(iii) The members should adopt measures for expanding rather than contracting international trade.
(iv) The members should discern the imports of different products or classes of products which are essential for importation as against non-essential imports.
(v) The members should avoid unnecessary damage to the commercial or economic interest of other members.
(vi) The members should allow minimum commercial quantities of each description of goods so as to avoid regular channels of trade.
(vii) The members should allow imports of commercial samples.

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[28]Ibid.

[29]John H. Jackson, supra note, 27, 714.

[30]Ibid.

(viii) The members should avoid restrictions which prevent compliance with 'patents', 'trade marks', 'copyright' or 'similar procedures'.[31]

In order to achieve and maintain full and productive employment or for the development of economic resources, a member may experience a high level of demand for imports threatening its monetary reserves and consequently justifying the imposing of QRs. A member may not be required to withdraw or modify the QRs which otherwise would not have justified the restrictions.[32]

If a member applies new restrictions or raises the general level of existing restriction substantially under Article XII, the member for increase, raise or before such increase or raise, shall consult other members of GATT 1994 explaining the nature of the member's balance-of-payments problem, alternative corrective measures available and the possible impact of these QRs on other members. Within one year, after the date fixed for consultation, the members applying import restrictions for balance-of-payments problems should enter into consultation with other members for justifying the restriction.[33]

If the consultation of the members finds that the restrictions are not consistent with the provision of Article XII, or with Article XIII, subject to the provisions of Article XIV, the members after indicating the nature of the inconsistency may advise the member to suitably modify the restrictions.[34]

However, if the consultations of members determine that the restrictions are applied inconsistently with Article XII, and are of serious nature damaging or threatening the trade of other member/members, the members shall accordingly inform the offending member with appropriate recommendations for securing compliance with such recommendations, within a specified period of time failing which the member whose trade is affected adversely may be released from the GATT obligations.[35]

The members of the GATT 1994 can invite any other member who is applying restrictions for balance-of-payments problems, to enter into consultation at the complaint of any member who can establish a *prima facie* case that the other Member is imposing restrictions which are inconsistent with the provisions of Article XII, XIII, or XIV and damaging or likely to damage its trade. Such consultations can apply only if prior direct consultations between the offending member and the affected member have taken place. Once the members as a result of such consultations arrive at a conclusion that the offending member is applying restrictions, not in accordance with the provisions of Article XII, and damage the trade or threat thereof is caused or likely to cause, the members shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn within the stipulated time set by the members of the GATT, the members

[31]Article XII: 3.

[32]Article XII: 3(d) 61. Article XII: 3(a).

[33]Article XII: 3(a).

[34]Article XII: 4(h).

[35]Ibid.

may release the affected member from its obligations under GATT towards the offending party keeping in view the special external factors adversely affecting the export trade of the offending member, and such a determination has to be completed within sixty days of the initiation of consultation.[36]

2. Widespread Application of Import Restrictions

Article XII: 5 provides that if there is a persistent and widespread application of import restrictions which may indicate that there is a general disequilibrium restricting international trade, the GATT members are allowed to initiate discussion to consider whether other measures are to be taken either by the members the balance-of-payments of which are under pressure, or by the members of whose balance-of-payments is exceptionally favourable or by intergovernmental agencies/organizations so that the underlying causes of disequilibrium are removed.[37]

The working of the GATT 1947 and the Committee on Balance of Payments reveals that import surcharges and import deposit schemes were widely used by the GATT contracting parties for which the less-developing countries were granted waivers by the GATT under Article XXI: 5 and for others the criteria whether these surcharges are in compliance with the provisions of GATT's Article XII was applied.[38]

In 1971, the USA introduced temporary surcharges in conjunction with exchange rate policy and a domestic wage and price freeze. The surcharge was part of a broader programme designed to correct a serious balance-of-payments crisis for the USA. The report of the Working Party on US Temporary Import surcharge "examined the surcharge" and noted that the USA taking into account the findings of the IMF, considered itself entitled under Article XII to apply quantity restrictions to safeguard its external balance-of-payments but had chosen instead to apply surcharges which were less damaging to international trade… The Working Party noted that the surcharge, to the extent that it caused the incidence of customs charges beyond the maximum rate bound under Article II, was not compatible with the provisions of the GATT.[39]

There are various suggestions which tend to argue that the

(a) trade restrictions for the balance-of-payments purposes are no longer justifiable in the world of floating exchanges;
(b) GATT balance-of-payments language is sterile and tends to condition the exception in monetary reserves; and

[36]Ibid.

[37]Article XII: 5.

[38]Analytical Index, Guide to GATT, LAW and Practice, Geneva 364–370 (1995).

[39]L/3573 Adopted on 16 Sept 1971, 18S/212, 222–223, para. 41.

(c) the GATT balance-of-payments working for the last decades have not worked well as there is a misunderstanding of the exchange rate system necessitating restrictions.

Therefore, in the Tokyo Round, the contracting Parties adopted a Declaration on Trade Measures taken for Balance-of-Payments purposes.[40] Article I of the Declaration describes that, 'the procedures for examination stipulated in Article XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes'.

The application of restrictive trade measures taken for balance-of-payments purposes shall be subject to the following conditions in addition to those provided for in Article XII, XIII, XV and XVIII without prejudice to other provisions of the GATT:

(a) In applying restrictive import measures, contracting parties shall abide by the discipline provided for in the GATT and give preference to the measure which has the least disruptive effect on trade (less developing countries must take into account their individual development, financial and trade situation when selecting the particular measures to the applied).
(b) The simultaneous application of more than one measure for this purpose should be avoided. The provisions of this paragraph are not intended to modify the substantive provisions of the GATT. All restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions.

Thus, since 1979, in principle, all restrictive import measures, including but not limited to quantitative restriction, surcharges and import duty requirements, have been subject to examination in the Committee on Balance-of-Payments and not to examination by special working parties.

The Understanding on the Balance-of-Payments provisions of GATT 1994 as adopted in the Uruguay Round includes the 1979 Tokyo Round Declaration discussed above, and in order to clarify the Tokyo Round Declaration, it adopted additional procedures for balance-of-payments consultations and norms about the application of such measures with reference to Article XII and XVIII. Those norms are as follows:

(1) Time schedules to be specified for removal of restrictive import measures for balance-of-payments purposes;
(2) Least disruptive measures which are price based including import surcharges, import deposits or other equivalent trade measures may be preferred which may exceed the bound tariffs under Article II;
(3) Avoidance of new QRs for balance-of-payments purposes and in exceptional cases of sharp decline in external payments to be justifiable, new QRs for

[40]Declaration of Trade Measures Taken for Balance-of-Payments Purposes, GATT BISD, 26th suppl. 205 (1980).

balance-of-payments can be imposed indicating the amount by which the price-based measure exceeds the bound duty; and

(4) Restrictive import measures to be taken only for balance-of-payments purposes applied to control the general level of imports and not exceeding beyond the balance-of-payments requirements in a transparent manner.

Finally, the members utilising balance-of-payments measures must notify the WTO of their use, and must submit to consultations procedures with the Committee on Balance-of-Payments Restrictions, which will report to the General Council. Whenever the General Council has made specific recommendations, the rights and obligations of members shall be assessed in the light of such recommendation.

D. Non-discriminatory Administration of Quantitative Restrictions (Article XIII)

The text of Article XIII (Non-Discriminatory Administration of Quantitative Restrictions) is reproduced below:

1. No Prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions, and to this end shall observe the flowing provisions:

   (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3(b) of this Article;
   (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licenses or permits without a quota;
   (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub-paragraph (d) of this paragraph, require that import licenses or permits be utilized for the importation of the product concerned from a particular country or source;
   (d) In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in

which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

3. (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licenses granted over a recent period and the distribution of such licenses among supplying countries: *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.
   (b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry: *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this sub-paragraph.
   (c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.
4. With regard to restrictions applied in accordance with paragraph 2(d) of this Article or under paragraph 2(c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the contracting party applying the restriction: *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the

other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of the Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

Interpretative Notes from Annex I Ad Article XIII

Paragraph 2(d)

No mention was made of 'commercial consideration' as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to 'special factors' in connection with the last subparagraph 2 of Article XI.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Article XI, XII, XIII, XIV, XVIII, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations.

1. General

Article XI read with Article XII and Article XVIII authorises quantitative restrictions under certain circumstances but are subject to certain conditions under Article XIII. Although tariff quotas are not prohibited (tariff quotas are those quotas where a product may be imported under one tariff rate up to a total amount specified and all amounts over that at a higher rate), paragraph 5 of Article XIII provides that when tariff quotas are used, they must also comply with the provisions of Article XIII and the principles of Article XIII are extended to export restrictions also.

Article XIII: 1 deals with the MFN treatment in respect of quotas, and a member cannot restrict the importation of any product from another member unless the importation of the like product from all third countries is 'similarly' restricted. In other words, the essence of non-discrimination obligation is that 'like products' should be treated equally, irrespective of their origin. In EC-Bananas III, the Appellate Body considered the EEC scheme of allocating tariff quotas shares to

members without allocating such shares to other members. EEC had provided two separate regimes for bananas, the preferential ACP bananas regime and *erga omnes* regime for all other imports of bananas and as such EEC contended that such a scheme was not discriminatory. The Appellate Body held that 'by choosing a different legal basis for imposing restrictions, or by applying different tariff rates, a member could avoid the application of the non-discrimination provisions to the imports of like products from different members, the object and purposes of non-discrimination provisions would be defeated'. The EEC scheme is violative of Article XIII. It would be very easy for a member to circumvent the non-discrimination provisions of GATT 1994 and other Annex IA Agreements, if these provisions apply only within regulatory regimes established by any member.[41]

Article XIII: 2 imposes obligations on members while applying import restrictions to any product, a member 'shall aim at a distribution of trade in such a product approaching as closely as possible the share which the various members might be expected to obtain in the absence of such restrictions'. To this end, Article XIII: 2 (a) further prescribes that whenever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed.[42] Article XIII: 2 established a series of rules which can be paraphrased as under:

(1) Where possible, use 'global quotas' (i.e. no specific amounts allocated to specific countries of firms);
(2) Where possible, avoid the requirement of licences; but
(3) If licences are required, they should not specify a particular country or source (i.e. they should also be 'global'); and
(4) Where the global principle is impracticable and quotas are allocated among supplying countries, then

    (a) agreement on allocation should be obtained; or

    (b) allocation should be "based upon the proportion, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product".[43]

Article XIII: 2 was subject of interpretation in EC-bananas III where Appellate Body found that European Community's import regime for bananas, and more specifically, in respect of treatment granted to countries which had concluded with

[41]EEC-Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, DSR 1997: II, para. 190.

[42]Panel Report on Norway—Restrictions on Imports of Certain Textile Products, L/4959, Adopted on 18 June 1980 27S/119, 125 para. 14.b.

[43]Ibid.

the European Community's so-called Banana Framework Agreement (BFA) by which a quota share utilised by one of the BFA countries could at the joint request of all BFA countries be transferred to another BFA country. No equivalent regulation existed with respect to banana exporting countries that were not part of the BFA and as such was violative of Article XIII: 2.[44]

The allocation of import quotas to Members who have no 'substantial interest' is permissible on MFN basis. Allocation of tariff import quotas to non-members is also permissible.[45]

Article XIII: 3 obligates the members who issue import licences for import restrictions to provide all information concerning the administration of the restrictions, the number of import licences granted in a recent period and distribution of such licences among supplying countries without having an obligation to furnish information of names of importing or supplying countries.

Article XIII: 3(b) deals with the notification of quotas and quota shares and requires that in case of import restrictions involving the fixing of quotas, the member applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period. Further Article XIII: 3(c) requires that 'in the case of quotas allocated among supplying countries, the member applying the restrictions shall promptly inform all other members having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying members and shall give public notice thereof'. In the context of Article XIII's overall concern with the non-discriminatory application of QRs, Article XIII: 3(b) and (c) are to be read together as both require that total quota and shares allocated are to be publicly notified for a specified future period. Thus, a Panel decided that the allocation of backdated quotas, i.e. quotas declared to have been filled at the time of their announcement, did not conform to the requirements of Articles XIII: 3(b) and 3(c).[46]

Article XIII: 4 elaborates the obligations of members in respect of restrictions applied under Article XIII: 2(d) or 2(c) of Article XI, and the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the member applying the restriction subject to the consultations as contemplated in Article XIII.

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[44]EEC-Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, DSR 1997: II, para. 7.73 and 7.76.

[45]Ibid., para. 7.91–7.92.

[46]L/6491, Adopted on 22 June 1989, 36S/93, 131–132. It found that EEC Commission Regulation 1040/88 constituted a backdated quota in respect of Chile, since although it published a quota share for Chile, it simultaneously declared that share to be filled and, in fact, continued the suspension of imports from Chile eight days before quotas were published. The EEC, therefore, had not observed the notification requirements of Article XIII: 3(b) and (c).

E. Exceptions to the Rule of Non-discrimination (Article XIV)

The text of the Article XIV of GATT 1994 (Exceptions to the Rule of Non-Discrimination) is reproduced as under:

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.
2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.
3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Sections B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.
4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI or XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.
5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

   (a) having equivalent effect to exchange restrictions authorized under Section 3 (b) of Article VII of the Articles of Agreement of the International Monetary Fund, or
   (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

Interpretative Notes from Annex I Ad Article XIV

Paragraph 1

The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.

Paragraph 2
One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations.

1. General

The intent of Article XIV: 1 is that a member who applies restrictions under Article XII or Section B of Article XVIII can deviate from the rule of non-discrimination where the member has been authorised to do so by a decision taken by the IMF in accordance with Articles VIII and XIV of the IMF or in pursuance of a special exchange arrangement under paragraph 6 of Article XV of the GATT 1994. A member could deviate from the provisions of Article XIII only in a manner which that member might at that time apply under the Articles of IMF and only on currency grounds. IMF Members who did not avail themselves of the transitional arrangements of Article XIV of the IMF had to seek prior approval from the IMF, under paragraph 2(a) or in respect of discriminatory currency arrangements or multiple currency practices, under paragraph (3) of Article VIII for the imposition of restrictions on the making of transfers and payments for current international transactions. IMF members who availed themselves of the transitional arrangements under Article XIV could, subject to annual consultations with the IMF, continue to maintain exchange restrictions and adapt them to changing circumstances so long as they were needed for balance-of-payments purposes. The IMF could, if it deemed such action necessary in exceptional circumstances, make representations to such members that conditions were favourable for the withdrawal of any particular restriction, or for the general abandonment of restrictions inconsistent with the provisions of any other Article of the IMF.

Any member of the GATT may temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the member/members substantially outweigh any injury likely to result to the trade of other Members (Article XIV: 2).

Article XIV: 3 provides an exception to the non-discrimination requirements of Article XIII: 1 which applies as between members. Under Article XXIV: 1, each separate customs territory on behalf of which GATT is applied is treated as though it was a member, and thus, the non-discrimination requirements of Article XIII: 1 of the GATT, which applies as between members, apply as between each separate customs territory even if it is under common sovereignty with another customs

territory. Therefore, Article XIV: 3 carves out an exception to Article XIII in favour of group of territories having a common quota in the IMF from applying imports from other countries, but not among themselves.

Article XIV: 4 enables a member to attain equilibrium in its balance of payments by increasing its exports to hard currency countries. It allows a country to continue to direct its exports so as to increase its earnings of currencies so that it may be able to cease practising import restrictions at an earlier date, than would otherwise be possible.

Article XIV: 5(a) permits quantitative restrictions having equal effect to exchange restrictions authorised under Article VII: 3(b) of the IMF.

Article VII: 3(a) of the IMF Articles provides: 'If it becomes evident to the Fund that the demand for a Member's currency seriously threatens the IMF's ability to supply that currency, the IMF… shall formally declare such currency scarce and shall thenceforth apportion its existing and accruing supply of the scarce currency…'. Article VIII: 3(b) of the IMF Articles provides that 'A formal declaration under Article VIII: (a) shall operate as an authorization to any member, after consultation with the IMF, temporarily to impose limitations on the freedom of exchange operations in the scarce currency. Subject to the provisions of Article IV and Schedule C, the member shall have complete jurisdiction in determining the nature of such limitations, but they shall be no more restrictive than is necessary to limit the demand for the scarce currency to the supply held by or accruing to the member in question, and they shall be relaxed and removed as rapidly as conditions permit'.

F. **Exchange Arrangements (Article XV)**

The text of Article XV (Exchange Arrangements) is reproduced as under:

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.
2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES.

The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2(a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.
4. Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.
5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.
6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.
7. (a) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.
   (b) The terms of any such agreement shall not impose obligation on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on members of the Fund.
8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.
9. Nothing in this Agreement shall preclude:

   (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or

(b) the use by a contracting party of restrictions or controls on imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

Interpretative Note Ad Article XV from Annex I

Paragraph 4

The word 'frustrate' is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more member of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

1. General

Article XV: 1 recognises the link between the liberalisation of world trade and international monetary system which essentially shields the world economy from the shocks and imbalances of monetary system. It is well known that orderly functioning of the monetary system is *sine-qua-non* for liberalization of economy.[47] The exchange rate and market instability have been of continuous concern to the IMF.

Under Article XV: 2, the members are required to consult with the IMF on the points specified therein, such as monetary reserves, balance of payments, foreign exchange arrangements. The consultation and the determination of the IMF on the basis of statistical and other facts collected by the IMF relating to foreign exchange, balance of payments, monetary reserves of the member to justify the imposition of restrictions in terms of the criteria set forth in Article XII: 2(a) are binding on the member. Also as to what constitutes a serious decline in the monetary reserves, a very low level of money reserves of a member, the IMF's determination shall be final. The members have to seek agreement with IMF regarding the procedures of consultations as set in Article XV: 2. And there have been procedures developed over the years for such consultations.[48]

[47]See generally, Tokyo Round of MTN, 2 MIN(73)1, Declaration of Ministers Approved at Tokyo on 14 September 1973, 20s/19, 22, para. 7.

[48]See GATT Analytical Index, Guide to Law and Practice, VI: 431–434 (1995).

The members of the GATT are under an obligation not to frustrate the provision of IMF or GATT, by exchange or trade action (Article XV: 4). If the GATT members consider that exchange restrictions on payments in connection with imports are being applied by a member in a manner inconsistent with the exceptions provided for in GATT for quantitative restrictions, it is their responsibility to report to the IMF of such inconsistency (Article XV: 5). A member who is not a member of IMF has to become a member of the Fund within a time frame to be determined by the WTO after consultation with the IMF and failing that enter into special exchange agreement with WTO. A member who ceases to be member of the Fund is under an obligation to enter into a special exchange agreement with the WTO which shall become part of its obligation under the GATT (Article XV: 6). Any special exchange agreement as referred above shall be to the satisfaction of WTO which proves that the objectives of GATT will not be frustrated as a result of such exchange arrangement. And the terms of such arrangement shall not impose more restrictions than those imposed by the IMF. The member which is not a member of IMF has to satisfy the requirements of section 5 of Article VIII of the IMF as the WTO may require in carrying out its functions under the GATT.

Article XV: 9 permits the use of exchange controls or restrictions which have been allowed by the IMF or under a special exchange arrangement with the Ministerial Conference of the GATT or the use of restrictions or controls on imports or exports, the sole effect of which in addition to the effects of Articles XI, XII, XIII, and XIV is to make effective such exchange controls or restrictions.

Chapter 13
Subsidies (Article XVI)

Article XVI (Subsidies) is reproduced below:

Section A—Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidisation, of the estimated effect of the subsidisation on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidisation necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidisation, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidisation.

Section B—Additional Provisions on Exports Subsidies

2. The contracting parties recognise that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.
3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

A. K. Koul, *Guide to the WTO and GATT*,
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4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957, no contracting party shall extend the scope of any such subsidisation beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.
5. The CONTRACTING PARTIES shall review the operation of the provision of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidisation seriously prejudicial to the trade or interests of contracting parties.

Interpretative Note Ad Article XVI from Annex I

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.
2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.
2. A system for the stabilisation of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and

(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

Paragraph 4

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

1 Jurisprudence of Subsidies Prior to 1994 (SCM Code)

The jurisprudence developed prior to the enactment of WTO Agreement on Subsidies and Countervailing Measures 1994 (SCM Code) is attempted as under:

Article XVI: 1 does not define 'subsidy' but includes any form of income or price support, which directly or indirectly operates in a manner increasing exports of any product or decreases the imports of any product, which a member is indulging in. The member is under an obligation to notify the GATT members in writing of the extent and nature of subsidisation, of the estimated effect of the subsidisation on the quantity of the effected product or products from its territory and of the circumstances necessitating such subsidisation. The subsidies may take various forms such as domestic price fixed above the world prices, subsidies financed by non-governmental levy, export credit programmes, internal transport charges, tax exemption, multiple exchange rates and border tax adjustments and duty drawbacks.

In the case of domestic prices fixed above the world price levels, it is generally agreed that a system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy.[1] However, a government may fix by law a minimum price to producers maintained by quantitative restrictions or a flexible tariff or similar charges which would not incur loss to the government and as such is beyond Article XVI.[2]

About subsidies financed by non-governmental levy, it was held by a GATT Panel that although GATT is not concerned with such action if a group of producers voluntarily taxed themselves in order to subsidize exports of a product, but if the

[1] L/1160, Adopted on 24 May 1960, 9S/188, 191, para. 11.

[2] L/1160, Adopted on 24 May 1960, 9S/188, 191, para. 11.

government directly or indirectly is involved in such an exercise, it can amount to subsidy.[3]

Export credit programmes if granted at rates below those, which are actually prevailing on international capital markets constituted a subsidy, was disputed by some countries.[4] Internal transport charges, when used directly or indirectly to increase the exports of any product amounts to subsidy.[5] In the case of tax exemption, employed in a manner where certain domestic industries were exempted from internal taxes payable on imported goods amounts to a subsidy.[6] Multiple exchange rates if not in pursuance of the IMF directives may amount to subsidy. Border tax adjustments and duty drawback may amount to a subsidy as the GATT provisions on tax adjustment applied the principle of destination identically to imports and exports.[7]

The expression to 'increase exports or to reduce imports' in Article XVI: 1 have been interpreted to mean maintaining exports at a level higher than would otherwise exist in the absence of subsidy'[8] or a subsidy which provides an incentive to increase production, in the absence of offsetting measures, e.g., a consumption subsidy either increases exports or reduces imports.[9]

The phrase that the member shall notify the contracting parties in writing about the extent and nature of subsidization makes it incumbent on the members of GATT to provide accurate information about the nature and extent of subsidization. However, although procedures for Notification and Reviews under Article XVI: 1 was adopted both in 1962 and in 1979 (Tokyo Round), majority of the countries have failed to do so.[10]

The subsidization causing serious prejudice to the interests of any other contracting party meant that no uncertainty in world trade should occur by such subsidization.[11]

Article XVI: 3 in the first sentence applies to 'subsidies on exports' of primary products but in the next sentence it speaks of 'any form of subsidy which operates

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[3]L/924, Adopted on 21 November 1958, 7S/46, 50–52, paras. 8–14. The 1958 Panel Report on "French Assistance to Export of Wheat and Wheat Flour concluded that the operation of the French system of price support which involved a tax on exporters to partially defray losses in the world market amounted to subsidy, L/924 Adopted on 02 Nov 1958. 7S/46, 50–52 paras. 8–14.

[4]Committee on Subsidies and Countervailing Measures, SCM/M/11-13.16.

[5]EPCT/127, p. 1.

[6]Havana Report, p. 107, para. 11–12; see also Panel Report on "United States Tax legislation, (DISC), L/3851, Adopted on 08 December 1981, 23S/98, 114, para. 77.

[7]L/3464, Adopted on 02 December 1970, 18S/97, 100, para. 10.

[8]GATT/CP.2/22/Rev. I, Adopted on 02 September 1948, II/39.44.

[9]L/1160 Adopted on 24 May 1960, 9S/188, 191, para. 10.

[10]Procedures for Notification and Reviews were adopted by GATT, in the year 1962 and updated in January 1994. 11/S/58 and L/7375 of 11 January 1994.

[11]Panel Report on 'European Communities—Refunds of Exports of Sugar, L/4833 Adopted on 6 November 1979, 26S/290, 319, paras, (g) and (h) and European Communities—Refund of Export of Sugar, L/ 5011, Adopted on 10 November 1980, 27S/69, 97.

to increase the export of any primary product' as a result not only an 'export subsidy' (one granted solely to exports) but also a general 'production subsidy' (direct or indirect) is covered 'if the latter has the effect of increasing exports'. The use of these subsidies for primary products is not prohibited, but discouraged. The more stringent obligation is the prohibition on subsidies that result in the subsidising nation having more than equitable share of the world export trade in that product.

The phrase more than 'equitable share' was subject matter of interpretation in the GATT Panel Rulings and other interpretations. As number of less developing counties contested the criterion of equitable share, which had no exports in the previous representative years, Interpretative Note to paragraph 3 remedied the lacunae. Further, for determining the equitable share of world trade, the desirability of facilitating the satisfaction of world requirements of the commodity concerned in the most effective and economic manner and the fact that export subsidies during the selected representative period may have influenced the share of the trade obtained by the various[12] exporting countries, may be taken into account. The GATT Panel Report has interpreted the '*equitable share*' as under:

French assistance to European Exports of Wheat Flour (1958): concept of *equitable share* meant to refer to share in world export trade of a particular product and not to trade *in* that product in individual markets.[13] United States-Subsidy on Unmanufactured Tobacco (1967): the concept of markets remaining static was not conceived as *equitable share* rather it allowed entry of new exporters.[14] European Communities—Refund of Exports of Sugar (1979): for the purposes of *equitable share* it is necessary to examine developments in individual market shares, price developments and effects on exports.[15]

Finally, Article 10 of the 1979 Agreement on the Interpretation and Application of Article VI, XVI and XXIII of the GATT, provides in paragraph 2: that

> For the purposes of Article XVI: 3, 'more than *equitable share*' of world trade shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the development of world markets; and with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining 'equitable share of world export trade.[16]

Article XVI: 4 states in its first sentence that the cessation of certain export subsidies called for will apply 'as from 1 January, 1958 or the earliest practicable date thereafter'. The second sentence provides for a standstill on such export subsidies in the *interim*. The Interpretative note to this provision states that 'the intention of paragraph 4 is that contracting parties should seek before the end of

[12]/334, Adopted on 03 March 1955, 3S/222, 226, para. 18.

[13]L/924, Adopted on 21 November 1958, 7S/46, 52, para. 15.

[14]L/2925, Adopted on 22 November 1967, 15S/116, 122, para. 21–22.

[15]L/4833, Adopted on 6 November 1979, 26S/290, 307, para. 4.9.

[16]L/5011, Adopted on 10 November 1980, 27S/69, 88 para. 4.6.

1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement'. The 1979 Agreement on Interpretation and Application of Articles VI, XVI, XXIII of the GATT prohibits export subsidies on products other than certain primary products, and contains an Annex with an illustrative list of twelve items defined as exempt subsidies to this prohibition.[17]

Article XVI: 5 imposes obligations on the 'Contracting Parties' to continually review the provisions of Article XVI keeping in view its effectiveness and in promoting the objectives of GATT and avoiding subsidisation seriously prejudicing the trade or interests of contracting parties. Therefore, in the Uruguay Round, the Contracting Parties negotiated WTO Agreement on Subsidies and Countervailing Measures, 1994 which is discussed in the next chapter.

[17]26S/56, 80–83.

Chapter 14
Agreement on Subsidies and Countervailing Measures, 1994 (SCM CODE)

1 Background

The problem of subsidies and countervailing measures became the intense subject of negotiations in the WTO on account of their rampant use in international trade since the birth of GATT in 1947. The use of subsidies in industry and agriculture in 1980s was resorted to by the governments under the influence of political and social pressures embarking on massive financial commitments. In order to support ailing industries, to stimulate infant industries and to promote exports, subsidies have become an important element in world trade to the extent that, in some sectors, financial ability to subsidize exports have overridden competitive reality.[1] Subsidies for the less developing countries and LDCs are important for the sustenance and maintenance of their economies at whatever stage of development these economies are.

Subsidies continue to be one of the most frequently used, though controversial, instruments of domestic and commercial policy of the governments which provide subsidies for a great variety of purposes, including assistance to facilitate the foundation or expansion of new industries, to encourage exports, to create new jobs or to enhance national security by ensuring that a country can provide itself with certain products. Subsidies can also be an instrument to serve as a means to support or ensure an internationally competitive position for certain high-tech industries. The Subsidies Code of GATT 1980 (Tokyo Round), in fact, recognized the reality that subsidies are an important tool of government policy and are used to promote social and economic policy objectives.

The Subsidies Code (1980) further noted some of the governmental objectives, which are promoted by the use of subsidies:

(a) The elimination of industrial, economic and social disadvantages of specific regions;

[1]GATT, GATT activities, 1988 47 (1989).

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_14

(b) To facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reasons of changes in trade and economic policies, including international agreements resulting in lower barriers to trade;
(c) Generally to sustain employment and to encourage, re-training and change in employment;
(d) To encourage research and development programmes, especially in the field of high-technology industries;
(e) Redeployment of industry in order to avoid congestion and environmental problems.

The use of subsidies by various governments depends on the varying needs of the governments. USA, for instance, provided industrial subsidies at the rate of 0.5%, while Sweden subsidized at the rate of 7.4% in 1986, and in OECD countries, industrial subsidies varied from 2 to 3.5% of their GDP.[2] According to G. C. Hufbauer,[3] in the 1970s and early 1980s government subsidies proliferated in response to hard times in agriculture and declining industries. This trend has been reversed. In most industrial countries, subsidies are stable or declining, and in certain developing countries, they are being slashed.

The subsidy climate changed dramatically in the late 1980s for several reasons such as budgetary stringency, as the claims of health, education, and the environment pressed upon resources in nearly all the industrial countries, growing public scepticism that industrial policy can revive sunset industries and fiscal bankruptcy in many South American countries, which brought a halt to the long-standing practice of allowing their industrialists to feast on rich menu of public subsidies. Yet, despite the present adverse climate for public subsidies, many delegations in the GATT Negotiating Groups on Subsidies and Countervailing Measures during Uruguay Round were less than anxious to see their future freedom to subsidize curbed by an international code.

On the other hand, J. Schott[4] believes that decline of subsidies in the OECD countries in 1980s and the economic downturn of 1990s may have the effect of providing subsidies to industries suffering difficulties.

However, subsidies continue to be of great concern in international trade negotiations as subsidies have assumed a greater importance as a tool of government's economic policy as against tariffs, which have been reduced to an insignificant level. Also, once tariffs have lost significance as a governmental economic policy, there is more incentive to use subsidy as a ready instrument for

[2]Ford and Suyker, Industrial Subsidies in the OECD Economics, OECD Working Paper No. 74 at 147 (Table I) (1990).

[3]G. C. Hufbauer, Subsidies in Completing the Uruguay Round: in J. Schott (ed.) A Results Oriented Approach to the GATT Trade Negotiations 93–94 (1990).

[4]Ibid., J. Schott. pp. 2–5. Ibid

solving economic, social and political problems besetting the governments, howsoever small it may be as it can change the production patterns from one country to another.[5]

2 Efforts to Deal with Subsidies Prior to the Uruguay Round

(i) Subsidies under GATT 1947

Countervailing duty laws are one means of addressing the adverse effect of subsidies to offset the amount of subsidization which certain imported goods might have received. Countervailing duty laws, in fact, have been employed as a remedial measure for more than one hundred years; for example, the USA enacted countervailing duty laws in 1890 and 1897.[6]

GATT 1947 in its Articles VI and XVI addressed the problem of subsidies and countervailing measures. Article VI deals with the imposition of anti-dumping and countervailing duties and defines 'countervailing duty' as a 'special duty' levied for the purpose of offsetting any bounty or subsidy bestowed, either directly or indirectly, upon the manufacture, production or export of any merchandise, and limits the amount of any countervailing duty imposed by a contracting party to an amount equal to the estimated bounty or subsidy determined to have been granted. Article VI: I establish that a contracting party shall not impose anti-dumping or countervailing duty on another contracting party unless it determines that the subsidization is such as to cause or threaten material injury to an established domestic industry, or is such as to materially retard the establishment of a domestic industry.

Article XVI deals with subsidies in general and export subsidies in particular, and sets out the basic obligations of a GATT member country. Paragraph 1 of Article XVI states that if any contracting party 'grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory' it has the obligation to notify the other contracting parties of the 'extent and nature of the subsidization' and 'of the circumstances making the subsidization necessary'.[7]

Paragraph 1 of Article XVI further states that if it is determined that any such subsidization causes or threatens 'serious prejudice to the interests of any other contracting party, then the party granting the subsidy shall discuss with other

[5]G. Hufbauer, A view of the Forest in Subsidies and Countervailing Measures: Critical Issues for the Uruguay Round, World Bank Discussion Paper No. 53 at 13 (B. Balassa ed. 1989).

[6]Tariff Act of 1890 deals with the bounties paid on the exportation of certain grades of sugar. By the Tariff Act of 1897, the U.S. enacted a general Countervailing Duty Law.

[7]Article XVI: I GATT 1947.

contracting parties, if requested, the possibility of limiting such subsidization'.[8] Paragraph 2 of Article XVI recognizes that a 'subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, and may cause undue disturbance to their normal commercial interests, and may hinder the achievements of the objectives' of GATT. Paragraph 3 of Article XVI at the same time advises that contracting parties should seek to avoid the use of subsidies on the export of primary products.[9]

If, however, export subsidies on primary products are granted by a contracting party, its obligation is set out in paragraph 3 of Article XVI, which states that export subsidies on primary products shall not be applied in a manner which results in that contracting party having more than an *equitable share* of world export trade in that product.[10] With respect to subsidies on non-primary products, paragraph 4 requires that 'contracting parties shall cease to grant either directly or indirectly any form of subsidy which results in the sale of such products for export at a price lower than the comparable price charged for the like product to buyers in the domestic market'.[11]

(ii) Subsidies Code: The Tokyo Round

The Tokyo Round Subsidies Code was essentially a compromise between the USA and EEC countries for the reason that EEC granted subsidies to industry and agriculture, whereas the US domestic law lacked 'injury test' and the USA was interested in strengthening the international rules governing subsidies.[12]

Accordingly, the Subsidies Code as stated in the preamble emphasized 'the effects of subsidies', and its purpose was to ensure that the use of subsidies does not adversely affect the interests of other signatories to the Code.[13] The text of the Code sought to implement this purpose by directing that signatories 'shall not grant export subsidies on products other than certain primary products'.[14] The Code also required, in accordance with the provisions of Article XVI: 3 of the GATT, that 'signatories do not grant, directly or indirectly, any export subsidy for certain primary products (primary agriculture) to the extent that such subsidy results in the displacement of the exports of others (by having more than an equitable share) of the world market, or in the undercutting of the prices of other suppliers in particular

[8]Serious Prejudice' has not been defined in GATT 1947.

[9]A 'primary product' is defined as 'any product of farm, forest, or fisheries, or any mineral, in its natural form or which has gone through such processing as is customarily required to prepare it for marketing in substantial volume in international trade'. Interpretative Note to Article XVI of the GATT, Section B, paragraph 2.

[10]GATT 1947, Article XVI: 3.

[11]Ibid., Article XVI: 4.

[12]John H. Jackson, The World Trading System, Law and Policy of International Economic Relations 258 (1998).

[13]Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT 1947 Reprinted in GATT, BISD 26th supp. at, 56 (1980).

[14]Ibid., Article 9.

markets'.[15] The Code further required, 'signatories to ensure that the use of countervailing duty measures comply with the requirements of Articles VI of GATT, which requires an injury determination.[16] The subsidies Code further provided a mechanism for the resolution of complaints brought by signatories concerning the subsidies of other signatories, which were believed to be in contravention of GATT or the Code. The Code resolved such complaints through means of conciliation, dispute settlement, and authorized counter measures.[17] The Code also established a two-track approach to disciplining subsidies. Track I dealt entirely with countervailing duties, establishing international rules on what national governments could do in implementing their countervailing duty rules as well defined material injury. Track II of the Code was devoted to the substantive obligations under international law regarding how governments should refrain from granting subsidies that effect goods in international trade.[18]

In practice, the 'Code was characterized by numerous disputes and there was lack of agreement between signatories on various issues'.[19] Track II of the Code, i.e. government-to-government consultation and conciliation, was the normative option for most of the GATT signatories. The USA, on the other hand, was the primary user of Track I, the imposition of countervailing duties via national law.[20]

The Code did not prohibit all subsidies or provide for direct enforcement of subsidy violations. Track II established a process designed to promote a 'mutually satisfactory solution'. If consultation did not resolve the problem within a short time, either party could refer the matter to the Code Committee for Conciliation, whose purpose was to review again the facts and encouraged the parties to reach a mutually acceptable solution.[21] The panel would submit findings as to facts and the application of the GATT and the Code to the entire Code Committee, which would in turn make recommendations to the parties aimed at resolving the dispute, and, in the event that the Committees, recommendations were not followed, the Committee would authorize appropriate countermeasures.[22]

Subsidies Code in Track I recognized a country's right to impose countervailing duties on subsidized imports that caused injury to its domestic producers. The Code outlined in detail the procedures for conducting subsidy-injury determination.

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[15]Ibid., Article 10.

[16]Ibid., Article 1 & 6.

[17]Tokyo Round Code, Article 13.

[18]John H. Jackson, supra note 12 at p. 265.

[19]John H. Jackson, supra note 12 at p. 265.

[20]R. Stern & B. Hoekman, The Codes Approach, in the Uruguay Round: in J. M. Finger and A. Olechowks, (ed). A Handbook for the Multilateral Trade Negotiations 59–61 (1987). Between 1980 and 1988, over ninety per cent of the countervailing duty cases initiated were brought by the USA and Chile. During this time, only one case was initiated against the USA and one case initiated against Chile. In general, countervailing duties are brought against a different group of countries more than they are initiated by the same group.

[21]Supra note, 13, Article 17.

[22]Ibid., Articles 18(8) and 18(9).

The Code specified that countries might only impose Countervailing duties after following the procedures outlined in the Code and after determining that the subsidized imports have caused injury to the domestic industry.

In addition to the Code being concerned with export subsidies and countervailing duties, Article II of the Code recognized that signatories may use non-export or domestic subsidies for the promotion of social and economic policy objectives.[23] These subsidies, which were described as being granted normally by region or by sector,[24] included subsidies aimed at the elimination of economic disadvantage of certain regions, the maintenance of employment, the encouragement of research, and the promotion of the economic and social developments of developing countries.[25]

The Code also required greater transparency regarding subsidy practices and in the administration of countervailing duty laws.[26]

The Subsidies Code did not provide an explicit definition of 'subsidy' except an illustrative list of export subsidies, which should not be granted.[27] The interpretative notes to the Subsidies Code also did not provide any further assistance, so that other than the examples provided, the definition of 'subsidy' remained unclear.

In 1975, USA proposed that any Code on Subsidy should delineate all types of subsidy practices and set out the conditions on which offsetting measures could be taken against such practices. The USA proposed three types of subsidies such as:

(a) Prohibited (practices designed to increase the competitiveness of national producers, thereby distorting international trade);
(b) Conditional (practices directed towards domestic, economic, political or social objectives, but which may distort international trade); and
(c) Permitted (practices with little or no impact on international trade against which offsetting measures could not be taken).[28]

Another issue prominently discussed during the Tokyo Round was the use of subsidies by the developing countries and to what extent they should be afforded special and differential treatment while still maintaining some meaningful discipline on the use of subsidies by developing countries. This same issue was a major concern of the Uruguay Round negotiations.

At the end of the Tokyo Round, the Subsidies Code represented a compromise of 'fundamental policy differences among the participating governments'. Articles VI and XVI of the GATT have been abbreviated, yet the Subsidies Code

[23]Tokyo Round Code, Article 11.

[24]Ibid., Article 11(3).

[25]Ibid., Article 1(1).

[26]Ibid.

[27]See GATT Activities 1979 and conclusion of the Tokyo Round Multilateral Trade Negotiations (1973-1979) 21 BISD (1980).

[28]GATT, The Tokyo Round of Multilateral Trade Negotiations, Report by the Director General of GATT(1979).

ultimately proved lacking in the clarity and effectiveness in resolving the problems posed by subsidies in international trade.[29]

(iii) Subsidies after the Tokyo Round

After the Tokyo Round, the problems of subsidies in international trade were not resolved. The USA stressed the need to reduce the use of trade-distorting subsidies and suggested:

(a) Persuading developing countries to make commitments that specify their obligations under the GATT to reduce or eliminate export subsidies that are inconsistent with their development needs;
(b) Persuading the GATT signatories to report the extent, nature and effect of subsidies; and
(c) Using the GATT's conflict resolution procedures to help eliminate the effects of specific subsidy practices.[30]

The USA and European Union following the Tokyo Round were involved in a number of disputes involving EEC subsidizing of its agricultural products. GATT rules permit a number of non-tariff barriers in agricultural trade, particularly import quotas and export subsidies. In the 1980s, in response to EEC export and production subsidies, the USA initiated a number of Section 301[31] cases involving the EEC agricultural policies. These disputes involved products such as sugar, poultry, meat, pastas, oilseed, and canned fruit. Similarly, there were disputes between USA and Canada regarding the use of the subsidies. Also 1980s saw a great number of disputes between United States and Mexico concerning subsidization of imported Mexican products, although the disputes arose in the countervailing duty context.[32]

(iv) Subsidies Debate before the Conclusion of the Uruguay Round

Before the conclusion of the Uruguay Round, 1994, the subsidies debates took serious twists and turns. The Ministerial Declaration of 1982 took note of the potentially detrimental trade effects of subsidies especially export subsidies, and the commitment of the contracting parties to avoid their use.[33] The Leutwiler Report[34] which detailed the shortcomings of GATT also underlined the adverse effect of subsidies in international trade for the reason that firms receiving subsidies from the governments gain an advantage which unsubsidized competitors regard as powerful instruments for overcoming domestic and economic and social problems. Further,

[29]John H. Jackson, supra note 12 at 259.

[30]See US General Accounting Office, Benefits of International Agreement on Trade-Distorting Subsidies not yet Realized. GAO Doc. No. GAO/NSIAD-10 (August 15, 1983).

[31]For an overview of these cases, see Patrick J. Mc Donough in T. O. Steward (ed.) The GATT, Uruguay Round, A Negotiating History 824–833; 1986–1992 (Kluwer Publications, 1993).

[32]Ibid.

[33]See Ministerial Declaration, Adopted on 29 November 1982 GATT Doc No. L/5424 reprinted in GATT, BISD 29 Supp. (1983).

[34]See Trade Policies for a Better Future, 'The Leutwiler Report' (1987).

the Report maintained that GATT rules on subsidies are not as explicit or as fully accepted as its rules on tariffs, but the damage to trade from subsidies is tremendous. A major challenge facing the trading system is to define what a subsidy is, and when it is legitimate to use it. Industrial policy, natural resource policy, tax policy and many other kinds of subsidies can bestow unfair trade advantages. The Report suggested that the export subsidies on primary products should be allowed on the condition that they do not lead to acquisition of more than an equitable share of the world export trade. The Report argued that a more meaningful explanation for legitimacy of export subsidies on primary products would be necessary, and indeed that exemption from discipline of such subsidies may not be legitimate at all.[35]

Subsidies debate was further taken up in early 1987 in the subsidies negotiating group in the Uruguay round.[36] The subsidies negotiating group in the backdrop of Uruguay Round declarations of September 1986 at Punta-del-Este, wherein subsidies and countervailing measures were kept as a separate subject for negotiations, underlined the need that subsidies, and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade.

In the Uruguay Round, the USA advocated for stronger and more effective subsidy disciplines, i.e. broadening the category of prohibited subsidies and strengthening GATT remedies, and supported the integration of the less developing countries into GATT discipline. It has been commented that US policy has been guided by an economic and political philosophy, which presumes that subsidies distort resource allocation and international trade flows, undercut economic efficiency, and distort the law of comparative advantage by enabling the survival of otherwise uncompetitive industries.[37] The United States also cautioned that subsidies have not increased trade or opened new markets, but instead have precipitated matching subsidies and counter measures under the GATT Article VI by other governments.[38]

As against the United States, the other negotiating participants stressed the need for reform in the area of countervailing measures. Their basic premise was that subsidies are legitimate instruments of social and economic policy, ‘a necessary safety net’ to ease industries and help geographic regions through periods of economic transition. EEC advocated a definition of subsidy which would permit regional and structural adjustment assistance.[39] Some participants while

[35]Ibid.

[36]See Generally, Problems in the Area of Subsidies and Countervailing Measures, Note by the Secretariat, GATT, Doc No. MTN GNG/NGIO/W/3 (March 17, 1987).

[37]See R. K. Lorentzed, Anti-dumping and Countervailing Duty Issues in the Uruguay Round of Multilateral Trade Negotiations in, The Commerce Department Speaks, (1990), The Legal Aspects of International Trade 459 (1990).

[38]Ibid.

[39]Ibid., p. 476.

acknowledging the necessity for subsidy discipline in general, sought to protect certain types of subsidies from discipline (e.g., Canada had an interest in seeing that regional subsidies are non-actionable, and Canada and Mexico had an interest in seeing that the price of natural resource products should not be considered to constitute subsidy).[40]

On the other hand, the developing country had expressed an interest in using subsidies as tools for economic development and demanded increased special and differential treatment. The developed countries who viewed subsidies as a necessary safety net and developing countries who viewed it as a major governmental instrument for furthering their economic development sought to focus on strengthening the countervailing measures.[41]

3 WTO Agreement on Subsidies and Countervailing Measures 1994 (SCM Code)

The WTO SCM Code is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII, which were negotiated in the Tokyo Round. Unlike its predecessor, WTO SCM Code defines subsidy and introduces the concept of 'specific' subsidy for the most part, a subsidy available only to an enterprise or industry, or group of industries or industries within the jurisdiction of the authority granting the subsidy. Only specific subsidies would be subject to the disciplines set out in the Code. The SCM Code classifies subsidies by the use of the metaphor of traffic lights, as green light (non-actionable), red light (prohibited) and yellow light (actionable).

For the purpose of the Code, a subsidy is deemed to exist if there is:

(i) Financial contribution by a government or any public body within the territory of a member;
(ii) Government practice involving a direct transfer of funds (e.g. grants, loans and equity infusion).
(iii) Potential direct transfers of funds or liabilities (e.g., loans, guarantees); government revenue that is otherwise due, is foregone or not collected (e.g., fiscal incentives such as tax credits); a government provides goods or services other than general infrastructure, or purchases goods;
(iv) A government makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) and (ii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments, or there is any form of income or price support in the sense of

[40]Ibid.
[41]Ibid.

> Article XVI of the GATT 1994 and a benefit is thereby conferred. However, a subsidy defined above shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V of the Code only if such subsidy is specific in accordance with the provisions of Article 2 of the Code.[42]

It has been further clarified that in accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Code, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption or the remission of such duties or taxes in amounts not in excess of those which have accrued shall not be deemed to be a subsidy.

In order to determine whether a subsidy as defined above is specific to an enterprise or industry or group of enterprises or industries or certain enterprises within the jurisdiction of the granting authority, the specificity has to be determined by applying the following principles as provided by Article 2 of the Code:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises;
(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions (objective criteria or conditions, as used herein, mean criteria or condition which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application such as number of employees or size of the enterprise) governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, or other official document, so as to be capable of verification.[43]

Notwithstanding any appearance of non-specificity resulting from the application of the principles as laid down in (a) and (b) above of Article 2, if there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: the use of a subsidy programme by a limited member of certain enterprises, predominant use by certain enterprise and the manner in which decision has been exercised by the granting authority in the decision to grant a subsidy. Further, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[44] A subsidy which is limited to certain enterprises located within designated geographical region within the jurisdiction of the granting authority shall be specific.

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[42]Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures, See, Arun Goyal (ed.) WTO in The New Millennium 342 (4th Ed. 2002).

[43]Article 2 of SCM Code.

[44]Article 2.1(c), of SCM Code.

It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a subsidy for the purposes of this Agreement.

4 Export Subsidies

Except as provided in the Agreement on Agriculture, Annex 1 of the WTO SCM Code provides an illustrative list of export subsidies which are prohibited such as governmental direct subsidies to a firm or an industry contingent upon export performance; currency retention schemes or any similar practices which involve a bonus on exports; internal transport and freight charges on export shipments, provided or mandated by the governments on terms more favourable than for domestic shipments; the provision for governments or their agencies either directly or indirectly through government mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms and conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters. The term, 'commercially available', means that the choice between domestic and imported product is unrestricted and depends only on commercial considerations.

The full or partial exemption, remission, or deferral specifically related to exports, or direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.[45]

[45]The term direct taxes shall mean taxes on wages, profits, interests, rents, royalties and all other forms of income and taxes on the ownership of real property. Import charges connote tariffs, duties and other fiscal charges as outlined above. Indirect taxes cover sales, excise, turnover, value added, franchise, stamp, transfer, inventory, and equipment taxes, border taxes and all taxes other than direct taxes and import charges. 'Prior stage' indirect taxes are those levied on goods or services used directly or indirectly in making the product. 'Cumulative indirect taxes' are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production. 'Remission of taxes includes the refund or rebate of taxes'. 'Remission' or 'drawback' includes the full or partial exemption or deferral of import charges. The deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. Further, the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. If administrative or other practices contravening the above principle results in significant saving of direct taxes in export transactions, consultations between Members may take place resolving the differences under existing bilateral treaties or other specific international mechanisms, without prejudice to rights and obligations of Members under GATT 1994, Original Footnote to the SCM Code.

The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production of domestic consumption, in the calculation of the base of which direct taxes are charged.

The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

The exemption, remission or deferral of prior-stage[46] cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption, provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[47]

The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste): provided, however, that in particular cases a firm may use a quantity and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not exceeding two years.

The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

All the above subsidies whether contingent in law or in fact solely or as one of the several other conditions and subsidies, contingent, whether solely or as one of the several other conditions, upon the use of domestic over imported goods are covered under prohibited subsidies.

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[46]Ibid.

[47]SCM Code.

The Agreement denominates certain specific types of programmes as prohibited subsides. Parties to the Agreement pledge not to grant or maintain these types of subsidies at all. If a signatory country fails to abide by this requirement, then the country may face formal retaliation, as other countries could bring a (non-product specific) case in the GATT based on the use of a prohibited subsidy. The prohibited subsidies constitute the 'red light category' within the 'traffic light' framework, and contracting parties are required to cease using them. This approach reflects the broad consensus of the contracting parties that certain types of subsidies by their very nature distort trade flows and impede the efficient allocation of resources.[48]

5 Trade Related Subsidies

During the Uruguay Round negotiations, participants suggested that certain trade related subsidies should be prohibited and the general consensus as reflected in the Agreement is that subsidies which are contingent upon export performance as well as subsidies contingent upon the use of domestic over[49] imported goods are prohibited.

6 Domestic Subsidies

The question of domestic subsidies whether by providing grants to cover operating losses, direct forgiveness of debt, loans at interest rates which are less than the government's cost of obtaining the funds plus any cost in administering the loans, provision of equity capital where the expected return is less than the government's cost of obtaining the funds plus any costs incurred in administering the equity investment, loan guarantee programmes where the premium rates are inadequate to cover the long-term operating costs and losses of the programme, and subsidies contingent upon production performance were discussed in the Uruguay Round Negotiation.[50] However, the Agreement does not reflect directly prohibiting any domestic subsidies other than prohibiting subsidies contingent on the use of domestic goods over imports.[51]

[48]SCM Code.

[49]Articles 3(1)(a)and (b), SCM Code.

[50]Proposals submitted by USA, See Elements of the Negotiating Framework: Submission by the United States, GATT Doc. No. MTN GNG/NG. 10/W/39 (Sept. 27, 1990).

[51]Article 3., SCM Code.

7 Remedies

The SCM Code in Article 4 provides for remedies against prohibited subsidies that if a signatory to the Agreement has reason to believe that a prohibited subsidy is being granted by another signatory, consultation may be requested, the purpose of which shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.[52] If the consultation does not result in a solution, within a period of 30 days, any member party may refer the matter to the DSB for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel. Once the panel is established, the panel may request the assistance of the Permanent Groups of Experts (PGE) to see whether the measure in question is a prohibited subsidy. The PGE shall have all the powers of reviewing the evidence of the existence or otherwise of the measure in question, and PGE has to afford an opportunity to the opposite party to justify that the measure is not a prohibited subsidy. The PGE report is time bound, and its conclusions whether or not a measure is a prohibited subsidy is final. If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing member withdraw the subsidy without delay. The report of the panel is adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[53]

If the panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. In case the Appellate Body fails to provide its report within 30 days, the Appellate Body has to inform the DSB in writing of the reasons for the delay together with an estimate of the period within which the Appellate Body shall submit its report and the submission of the report cannot exceed 60 days.[54]

Once the appellate report is submitted to the DSB, the DSB has to adopt the same and is binding on the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the members.[55]

In the event the recommendations of the DSB are not followed within the time period specified by the panel, which commences from the date of adoption of the panel's report or the Appellate Body's report, the DSB is competent to grant authorization to the complaining member to take appropriate counter measures, unless the DSB decides by consensus to reject the request.[56] Important, but largely time-limited exceptions to the rule on prohibited subsidies apply to less developing countries and countries in transition to a market economy.

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[52]Article 4., SCM Code.

[53]Article 4.3 to 4.8. of SCM Code.

[54]Article 4.4.

[55]Article 4.5.

[56]Article 4.9, SCM Code.

The above discussion on the definition of a subsidy specifies that a subsidy exists only if (a) financial contribution is provided; (b) the contribution is made by a government or a public body within the territory of a WTO member; and (c) the contribution confers a benefit. Article 1.1(a)(1) lists the categories of subsidies in the Code which have a reach that extends beyond the actions of national governments to those of sub-national governments and bodies such as state-owned companies.

Existence of a subsidy means that government practice involves a direct transfer of funds or potential direct transfer of funds, and not only when government actually effectuates such transfer or potential transfer.[57] The potential direct transfers of funds exist only where an action gives rise to a benefit and thus confers a subsidy irrespective of whether any payment occurs.

The expression, "otherwise due is forgone" in Article 1.1. (a)(1)(ii) has been interpreted by the DSB;

"In our view, the foregoing of revenue 'otherwise due' implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, 'otherwise'. [The] word 'forgone' suggests that the government has given up the entitlement in the abstract, because governments could tax all revenues. There must, therefore, be some defined benchmark, against which a comparison can be made between the revenue actually raised and the revenue that could have been raised 'otherwise'. What is otherwise due depends on the rules of taxation that each member, by its own choice, establishes for itself.[58]

In regard to the relationship between the provisions of SCMAgreement and 'It is clear from even a cursory examination of Article XVI: 4 of GATT 1994 that it differs very substantially from the subsidy provisions of the SCM Agreement, and in particular, from the export subsidy provisions of both the SCM Agreement and Agreement on Agriculture. First of all, the SCM Agreement contains an express definition of the term 'subsidy' which is not covered in Article XVI: 4. [The] SCM Agreement contains a broad package of new export subsidy disciplines that go beyond merely applying and interpreting Articles VI, XVI, and XXIII of the GATT 1947. Article XVI: 4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the comparable price charged for the like product to buyers in the domestic market. In contrast, 'the SCM Agreement' establishes a much broader prohibition against any subsidy which is contingent upon export performance'.

To say the least, the rule contained in Article 3.1(a) of the SCM Agreement that all subsidies which are contingent upon export performance are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product

[57]Brazil—Export Financing Programme for Aircraft, Panel Report, WT/DS46/RW/2, Adopted 23 Aug. 2001, para. 7.13.

[58]US—Tax Treatment for 'Foreign Sales Corporations', Appellate Body Report WT/DS108/AB/R, 20 March, 2000, para. 90.

when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI: 4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. Also, significantly, Article XVI: 4 of the GATT 1994 does not apply to primary products which include agricultural products, contained in Article 3, 8, 9 and 10 of the Agreement on Agriculture and which must clearly take precedence over the exemption of primary products from export subsidy discipline in Article XVI: 4 of GATT 1994'.[59]

The word 'benefit' as used in Article 1.1(b) implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the financial contribution makes the recipient 'better off' than it would otherwise have been, in the absence of that contribution. The market place provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred' because the trade distorting potential of a financial contribution can be identified by determining whether the recipient has received a financial contribution on terms more favourable than those available to the recipient in the market.[60]

The Appellate Body on the question of whether potentially allocable subsidies could have travelled with the productive unit following a change in ownership held that in general there could not be irrefutable presumption that a 'benefit' continues to flow from untied non-recurring financial contribution, even after change in ownership. The new owners of the producing facilities could not be deemed to have obtained a benefit by previous subsidies bestowed upon the enterprise, if a fair market value has been paid for all productive assets in the course of the privatization.[61]

The SCM Code recognizes three types of specificity;

- Enterprise specificity wherein a government picks out a particular company or companies to be subsidised;
- Industry specificity wherein a government subsidizes producers in specified parts of its territory; and
- Prohibited subsidies wherein a subsidy is linked to export performance or the use of domestic inputs.

[59]US—Tax Treatment for Foreign Sales Corporation's supra note, 58, para. 117–118.

[60]Appellate Body Report on Canada—Measures Affecting the Export of Civilian Aircraft, Appellate Body Report WT/DS70/AB/R, DSR 199: para. 157.

[61]US—Imposition of Countervailing Duties on Certain Hot Rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom, Appellate Body Report, WT/DS138/AB/R, para. 68.

8 Actionable Subsidies—Yellow Light Subsidies

The yellow light subsidies, Part III of the SCM Code, does not strictly define actionable subsidies, and such subsidies are neither prohibited nor exempt from challenge and are yet open to complaint, or to countervailing action, provided the necessary conditions are met. Article 5 of the SCM Code lays down the general principles that no member should cause, through use of specific subsidy as defined in Articles 1 and 2 of the Code, adverse effects to the interests of other members. Article 5 of the SCM Code identifies three types of adverse effects such as (a) injury to the domestic industry of another member; (b) nullification and impairment of benefits accruing under GATT 1994; and (c) serious prejudice to the interests of another member.

The 'injury' effect is on the same lines as government's subsidies cause to the domestic industry of another WTO member as though dumping caused it. As in the case of dumping, a member under the Code may impose a countervailing measure (duty) if it determines that subsidized imports are causing injury to a domestic industry. Alternatively, a member may challenge an injurious subsidy before a WTO dispute settlement panel. Nullification and impermanent of benefits are a concept with a long GATT history, and in the case of subsidies, it is likely to arise when a member finds that the improved market access it might have expected to gain as the result of another member's tariff bindings has been undercut by the effects of subsidy given by that member.[62]

9 Serious Prejudice

Serious prejudice is a wide concept and needs detailed analysis. The Code addresses 'serious prejudice' in two ways. One, by setting criteria for a presumption of serious prejudice, and second, by identifying conditions or trade effects under which serious prejudice may arise. The presumptions of serious prejudice as provided in Article 6(I) of the Code are:

(a) Where the total *ad-valorem* subsidization of a product exceeds 5%;
(b) Where subsidies are used to cover operating losses sustained by an industry;
(c) Where subsidies are used to cover operating losses sustained by an enterprise other than one time measures which are non-recurrent, cannot be repeated for the enterprise, and which are given to provide time to develop long-term solutions and to avoid acute social problems; and
(d) Where there is 'direct forgiveness of debt', (i.e., government held debt), and 'grants to cover debt repayments'.[63]

[62]Article 5, SCM Code.
[63]Article 6, SCM Code.

The subsidies as contemplated in the category of serious prejudice are considered to be the dark amber category of subsidies. They are presumed to give rise to serious prejudice. However, the presumption of serious prejudice established by Article 6(1) may be rebutted if the subsidizing country can demonstrate that the subsidy has not resulted in any of the conditions or trade effects that are enumerated in Article 6(3).[64] Article 6(3) of the Code enumerates four cases in which serious prejudice may arise:

(a) Where the 'effect of the subsidy is to displace or impede the imports of like products into the market of the subsidizing member'; the total *ad-valorem* subsidization shall be calculated in accordance with the provisions of Annex IV of the SCM Code;
(b) Where the 'effect of the subsidy is to displace or impede the exports of 'like product' of another signatory from a third country-market';
(c) Where the 'effect of subsidy is a significant price undercutting by the subsidized products as compared with the price of a 'like product' of another signatory in the same market or significant price suppression, price depression or lost sales in the same market'; and
(d) Where the 'effect of subsidy is an increase in the world market share of the subsidizing signatory in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of 3 years and this increase must follow a consistent trend over a period when subsidies have been granted'.

Succeeding provisions of Article 6 of the Code especially Articles 6(4) and 6(5) further explain the meaning and scope of 'displacing or impeding' imports and exports and price undercutting, while Article 6(7) lists six circumstances where displacement or impedance shall not give rise to serious prejudice. These circumstances, which must not be isolated, sporadic or otherwise insignificant, are:

(a) Where there is a prohibition or restriction on exports of the like product from the complaining signatory or on imports from the complaining signatory, into the third market concerned;
(b) Where there is a decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining signatory to another country or countries;
(c) Where there are natural disasters, strike, transport disruption or other *force majeure*, substantially affecting production, qualities, quantities or prices of the product available for exports from the complaining signatory;
(d) Where there exist arrangements limiting exports from the complaining signatory;
(e) Where there is a voluntary decrease in the availability for export of the product concerned from the complaining signatory including *inter alia*, a situation

[64]Ibid.

where firms in the complaining signatory have been automatically reallocating exports of this product to new markets; and

(f) Where there is a failure to conform to standards and other regulatory requirements in the importing country.[65]

Agriculture is exempted from the above said subsidies regime.

10 Injury

The Code establishes a '*de-minimis*' threshold standard regarding subsidy amount and import volume. Article 11(9) of the Code states that there shall be immediate termination of countervailing duty in cases where the amount of a subsidy is *de-minimis* or where the volume of subsidized imports, actual or potential, or the injury is negligible. The amount of subsidy shall be considered negligible if the subsidy is less than one per cent *ad-valorem*. In contrast to the one per cent *de-minimis* standards, Article 27:10 of the Code requires that any countervailing duty or investigation of a product originating in a developing country signatory shall be terminated where the level of subsidies is less than two per cent *ad valorem*, and the volume of the subsidized imports represents less than four per cent of the total imports, 'unless imports from developing country signatories whose individual share of the total import represents less than four per cent collectively account for more than nine per cent of the total imports for the like product in the developing country'.[66]

11 Cumulation

The Code adopts the view that a subsidy must exceed a *de- minimis* threshold before its effect may be cumulatively assessed with the subsidized imports from the other countries. Article 15(3) of the Code provides that cumulation may be applied only if the investigating authorities determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de- minimis* as defined in Article 11:9 and the volume of imports from each country is not negligible; and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition, between imported products and the conditions of competition between the imported products and the domestic product.[67]

[65]Article 6 of SCM Code.

[66]Article 11 and 27 of SCM Code.

[67]Article 15 of SCM Code.

12 Non-actionable Subsidies

Part IV in Article 8 of the SCM Code defines three categories of non-actionable subsidies, in addition to the general exclusion of non-specific subsidies. As the members require that government assistance for various purposes is duly provided by members and the mere fact that such assistance may not qualify for non-actionable treatment under Article 8 does not in itself restrict the ability of members to provide such assistance.[68] The non-actionable subsidies or the green light subsidies are

(a) Assistance for basic research, up to a maximum of 75% of the cost, or 'for pre-competitive development' up to a maximum of 50%;
(b) Assistance to disadvantaged regions, provided that the aid is not limited to specific enterprises or industries within a region, is given as part of a general scheme of regional development, and the region can be shown to be disadvantaged (in terms of such measures as GNP and unemployment rates) by comparison with the member country as a whole; or
(c) Assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided the assistance is given on a one-time basis, and limited to 20% of the total costs and is generally available.

Article 9 of the Code takes care in consultations and authorized remedies that in case members have reasons to believe, notwithstanding the fact that programme under Article 8 is consistent that the programme may still be causing damage and have adverse effects on the domestic industry of another member, consultation may follow between the member granting the subsidy and the member feeling offended. If consultations fail to arrive at a mutually agreed solution, the matter can be referred to the Committee on Subsidies and Countervailing Measures which has the jurisdiction to oversee the Code. If the Committee finds that the subsidy in question is not warranted, it will recommend to the subsidizing member to modify the assistance failing which Committee shall recommend and authorize the requesting member to take necessary counter-measures commensurate with the nature and degree of the subsidy.

[68]Footnote 23 to Article 8.1, SCM Code.

13 Subsidies by Developing Countries

Article 27 of the Code and its Annex VII dealing with the special and differential treatment of developing countries were highly controversial when they were released. Both developed and developing countries were dissatisfied with the substance of these provisions.[69]

Article 27 of the Code begins with a recognition that subsidies may play an important role in development programmes of developing countries and then specifies which developing countries shall be exempt from the prohibition of Article 3(1)(a) against the use of export subsidies and subsidies contingent on export performance:

(a) developing country signatories referred to in Annex VII and;
(b) other developing country signatories for eight years from the date of entry into force of this Agreement subject to compliance with the provision in paragraph 4.

Paragraph 4 of Article 27 states that any developing country referred to above shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. In that period, the developing country may not increase the current level of its export subsidies and actually shall eliminate them within a period shorter than that provided for in this provision when the use of such export subsidies is inconsistent with its development needs.[70]

The Code further provides that if any developing country believes it is necessary to maintain its export subsidies beyond the eight-year period that country must so inform, and consult with, the Committee on Subsidies at least one year before the end of eight-year period.[71]

For those developing countries, which have reached export competitiveness in any given products, the Code requires that the export subsidies for such products be phased out over a period of two years.[72]

However, for those countries listed in Annex VII, if they reached export competitiveness in one or more products, the phase-out period for export subsidies on such products shall be eight-years.[73]

Article 27(6) of the Code establishes the criteria for determining whether export competitiveness in a particular product exists. It specifies that export competitiveness in a product exists if a country's export of that product has reached a share of at least 3.25% in world trade of that product for two consecutive calendar years.

[69]See Minutes of the Meeting of 6 Nov. 1990, Note by the Secretariat, GATT Doc. No. MTN. GNC/NG 10/24 (Nov. 29, 1990).

[70]Article 2.1 (c), SCM Code.

[71]Ibid.

[72]Article 27(4) of SCM Code.

[73]Article 27(4) of SCM Code.

Further, the Code defines a product as a section heading of the Harmonized System Nomenclatures. This Article also establishes that export competitiveness shall be shown to exist either

(a) on the basis of notification; or
(b) on the basis of a computation undertaken by the GATT Secretariat at the request of any signatory.

Article 27(7) of the Code provides that the remedies specified in Article 4 (remedies for prohibited subsides) shall not apply to a developing country's export subsidies as long as they are in conformity with Articles 27(2)-27(5), and the applicable remedy provision shall be Article 7 (remedies for actionable subsidies). There shall be no presumption that a developing country subsidy results in serious prejudice, as that term is defined in Article 6(1) of the Code and if serious prejudice exists, it must be demonstrated by positive evidence.

Article 27(9) of the Code goes further and states that no action may be taken against a developing country's actionable subsidies (other than those referred to in Article 6(1)) unless nullification or impairment exists so as to 'displace or impede' imports of like products, or unless injury to the domestic industry occurs.[74]

The Code in Articles 27(10) and (11) adds specific *de- minimis* percentage and provides:

Any countervailing duty investigation of a product originating in a developing country signatory shall be terminated as soon as authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed two per cent of its value/calculated on a per unit basis; or
(b) the volume of the subsidized imports represents less than four per cent of the total imports of the like product in the importing signatory, unless imports from developing country signatories whose individual share of the total imports represents less than four per cent collectively account for more than nine per cent of the total imports for the like product in importing country.

Article 27:13 of the Code provides that direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities between such subsidies are granted within and directly linked to a privatization programme of a developing country signatory provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee on Subsidies and that the programme results in eventual privatization of the enterprise concerned.

Finally, the Code empowers the Committee on Subsidies which upon request and depending upon the nature of the request undertake a review of either (a) a specific export subsidy of a developing country to determine whether it conforms to

[74]Article 27.1, SCM Code.

that country's development needs or (b) a specific countervailing measure against a developing country's subsidy in order to determine whether the measure is consistent with the provisions of Articles 27:10 and 27:11.

14 Calculation of the Amount of a Subsidy

Article 14 of the Code provides that any method used to calculate the benefit conferred by a subsidy must be provided in each signatory's national legislation and be adequately transparent. In addition, it provides the following guidelines for calculating the amount of a subsidy;

(a) a government provided equity does not confer a benefit unless the investment is inconsistent with the usual investment practice of private investors;
(b) a government loan does not provide a benefit unless there is a difference between what the firm receiving the loan pays and what it would pay for a comparable commercial loan which the firm could obtain on the market; if different, the benefit conferred is the difference between the two amounts;
(c) a government loan guarantee does not confer a benefit unless there is a difference between what the amount the receiving firm pays on the guaranteed loan and the amount the firm would pay for a comparable commercial loan without the government guarantee. If different, the benefit conferred is the difference between the two amounts, adjusted for any difference in fees; and
(d) the provision of goods or services or the purchase of goods by a government does not confer a benefit unless provided for less than adequate remuneration or purchased for more than adequate remuneration, determined in relation to prevailing market conditions (including price, quality, availability, marketability, transportation), etc.

15 Countervailing Measures

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any member imported into the territory of another member is in accordance with the provisions of Article VI of GATT 1994 and the terms of the Code. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[75] The countervailing duty is understood to mean special duty levied for the purpose of offsetting any subsidy

[75]Article 10, SCM Code.

given directly or indirectly upon the manufacture, production or export of any merchandise provided in Article VI, GATT 1994 (paragraph 3).

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the product, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of Article VI of GATT 1994, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another;

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or
(b) in the absence of such domestic price, is less than either

  (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purpose of Article VI, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 3.[76]

No countervailing duty shall be levied on any product of the territory of any contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly, or indirectly, upon the manufacture, production or export of any merchandise.[77]

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.[78]

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[76]Article VI, GATT 1994.

[77]Article VI (3), GATT 1994.

[78]Article VI (4), GATT 1994.

The Contracting Parties may waive the above requirement so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping of subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The Contracting Parties shall waive the above requirements so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.[79]

In exceptional circumstances, however, where delay might cause damage, which would be difficult to repair, a contracting party may levy a countervailing duty without the prior approval of the Contracting Parties; provided that such action shall be reported immediately to the Contracting Parties and that the countervailing duty shall be withdrawn promptly if the Contracting Parties disapprove.[80]

A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.[81]

16 Determination of Dumping

A product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[82] When there are no sales of the like product in the ordinary

[79]Article VI(5), GATT 1994.
[80]Article VI(6), GATT 1994.
[81]Article VI(7), GATT 1994.
[82]Article 2 of the Agreement on Article VI of GATT 1994.

course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[83]

Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices, which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[84]

Costs shall normally be calculated on the basis of records kept by the exporter of producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations, costs shall be adjusted appropriately for those non-recurring items of cost, which benefit future or current production, or for circumstances in which costs during the period of investigation are affected by start-up operation.[85]

The amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) The actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products.[86]

[83]Article 2(1) and 2(2) of the Agreement on Article VI of 1994.

[84]Ibid., Article 2.2.1.

[85]Ibid.

[86]Ibid., Article 2(1) and 2(2).

(ii) The weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin.[87]

(iii) Any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.[88]

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as importer, on such reasonable basis as the authorities may determine.[89]

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of a sale made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which effect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics and any other differences which are also demonstrated to affect price comparability. In the cases referred to above allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price or shall make due allowance as warranted. The authorities shall indicate to the parties in question what information is necessary to ensure fair comparison and shall not impose an unreasonable burden of proof on those parties.[90]

When the comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.[91]

Subject to the provisions governing fair comparison the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of

[87]Article 2.2.1 of the Agreement on Article VI of GATT 1994.

[88]Article 2.2.2 of the Agreement on Article VI of GATT 1994.

[89]Ibid., Article 2.3.

[90]Article 2.4 of Agreement on Implementation of Article VI.

[91]Ibid., Article 2.4.1.

prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.[92]

In the case where products are not imported from the country of origin but are exported to the importing member from an intermediate country, the price at which the products are sold from the country of export to the importing member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.[93]

The term 'like product' (product similar) shall be interpreted to mean a product, which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[94]

This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 to GATT 1994.[95] A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[96]

With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

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[92]Article 2.4.2. of Agreement on Implementation of Article VI.

[93]Ibid., Article 2.5.

[94]Ibid., Article 2.6.

[95]Ibid., Article 2.7 of Agreement on Implementation of Article VI Article VI.

[96]Article 15.3 of the SCM Code.

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de-minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[97]

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity factors affecting domestic prices, the magnitude of the margin of dumping actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[98]

It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia,* the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[99]

The effect of the dumped imports shall be assessed in relation to the domestic production of the like product, when available data permit the separate identification of the production on the basis of such criteria as the production process, production, sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.[100]

A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances

[97]Article 15.2 of the SCM Code.

[98]Article 15.3 of the SCM Code.

[99]Article 15.4 of the SCM Code.

[100]Article 15.8 of the SCM Code.

which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia,* such factors as:

(i) A significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
(ii) Sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing member's market, taking into account the availability of other export markets to absorb any additional exports;
(iii) Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
(iv) Inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.[101]

17 Countermeasures in the SCM Agreement

The arbitrators in Brazil—Aircraft were the first to discuss the meaning of countermeasures. They also referred to ILC's draft on state responsibility (US—OFFCET ACT (Byrd Amendment) (Art. 22.6-Korea) para. 3.74) and accepted the view of both the parties that countermeasures in Art. 4 may include suspension of concessions or other obligations. The arbitrators in US-FSC held that countermeasures could be directed either at countering the measure at issue (in this case, at affectively neutralizing the export subsidy) or at counteracting its effects on the affected party or both (Decision by Arbitrators, US-FSC, Art. 22.6-US, para. 5.6) this view was confirmed by the arbitrators in Canada—Aircraft. In US—Upland Cotton the arbitrators further differentiated the countermeasures against prohibited and actionable substance. In their view countermeasures can be taken to act against the failure to withdraw prohibited subsidies within the required time period (US—Upland Cotton (Art. 22.6-USII), (para. 4.26). The arbitrators in US—Upland cotton also agreed with countermeasures as defined in ILC's Draft Articles on State responsibility. In confirming that the nature of countermeasures in the SCM

[101] Article 15.8 of the SCM Code.

Agreement complies with that in general international law, The US—Upland Cotton (Art. 20.6-US) arbitrators decision represents first measure development in the WTO dispute settlement system.

Judging the appropriateness of the countermeasures against prohibited subsidies, previously arbitrators have generally held that any countermeasures should take into account the gravity of the breach and the nature of the complaint in the balance of rights and obligations. [Decision by the Arbitrators, US-FSC (Art. 22.6-US para. 5.61)].

In judging the appropriateness of the countermeasures in the SCM Agreement, the following factors should be taken into consideration:

The trade distorting effect of subsidies should be used as a basis for calculating the level of retaliation. The trade distorting impact of the prohibited subsidy at issue on the complaining member would effectively reflect the manner in which the economic position of the complaining party to the dispute has been disrupted and harmed by the illegal measure.

18 Conclusion

From the above discussion, it is clear that the WTO Agreement on Subsidies and Countervailing Measures represents the culmination of five years hard work of negotiators and their negotiating skills. The Ministerial Declaration which launched the Uruguay Round stated the objectives of the subsidies negotiations as follows:

'Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on Subsidies and Countervailing Measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues'.

Thus, the primary goal of the subsidies and countervailing measures negotiations was to improve GATT disciplines that relate to all subsidies and countervailing measures.

The perusal of the viewpoints put forward by various countries in the negotiations was characterized by a conflict between two points of view-one, being the view that saw subsidy discipline as the primary goal of negotiations, while the other view emphasized the objective of greater discipline over the use of countervailing measures. The Uruguay Round of Negotiations dwelt on both subsidies and countervailing measures aiming in disciplining both. It is obvious that the WTO success in negotiating the Multilateral Agreements on Subsidies and Countervailing Measures is susceptible to the competing view points as outlined above.

The WTO Agreement on Subsidies as explained in the beginning of this chapter categorises subsidies as either prohibited, actionable or non-actionable, establishes a rebuttal presumption of serious prejudice based on, *inter alia*, a quantitative standard, articulates a benefit to the recipient, standard for calculating particular types of benefits and requires public notice of other types of calculation

methodologies, establishes measures to prevent circumvention of countervailing duty orders and institutes a programme of phase-out of the use of export subsidies by developing countries.

The WTO Agreement on Countervailing Duties provides, *inter alia*, a quantitative Definition of *de- minimis* subsidies below which a countervailing duty investigation would be terminated. It also establishes that imports may be cumulatively assessed only if subsidies are not *de- minimis* and volumes not negligible; provides that a petitioner in a countervailing duty case must show positive evidence of industry support before an investigation is initiated; recommends that the public interest (including the interest of consumers) be considered in determining whether the imposition of countervailing duties is appropriate; and establishes a mandatory review provision under which a countervailing duty order would lapse (sunset) after five years unless good cause were shown for its continuance.

In conclusion, it can be said that the WTO Agreement on Subsidies and Countervailing Measures meets the stated goals of Punta-de-Este Declaration for the measures. However, as with anything new in law (be it domestic or international), it is ripe for fresh interpretations as its limits are explored by those with a vested interest in doing so.

Further, after the Doha Declaration, 2001, the anti-dumping and countervailing duty law has been brought back on the WTO negotiating table, with proposals to clarify the existing SCM Code, as both the Anti-dumping and Subsidies Code of WTO are being resorted by developed as well as developing countries. These measures should not be left as last resort for uncompetitive industries as the other trade measures have seen gradual demise by now.

Since the establishment of the WTO six retaliation requests have been filed in subsidy related disputes. Of these four cases adjudicated pursuant to Art. 4.11 and/or Art. 7.10 of the SCM Agreement and Art. 20.6 of the DSU. Some of these cases are: Brazil air freight Guarantees for Regional Aircraft (DS222) and US—Upland Cotton (DS267). The most recent retaliation request between EU and the USA over aircraft trade in December, 2011, the USA requested to take counter measures amounting to between USD 7 billion and 10 billion annually due to the failure of EU to comply with recommendations and rulings of the DSB in regard to dispute EC and Certain Member States-measures Affecting Trade in large Civil Aircraft (DS316). Ten months later, the EU fought back and requested to take counter measures amounting to USD 12 billion annually against the USA (Communication EU recourse to Art. 22.2 of DSU and Arts. 4.10 and 7.9 of the SCM Agreement, [US—Measures Affecting Trade in large Civil Aircraft (Second Complaint), WT/DS 353/17Oct. 2012)]. The Compliance Panel proceedings in the two cases are ongoing. If the cases result in the imposition of actual counter measures, global trade will suffer immeasurably.

Levels of retaliation in subsidy-related disputes

Sr. no.	Dispute	Complainant	Level of retaliation requested	Level of retaliation determined by the arbitrators
1.	Brazil-Aircraft (DS46)	Canada	CAD 700 million per year	CAD 344.2 million per year
2.	US-FSC (DS108)	EC	USD 4043 million per year	USD4043 million per year
3.	Canada-Aircraft (DS222)	Brazil	USD 3.36 billion per year	USD 247797000
4.	US-Upland Cotton (DS267-1)	Brazil	USD 3 billion per year against prohibited subsidies	USD 147.4 million for FY 2006
5.	US-Upland Cotton (DS267-II)	Brazil	USD 1.037 billion per year (against actionable subsidy)	USD 147.3 million per year

Chapter 15
State-Trading Enterprises (Article XVII)

The text of Article XVII (state-trading enterprises), Interpretative Note Ad Article XVII and Uruguay Round Understanding on Interpretation of Article XVII are reproduced as under:

1. (a) Each contracting party undertakes that if it establishes or maintains a state enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
   (b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
   (c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

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3. The contracting parties recognise that their enterprises of the kind described in paragraph 1(a) of this Article might be operated so as to create serious obstacles to trade; thus, negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.
4. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1(a) of this Article.
   (b) A contracting party establishing, maintaining or authorising an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import markup on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.
   (c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1(a), request the contracting party establishing, maintaining or authorising such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.
   (d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interest of particular enterprises.

Interpretative Note Ad Article XVII from Annex I

Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b)

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different price for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1(a)

Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute ‘exclusive or special privileges’.

Paragraph 1(b)

A country receiving a 'tied loan' is free to take this loan into account as a 'commercial consideration' when purchasing requirements abroad.

Paragraph 2

The term 'goods' is limited to products as understood in commercial practice and is not intended to include the purchase or sale of services.

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provision of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

Paragraph 4(b)

The term 'import mark-up' in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994

Members, Nothing that Article XVII provides for obligations on Members in respect of the state-trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

Nothing further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state-trading enterprises:

Recognising that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII; Hereby agree as follows:

1. In order to ensure the transparency of the activities of state-trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition: 'Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports'.

   This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state-trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notification so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.
3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 9S/184-185), it is being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.
4. Any Member who has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counternotification to the Council for Trade in Goods, for consideration by the working party set-up under paragraph 5, simultaneously informing the Member concerned.
5. A working party shall be set up, on behalf of the Council for Trade in Goods, to review notification and counternotifications. In the light of this review and without prejudice to paragraph 4(c) of Article XVII, the Council for Trade in Goods may make recommendations with regard to the adequacy of notification and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the above-mentioned questionnaire on state trading and the coverage of state-trading enterprises notified under paragraph 1. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the Secretariat will provide a general background paper for the working party on the operation of state-trading enterprises as they relate to international trade. Membership of the working party shall be open to all Members indicating their wish to serve on it. It shall meet within a year of the date of entry into force of the WTO Agreement and thereafter at least once a year. It shall report annually to the Council for Trade in Goods.

Note 1: The activities of this working party shall be coordinated with those of the working group provided for in Section III of the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

1 General

Article XVII does not prevent a contracting party from establishing or maintaining state-trading enterprises which are legally placed on the same basis as any other enterprises. Article XVII makes a distinction between various types of enterprises: ‘a state enterprise’ or ‘any enterprise that has been granted formally or in effect,

exclusive or special privileges' [paragraph 1(a)] including 'Marketing Boards' (Interpretative note to paragraph 1); any enterprise under the jurisdiction of a contracting party [paragraph 1(c)]; and 'an import monopoly' [paragraph 4(b)]. Each contracting party undertakes that 'such enterprise shall, in its purchases or sales involving imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in GATT for governmental measures affecting imports or exports by private traders' .

This standard of conduct is further explained in subparagraph (b) to require that such enterprises shall having due regard to the other provisions of GATT make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale and shall afford the enterprises of the other contracting parties adequate opportunity in accordance with customary business practices, to compete for participation in such purchases or sales. A country receiving a 'tied loan' is free to take the loan into account on a 'commercial consideration' for purchasing requirements abroad [Interpretative Note 1(b)]. Under Article XVII: 1(c) read with 1(a), the contracting parties are under an obligation to act in their relation with state trading and other enterprises on a MFN basis. However does the 'contracting party' need to extend 'national treatment' also is not clear'. Article XVII: 2 makes an exception to the obligations of the contracting parties for imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale and the governments are required to extend fair and equitable treatment to the trade of other contracting parties for such imports. The Uruguay Round has negotiated a WTO Agreement on Government Procurement, 1994.

Article XVII: 3 imposes an obligation for negotiations on obstacles to trade created by the operation of state-trading enterprises and a note to that provision provides that such negotiation may be directed towards the reduction of duties and other charges on imports or exports or towards the conclusion of any other mutually satisfactory arrangement. Another obligation on the GATT contracting parties as pointed out in the interpretative note to the GATT Articles on quantitative restrictions is that: "throughout Articles XI, XII, XIII, XIV and XVIII the terms 'import restrictions' or 'exports restrictions' include restrictions made effective through 'state-trading operations'.

Paragraph 4 of Article XVII was enacted by way of amendment in 1955 to ensure adequate disclosure of the activities of state enterprises. It provides that contracting parties shall notify the Contracting Parties (Council for Trade in Goods) of the products which are imported or exported from their territories by state enterprises. Further, the contracting parties, maintaining or authorising an import monopoly of a product not being the subject of concession under Article II of GATT, shall on the request of another contracting party having a substantial trade in that product, inform the Council for Trade in Goods of the import markup on the product during a recent representative period, or when it is not possible to do so, of the price charged on the resale of the product. The Interpretative Note to Article XVII: 4(b) defines the term 'import mark-up' to give the contracting parties some

guidelines in reporting this item. It provides that 'import mark-up' shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

The Uruguay Round Understanding on the Interpretation of Article XVII provides, *inter alia*, for improvements in notifications:

Each member shall conduct a review of its policy with regard to the submission of notification on state-trading enterprises …. In carrying out such a review, each member should have regard to the need to ensure the maximum transparency possible in its notification so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operation on international trade.

Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 … it being understood that member shall notify the enterprise referred to in paragraph 1 whether or not imports or exports have in fact taken place.

Any member who has reason to believe that another member has not adequately met its notification obligations may raise the matter with the member concerned. If the matter is not satisfactorily resolved it may make a counternotification to the Council for Trade in Goods, for consideration by the working party set-up under paragraph 5, simultaneously, informing the member concerned.

At its meeting held on 20 February 1995, the Council for Trade in Goods decided that 'all new and full notification dealt with under Article XVII of GATT and paragraph I of the Understanding on the Interpretation of Article XVII of GATT 1994 should be submitted not later than 30 June in every third year after 1995 and that the updating notifications due in each of the two intervening years should be submitted not later than 30 June in the respective year.

Chapter 16
Governmental Assistance to Economic Development (Article XVIII)

Governmental Assistance to Economic Development (Art XVIII) reads as under:

1. The contracting parties recognise that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.
2. The contracting parties recognise further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry, and (b) to apply quantitative restrictions for balance-of-payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.
3. The contracting parties recognise finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

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4. (a) Consequently, a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the provisions of the other Articles to this Agreement, as provided in Sections A, B and C of this Article.
   (a) A Contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (a) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognise that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4(a) and (b) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.
6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

Section A

7. (a) If a contracting party coming within the scope of paragraph 4(a) of this Article considers it desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.
   (b) If agreement is not reached within sixty days after the notification provided for in subparagraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting

party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in subparagraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.

Section B

8. The contracting parties recognise that contracting parties coming within the scope of paragraph 4(a) of this Article tend, when they are in rapid process of development, to experience balance-of-payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.
9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4(a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported: *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

   (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
   (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

   Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.
10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trademark, copyright or similar procedures.
11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall

eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.

12. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance-of-payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in subparagraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; provided that no consultation under this subparagraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with a contracting party under subparagraph (a) or (b) of this paragraph, the contracting parties find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(e) If a contracting party against which action has been taken in accordance with the last sentence of subparagraph (c)(ii) or (d) of this paragraph finds that the release of obligations authorised by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[1] and to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(f) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

[1]By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT Secretariat from 'Executive Secretary' to 'Director-General'.

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the contracting parties in accordance with provisions of paragraph 18; *Provided* that, if the industry receiving assistance has already started production, the CONTRACTING PARTIES may take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.
15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them, that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.
16. If it is requested by the CONTRACTING PARTIES to do so, the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.
17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.
18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

(a) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or
(b) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry, the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance-of-payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section: *Provided* that it shall not apply the proposed measure without the concurrence of the CONTRACTING PARTIES.
20. Nothing in the preceding paragraphs of this Section shall authorise any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.
21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove: *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

Section D

22. A contracting party coming within the scope of subparagraph 4(b) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit

it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

Ad Article XVIII from Annex I

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

Paragraphs 1 and 4

1. When they consider whether the economy of a contracting party 'can only support low standards of living', the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.
2. The phrase 'in the early stages of development' is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialisation to correct an excessive dependence on primary production.

Paragraphs 2, 3, 7, 13 and 22

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

Paragraph 7(b)

A modification or withdrawal, pursuant to paragraph 7(b), by a contracting party, other than the applicant contracting party, referred to in paragraph 7(a), shall be made within six months of the day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

Paragraph 11

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

Paragraph 12 (b)

The date referred to in paragraph 12(b) shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4(b) of Article XII of this Agreement.

Paragraphs 13 and 14

It is recognised that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

Paragraphs 15 and 16

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

Paragraphs 16, 18, 19 and 22

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.
2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraphs 18 and 22

The phrase ‘that the interests of other contracting parties are adequately safeguarded’ is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 8 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would have the right to safeguard its interests through such a temporary suspension of a concession; *Provided* that this right will not be exercised when, in the case of a measure imposed by a contracting

party coming within the scope of paragraph 4(a), the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

Paragraph 19

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the 'reasonable period of time' referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4(a) of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance-of-payments import restrictions.

Paragraph 21

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

1 General

Article XVIII represents a positive approach to the problems of economic development and the ways and means of reconciling the requirements of economic development with the obligations undertaken under the GATT. The positive approach of Article XVIII is reflected in recognising that the attainment of objectives of the GATT will be facilitated by the progressive development of the economies of the members whose economies can support only low standards of living or are in the early stages of development, which includes both developing, and the least developed countries.[2] It is also recognised that these types of members may take such protective and other measures as are necessary to achieve their economic development in keeping with the GATT commitments. Therefore, the less developing and the least developed countries (LDCs) enjoy additional facilities; (a) granting tariff protection required for the establishment of a particular industry; and (b) applying quantitative restrictions (QRs) for balance of payments purposes taking into account the continued high level of demand for imports likely to be generated by their economic development programmes.[3] Article XVIII is not open to all members but is available to only two types of members; (1) the economy of which can only support low standards of living; and (2) the economy of which is in the process of development but which does not fall in the first category. The

[2]GATT, Article XVIII: 1.

[3]GATT, Article XVIII: 4 read with paragraph 7(a) and (b).

members who fall in the second category may submit applications under section D of this Article. The members who fall in the category (I) have the right to utilise sections A, B and C of this Article. This limitation appears to be justified in the face of the fact that less developing and LDCs rely exclusively on primary production and limited resources to comply with GATT obligations. The expression 'can only support low standards of living' implies that the Contracting Parties shall take into account the normal position of that economy and shall not base their determination on exceptional circumstances. The phrase 'in the early stages of development' is not meant to apply only to members who have just started their economic development, but also to members the economies of which are undergoing a process of industrialisation to correct an excessive dependence on primary production.[4] A member that meets the above two criteria, i.e. the 'eligible state' has the option of recourse to Section A, B or C of Article XVIII.

2 Article XVIII: Section A

Section A permits a member of GATT which comes within the definition of paragraph 4(a) of Article XVIII to enter into negotiations for the modification of a concession, in order to promote the establishment of an industry, with the country with which it was initially negotiated and with other substantially interested countries. If the contracting parties find that the member, which initiated the negotiation, has made every effort to reach an agreement and has offered an adequate compensatory adjustment they can allow the contracting party to modify or withdraw the concession. If no agreement is reached, the matter may be referred to the contracting parties who may authorise tariff increases under certain circumstances.[5]

3 Article XVIII: Section B

Section B of Article XVIII refers to import measures for balance of payments and embodies the special and differential treatment foreseen for developing countries with regard to such measures. A country which can only support low standards of living and is in the early stages of development for safeguarding its external financial position as well as assuring an adequate levels of resources may control the general level of its imports by restricting the quantity or value of merchandise

[4]GATT, Annex. I, Ad. Art. XVIII, paras. 1 and 4.

[5]Article XVIII Paragraphs 10 and 11. An Interpretative Note.

permitted to be imported subject to the condition that such restriction shall not exceed those necessary:

(a) to forestall the threat, or to stop, a serious decline in its monetary reserves, or
(b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

In applying restrictions on the ground of balance of payments, the country has to take into account: (a) the impact on imports of other products giving priority to the product which are more important for economic development; (b) the restrictions should not impose burdens or damages to the commercial interest of third parties; and (c) the restrictions should allow minimum imports including commercial samples so that regular channels of trade are not impeded. The country is under an obligation while carrying out its domestic policies to restore equilibrium in its balance of payments on a sound and lasting basis. As conditions of balance of payments improve, the restrictions shall be maintained only to the extent necessary under paragraph 9 of Article XVIII and shall be eliminated when conditions no longer justify their maintenance.[6] After the establishment of WTO, these provisions are subject of scrutiny by the WTO Dispute Settlement Body. Therefore, it has been held that Article XXIII of the GATT, 1994 read with DSU Understanding of the WTO, has jurisdiction to review the justification or otherwise of restrictions imposed by a country under Article XVIII read with balance-of-payments provisions of the GATT, 1994.[7]

The consultation procedure as to the nature of balance-of-payments difficulties and alternative corrective measures are elaborate. Once a country has started applying restrictions, it is incumbent on it to enter into consultations with Contracting Parties detailing the nature of balance of payments, alternative corrective measures and the possible effect of such restrictions on third parties. Once notice of consultation has been given, the Contracting Parties after two years of such notice shall enter into consultation with the country applying restrictions and shall indicate the inconsistency of the restriction either with Article XVIII, 9(b) or with those of Article XIII subject to the provisions of Article XIV, i.e., non-discriminatory administration of quantitative restrictions and exceptions to the rule of non-discrimination.[8]

In case the Contracting Parties have determined that restrictions are inconsistent and are serious in nature threatening or damaging the trade of other countries, the Contracting Parties will suggest appropriate recommendations for securing conformity and if the member does not comply with these recommendations for securing conformity, the Contracting Parties may release the countries being

[6]India—Quantitative Restriction on Imports of Agricultural, Textiles and Industrial Products, Panel Report, WT/DS90/R, adopted 22 September 1999 as upheld by the Appellate Body Report, WT/D/DS90/AB/R, DSR 199: V: paras. 87–88 and 94–95.

[7]Article XVIII Paragraph 12.

[8]Ibid., Paragraph 12.

affected by the restrictions from the GATT obligations towards the country applying restrictions.[9]

Further Contracting Parties may invite a country applying restrictions for balance- of-payments on the request of any third party who can establish a *prima facie* case that restrictions are inconsistent or the Contracting Parties *suo-motto* come to the same conclusion, the procedure for terminating the restrictions or releasing the third party from GATT obligations *vis*-à- *vis* the country imposing the restriction as detailed above applies.[10]

4 Understanding on the Balance-of-Payments Provisions of the GATT, 1994

The text of the Article XVIII: B has to be read in the light of the understanding on the balance-of-payments provisions of the GATT, which clarifies the provisions of Article XII and XVIII: B and of the 1979 Declaration on Trade Measures Taken for Balance of Payments Propose[11] as well refers to procedures for balance-of-payments consultations adopted in 1970 (full consultation procedures) and 1972 simplified consultation procedure, however, it does not explicitly refer to Article XVIII: 12(e) and (d).

The General Council of WTO established a WTO Committee on Balance-of-Payments Restrictions on 31 January 1995.[12] The terms of reference for the Committee are:

(a) to conduct consultations, pursuant to Article XII: 4; Article XVIII: 12 and the understanding on the balance-of-payments provisions of the GATT, 1994, on all restrictive import measures taken or maintained for balance-of-payments purposes, and pursuant to Article XII: 5 of GATS on all restrictions adopted or maintained for balance-of-payments purposes on trade-in-services on which specific commitments have been undertaken; and
(b) to carry out any additional functions assigned to it by the General Council.[13] The GATT 1994 Understanding on balance of payments is designed to constantly and periodically monitor the imposition of restrictions by way of balance-of-payments purposes and adopts a simplified procedure. The simplified procedure provides that (a) each year, the GATT Secretariat establishes a schedule showing the contracting parties acting under Article XVIII: B which are required to consult under paragraph 12(h) of the understanding that year;

[9]Ibid., Paragraph 12(c).
[10]Article XVIII, Paragraph 12(d).
[11]L/4904 Adopted on 28 November 1979, 265/205.
[12]WT/GC/M/1, Section 7A.(1).
[13]WT/GC/1, Section 7A.(1).

(b) each of these contracting parties should submit to the contracting parties a concise written statement on the nature of the balance-of-payments difficulties, the system and methods of restrictions (with particular reference to any discriminatory features and changes in the past two years), the effects of restrictions and prospect of liberalisation; (c) the statements received will be circulated to all contracting parties and presented to the Committee on balance-of-payments restrictions for prior consideration, so that the committee may determine whether full consultation is desirable. If it decides that such a consultation is not desirable, the Committee will recommend to the Council that the contracting party be deemed to have consulted with the Contracting Parties and to have fulfilled its obligations under Article XVIII: 12 for that year. Otherwise, the Contracting Parties will consult the International Monetary Fund (IMF), and the Committee will follow the procedure hitherto for a full consultation; and (d) arrangements will be made with the IMF for the supply of balance-of-payments statistics for each country submitting a statement in accordance with paragraph (b) above.[14] The simplified procedure is to be applied for the LDCs and less developing countries which are pursuing liberalisation efforts in conformity to the schedule presented to the Committee in theprevious consultation. Simplified consultation procedures may also be used when Trade Policy Review of a developing country member is scheduled for the same calendar year as the date fixed for consultation. In such cases, the decision as to whether full consultation procedures should be used will be made on the basis of factors enumerated in paragraph 8 of the 1979 Declaration.

Paragraph 8 of the 1979 Declaration reads as under:

In the case of consultations under Article XVIII: 12(b) the Committee on balance of payments shall base its decision on the type of procedure on such factors, *inter-alia,* (a) the time elapsed since the last full consultation; (b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations; (c) the changes in the overall level or nature of the trade measures taken for balance-of-payments purposes; (d) the changes in the balance-of-payments purposes; (e) the changes in the balance-of-payments situation; and (f) whether the balance-of-payments problems are structural or temporary in nature.[15] Except in case of LDCs Members no more than two consultations may be held under simplified procedures. The Committee on balance of payments has to report to the General Council and in case full consultations have taken place, the Committee report should contain the nature of consultation, facts and reasons on which the report is based and proposals for recommendations. The General Council is empowered to make recommendations.

[14]L/3772/Rev. I, approved by the Council on 19 December 1972, 20S/47, 48–49, para. 3.

[15]L/4904, adopted on 28 November 1979, 26S/205, 206–208.

5 Article XVIII: Section C

Section C of Article XVIII empowers a contracting party, the economy of which can only support low standards of living and is in the early stages of development to deviate temporarily from the provisions of other Articles of GATT, and can provide governmental assistance promoting the establishment of a particular industry for raising the general standards of living of its people.[16] Such measures of derogation can be introduced if within thirty days of their notification, the contracting parties do not ask for consultation or within ninety days of their notification, the contracting parties have not concurred with such measure. The contracting parties may ask for consultation with the country seeking clarifications of the proposed measure, and the possible effects of the measure on commercial and economic interests of third parties. In case the contracting parties come to the conclusion that there is no measure consistent with other provisions of GATT which could have been taken recourse to by a country, and concur in the proposed measure, the country applying restrictions by way of governmental assistance can be released from GATT obligations.[17]

However, if the proposed measure affects the product, which is subject to concessions in the appropriate schedule of GATT, the contracting party shall enter into consultations with any other contracting party with which the concession was initially negotiated and with contracting parties having substantial interest therein.

The Contracting Parties shall concur in the measure if they agree that there is no measure consistent with other provisions of GATT, which is practicable in order to achieve the objectives of providing governmental assistance to particular industry, and if they are satisfied;

(a) that the agreement has been reached with such other contracting parties as a result of consumption, or
(b) if no such agreement has been reached within sixty days after the notification of the proposed measure has been received by the contracting parties, that the contracting party has made all reasonable efforts to reach an agreement and the interests of other contracting parties are adequately safeguarded.

6 Article XVIII: Section D

A contracting party, the economy of which is in the process of development but which does not come within the scope of an economy which can only support low standards of living and is in the early stage of development, desiring of giving governmental assistance to a particular industry must act in accordance with Section D of Article XVIII. It must apply to the Contracting Parties for approval of

[16]Article XVIII, Section C, Paragraph 13.

[17]Article XVII, Section C, Paragraph 15–17.

measures to be taken. Consultation will take place in accordance with Article XVIII and if the Contracting Parties concur in the proposed measures, the applicant country will be released from obligations under the relevant provisions of other Articles of the GATT. If the proposed measure affects a product, which is the subject of a concession included in a schedule annexed to the GATT, the special procedure of Article XVIII has to be followed.

Chapter 17
Emergency Action on Imports of Particular Products (Art. XIX)

Article XIX: Emergency Action on Imports of Particular Products reads as under:

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
   (b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.
2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the

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contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

   (b) Notwithstanding the provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

1 Article XIX—Escape Clause Actions

Article XIX conceives of certain escape clause actions or protective actions which can be taken by a contracting member, 'if as a result of unforeseen developments and of the effect of obligations incurred by a contracting party under GATT, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions that cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free in respect of such product and to the extent and for such time as may be necessary to prevent or remedy such injury'.[1]

The 'Escape Clause' action is possible provided it is shown that (a) imports are entering in the contracting parties in such increased quantities; (b) that such

[1]GATT 1994, Art. XIX 1(a).

increased imports are a result of both (i) unforeseen developments and (ii) increased imports are causing serious injury or threaten serious injury to domestic producers of the like or directly competitive products effecting the GATT obligations.

If the above happens, then the contracting party may prevent or remedy such injury by suspending its obligation in whole or part or withdrawing or modify the concession.

In case a product is subject of a preferential concession and is causing the damage as set out above, the remedy is the same.[2]

2 Unforeseen Developments

It is obligatory on the part of a contracting party if it wants to take recourse to 'escape clause' action that the 'increased imports' were a result of both GATT obligations and unforeseen developments. To determine the meaning of the clause 'as a result of unforeseen developments and the effect of GATT obligations, that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers' must have been unexpected.[3]

Article XIX: 1(a) contains three conditions for the applications of safeguard measures. These conditions are also reiterated in Article 2.1 of the Agreement on safeguards which are that: (I) a product is being imported in such quantities and under such conditions; (2) as to cause; (3) serious injury or threat thereof to domestic producers. The first clause in Article XIX: 1(a) 'as a result of unforeseen developments and of the effect of GATT obligations including tariff concessions' is a dependent clause which is linked grammatically to the verb phrase is 'being imported' in the second clause of that paragraph. The first clause in Article XIX: 1 (a) describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. As such there is a logical connection between the first clause (the circumstances) and the conditions set forth in the second clause of Article XIX: 1(a) for the imposition of a safeguard measure.[4]

The safeguard measures demonstrate fairly that they were intended by the drafters of GATT to be matters of urgency and emergency actions' and are to be invoked only in situations, when as a result of GATT obligations a member finds itself confronted with developments it had not foreseen. The remedy contemplated in Article XIX: 1(a) is temporarily to 'suspend the obligation in whole or in part or

[2]Article XIX: Para. 1(b) read with para 1(a).

[3]Argentina—Footwear (EC) Appellate Body Report, WT/DS121/ABR, para. 91. See also Appellate Body Report on Korea—Definitive Safeguard Measures Imports of Certain Dairy Products WT/DS98/AB/R, para. 84.

[4]Ibid., para. 92.

to withdraw or modify the concession'. The remedy is to allow a member when it is faced with 'unexpected' and thus 'unforeseen' circumstances as conceived in Article XIX to read just temporarily the balance in the level of concessions between itself and other exporting members. Such a remedy is not available in 'unfair' trade actions such as anti-dumping and countervailing measures. Thus import restrictions that are imposed on products of exporting members when escape clause action under Article XIX is taken must be extraordinary.[5]

Further 'unforeseen development' should be interpreted to mean developments occurring after the negotiations of the relevant tariff concessions which it would not be reasonable to expect and that the negotiations of the country making the concessions could or should have foreseen at the time when the concession was negotiated.[6]

The phrase 'effect of GATT obligations in Article XIX' means that it must be demonstrated as a matter of fact that the importing member has incurred obligations under GATT 1994, including tariff concessions. As schedules annexed to GATT 1994 are made an integral part of GATT, any concession or commitment in a member's Schedule is subject to MFN treatment under GATT 1994.

3 Escape Clause Action and Remedies

XIX: 3 authorises retaliation from the other members if a member takes an escape clause action under Article XIX: 1. However, Article XIX: 2 contemplates a consultation by a member who is contemplating escape clause action with contracting party and other contracting parties who have substantial interest as exporters of the product concerned and provide an opportunity to consult for the proposed action. This has uniformly be taken to mean that parties are entitled to consult because they have a substantial interest as exporters of the product concerned and can obtain the agreement of the invoking party to compensatory withdrawal of concessions, or that the consulting parties can accept compensatory concession by the invoker.

If no agreement is reached, the invoking member has the right to proceed with its withdrawal privileges under Article XIX and the exporting country is then given a right to respond in kind. However, this counterresponse is the prerogative of 'affected contracting parties' and is qualified as follows:

(1) Thirty days written notice of the action must be given (with one exception) and the action must occur not later than 90 days after the initial action by the invoker.

[5]Ibid., para. 93.

[6]Hatters Fur Case, GATT/CP/106, Adopted 22 Oct. 1951.

(2) The counterresponse allowed is to suspend the application of substantially equivalent concessions or other GATT obligations to the trade of the invoker (note that this implies discriminatory treatment against the invoker, contrary to the invokers' right of suspension or withdrawal); and
(3) The contracting parties do not approve.[7]

[7]John H. Jackson, World Trade and the law of GATT 564–566 (1969).

Chapter 18
WTO Agreement on Safeguards 1994

1 Introduction

Article XIX of GATT 1947 as already discussed in the previous chapter envisages circumstances leading to emergency action on imports of particular products by an importing country which are sometimes referred as safeguards or escape clause actions. Article XIX in parenthesis contains a normative action which can be taken, 'if as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products…'.[1]

For invoking Article XIX, the following prerequisites have to be shown;

(1) Imports in such increased quantities;
(2) The increased imports are a result of (a) unforeseen developments and (b) effect of GATT obligations;
(3) The increased imports cause serious injury or threaten serious injury.[2]

In addition, a separate clause sets out a circumstance involving preference concessions.[3] Article XIX, paragraph 1(b) goes further and states that:

If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference.

[1]GATT 1947, Article XIX, para. 1(a); See John H. Jackson, World Trade And the Law of GATT, 557 (1969).
[2]Ibid.
[3]GATT 1947, Article XIX, para. 1(b).

A. K. Koul, *Guide to the WTO and GATT*,
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The remedy granted by Article XIX is to suspend the obligations in whole or in part or to withdraw or modify the concession. The above remedy is subject to number of qualifications such as:

(1) Generally, written advance notice must be given to the contracting parties and an opportunity to consult afforded; an exception to this is made for critical circumstances where delay would cause damage which it would be difficult to repair[4];
(2) The phasing of the remedy implies that the obligation withdrawn must relate causally to the increase in imports[5];
(3) The withdrawal is "to be only to the extent and for such time as may be necessary" to prevent or remedy such injury[6];
(4) The withdrawal is to be 'in respect of such a product', i.e. the imported product causing the injury[7]; and
(5) Although nowhere expressly mentioned in the language, the preparatory work and subsequent GATT practice make it clear that the withdrawal or suspension shall be on a non-discriminatory MFN basis.[8]

On the basis of working of GATT 1947 till the conclusion of the Uruguay Round and with the introduction of the WTO Agreement on Safeguards, it can safely be said that Article XIX was more or less bypassed by resorting to other escape or safeguard measures not traced to the GATT 1947, such as Voluntary Export Restraints (VERs), Voluntary Restraint Agreements (VRAs), Voluntary Import Expansion Agreement (VIEA) and Orderly Marketing Arrangements (OMA) in order to protect the domestic industry from the flooding of imports due to unforeseen circumstances.[9]

Although Article XIX of GATT 1947 consisted of five paragraphs, it lacked detailed procedural and substantive norms on the application of safeguards, causing serious ambiguities and confusion in the discipline of safeguards. In one of the GATT's analysis, 'Work Already Undertaken in the GATT on Safeguards', it was revealed that Article XIX is beset with several problems:

(i) lack of transparency for the application of safeguard measures;
(ii) inadequacy of notification and consultation process;
(iii) uncertain time duration for safeguard measures;
(iv) unclear definition of serious injury; and
(v) violation of MFN principle in the application of safeguard type measures.[10]

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[4]GATT 1947, Article XIX, para. 2.

[5]GATT 1947, Article XIX, para.1(a).

[6]GATT 1947, Article XIX, para.1(a).

[7]J. Michael Finger, GATT Experience with Safeguards: Making Economic and Political Sense Of the Possibilities that the GATT allows to Restrict Imports. World Bank (2000).

[8]Supra note 1, Jackson at p. 564.

[9]Supra note 7.

[10]A Secretariat Note 1987, GATT Doc, MTN, GNG/NG9/W/1 (8th April, 1987).

In the Tokyo Round of Tariff Negotiations (1973–1979), one of the objectives was to develop a new 'safeguards code' that would have enhanced the international discipline of safeguards. It failed to materialize.[11] At the Ministerial Meeting of GATT 1982, the Ministerial Declaration noted the need for a comprehensive understanding to include, *inter alia*, the following elements in the topic of safeguards such as; transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity, and structural adjustment, compensation and retaliation, and notification, consultation, multilateral surveillance, and dispute settlement with particular reference to the role and functions of the safeguards committee.[12]

The Uruguay Round of Tariff Negotiations (1986–1994) recognised the above problems in administering Article XIX of GATT 1947 and also keeping in mind the effective discipline on import restrictions agreed to establish clear, more detailed rules on safeguards in establishing the Agreement on Safeguards, 1994.

2 WTO Agreement on Safeguards—An Analysis

(i) General

The WTO Agreement on Safeguards has been hailed as a substantial achievement of Uruguay Round, and indeed a heroic statement of principle.[13] It sets out specific and explicit rules on the following aspects of safeguards:

(a) Establishes a series of procedural rules of standards of transparency, procedural fairness, public notice to the interested parties, etc.;
(b) Remedies some of the broader ambiguities of GATT Article XIX, with more explicit language and definitions of some of the concepts such as 'serious injury', 'threat of serious injury', 'domestic industry', 'Causal link' has been further elaborated;
(c) Provides explanations and additional language of the nature of safeguard measures (basically tariffs or quotas) and defines some limits about how quotas shall be administered so as to respect a fair allocation of shares in the quotas with all other members. It also limits their duration (basically eight years);
(d) Relaxes the compensation requirement under the prior GATT rules, provided that the safeguard measure has been taken as a result of an 'absolute increase in imports and that such a measure conforms to the provisions of this Agreement'.

[11]See Generally, Lesly Alan Glick, Multilateral Trade Negotiations, World Trade after the Tokyo Round (Ottawa, ND, 1984); See also Gibert Winham, International Trade and the Tokyo Round Negotiations 243–247 (Princeton, N. Princeton University Press, 1985).

[12]GATT, Ministerial Declaration of 29 Nov. 1982, GATT, BISD 29 Supp. 12–13(1982); See also. John H. Jackson, The World Trading System, Law and Policy of International Economic Relations 210, 1998.

[13]John H. Jackson, supra note 12, p. 270.

If these conditions are fulfilled, there shall be no right of suspension (retaliatory or compensatory nature) for exporting countries affected during the first three years of safeguard measure. This appears to introduce something of a two-tier approach to safeguards, whereby a *quid pro quo* for adhering to more precise and higher standards and criteria will be an escape from retaliatory-type measure for this limited period of time;

(e) Appears to impose severe prohibitions on the use of safeguard measures, or the use of voluntary export restraints, other than permitted under the Agreement. There was a period during which existing measures were to be phased out (four years after the date of entry into force of the WTO), although provision was made for one exception for importing member to maintain a restriction until the end of 1999; and

(f) No provision is made for adjustment assistance or structural adjustment promotion.[14]

Safeguard measures are often referred as 'trade remedies' which are essentially in the nature of trade remedies to offset the competing import that can be adopted under the WTO rules.[15] Trade remedies stand for anti-dumping, countervailing duties and safeguard measures, which are covered by Articles VI, XVI and XIX of the GATT and the Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures as well as Agreement on Safeguards.

The safeguard provisions of Article XIX of GATT 1994 and the Agreement on Safeguards do not require the presence of unfair trade practice on the part of exporting member, nor there is a need to provide any evidence of an unfair trade practice like anti-dumping and countervailing measures. Safeguard measures are extraordinary remedies to be taken only in emergency situations, since they are imposed in the absence of any allegation of unfair trade practice. By restricting the imports of other WTO members, safeguard measures will prevent those WTO members, from enjoying the full benefit of trade concessions under the WTO Agreement.[16] WTO in its Annual Report 2003, has indicated that the manner in which safeguards are implemented is a development that tends to undermine fundamental 'values of the world trading system, such as the MFN principle'.[17]

(ii) Article XIX of GATT, 1994 and Its Relationship with the WTO Agreement on Safeguards, 1994

The preamble of the WTO Agreement on Safeguards 1994 outlines four major objectives of the Agreement; viz.

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[14]John H. Jackson, supra note 12, p. 210.

[15]Michael Sanchez Rydelski, The WTO and EC Law on Safeguard Measures, EUZW 654 (1999).

[16]Jackson, supra note 12, p. 191.

[17]WTO Annual Report 2003 with reference to the US Safeguards on Certain Steel Products, at p. 19, http://www.WTO.org/english.

(i) to improve and strengthen international trading system based on GATT 1994;
(ii) clarify and reinforce the disciplines of GATT 1994 especially those of emergency action on imports of particular products (Article XIX);
(iii) re-establishing multilateral control over safeguards and to eliminate measures that escape such control; and
(iv) to enhance competition in international trade rather than limiting it.

The parameters of the preamble are that safeguard measures result in temporary suspension of treaty concessions or the temporary withdrawal of treaty obligations which are fundamental to the WTO Agreements such as those in Article II and Article XI of the GATT.[18] If WTO law were not to offer a 'safety valve' for situations in which, following trade liberalisation, imports increase so as to cause serious injury or threat thereof to a domestic industry, members could be deterred from entering into additional tariff concessions and from engaging in further trade liberalisation. It is for this reason that the safeguard mechanism in Article XIX has always been an integral part of GATT. A conceptual approach of defining the relevant domestic industry which would leave it to the discretion of competent national authorities how far upstream and/or downstream the production chain of a given like product to look in defining the scope of the domestic industry could easily defeat the safeguards Agreement's purpose of reinforcing discipline in the field of safeguards and enhancing rather than limiting competition.[19]

As the Safeguards Agreement establishes rules for the application of safeguard measures as enshrined in Article XIX of the GATT 1994, the conditions contained in Article XIX: 1(a) are partly reflected in Article 2:1 of the Safeguards Agreement 1994 which reads:

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

Article 2.1 of the Agreement on Safeguards stipulates that

> a Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

[18]Appellate Body Report in Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products, WT/DS 98 AB/R para. 88.

[19]Appellate Body Report, US—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS/177/AB/R, paras. 7.76 and 7.77.

The wording of Article XIX: 1(a) of GATT 1994 corresponds with Article 2.1 of the Agreement on Safeguards 1994 in as much as both require that a product is being imported into the territory of a contracting party in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, since the phrase 'as a result of unforeseen developments' does not find mention in Article 2.1 of the Agreement on Safeguards, a controversy has arisen whether the phrase, 'unforeseen developments' in Article XIX: 1(a) of GATT 1994 creates an additional legal requirement for the application of the safeguard measures under the Agreement on Safeguard Measures 1994".[20]

However, the Appellate Body in the case of Korea—Dairy Products[21] ruled that members applying safeguard measure must demonstrate the existence of 'unforeseen developments' as a matter of fact, laying at rest the controversy noted above. As a matter of fact, the Panel in Korea—Dairy Products case has ruled that 'unforeseen developments clause under the provisions of Article XIX is merely an explanation of why an Article XIX measure may be needed, taking into account the fact that at the time of GATT 1947 the contracting parties had just agreed on multilateral tariff bindings and on a general prohibition against quotas'.[22]

In the Argentina—Footwear (EC),[23] the relationship between Article XIX of GATT 1994 and the WTO Agreement on Safeguards 1994 has been dealt with extensively and the following propositions have been laid in this connection.

(i) We see nothing in the language of either Article 1 or Article 11.1(a) of the Agreement on Safeguards that suggests an intention by the Uruguay Round negotiators to subsume the requirement of Article XIX of GATT 1994 within the Agreement on Safeguards and thus to render those requirements no longer applicable.
(ii) Any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.
(iii) The Uruguay Round negotiators did not intend that the Agreement on Safeguards would entirely replace Article XIX.
(iv) The intention of the Uruguay Round negotiators was that the provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards would apply cumulatively, except to the extent of a conflict between specific provisions.

[20]Yong-Shik Lee, The WTO Agreement on Safeguards: Improvement on the GATT Article XIX 14 International Trade Journal, 3 (2000) 284; Critical Issues in the Application of the WTO Rules on Safeguards, 34 JWT 2 (April 2000) p. 135.

[21]Supra note 19, Appellate Body Review, para. 85; Argentina—Footwear, WT/DS121/AB/R, para. 92.

[22]Korea—Dairy Products, supra note 18, Panel Report, WT/DS98/R, para. 7.47.

[23]Appellate Body Report, WT/DS121/AB/R.

Therefore, the safeguards measures should be taken only after it established in investigations undertaken by competent authorities that increased imports are causing serious injury to the domestic industry producing like products on the basis of evaluation of all relevant factors of an objective and quantifiable nature having bearing on the situation of the industry, in particular:

- the rate and amount of increase in imports of the products concerned in absolute and relative terms;
- the share of domestic market taken by increased imports; and
- changes in the levels of sales, production, capacity utilisation, profits and losses and employment.

These standards are higher than the standards of material injury under the Anti-Dumping and Countervailing Agreement and SCM Agreement.

(iii) Conditions for the Application of a Safeguard Measure

Article 2.1 of the Agreement on Safeguards provides that a member may apply safeguard measures to a product only if that member has determined, pursuant to the provisions as set out in the Agreement, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Footnote 1 of Article 2 of the Agreement on Safeguards allows a customs union to apply a safeguard measure as a single unit or on behalf of a member state of a customs union. However, the rider is that while applying a safeguard measure by a customs union as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. If the safeguard measure is applied on behalf of a member state, the determination of serious injury or threat thereof shall be based on the conditions of the member state and the safeguard measures are to be limited to that member state.

The jurisprudence as developed by the DSB in the cases decided in respect of when and under what circumstances that customs union as a whole or as individual member of the customs union can apply safeguard measures have laid down some broad parameters. However, some questions still need to be clarified.

A customs union is not allowed to apply a safeguard measure against products from non-member countries only, where it considered in its injury determinations imports from all sources including the other member countries.[24] Article XXIV (customs union) of the GATT allows a member of the customs union to exclude the other members from its application of safeguard measures. The provisions of Article XXIV of GATT 1994 authorising the elimination of duties and other

[24]Panel Report in Argentina—Footwear, WT/DS/121/AB/R, paras. 99–114.

restrictive regulations of commerce among the members of a customs union can also be used to exempt imports from the member countries in the application of safeguard measures.[25]

The questions in regard to the customs union which need clarification are:

(i) Although, the Appellate Body in the US-Line Pipe case[26] affirmed the requirement of parallelism under the provisions of Article 2, which requires that the sources of products under investigation should be identical to those subject to the application of a safeguard measure, yet that does not answer the question whether a member of a customs union may exclude imports from the other members at all.[27]

(ii) Do the provisions of Article XIX of GATT 1994 provide defense to the non-discriminatory application required under Article 2.2 of the Agreement on Safeguards.[28]

(iii) The authorisation of Article XXIV: 8(a)(i) for the permanent elimination of trade barriers among members of a customs union may not hold good in situations where trade barriers are temporarily imposed to remedy or prevent serious injury to domestic industry especially as contemplated in Articles 2 and 4 of the Safeguards Agreement.[29]

3 Increase in Imports

The increased quantities of imports in Article 2.1 by the nature of their quantity must have been recent enough, sudden enough, sharp enough and significant enough both quantitatively and qualitatively, to cause or threaten to cause serious injury. The data on import quantities in absolute terms and relative to (the quantity of) domestic production are relevant factors to assess whether the imports have increased. The Agreement requires not just an increase (i.e. any increase) but an increase in such quantities as to cause or threaten to cause serious injury. The increase in imports must be judged in its full context, in particular with regard to its rate and amount as required by Article 4.2(a) of the Agreement on Safeguards. The changes in the import levels over the entire period of investigation seem unavoidable when making a determination of whether there has been an increase in imports in such quantities in the sense as stipulated in Article 2.1 of the Safeguards Agreement. Where the volume of imports have declined continuously and

[25]US—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, Panel Report, WT/DS202/R, Adopted 8 March 2000, paras. 7.135–7.163.

[26]Ibid., paras. 197–199.

[27]Young-Shik Lee. Safeguard Measures: Why Are They not Applied Consistently with the Rules? 26 JWT (4) 641 at 649 (2002).

[28]Ibid.

[29]Ibid.

significantly during each of the most recent years of the period, more than a 'temporary' reversal of an increase has taken place.[30]

The phrase 'and under such conditions' in Article 2.1 has been subjected to interpretations in Korea—Dairy.[31] Argentina—Footwear (EC)[32] and US—Wheat Gluten,[33] by the DSB and it has been held that it does not constitute a separate analytical requirement in a safeguard investigation. The Panel Reports in the above cases have held that this phrase does not require an analysis of prices of imported products and like or directly competitive products.

The phrase 'under such conditions' indicates the need to analyse the conditions of competition between the imported product and the domestic like or directly competitive products in the importing country's market. It is the condition of competition in the importing country's market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. For a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are such that the increased imports can and do cause or threaten to cause serious injury.[34]

It has been further clarified that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases are which products may compete include physical characteristics (e.g. technical standards or other performance-related aspects, appearance, style or fashion), service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It is these sorts of factors that must be analyzed on the basis of objective criteria/evidence in causation analysis to establish the effect of the imports on the domestic industry.[35]

4 Investigation

For any member applying the safeguard measures, it is incumbent on its competent authorities to follow the procedures established in advance and make the procedures public in consonance with Article X of GATT 1994.

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[30]Supra note 21, paras. 161–162.

[31]Korea Definitive Safeguards Measure on Imports of Certain Dairy Products, Panel Report, WT/DS98/R and corr. 1. Adopted 12 January, 2000, para. 7.2.

[32]Argentina—Safeguard Measures on Imports of Footwear, Panel Report, WT/DS121/R, Adopted 12 Jan, 2000, para. 8.249.

[33]United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the EC, Panel Report, WT/DS166/R, Adopted 19 Jan, 2001, para. 8.108.

[34]Panel Report in Argentina—Footwear, WT/DS/121/AB/R, paras. 99–114.

[35]Ibid., para. 8.251.

Further, the investigations by the national competent authorities should issue public notice of the investigations to interested parties and hold public hearings in which all interested parties, importers and exporters included could present their points of view. The national competent authority for such public hearing should follow the normal due process of law, *inter alia*, and allow presentations whether the safeguard measure is in public interest. The national competent authorities shall publish the report setting forth their findings and reasoned conclusions reached on all pertinent issues of law and fact [Article 3.1 of the Agreement on Safeguards].

The national competent authorities may keep any information confidential asked for by the concerned parties subject to the final decision of the competent authorities [Article 3.2 of the Agreement on Safeguards].

The national competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all the relevant factors expressly mentioned in Article 4.2(a) of the Agreement on Safeguards. If the competent authorities consider that a particular 'other factor' may be relevant to the situation of the domestic industry under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties. In that respect, the competent authorities, investigations under Article 3.1 are not limited to the investigative steps but must simply, 'include' these steps. Therefore, competent authorities can undertake additional steps, when the circumstances so require, in order to fulfil their obligations to evaluate all relevant factors.[36]

5 Determination of Serious Injury or Threat of Serious Injury

As already mentioned that safeguard measures are applied to remedy or prevent serious injury to domestic industry (Article 2.1 of the Agreement on Safeguards), the determination of injury or threat thereof is the central core of any investigation process for reaching a conclusion whether safeguard measures need to be applied.

Therefore, it is incumbent on the competent national authorities to examine all relevant injury factors or threats *thereof*, which are to be understood as 'significant overall impairment' in the position of domestic industry or the threat of serious injury is imminent, based on facts and not merely on allegations, conjectures or remote possibility. For the purposes of injury or threat thereof, a domestic industry means the producers as a whole of the like or directly competitive products

[36]Appellate Body Report, WT/DS/166/AB/R, para. 55.

operating within the territory of a member country or whose collective output of the like or directly competitive products constitute a major proportion of the total domestic production of those products.[37]

Further, the national competent authorities, in order to determine the threat or serious injury by imports, are under an obligation to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment. The above determination of injury shall not be made unless, the investigation for that purpose, demonstrates on the basis of objective evidence, the existence of 'causal link' between the increased imports of the product concerned and serious injury or threat thereof. If there are other factors increasing imports and causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.[38]

The concept of 'serious injury' as 'significant overall impairment' connotes that:

(a) All factors relevant to the overall situation of the industry should be included.[39]
(b) Word 'injury' is qualified by 'serious' an adjective, which underscores the extent and degree of significant overall impairment that the domestic industry must be suffering or must be about to suffer.[40]
(c) Although, Article 4 contains eight injury factors, it is not necessary to take into account all these factor, the investigating authorities are required to consider each and every factors before dismissing some of them.[41]
(d) A threat determination may be arrived at even if the majority of the firms within the relevant industry are not facing declining profitability, provided that an evaluation of the injury factors as a whole indicates threat of serious injury.[42]
(e) Given the fact that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, it is essential that current serious injury if to be found, it should be found to exist, up to and including the very end of the period.[43]
(f) The threat of serious injury which is clearly imminent means that the serious injury is on the verge of occurring, there is a high degree of likelihood that serious injury will materialise in the very near future i.e., it must be manifest that the domestic industry is on the brink of suffering serious injury.[44]

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[37]Article 4:1 of the Agreement on Safeguards.

[38]Article 4:2(a) and (b) of the Agreement on Safeguards.

[39]Appellate Body Report. WT/DS166/AB/R. para. 74.

[40]US—Safeguard Measures on Imports of Fresh. Chilled or Frozen Lamb Meat from New Zealand and Australia. Appellate Body Report. WT/DS138/ABR. Para. 124.

[41]Supra note 32. Panel Report WT/DS 121/AB/R. PARA 139.

[42]Panels Report, WT/DS177/R, Adopted on 16 May, 2001, para. 7.188 and 7.203.

[43]Panel Report, WT/DS166/R, para 8.81.

[44]US—Lamb, supra note 40, para. 125.

(g) A determination of the existence of a threat of serious injury due to a threat of increased imports would amount to a determination based on allegation or conjecture, which is not allowed under Article 4.1(b) of the Agreement.[45]

The concept of domestic industry has been interpreted by the DSB to convey that the identification of products of a domestic industry which are likely or directly competitive with the imported product[46] and a measure may only be imposed if that specific product (such product) is having the stated effects upon the domestic industry that produces like or directly competitive products.[47] Domestic industry extends solely to the producers… of the like or directly competitive products and exclusively on the producers of a very specific group of products. Producers of products that are not like or directly competitive products do not form part of the domestic industry.[48]

The injury assessment has been a recurrent problem in disputes brought before the DSB on safeguards. Various questions have been raised in the cases brought before the DSB especially in regard to methodology and cost-benefit analysis of the safeguard. It appears that the DSB would accept methodology for assessing the injury unless refuted by the complainant with a proposal on an alternative methodology.[49]

In the context of the requisite 'causal link' between increased imports and serious injury, the Appellate Body of the DSB while reversing the interpretation by the Panel held that a national authority should consider all the factors listed in Article 4.2(a) regardless of whether they relate to imports specifically or domestic industry more generally.[50] The Appellate Body held further that the determination of 'causality' under Article 4.2(b) must give the phrase 'all relevant factors' the same meaning as under Article 4.2(a) as Article 4.2(a) imposes an obligation to evaluate and by implication to include the effect of all relevant factors on the domestic industry which is an obligation under Article 4.2(a) and would be violated if the very same effects, caused by those same factors, were with the exception of increased imports to be excluded from consideration under Article 4.2(b).[51]

What constitutes 'factors of an objective and quantifiable nature' within the meaning of Article 4.2(a), the Appellate Body of the DSB held that factors can be only of an objective and quantifiable nature, if they allow a determination to be made, as required by Article 4.2(b) of the Agreement on Safeguards, on the basis of objective evidence. Such evidence is in principle, objective data. The words, factors of an objective and quantifiable nature imply, therefore, an evaluation of objective

[45]Argentina—Footwear (EC), Panel Report, WT/DS121/R, Adopted 12 Jan. 2000, para. 8.284.

[46]US—Lamb, supra note 40, para. 119.

[47]Ibid., para. 86.

[48]Ibid., para. 84.

[49]US—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, Panel Report, WT/DS202/R, Adopted 8 March, 2002, para. 7.228.

[50]US—Wheat Gluten. Appellate Body Report. WT/DS166/AB/R, para. 72.

[51]US—Lamb. Supra note 40, para. 130–131.

data which enables the measurement and quantification of these factors. The data evaluated by the competent authority must be sufficiently representative of the 'domestic industry' to allow determinations to be made about that industry. The investigating authorities must where necessary undertake additional investigative steps in order to fulfill their obligations to evaluate all relevant factors.[52]

6 Causation

The 'causation' or 'causal link' as provided in Article 4.2(b) requires that there must be a 'causal link' between the increase in imports and serious injury to domestic industry for determining whether increased imports have caused or are threatening to cause serious injury to the domestic industry. This determination should be made only when the investigation demonstrates on the basis of objective evidence, the existence of causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.[53]

The DSB has held that whether an upward trend in imports coincides with downward trend in the injury factors, and if not, whether a reasoned explanation is provided as to why the data nevertheless shows, 'causation'. Secondly, whether the conditions of competition in the domestic market between imported and domestic products demonstrate, on the basis of objective evidence, 'a causal link' of the imports to any injury. Third, whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[54]

In making assessment of causation and findings, the national authority is required to consider the rate (i.e. direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the changes in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to, injury' and 'causation'. The relationship between the movements in imports (volume and market share) and the movement in injury factors are central to 'a causation analysis and determination'.[55]

Under Article 4.2(b), the injury caused to the domestic industry by factors other than increased imports 'shall not be attributed to increased imports'. In a situation where several factors are causing injury at the same time, a final determination

[52]Supra note 41 para. 55–56.

[53]Article 4.2(b) of the Agreement on Safeguards.

[54]Panel Report, Argentina—Footwear, WT/DS121/ABR, para. 8.229. The Appellate Body affirmed this test, and it was also followed by the Panel in US—Wheat Gluten, WT/DS166/R, para. 8.91.

[55]Ibid.

about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise any conclusion based exclusively on an assessment of only one of the causal factors—increased imports—rests on an uncertain foundation; because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship 'of cause and effect' between increased imports and serious injury.[56]

Finally, it may be noted that the national authorities have an onerous job of determining the injury caused by imports as well as to separate the chaffee from the grain while considering factors which may have the effects of increase in imports. A mere identification of other contributory factors and a conclusive assertion of the requisite 'causal link' will not be sufficient as injury test involves complicated economic analysis also. The national authorities would have to establish the 'causal link' by offering reasoned explanations that the increase in imports contributes clearly to the injury.[57]

7 Application of Safeguard Measures

Safeguard measures are to be applied by a member only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Further, if a member takes a safeguard measure in the form of quantitative restrictions which reduces the quantity of imports below the average of imports in the last three representative years of which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members are required to choose measures most suitable for applying safeguard measures.[58]

The measures contemplated above are to be justified as Article 5.1 creates a general obligation to apply a measure that is not excessive.[59] Members need not prove the adequacy of their measure unless it is quantitative restriction beyond the minimum quota, but the requirements under the Agreement on Safeguards of clearly explaining and justifying the extent of application of the measure still falls on the member.

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[56]Appellate Body Report on US—Lamba, supra notes 40, paras. 179–180.

[57]Young-Shik Lee, Safeguard Measures: Why Are They Not Applied Consistently with the Rules? 36(4) JWT 657 (2002).

[58]Article 5 of the Agreement on Safeguards.

[59]Panel Report, Korea—Dairy Products, supra note 18, para. 7.101.

The complainant member has to establish a *prima facie* case that the measure is applied beyond the necessary extent where it demonstrates that the importing member did not comply with its obligations under the Agreement on Safeguards including the '*causal link*' between the increased imports and the injury.

So far as adjustment is concerned, it has been held that as the safeguard measures are temporary in nature, adjustment plans are not contemplated in Article 5.1. However, the adjustment plan would constitute a strong evidence to support that the authorities were considerate while assessing whether the measure was in compliance with the objectives of preventing or remedying serious injury and facilitating adjustment.[60]

In cases where import quotas are allocated among exporting countries, the allocation is to be made in proportion to their market share during a previous representative period of the total quantity or value of imports of the product. Due account must be given to the special factors, if any, which may have affected or may be affecting the trade in that product.[61] The importing member may, however, apply to the 'Committee on Safeguards' established by the Agreement on Safeguards for permission to depart from allocation of quotas under a historical formula upon a 'clear demonstration' that imports from a particular member have increased disproportionately during the representative period.[62] The duration of any such measure shall not extend beyond the initial period of time as may be necessary to prevent or remedy serious injury and shall not exceed four years unless extended for achieving the objectives of the Agreement on Safeguards.[63]

However, the flexibility described above to deviate from the principle of non-discrimination is further complemented by the rule which requires countries applying safeguards measures irrespective of whether they are applied through the imposition of QRS, tariff rate quotas or additional tariffs, to exempt imports from a developing country as long as its share in the imports of the product concerned does not exceed 3%. However, this obligation applies only where total imports of countries less than 3% do not exceed 9% of total imports of the concerned products. It is important to note that this obligation applies only where total imports of countries less than 3% do not exceed 9% of total imports of the concerned product. It is important to note that this obligation to exempt imports from developing countries whose share is less than 3% is legally binding on all countries, developed, developing and least developed.

[60]Ibid., para. 7.108.

[61]Article 5.2(a) of the Agreement on Safeguards.

[62]Article 5.2(b) of the Agreement on Safeguards.

[63]Article 5.2(b) of the Agreement on Safeguards.

8 Duration and Review of Safeguards

Duration of safeguards applied by a member extends only for such period of time as may be necessary to prevent or remedy serious injury and facilitate adjustment and shall not exceed four years initially. However, if the members under the procedures in the Agreement of Safeguards agree, the period may be extended up to a total of eight years. However, to facilitate adjustment in a situation where notification and consultation under Article 12 paragraph 1 of the Agreement on Safeguards is over one year, it is necessary for a member to progressively liberalise the adjustment at regular intervals. And, if the duration exceeds three years, the member applying such a measure should review the situation in the mid-term of the measure, and either withdraw the measure or increase the pace of liberalisation.[64]

The product which has been subjected to a safeguard measure shall not be subjected to such a measure again for a period of time equal to that during which such measure had been applied previously, provided the period of non-application is at least two years. An exception to this rule has been made in cases where safeguard measure of 180 days duration or less may be subjected to the import of a product if (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of a product; and (b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.[65]

It is incumbent on the member proposing or extending a safeguard measure to provide adequate opportunity for prior consultations with those members who have substantial interest as exporters of the concerned product as the member proposing or extending the measure has to maintain a substantially equivalent level of concessions and other obligations under GATT 1994 between it and the affected exporting member. Members concerned may, therefore, agree on any adequate means of trade compensation for the adverse effects of the measure on their trade. If the prior consultations fail to achieve an agreement within 30 days, the affected exporting member shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the date on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994 to the trade of the member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

The above right of suspension is not available for the first three years when the safeguard measure is in effect.[66]

All safeguard measures taken which are pursuant to Article XIX, GATT 1947, which are in existence at the time of entry into force of the WTO Agreement stand

[64]Article 7 of the Agreement on Safeguards.

[65]Article 7.5–6 of the Agreement on Safeguards.

[66]Article 8 of the Agreement on Safeguards.

terminated not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.[67]

9 Prohibition and Elimination of Certain Measures Including VER and OMA

Any emergency action on imports of particular products by a member has to conform strictly to the provisions of Article XIX of GATT 1994 as well as to the provisions of the Agreement on Safeguards. No member is allowed to seek, take or maintain any voluntary export restraints (VERs), orderly marketing arrangements (OMAs) or any other 'similar measures' on the export or the import side. However, an import quota may be applied as a safeguard measure provided it is in conformity with the provisions of GATT 1994 and the Agreement on Safeguards, mutually agreed and administered by the exporting member. Example of 'similar measures' include export moderation, export price or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which affording protection. The above restraints include actions taken by a single member as well as actions taken under agreements, arrangements and understandings entered into by two or more members. All these measures have to either phase out or to be brought into conformity with the Agreement on Safeguards.[68]

The timetable for phasing out the restraints as mentioned above is that the Committee on Safeguards has to be informed not later than 180 days after the WTO came into force, of the timetable for phasing out the restraints which should not exceed four years after the WTO Agreement came into force and the Agreement on Safeguards, subject to not more than one specific measure per importing, the duration of which shall not extend beyond 31 December 1999. Such exceptions are to be mutually agreed between the members directly concerned and notified to the Committee on Safeguards for its review and acceptance within ninety days of the entry into force of the WTO Agreement.

The Agreement on Safeguards does not apply to measures sought, taken or maintained by a member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annexes 1A other than the Agreement on Safeguards or pursuant to protocols and arrangements as concluded within the framework of GATT 1994.

[67]Article 10 of the Agreement on Safeguards.

[68]Article 11.1 of the Agreement on Safeguards.

10 Notification and Consultation

It is obligatory on the members proposing to apply a safeguard measure to furnish to the 'Committee on Safeguards' with proper notifications of their investigations and decisions. They must also provide exporting members an opportunity which should be adequate for consultations prior to the application of a safeguard measure. The purpose of the notification is to act as a safety value so that the affected members are informed of the progress of investigations. Also, the prior consultation gives an opportunity to the affected members of exchanging views with the importing member so as to achieve a mutually agreed settlement. The contents of the notification which the member proposes to apply or extend the safeguard measure should provide to the Committee on Safeguards with all pertinent information. Further, a member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
(b) making a finding of serious injury or threat thereof caused by increased imports; and
(c) taking decision to apply or extend a safeguard measure.[69]

The DSB while interpreting the phrase 'all pertinent information' held that all item, specified in Article 12.2 as well as the address of injury factors listed in Article 4.2(a) need to be included in the notification.[70]

So far as the expression 'shall immediately notify' in Article 12.1, the Panel on Korea-Dairy held that there is a need under the Agreement to balance the requirement for some minimum level of information in a notification against the requirement for immediate notification. The more detail that is required, the less 'instantly' members will be able to notify. There is no basis in the wording of Article 12.1 to interpret the term 'immediately' to mean 'as soon as practicably possible'.[71]

In the case of US—Wheat Gluten, the Panel reiterated the propositions as held in Korea—Dairy cited above, that member has to notify immediately its decisions or findings. Observance of this requirement is all the more important considering the nature of safeguard investigation. A safeguard measure is imposed on imports of a product irrespective of its source and potentially affects all members. All members

[69]Article 12.1 of the Agreement on Safeguards.

[70]Specifically following should be included in the notifications pursuant to the provisions of Article 12.1 and (c): evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and time table for progressive liberalisation. Appellate Body Report, Korea—Dairy Products, supra note 18, para. 108.

[71]Supra note 19, para. 7.116.

are, therefore, entitled to be kept informed, without delay of the various steps of the investigation of the Safeguard Agreement.[72]

Article 12.2 of the Safeguard Agreement lists the types of information which a member proposing to apply or extending a safeguard measure has to furnish to the 'Committee on Safeguard'. Such information, *inter alia*, should include:

(i) evidence of serious injury or threat thereof caused by increased imports;
(ii) precise description of the product involved and the proposed measure;
(iii) proposed date of introduction; and
(iv) expected duration and timetable for progressive liberalisation. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Goods or the Committee on Safeguards have the power for asking additional information from the members proposing to apply or extend the safeguard measure.

On the other hand, Article 12.3 of the Safeguard Agreement requires members proposing to apply a safeguard measure to consultations prior to the implementation of its measure. Consultations are essentially important since they provide concerned parties with an opportunity to exchange views on the proposed measure and to reach a mutually satisfactory settlement. Therefore, members proposing to apply a safeguard measure are advised to hold those consultations well before the implementation of a safeguard measure so that the consultation results can be incorporated in its implementation.

The other procedural formats envisaged in Article 12.4 to 12.11 of the Agreement on Safeguards are as under:

- Provisional safeguard measures, if any, to be notified to the Committee on Safeguards;
- The results of consultations and mid-term review or any form of compensation and proposed suspension of concessions/obligations to be conveyed immediately to the Council for Trade in Goods;
- Members, laws, rules, regulations relating to safeguards to be notified to the Committee on Safeguards;
- Any non-governmental measure has to be notified to the Committee on Safeguards;
- All notifications to the Council for Trade in Goods shall normally be made through Committee on Safeguards; and
- Confidential information may not be disclosed by any member if its disclosure would impede law enforcement or be contrary to public interest or prejudice the legitimate commercial interests of particular enterprises, public or private.

[72]Supra note 33, para. 7.128.

Article 12.3 of the Agreement on Safeguards in regard to consultation was discussed in Korea—Dairy Products,[73] US—Line Pipe,[74] and US—Wheat Gluten cases.[75] The sum total of these decisions is that if modification of the original measure takes place, that indicates fair amount of consultation which led to a modification of the original measure. Secondly, consultations are an important means of achieving the aims of Article 8.1 of the Safeguard Agreement. The settlement of compensation maintains a balance of concessions. The fair amount of time necessary for consultations should be decided on case-by-case basis. In any case, the exporting members should be allowed necessary time to analyse the proposed measure and determine its consequences before consultations so that they can have a meaningful exchange of views on the proposed measure. Proper consultations are in the best interests of both importing and exporting members since the understanding and settlement during the consultations may well enable them to avoid disputes and subsequent retaliatory actions.

11 Surveillance and Dispute Settlement

After the establishment of a Committee on Safeguards under the authority of the Council for Trade in Goods, following functions of surveillance are carried out by the Committee:

(a) to monitor, and report annually to the Council for Trade in Goods and make recommendations of the general implementation of the Agreement on Safeguards and its improvements;
(b) upon a request of a member find, whether or not, the procedural requirements under the Agreement on Safeguards have been complied and report its findings to the Council for Trade in Goods;
(c) to assist the members in their consultations under the provisions of the Safeguard Agreement on a member's request.
(d) to examine measures covered by Article 10, and paragraph (1) of Article 11 and monitor the phasing out of such measures and report to the Council for Trade in Goods;
(e) to review upon a request of a member taking a safeguard measure, whether proposal to suspend concessions or other obligations are substantially equivalent and report to the Council for Trade in Goods;

[73]WT/DS 98 AB/R, para. 88.
[74]Supra note 25.
[75]Supra note 33.

(f) to receive and review all the notifications provided for in the Agreement on Safeguards and report to the Council for Trade in Goods; and
(g) to perform any other function connected with the Agreement on Safeguards that the Council for Trade in Goods may determine.[76]

12 Conclusion

As the WTO has ushered in a liberal and free trade and multilateralism in the international trading system, the protectionism of whatever type may erode the functional premises of the WTO. The concessions and obligations entered upon by the trading members under the WTO auspices need to be respected and safeguarded. The safeguard actions/escape clauses should be resorted to only on exceptional basis and applied as a last resort to remedy or prevent serious injury or threat thereof caused by sudden spurt of imports.

In a study of safeguard measures taken between 1995 and 2003, it was found that out of seventy-eight cases in which safeguard measures were taken, twenty-one cases made no reference to unforeseen developments. There are immense difficulties faced in establishing that the increased imports were the result of the developments which were the result of the developments which were not foreseen, have made some of the developed countries, to meet the requirement by referring to the developments in world political, economic and financial situation. For instance, for safeguard measures in 2001 on imports of steel, the US attributed increased imports into the USA to the unforeseen developments such as Asian Financial Crisis, the appreciation of US currency and drop in steel demand following the breakdown of the Soviet Union. In justifying the retaliatory measures which the EU took following the application of the US measures, the EU also refers to the Asian Financial Crisis and technological progress as unforeseen developments in justifying application of the safeguard measures, Vinod Rege [47no.3JWT (2013) 453–480]. Thus, the unforeseen development condition puts unnecessary and serious constraint on the affected industry in applying for relief through the imposition of safeguard measures.

[76]Article 13 of the Agreement on Safeguards.

Chapter 19
General Exceptions (Art. XX)

Text of the General Exceptions (Article XX) is reproduced below:

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

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such

A. K. Koul, *Guide to the WTO and GATT*,
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domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply: *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

1 General

Article XX in its preambular language ('Chapeau') obligates the members that nothing in this Agreement shall be construed to prevent the adoption or enforcement of any contracting party of measures/exceptions as listed in paragraphs (a)–(j) of the Article subject to the condition that these exceptions/measures should not be applied arbitrarily or unjustifiably between the countries where the same conditions prevail. And these exceptions/measures should not amount to disguised restrictions on international trade.

Paragraphs (a)–(j) comprise measures that are recognised as exceptions to substantive obligations of GATT 1994 because the domestic policies embodied in such measures have been recognised as important and legitimate. It is not necessary to assume that they require from exporting countries compliance or adoption of certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, rendering a measure a priori incapable of justification under this Article.[1] However, a balance has to be struck between the right of a member to invoke an exception under Article XX and the duty of that same member to respect the treaty rights of other members.[2]

The application and interpretation of 'Chapeau' are a delicate one of locating and masking out a line of equilibrium between the right of a member to invoke an exception under Article XX and the rights of other members under varying substantive provisions of the GATT 1994 so that neither of the competing rights will cancel out the other and thereby distort and mollify or impair the balance of rights and obligations constructed by the members themselves in the GATT. The location of the line of equilibrium, as expressed in the 'chapeau', is not fixed and unchanging; the line moves as the kind and shape of the measures of members vary and as the facts making up specific cases differ.

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[1]US—Import Prohibition of Certain Shrimp Products, Appellate Body Report, WT/DS 58/AB/R, DSR 1998: VII, para. 121.

[2]Ibid., paras. 156 and 15.

The 'Chapeau' imposes a two-tier test in the sense that the measure/exception at issue contemplated in the Article must not only come under one or another of the particular exceptions-paragraph (a)–(j) of the Article; it must also satisfy the requirements imposed by the opening clause of the Article. The analysis is, therefore, two tired. First, provisional justification by reason of characterization of the measure under XX (a)–(j); and second, further appraisal of the same measure under the introductory clause of the Article.[3] However, the standards established in the 'Chapeau' are very broad in scope and reach, as suggested by the language that the prohibition of the application of a measure 'in a manner which would constitute a means of "arbitrary" or "unjustifiable discrimination" between countries where the same conditions prevail or is a disguised restriction on international trade'.

The Appellate Body of the DSB in the case US—Shrimp[4] provided an overview regarding the three constitutive elements of the concept of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and held that: First, the application of the measure must result in discrimination; second, the discrimination must be arbitrary or unjustifiable in character; and third; this discrimination must occur between countries where the same conditions prevail.[5] Further, 'arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restrictions' on international trade have to be read side-by-side as they impart meaning to one another. Disguised restrictions include disguised discrimination, and concealed or unannounced restrictions or discrimination in international trade does not exhaust the meaning of 'disguised restrictions' and fall within the domain of restrictions on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

Arbitrary discrimination, unjustifiable discrimination and disguised restrictions on international trade may, accordingly, be read side-by-side, and they impart meaning to one another. It is clear that disguised restrictions include disguised discriminations in international trade. It is equally clear that concealed unannounced restrictions or discriminations in international trade does not exhaust the meaning of disguised restrictions: whatever else it covers may properly read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Art. XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to arbitrary or unjustifiable discrimination may also be taken in account in determining the presence of disguised restriction on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the

[3]US—Standards for Reformulated and Convention Gasoline, Appellate Body Report, WT/DS2/AB/R, DSR 1996: 1 para. 22.

[4]Appellate Body Report, WT/DS58/AB/R, DSR 1998: VII, paras. 121–122.

[5]Ibid., para. 150.

exception to substantive rules available in Art. XX (Appellate Body Report, US—Gasoline, WT-DS2/AB/R at 25).

Therefore a violation of any of these concepts would suffice to disqualify the measure under Art. XX. Yet the standards embodied in the language of the chapeau of Art. XX are not on the different from the standards used for the substantive violation of GATT (US—SHRIMP, WT/D58/AB/R at para. 150).

When the analysis of the Chapeau of Art. XX took place in the context of the invocation of subparagraph(g), The Appellate Body [Faced with a measure benefitting from a provisional justification under Art. XX(g)] examined under the chapeau of Art. XX, whether less trade-restrictive alternatives were reasonably available took the USA and whether the restrictive measures of the measures were somehow disproportionate, since similar costs were not at all imposed on domestic producers in other words, even after Art. XX(g) itself is satisfied, a least trade-restrictive alternative analysis akin to necessity tests seems to be performed under the Chapeau Art. XX.

In other words, Art. XX offers justification that can lead to exemption from any provision of GATT. In situation where the trade restrictions or discrimination is waived has necessary, or otherwise appropriately or proportionally related to the implementation of the policies listed in Art. XX the Appellate Body in US—Gasoline concluded, when discussing a violation of the Chapeau of Art. XX. That the resulting discrimination must not have been foreseen, and was not merely inadvertent or unavoidable (US—Gasoline, WT/DS/AB/R at para. 24).

2 Necessary to Protect Public Morals

In order to justify a measure which is necessary to protect public morals, it must also satisfy the requirements imposed by the opening clause of Article XX. The burden of demonstrating that the measure is provisionally justified on the anvil of public morals is highly debatable. What constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or are disguised restrictions on trade? No jurisprudence has yet developed for this clause neither under GATT 1947 nor under GATT 1994.

3 Necessary to Protect Human, Animal or Plant Life or Health

A country invoking an exception has to bear the burden of proof in demonstrating that the inconsistent measure came within that scope of exception and accordingly has to establish the following elements:

(1) That the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
(2) That the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and
(3) That the measures were applied in conformity with the requirements of 'Chapeau' Article XX.

In order to justify the application of Article XX(b), all the above elements have to be satisfied.

The intention of the drafters appears that quarantine and other sanitary regulations should be given careful attention with a view to preventing measures 'necessary to protect human, animal or plant life or health from being applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'.[6]

The exception in Article XX(b) can also justify internal tax differentiations among like or directly competitive products provided it is necessary to protect human, animal or plant life or health.[7] If something constitutes a serious risk to human health and a measure is introduced by a contracting party to reduce the consumption of cigarettes, it can be justified under Article XX(b) as it gives priority to human health over trade liberalization.[8]

4 Aspect of Measure to Be Justified as Necessary

A contracting party cannot justify a measure inconsistent with other GATT provisions as 'necessary' in terms of Article XX(b) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions as available to it.

In the case of US—Restrictions on Imports of Tuna, wherein USA had prohibited the imports of certain yellow-fin tuna and certain yellow-fin tuna products from Mexico on the ground that the US Marine Mammal Protection Act (MMPA) allows such prohibition of imports, were claimed as justified by the USA under Article XX(b) because for the protection of life and health of dolphins even outside the US jurisdiction there was no alternative measure available to the USA to achieve the objective. Mexico contended that Article XX(b) was not applicable to a measure outside the jurisdiction of the contracting party and the measure was not necessary as US had other alternatives of protecting dolphins life or health namely international co-operation between the countries concerned.[9]

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[6]Havana Conference, Third Committee, E/CONF.2/C.3/SR/.35.

[7]L/6216, Adopted on 10 Nov. 1987, 34 S/83, 124, para. 5.13.

[8]DS 10/R, Adopted on 7 Nov. 1990. 37 S/200.

[9]DS 29/R dated 16 June 1994. paras. 5.28–5.29. The Panel Decision was not adopted.

The Panel decided that, (a) even if Article XX(b) was interpreted to permit extraterritorial protection of life and health, the measure did not meet the requirement of necessity, (b) USA had not exhausted all options reasonably available, and (c) the particular measure was not necessary within the meaning of Article XX(b).

In the EC-Asbestos, the measure at issue was a French ban on the manufacture, importation and exportation, and domestic sales and transfer of certain asbestos products including products containing chrysotile fibres were inconsistent with Article III: 4, but justified under Article XX(b) in the light of the underlying policies of prohibiting chrysotile asbestos in order to protect human life and health. The Appellate Body rejected Canada's argument that under Article XX(b) the Panel erred in law by deducing that chrysotile-cement products pose a risk to human life or health.[10] The Appellate Body held further that 'in justifying a measure under Article XX(b), a Member may rely, in good faith, on scientific sources which at that time represent a divergent, but qualified and respected opinion.[11] It was further held that the risk may be evaluated either in quantitative or qualitative terms. The right to determine the level of protection to health is the sole prerogative of a Member of WTO. Approving the Panel findings in Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, the Appellate Body held that a measure under Article XX(b) was necessary if, 'The import restrictions imposed by Thailand could be considered "necessary" in terms of Article XX(b) only if there was no alternative measure consistent with the GATT, or less consistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives'.

5 Relating to the Importation or Exportation of Gold and Silver

The Clause was subject matter of discussion in the Panel Report on Canada-Measures Affecting the Sale of Gold and Silver, which was not adopted. It examined a tax measure of the province of Ontario imposing a retail sales tax on gold coins and exempting from this tax Maple leaf gold coins struck by the Canadian Mint. The Panel noted that while both the Maple Leaf and the Krugerrand were legal tender in their respective countries of origin, both were normally purchased as investment goods, and therefore, considered that the Maple Leaf and Krugerrand Gold Coins were not only means of payment but also 'products' within the meaning of Article III: 2.[12]

[10]Appellate Body Report in EC-Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS 135/AB/R, para. 161.

[11]Ibid., para. 168.

[12]L/5863 (unadopted) dated 17 Sept. 1985, para. 51.

6 Necessary to Secure Compliance: The Protection of Patents, Trademarks and Copyrights, and the Prevention of Deceptive Practices

The conditions specified in Article XX(d) to justify measures otherwise inconsistent with GATT are as follows:

- that the 'laws or regulations' with which compliance is being secured are themselves not inconsistent with the GATT;
- that the measures are 'necessary to secure compliance' with those laws or regulations;
- that the measures are 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction in international trade.

Each of these conditions must be met if an inconsistency with other GATT provisions is to be justified under Article XX(d).[13]

In Korea—Various Measures on Beef, the Appellate Body attempted to situate the meaning of the term 'necessary' within the context of Article XX(d) on a "continuum" stretching from "indispensable"/of "absolute necessity" to "making contribution to" as found in Article XX(d) and held that in "assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation, a treaty interpreter may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect".[14]

In order a measure to be covered by Article XX(d), it must secure 'compliance with' laws or regulations that are not inconsistent with GATT Article XX(d), namely those relating to customs enforcement and the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII of the GATT. The protection of patents… and the prevention of deceptive practices also suggest that

[13]Panel Report on 'US—Section 337 of the Tariff Act of 1930 dealt with the claim by the EEC that the special "Section 337" procedure for enforcing patent claims against imported products treated such products less favourably than the procedures applicable to patent claims involving products of domestic origin contrary to Article III:4 and this special procedure was not justified under Article XX(d) as "necessary" to enforce US patent laws against imports. After a threadbare analysis of the conditions required to justify an exception under Article XX(d), the Panel found that the system of determining allegation of violations of the US patent right cannot be justified as necessary within the meaning of Article XX(d) so as to permit an exception to the basic obligation contained in Article III: 4 of the GATT. Panel noted further that some of the inconsistencies with Article III:4 of individual aspects of procedures under Section 337 could be justified under Article XX (d) in certain circumstances: L/6439, Adopted on 7 Nov. 1989, 36 S/345, 392, paras. 5.22–5.35.

[14]Appellate Body Report in Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Appellate Body Report, WT/DS 161/AB/R; WT/DS 169/AB/R, para. 157.

Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws or regulations.

In the Panel Report on EEC—Regulations on Imports of Parts and Components, the Panel examined the consistency with GATT of Article 13:10 of EEC Council Regulation No. 2176/84 on anti-dumping. This provision was intended to prevent circumvention of anti-dumping duties on finished products through the importation of parts or materials for use in the assembly or production of like finished products within the EEC. Japan challenged this provision to be inconsistent with Article VI of the GATT, whereas EEC justified the provision under Article XX(d). The Panel concluded that the anti-circumvention duties do no serve to enforce the payment of anti-dumping duties nor do they secure compliance with obligations under EEC's anti- dumping regulations and therefore could not be justified under Article XX(d).[15]

Laws or regulations which are not inconsistent with the provisions of GATT were interpreted to mean that Article XX(d) only exempts from the obligations under the GATT measures necessary to secure compliance with those laws and regulations, which are not inconsistent with the provisions of GATT Article XX(d). It does not permit contracting parties to operate monopolies inconsistently with the other provisions of the GATT especially if such a monopoly is inconsistent with Article XI.[16]

In order to understand the dialectics of debate of adjusting core labour standards, a separate chapter entitled WTO and Labour standards is devoted to explore the meaning of this subject.

7 Relating to the Conservation of Exhaustible Natural Resources

Article XX(g) does not state how the trade measures are to be related to the conservation and how they have to be conjoined with the production restrictions. This raises the question of whether any relationship and conjunction with production restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a particular relationship and conjunction are required. The answer lies in interpreting Article XX(g) in a manner that it covers wider range of measures which are essential or necessary for the conservation of exhaustible natural resources, as the very incorporation of Article XX(g) in GATT suggests that commitments under the GATT should not hinder the pursuit of policies aimed at conservation of natural resources. A trade measure need not have to be necessary or essential to the conservation of exhaustible natural resource, it had to be primarily aimed at the

[15]L/6657 Adopted on 16th May 1990, 375/132; 194–195, paras. 5.125.18.

[16]Panel Report on Japan—Restriction on imports of Certain Agricultural Products, L/6253 Adopted on 2 Feb. 1988 355/63, 230, para. 5.2–5.3.

conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX(g).[17]

A country can effectively control the production or consumption of an exhaustible natural resource only to the extent that production and consumption are under its jurisdiction. Article XX(g) allows each contracting party to adopt its own conservation policies. The conditions set out in Article XX(g) which limit resort to this exception, namely that the measures taken must be related to the conservation of exhaustible natural resources, and that they 'do not constitute a means of arbitrary or unjustifiable discrimination… or a disguised restriction on international trade' refers to the trade measure requiring justification under Article XX(g), not however, to the conservation policies adopted by the contracting party.[18] Exhaustible natural resources in Article XX(g) relate to both living and non-living resources and are to be read in the contemporary concerns of the community of nations about the protection and conservation of the environment which after the WTO and GATT 1994 have been raised as legitimate goal of national and international policy. The preamble to the WTO Agreement which informs not only the GATT 1994 but also the other covered Agreements explicitly acknowledges the objectives of sustainable development and environment as necessary corollaries. This explicit acknowledgement of a relationship between environment and trade has been subject matter of further debate on the WTO/GATT Agenda and has been dwelt at length in a separate chapter 'Trade and Environment Issues'.

In US—Gasoline, the Panel held that the US measures at issue could not be justified in the light of Article XX(g) as a measure 'relating to the conservation of exhaustible natural resources'. More specifically, the Panel held that it 'saw no direct connection between less favorable treatment of imported gasoline that was chemically identical to domestic gasoline, and the United States objective of improving the air quality in the United States and that the less favorable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources'.[19] The Appellate Body reversed the Panel's findings and held that the measure was justified under Article XX(g), although it ultimately found that the measure was inconsistent with the "Chapeau" of Article XX.[20]

The application of Art. XX(g) necessitated a complicated three-tier test, as this provision is actually composed of several elements it is implied by both authoritative commentators and WTO/GATT dispute settlement practices that three requirements must be satisfied to successfully invoke Art. XX(g) exception:

First, it is a measure concerned with the conservation of exhaustible natural resource.

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[17]Panel Report on Canada—Measures Affecting Exports of unprocessed Herring and Salmon, L/6268, Adopted on 22 March 1988, 35 S/98, 113–115, para. 4.4–4.7.

[18]USA—Restrictions on Imports of Tuna, DS21/R/(Unadopted) 3 Sep. 1991, 39S/155, 200–201, para. 5.30–5.34.

[19]US—Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS/108/RW, Adopted 20 May 1996, para. 6.40.

[20]Ibid., Appellate Body Report, WT/DS/AB/R, DSR 1996: 1, p. 16.

Second, it is the measure one, relating to the conservation.

And, third is the measure effective in conjunction with restrictions on domestic production or consumption.

Further, with particular respect to the first requirement mentioned above, the party that invokes this exception bears the burden to prove that, *inter alia*, the WTO inconsistent measures are 'relating to conservation of exhaustible natural resources'.

This is not an easy task because this requirement includes several important legal terms that need to be interpreted in WTO disputes settlement such as relating to, exhaustible, natural resources and conservation.

List of cases invoking Art, XX(g):

1. US—Prohibition of Imports of Tuna and Tuna Products from Canada (US—Tuna Canada—GATT Panel Report, L/5198 adopted 22nd Feb. 1982, BISD295/91).
2. Canada—Measures Affecting Exports of Unprocessed Herring and Salmond of 1988 (Canada—Herring and Salmond) (GATT, Panel Report L/6268, adopted 22nd Mar. 1988, BISD 355/98).
3. US—Restrictions on Imports of Tuna of 1991 (US—Tuna Mexico) GATT, Panel Report, DS21/R, 3rd Sep. 1991 unadopted, B/D3gs/155).
4. US—Restrictions on Imports of Tuna of 1994 (US—Tuna EEC) GATT, Panel Report, DS29/R, 16th June 1994, Unadopted).
5. US—Taxes on Automobiles of 1994 (US—Auto Taxes) GATT, Panel Report, DS31/R, 11th Oct. 1994 unadopted).
6. US—Shrimp (US—Import Prohibition of Certain Shrimp and shrimp Products of 1996).
7. China—Raw Materials and China-Rare Earth, the complainants complain that China's exports measures violated various GATT provisions and China's WTO/ Obligations contained in China's Accession protocol. Available at www.wto.org/English/treatyop_e/disputee/cases_/dsd394_e.htm; http:09may15,2014.

8 Undertaken in Pursuance of Obligations Under Any Commodity Agreement

In order that a measure to be covered by Article XX(h) and the Interpretative Note Ad Article XX(h), the inter-government agreement in question must: (a) conform to criteria submitted to the contracting parties and not disapproved by them; (b) be

itself submitted and not disapproved; or (c) conform to the principles approved by the Economic and Social Council of the United Nations in its Resolution 30(IV) of 28 March 1947.[21]

9 Stabilisation Schemes

The purpose of Article XX(i) is to provide price stabilisation schemes as a matter of policy by a contracting party to stabilise its general price levels when it faces the problem that the world prices for certain commodities, particularly raw materials which it exports, will be substantially higher than the stabilised domestic price for the like commodity. However, such restrictions by a member country should not be such as to operate to increase the exports of or the protection offered to such domestic industry, and should not depart from the obligations of GATT relating to non-discrimination.[22]

Once a contracting party is maintaining export restrictions on a raw material which had the effect of assisting a domestic industry processing that material and on the other hand is maintaining a prohibition on imports of the finished products, the contracting party will have to justify such restrictions under Article XX(i) or else these restrictions may be violative of Articles I, II and III of GATT.[23]

10 Local Short Supply

The Preparatory Committee had noted that during a post war transitional period it should be permissible to use quantitative restrictions to achieve the equitable distribution of products in short supply, the orderly maintenance of war-time price control by countries undergoing shortages as a result of war, and the orderly liquidation of temporary surpluses of government-owned stocks and of industries, which were set up owing to the exigencies of war, but which were uneconomical to maintain in normal times… all these exceptions would be limited to a specified post-war transitional period, which might, however, be subject to some extension in particular cases.[24] No dispute has arisen under this exception and subsequent review of this paragraph has not changed the content of this paragraph.[25]

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[21]The text of the Resolution 30(IV) OF 28 March, 1947 is reprinted in Review of International Commodity Agreements, ICCICA, Geneva (Nov. 1947) pp. 8–9.

[22]Paragraph (i) of Art. XX is based on the proposal submitted by New Zealand to the Preparatory Committee at Geneva in 1947. See EPCT/A/PV-36. p. 22.

[23]GATT/CP.4/33 (sales No. GATT/1950-3).

[24]London Report, p. 11, para. II.c.1(b).

[25]Decision of the Contracting Parties, 20 Feb. (1970) L/3361, 175/18.

Security Exceptions (Article XXI)

The text of security exceptions (Article XXI) is as follows: Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
    (i) relating to fissionable materials or the materials from which they are derived;
    (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
    (iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(i) **General**

The security exceptions in Article XXI are the most sensitive of GATT as the wording of this Article suggests that every country is the sole judge on questions relating to its own security.[26] On the other hand, it is imperative that while pursuing the security interest a contracting party should not undermine the GATT obligation. This is a difficult balance for a contracting party which has been demonstrated in a complaint brought by the then Czechoslovakia concerning US national security export controls in response to a request by Czechoslovakia for information under Article XIII: 3 on the export licensing system. The United States although conceded to supply some information but on balance refused to reveal the names of commodities which it considered most strategic under Article XXI.[27]

In the cases brought before the Contracting Parties under Article XXI in respect of security exceptions, it is clear that Article XXI, although laudable to respect the political and economic sovereignty of nations, yet on balance the political considerations outweigh the economic considerations. If a modicum of law and order in international economic relations is the primary goal, then under the garb of

[26]John H. Jackson, World Trade And the Law of GATT, 748 (1969).
[27]GATT/CP.3/38, p. 9.

security exceptions measures taken may turn out to be protectionist measures.[28] The wording of the Article is all embracing—"[n] thing in this Agreement shall be construed" to (1) require disclosure where a party deems such disclosure "contrary to its essential security interests"; (2) "prevent action relating to fissionable materials", traffic in arms, or action taken in war time; or (3) prevent action pursuant to United Nations peacekeeping obligations.[29]

[28]See the following cases:

(i) US—Trade Measures affecting Nicaragua, L/6053, 13 Oct. 1986 (unadopted), paras. 5.1–5.3.
(ii) Accession of the United Arab Republic, L/3362, Adopted on 27 Feb. 1979, 179/33, 39, para. 22.
(iii) EEC and its Members Suspension of Imports from Argentina, L/5317, L/5336; C/M/157, CM/159.

[29]For a critical analysis, see John H. Jackson, *supra* note 26, pp. 748–752.

Chapter 20
Consultations (Article XXII), Nullification and Impairment of Benefits (Article XXIII)

The text of Articles XXII (Consultations) and Article XXIII (Nullification and Impairment of Benefits) is reproduced as under:

Article XXII: Consultations

1. Each contracting party shall accord sympathetic consideration to and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII: Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

   a. the failure of another contracting party to carry out its obligations under this Agreement, or
   b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
   c. the existence of any other situation.

The contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

A. K. Koul, *Guide to the WTO and GATT*,
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2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organisation in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

1 General

Prior to the coming into force of WTO, and the Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT 1947 did not provide a formal judicial mechanism of settling disputes. However, Articles XXII and XXIII were taken recourse to for settling the disputes. Article XXII: 1 provided a mechanism of consultation between the contracting parties so as to afford an adequate opportunity of settling any matter affecting the operation of GATT. Article XXII: 2 authorised the Contracting Parties acting jointly at the request of a contracting party, to consult with other parties for matters which were not resolved through Article XXII: 1 consultation. Eventually, the consultations became a basis for the generation of GATT's dispute settlement procedures which were grounded in Article XXIII. Under Article XXIII: 1 a complainant must show that either (i) benefits accruing to him under the GATT are being nullified or impaired; or (ii) attainment of any objective of the GATT is being impeded. In addition, the complainant must further show that such nullification and impairment is a result of (a) breach of obligations by respondent contracting party; (b) the application of any measure by the respondent contracting party, whether it conflicts with the GATT or not; or (c) the existence of any other situation. If no satisfactory adjustment is made between the complainant and the respondent contracting parties within a reasonable period of time or if the difficulties pertain to clause (c) of Article XXIII, then the complaining party is authorised to refer the matter to the Contracting Parties under Article XXIII: 2 who are required to investigate the matter and make appropriate recommendations. In an

appropriate case, Article XXIII: 2 permitted the Contracting Parties to authorise the complaining party to suspend the application of tariff concessions or other GATT obligations to the party which is acting inconsistently with its obligations under the GATT.

GATT 1947 over the years developed a technique of appointing panels of three or occasionally five independent experts to look into the facts of the matter and the relevant GATT rules and to make recommendations. Their recommendations became binding when adopted by the GATT Council of Representatives. Over 120 such panels were established between 1948 and 1994, and in most cases their efforts led to resolution of the disputes. However, these settlements of disputes methods did not prove successful as there were delays, differences in settling the terms of references to panels, and often times the contracting parties did not comply with recommendations of the panels. After the Tokyo Round 1979, the settlement of disputes mechanisms was further complicated as the Tokyo Codes on non-tariff measures provided separate settlement of dispute mechanisms and the possibility of 'forum shopping' making a complaint under the procedures which would likely yield a desired result became a reality.

In order to strengthen the dispute settlement mechanism after the establishment of WTO, a single set of dispute settlement procedures has been conceived in the Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994 retaining Articles XXII and XXIII of GATT 1947 in GATT 1994 to apply to all the areas of trade relations covered by the WTO including the various multi-lateral Agreements covered under the WTO. The settlement of disputes mechanism under the WTO and the DSU after 1995 has yielded rich dividends in settling disputes and is subject of analysis separately under the topic, WTO Dispute Settlement Mechanisms—Chap. 3 of this book.

Chapter 21
Territorial Application, Frontier Traffic, Customs Unions and Free Trade Areas (Article XXIV)

A. **The Text of Article XXIV, Interpretation Note AD Article XXIV and Understanding on the Interpretation of Article XXIV of The GATT, 1994 are as under**:

Territorial Application-Frontier Traffic-Customs Unions and Free Trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party: provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.
2. For the purposes of this Agreement, a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.
3. The provisions of this Agreement shall not be construed to prevent:

   (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic.

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(b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory; provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognise the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognise that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.
5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
(c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5(a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.
7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make

available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5(c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardise or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same, duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected. This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8(a)(i) and paragraph 8(b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5–9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.
11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognising the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.
12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

B. Ad Article XXIV from Annex I

Paragraph 9

It is understood that the provisions of Article 1 would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of this Agreement.

C. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994

Members,

Having regard to the provisions of Article XXIV of GATT 1994;

Recognising that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

Recognising the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognising also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other

Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

Convinced also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognising the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV.

Hereby *agree* as follows:

1. Customs unions, free-trade areas and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia,* the provisions of paragraphs 5, 6, 7 and 8 of that Article.

Article XXIV: 5

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognised that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.
3. The 'reasonable length of time' referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

Article XXIV: 6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT

1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.
6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for trade in Goods may make such recommendations to Members as it deems appropriate.
8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.
9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.
10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the operation of the relevant agreement. Any significant changes or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

Article XXIV: 12

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it, to ensure such observance by regional and local governments and authorities within its territory.
14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.
15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

1 General

Article XXIV at the drafting stage was not conceived to unleash a verve of proliferation of regional economic groupings or free trade areas and regional trade agreements but was conceived to allow ‘metropolitan customs territories’, and ‘any

other customs territories' under Article XXVI or under Article XXXIII or pursuant to the Protocol of Provisional Application. Each of these customs territories were to be treated as a contracting party. The customs territory was to be understood to mean a territory having a separate tariffs or other negotiations of commerce maintained for a substantial part of the trade of such territory with other territories. These customs territories were to be differentiated from preferential system which retains internal barriers, obstructs economy in production and restrains growth of income and demand. A customs union essentially is conducive to the expansion of trade on a basis of multilateralism and non-discrimination.[1]

Under Article XXIV, a customs union or a free trade area agreement or frontier traffic is a permitted exception to the principle of most-favoured-nations treatment and non-discrimination of GATT, as it is generally recognised that such arrangements and agreements are helpful in achieving economic integration without adversely affecting the economic interests of third countries. For the purpose of facilitating frontier traffic, advantages accorded by a contracting party to neighbouring (adjacent) countries are accepted including the advantages accorded to the trade with Free Territory of Trieste by the countries contiguous to that territory.[2]

The customs union and free-trade areas are considered desirable in international trade, provided they are conceived to facilitate trade between the constituent territories and should not raise barriers to trade of other contracting parties with such territories.[3] For the formation of a customs union or an interim agreement leading to the formation of a customs union, it is incumbent that the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement should not be higher or more restrictive than the 'general incidence of duties and regulations of commerce' applicable in the constituent territories prior to the formation of such customs union or the adoption of such interim agreement.[4]

The evaluation of 'general incidence of duties and regulations of commerce' shall be made in respect of duties and charges levied before and after the formation of customs union and upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period supplied by the customs union on a trade line basis and in values and quantities, broken down by WTO country of origin. The secretariat of the WTO has been authorised to compute the weighted average tariff rates and customs duties collected in accordance with the methodology followed in assessing the tariff offers in the URMTNS, and these duties and charges are applied ones. In case, where the overall assessment of the incidence of other regulations of

[1]Clair Wilcox, A Charter of World Trade (70-71) (1949); Paragraph 1 and 2 of Article XXIV; For the Drafting History, see EPCT/C.11/PV/4, pp. 18–20.

[2]Article XXIV: 3.

[3]Article XXIV: 4; See also Understanding on the Interpretation of Article XXIV of GATT 1994, Preamble.

[4]Article XXIV: 5(a).

commerce for which qualification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows may be taken into account.[5]

The above limitation applies to the free-trade areas or an interim agreement leading to the formation of free-trade areas. Therefore, the duties and other regulations of commerce maintained in each of the constituent territories and agreements at the formation of such free-trade area not included in such area or not parties to such agreement, shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of free-trade area. The time period for planning and concretising a free-trade area or customs union is 10 years and for any extension, an explanation has to be provided to the Council for Trade in Goods.[6] While constituting a customs union or an interim agreement leading to the formation of such a union, if the contracting party proposes to increase any rate of duty which is inconsistent with Article II of the GATT, the procedure set forth in Article XXVIII (Modification of Schedules) will come into motion. And in case compensatory adjustment has to be made, due account of compensation already offered has to be taken into account by way of reductions brought about in the corresponding duty of the other constituents of the Union.[7]

The purpose of a customs union is 'to facilitate trade between the constituent members' and 'not to raise barriers to trade' with third countries. This objective demands that a balance has to be struck by the constituent members of a customs union. The GATT 1994 Understanding on Article XXIV reaffirms the above said purpose of the customs union and stresses those Members should 'to the greatest extent possible avoid creating adverse effects on the trade of other Members'. While forming a customs union, the 'Chapeau' to paragraph 5 of Article XXIV allows the defence of some inconsistencies with GATT obligation and justifies the measure only to the extent that formation of customs union would be prevented if the introduction of the measure inconsistent with GATT were not allowed.[8]

In Canada-Autos,[9] Canada invoked Article XXIV exception with respect to certain import duty exemption, which was found inconsistent with GATT, Article I. The Panel in a finding not reviewed by the Appellate Body, rejected this defence, noting that the import duty exemption was not granted to all products imported

[5]Article XXIV: 5 of Understanding of GATT 1994.

[6]Article XXIV: 5 (2) and (3); Turkey—Restrictions on Imports of Textiles and Clothing Products, Panel Report, WT/DS34/R, Adopted on 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999: VI, paras. 58–59.

[7]Article XXIV: 6.

[8]Turkey-Textiles, Supra note 6, pp. 58–59.

[9]Canada—Certain Measures Affecting the Automobile Industry, Panel Report, WT/DS139/R, Adopted 19 June 2000 as Modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS 142/AB/R; paras. 10.55–10.56.

from the United States and Mexico and was also granted to products from countries other than Mexico and United States and as such was not a measure within the concept of free-trade area.[10]

2 Increase in Bound Rate of Duty

The procedure to be followed when a WTO Member forming a customs union proposes to increase a bound rate of duty is set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, which must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union. These negotiations are to be entered in good faith taking into account reductions of duties on the same tariff lines made by other constituents of the customs union upon its formation and should achieve mutually satisfactory compensatory adjustments. In case such reductions are not sufficient to provide the necessary compensatory adjustment, the customs union should offer compensation which may take the form of reductions of duties on other tariff lines. Such an offer should be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. When, despite such efforts, agreement in negotiations on compensatory adjustment remains unacceptable, negotiations should be continued. When, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the GATT Understanding on Interpretation of Article XXVIII 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall be free to modify or withdraw the concessions. Members who are affected shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII. GATT 1994 imposes no obligations on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.[11]

A Panel in 'EEC-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins' examined, *inter alia*, the effect of substitution of EEC Schedules, after successive Article XXIV: 6 negotiations as a result of Community enlargement, on non-violation, nullification or impairment claims of contracting parties with respect to concessions in those Schedules.[12] The

[10]Canada—Certain Measures Affecting the Automobile Industry, Panel Report, WT/DS139/R, Adopted 19 June 2000 as Modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS 142/AB/R; paras. 10.55–10.56.

[11]Article XXIV: 6; Understanding on the Interpretation of Article XXIV of the GATT 1994.

[12]BISD375/86, Adopted on 25 January 1990, para. 144–146.

question raised before the Panel was whether the benefits accruing to the USA under the tariff concessions on oilseeds presently in force include the protection of expectations that prevailed in 1962 when the tariff concessions on oilseeds were originally incorporated in the schedule of concessions of the Community.

The Panel concluded that the answer to the question lies in the fact that the result of the initial Article XXIV: 6 negotiations of the Community in 1962 was the creation of a Schedule of Concessions for its common external tariff that had replaced the tariffs of six founding member states. In these negotiations, the trading partners of the Community compared the benefits accruing to them under the previous tariff concessions of the individual member states with the benefits accruing to them under the common external tariff in the whole territory of the Community. The result of the Article XXIV: 6 negotiations following the successive enlargements of the Community was not the creation of a new common external tariff but the extension of the existing tariff concessions of the Community to the new member states.[13] On the occasion of these negotiations, pre-existing concessions of the Community were renegotiated as well but such modifications remained exceptional. Except where such modifications were specifically renegotiated, the partners of the Community could confine themselves to comparing the benefits accruing to them under the previous tariff concessions for the new member states with the benefits accruing to them as a result of the applications of the Community's tariff concessions by the new member states. They have no reason to proceed to a global reassessment of the value of all the Community's concessions in the whole of the Community's territory.

As the balance of concessions negotiated in 1962 in respect of oilseed was not altered in the successive Article XXIV: 6 negotiations, the Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV: 6 negotiations of 1986/87 include the reasonable expectation the United States had when these concessions were initially negotiated in 1962.[14]

3 Review

Article XXIV: 7(a) of the GATT requires that any contracting party deciding to enter into a customs union or free-trade area or an interim agreement leading to the formation of such a union or area, shall promptly notify the Contracting parties. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a

[13]Article XXIV:6 Negotiations: Communication from the Commission of European Communities", Doc. L/3807, 11 January 1973; Doc TAR/16, 20 May 1981; DocL/5936, Add. 2 and third Geneva (1987) Protocol, Schedule LXXX.

[14]Supra note 12, para. 146.

working party in the light of the relevant provisions of GATT 1994.[15] The working party has to submit a report to the Council for Trade in Goods of WTO on its findings in this regard. The Council for Trade in Goods may make recommendations to Members as it deems appropriate. With regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time frame and on measures required to complete the formation of customs union or free-trade area and may provide for further review if necessary.

It is obligatory on the part of Members parties to an interim agreement to notify substantial changes made in the plan and schedules included in that agreement to Council for Trade in Goods of WTO, and if so requested, the Council shall examine the changes. If the interim agreement does not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV (requiring a plan and schedule within a reasonable time) the working party shall recommend such a plan and schedule in its recommendations. The parties are not supposed to maintain or put into force, as the case may be, such agreement if the parties are not prepared to modify it in accordance with these recommendations. Working party should provide for subsequent review of the implementation of the recommendations.[16]

Customs unions and constituents of free-trade areas are under an obligation to report periodically to the Council for Trade in Goods as envisaged by the Contracting Parties to GATT 1947 in their instructions to the GATT 1947 Council concerning reports on regional agreement (BISD 185/38), on the operation of the relevant agreement. Any significant change or developments in the agreement should be reported to [Council for Trade in Goods] as they occur.[17]

In November 1998, the Council for Trade in Goods, the Council for Trade in Services and the Committee on Trade and Development acted upon the recommendations adopted by the Committee on Regional Trade Agreements with respect to the required reporting as described above on the operation of regional trade agreements.[18] Schedules for the submission of triennial reports were presented to the Committee on Regional Trade Agreements in December 1998 and February 2001.[19] The Committee on Regional Trade Agreements established by the General Council of the WTO is mandated to examine regional trade agreements referred to it

[15]Customs Unions, Free-Trade Areas and Interim Agreements leading to the formation of a Customs Union or Free-Trade Area, has to be consistent with Article XXIV and must satisfy the provisions of paragraphs 5, 6, 7 and 8 of Article XXIV, Understanding on the Interpretation of Article XXIV of GATT 1994, paragraph 1.

[16]Article XXIV: 8, 9 and 10.

[17]Article XXIV: 11.

[18]For the text of the Adopted Committee's Recommendations, See WT/REG/6.

[19]As on 22 November 2005, 186 Regional Trade Agreements have been notified to WTO. Of these 186 notifications, 131 where notified under Article XXIV of GATT 1994, 22 under the Enabling Clause and 33 under GATS Article 5.

by the Council for Trade in Goods,[20] in addition to formulation of procedures for improving the examination process as well as defining the scope of the existing obligations for regional trade arrangements and reporting of the activities for purposes of implementation of the obligations under Article XXIV.[21]

The examination of customs unions or free-trade agreements under Article XXIV of GATT, 1947 has almost never led to a unanimous conclusion or a specific endorsement by the CONTRACTING PARTIES that all the legal requirements as required under Article XXIV had been met so that the parties to the agreement could claim benefits under Article XXIV. Treaty establishing the European Community,[22] Canada-United States Free Trade Agreement[23] and Accession of Greece to the European Community,[24] were subjected to intense review by the GATT contracting parties. However, no common consensus was arrived as to whether these groupings are in conformity with GATT, Article XXIV or other Articles of GATT 1947.

The GATT 1994, however, makes the establishment of customs unions, free-trade areas and other such regional arrangements justifiable as paragraph 12 of Article XXIV, provides that 'The provisions of Articles XXII and XXIII of GATT, 1994 as elaborated and applied by the DSU may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim arrangements to the formation of customs unions or free-trade areas'.

4 Duties and Other Restrictive Regulations of Commerce Eliminated

Paragraph 8(a)(i) of Article XXIV establishes the standards for the internal trade between constituent members in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially' all the trade between them. Neither the GATT Contracting Parties nor the WTO members have ever reached an agreement on the interpretation of the term 'substantially' in this provision. It is clear though that 'substantially all the trade' is something

[20]Currently 167 RTAs are under review of Committee on RTAs. Of these 167, 7 are at the stage of consultation of draft report, for 22 factual examination was not requested, for 43 factual examination was concluded, for 51 factual examination was not started and 44 are not under factual examination.

[21]The further developments in the working of regional trade agreement at Singapore Declaration was reinforcing the complementarity of regional trade agreements with multilateralism.

[22]GATT, 7S/71; See also Conclusion Adopted on Latin American Free Trade Area, 18 November 1960, 9S/121.

[23]C/M/253, p. 25.

[24]C/M/253, p. 25, 30S/175, para. 18.

considerably more than merely some of the trade. It is also a fact that paragraph 8(a)(i) provides that members of a customs union may eliminate where necessary in their internal trade certain restrictive measures of commerce that are otherwise permitted under Articles XI through XV and under Article XX of GATT 1994. Therefore, the terms of paragraph 8(a)(i) offer some flexibility to the constituent members of a customs union when liberalising their internal trade keeping in view the requirement that 'duties and other restrictive regulations of commerce' be eliminated with respect 'to substantially all internal trade'.[25]

In assessing whether XXIV justifies a measure inconsistent with other WTO provisions, the party claiming the benefit must demonstrate that the measure at issue introduced upon the formation of a customs union conforms to the requirements of paragraph 8(a) and 5(a) of Article XXIV. Secondly, the party must demonstrate that the formation of a customs union would be prevented if it were not allowed to introduce the measure at issue.[26]

In Turkey-Textiles case, Turkey had introduced quantitative restrictions on textiles and clothing from India which was at issue. The European Communities would have excluded these products from free trade within the Turkey—EC customs union, the Appellate Body held that Turkey was not in fact, required to apply the quantitative restrictions at issue in order to form a customs union with the EC as Turkey could have adopted rules of origin for textiles and clothing products that would have allowed EC to distinguish between those textiles and clothing products originating in Turkey, which would enjoy free access to the European Communities under the terms of customs union and, those textiles and clothing products originating in third countries including India.[27] A system of certificates would have been a reasonable alternative until the quantitative restrictions applied by the EC are required to be terminated under the provisions of ATC.

Paragraph 8(a)(i) establishes the standards for the trade of constituents members with third countries in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to apply 'substantially the same' duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are required to apply an external trade regime, relating to both duties and other regulations of commerce. However, paragraph 8(a)(ii) does not require each constituent member of a customs union to apply the same duties and other regulations, of commerce as other constituent members with respect to trade with third countries, instead it requires that substantially the same duties and other regulations of commerce shall be applied. The expression 'substantially the same duties and other regulations of commerce are applied' by each of the members of a customs union would appear to encompass

[25]Turkey—Restrictions on Imports of Textile and Clothing Products, Panel Report WT/DS34/R, Adopted 19 November 1999, as Modified by Appellate Body Report, WT/DS122/AB/R, para. 48.
[26]Ibid., para. 48.
[27]Turkey—Restrictions on Imports of Textile and Clothing Products, Panel Report WT/DS34/R, Adopted 19 November 1999, as Modified by Appellate Body Report, WT/DS122/AB/R, para. 48.

both quantitative and qualitative elements. The quantitative aspects are more emphasized in relation to duties.[28] As a general rule, a situation where constituent members have 'comparable' trade regulations having similar effects with respect to trade with countries, would generally meet the qualitative requirements of paragraph 8(a)(ii).[29]

Article XXIV, paragraph 8(b) contemplates a free-trade area to mean a group of two or more customs territories in which the 'duties and other restrictive regulations of commerce' (except where necessary, those permitted under Articles XI to XV and Article XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

The 1947 GATT practice does not show a uniform approach in tackling the phrase 'duties and other restrictive regulations of commerce' are eliminated on substantially all the trade between the constituent territories in products originating in such territories. In the Working Parties on EEC Association with African and Malagasy States',[30] EEC-Agreement of Association with Malta,[31] EEC Association with certain non-European Countries and Territories,[32] and Free Trade Agreement between Canada and United States,[33] the fiscal charges on imports from other members, revenue duties imposed by members and customs user fee were hotly contested as falling within the prohibition of Article XIX: 8(b) but without a final solution.

The exceptions permitted under Article 8(b) are in derogation of the rule regarding the elimination of internal obstacles. The 1991 Report of the Working Party on 'Free-Trade Agreement between Canada and the United States' notes the view of the member that, 'if a party to a free-trade agreement invoked Article XX, for instance, to justify an export licensing scheme for short supply, or conservation purposes, in a non-discriminatory basis, Article XXIV: 8(b) did not allow parties to a free-trade agreement to exempt other parties from the measures taken under the exceptions provided in that Article'. Such measures could not be considered other restrictive regulations of commerce in terms of Article XXIV: 8(b). The representative of Canada said that under Article XXIV: 8(b), restrictions meeting the exceptions of Article XX, could be maintained in free-trade agreement. Export contract measures were included in 'other restrictive measures of commerce' in Article XXIV: 8(b).[34]

[28]Ibid., Panel Report, para. 9.148.

[29]Ibid., paras. 9.150–9.151.

[30]L/3465, Adopted on 02 December 1970, 185/133.

[31]L/3665, Adopted on 29 May 1972, 195/90.

[32]L/3611, Adopted on 09 November 1971, 185/143.

[33]L/6927, Adopted on 12 November 1991, 38S/47, 61, para. 45.

[34]L/6927, Adopted on 12 November 1991, 385/47, 61, para. 45.

5 Observance of the Provisions of This Agreement by Regional and Local Governments and Authorities

Paragraph 12 of Article XXIV subjects each contracting party under an obligation to take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by regional and local governments and authorities within its territory.

Paragraph 12 has been subjected to various Panel decisions. In 1985, a Panel Report on Canada-Measures Affecting the Sale of Gold Coins which was not adopted, held that the purpose of Article XXIV: 12 was to qualify the basic obligation to ensure the observance of the GATT by regional and local government authorities. In the case of contracting party with a federal structure "Article XXIV: 12 has to be interpreted in a way that meets the constitutional difficulties which federal states may encounter in ensuring the observance of the provisions of GATT by local governments, while minimising the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties. Only an interpretation according to which Article XXIV: 12 do not limit the applicability of the provisions of GATT but merely limits the obligations of federal states to secure their implementation would achieve this aim".[35]

Article XXIV: 12 have been clarified in paragraphs 13–15 of the Understanding on the Interpretation of Article XXIV of the GATT, 1994 which provides as follows:

> Each Member is fully responsible under GATT 1994 to observe the provisions of GATT 1994 and is under an obligation to take all such measures as are necessary to ensure such observance by regional and local governments and authorities within its territory. In case regional local governments or authorities within the territory of a Member are not observing the compliance of the GATT, the settlement of disputes provisions of DSU of GATT, 1994 may be invoked. When the DSB rules that a provision of GATT has not been observed the responsible Member has to take reasonable measures of compliance with the GATT obligations. If compliance is not possible, the provisions relating to compensation and suspension of concessions or other obligations apply for non-observance. Each Member undertakes to accord sympathetic consideration to and afford, adequate opportunity for consultation regarding any representation made by other contracting party concerning measures affecting the operation of GATT taken within the territory of the former.

6 Jurisprudence of the Regional Trade Arrangements (RTAs)

Over, the last three or four decades regional trading agreements have proliferated on an unprecedented scale and today virtually all the members of the WTO belong to an RTA of some kind, in most cases a customs union, a free trade agreement (FTA),

[35]L/5863 (unadopted) 17 September 1985, paras. 53–64.

or an interim agreement leading to one or the other. This development has greatly changed the world trade scenario which gives both a challenge and a unique opportunity for the WTO, as RTAs may result in trade and investment diversion leading to high welfare costs for non-participants and an opportunity as RTAs may create regional dynamic forces in favour of free trade which, in turn, may generate important welfare benefits for the rest of the world.

The motivation for countries to join RTAs arises from variety of reasons; economic, political or a combination of two or institutional reasons. For economic interests many of the smaller, more protectionist countries may prefer to implement comprehensive trade liberalisation reform programmes. In certain situations, unilateral liberalisation becomes relevant in RTAs creation as smaller countries need to complement internal efficiency gains from trade with external market access.

Countries may also join RTAs for political benefits. Countries which trade together are less likely to go to war with each other. Countries use RTAs as a means to consolidate domestic economic reforms and to provide political stability as well. Some RTAs even require from its members their commitment to democracy as a condition of membership. Smaller countries increase their bargaining power by joining RTAs.

Sometimes countries also join RTAs in order to avoid political or economic isolation. The more the countries becoming parties to RTAs, the greater will be the incentives for others to enter into RTAs.

Article 1 of the GATT establishes the principle that all signatory governments shall extend unconditionally to all other contracting parties or members any advantage, favour, privilege or immunity affecting customs duties, charges, rules and procedures that they give to products originating in or destined for any other country.

Why did the founders of GATT include provisions permitting establishment of customs union and free trade areas in Article XXIV since the case of non-discrimination provisions is so strong. The answer lies in the political realism of the times. Since customs unions have a long history and many countries would not have signed an agreement that prohibited future regional arrangements with friendly and neighbouring countries. Generally, genuine customs union and free trade areas were considered compatible with the principle of non-discrimination distinct from various forms of ad hoc and partial discrimination that were prevalent in the interwar period.

The economic integration among countries has an economic rationale analogous to the process of integration within a single sovereign state, which in turn means that regional integration agreements do not pose an inherent threat to the efforts to promote continued integration on a worldwide basis.

The rules of GATT on customs union and free trade areas as discussed above reflect the desire for such agreements, while it also ensures that the trading interests of third parties are also respected in that process. It also ensures that such agreements are compatible with a rule based and progressively more open world trading system. For this reason, the customs union and free trade area provisions establish a

number of conditions which the RTAs must satisfy, as well as transparency requirements in order to monitor whether those conditions are being met.

Although it is believed that RTAs reduce or eliminate trade barriers among its members, yet it may introduce some distortions in the international trade; the distortion may happen when the concessions provided to the members of RTAs are not made available to non-members. Trade diversion may occur when the preferential treatment causes a country to replace imports from the rest of the world with imports from a partner country. Trade creation generates efficiency gains for the member countries, in as much as it encourages goods to be produced wherever costs are lowest within the RTAs. It can also benefit outsiders by increasing demand for related intermediate and final goods. However, trade diversion can be harmful to the importing country. Goods that could be purchased from the rest of world at a lower cost are instead procured from a regional source at a higher cost.

In free-trade areas, the potential for trade diversion arises especially for the administration of rules of origin. A rule may specify that non-regional intermediate goods must undergo a substantial transformation process within the region in order to qualify for regional preferences. This phrase is usually interpreted to mean that the imported intermediate good must undergo a change in tariff classification heading within the region. Alternatively, rules of origin may require that non-regional inputs account for no more than some specified maximum percentage of the production cost or the transaction value of the good. A rule may also require that some specific process be undertaken within the region, or that some other product-specific technological requirement be met.

Rules of Origin can cause additional trade in intermediate goods to be diverted beyond what would result solely from the differential tariffs applied to regional and non-regional sources of these goods. Consider, for example, an intermediate good with an MFN tariff of zero, regional producers would have no reason to source this good from high-cost producers in partner countries in order to avoid payment of the MFN duty, but these producers might nonetheless prefer to import higher-cost regional components in order to satisfy the rules of origin. That is, the use of regional inputs might make the final good eligible for preferential treatment within the region when it would not otherwise be entitled. The scope for this type of trade diversion depends on the size of regional preferences, the restrictiveness of the rules of origin and the extent of disparities in external tariff rates among member countries.

RTAs sometimes may lead to investment creation if individuals and firms in a member country choose to invest in their partner country when they otherwise would have invested at home or none at all. Investment diversion takes place if investment in a member country displaces investment in the rest of the world, or when investment by a member country displaces investment that would have been undertaken by a firm from a country outside the customs union. Like trade diversion, investment diversion brings external harm to members of the multilateral system that are not parties to the particular agreement. An RTA may also induce non-member countries to invest in the region to acquire duty-free access, thereby diverting investment into the RTA.

RTA may force nations to divert their resources from multilateral initiatives with the result that the pace of multilateral liberalisation may slow down as the countries will start concentrating on regional arrangements.

Regional agreements at the same time can promote faster trade liberalisation at multilateral level as they can provide a testing ground for many difficult trading problems, for the fact that certain valuable information generated by the RTAs can make multilateralism stronger and durable. RTAs may also provide means for reforming the economies of the members of WTO without outside interference.

To harmonise the national systems on a global basis is very difficult however, integration of markets is possible at the regional level. Integration is a process of eliminating behind the border barriers to trade. In integration of markets, the complexity of negotiations increases exponentially with the number of countries involved. Therefore, it is sometimes argued that integration could not be achieved at a multilateral level. The long, exhaustive and painful GATT Uruguay Round Negotiations contributed to an increase in the demand for alternative routes towards integration. There were also important demonstrable factors at work. Just as the Treaty of Rome did in the late 1950s, discussions on the European Community (EC) single market initiative in the late 1980s had a demonstrable effect that rekindled interest in regionalism. The process of integration is likely to continue to evolve at a faster rate on a regional basis. This does not mean that integration is not possible at a multilateral level. The Uruguay Round tried to advance some discipline in this area. Regionalism will continue to evolve because it is much easier to pursue integration at the 'mini-lateral' level.

The number of new regional initiatives has grown, particularly from 1990 onwards. In Europe, some new association agreements with the former European Community, now known as European Union, and presently having 27 members, have evolved. In North America, Canada, USA and Mexico established NAFTA. In South America, there is MERCOSUR. The Americans are now trying to establish FTAA by including all the 34 countries of American continent. In Asian region, ASEAN has been strengthened further and now the legal framework of SAFTA is already in place. In Africa too, some new regional initiatives that try to revive older initiatives are already in progress. The number of new arrangements is mind boggling.

On 14 December 2006, the General Council of the World Trade Organisation (WTO) adopted by consensus a new transparency mechanism (TM) for regional trade agreements (RTAs) thereby consolidating five years of negotiations, which had been mandated by WTO members during the Doha Ministerial Conference in 2001. The purpose of the negotiations, as stated in paragraph 29 of the Doha Ministerial Declaration was to 'clarify… and improve [e] disciplines and procedures under the existing WTO provisions applying to regional trade agreements'.

The new TM applies to all RTAs covering goods or services whether notified to the WTO under Article XXIV of the General Agreement on Tariffs and Trade (GATT), Article V of the General Agreement on Trade in Services (GATS), or the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ('Enabling Clause'). It is being

applied on a provisional basis pending the final results of the Doha Round. It is subject to review and possible modification and will be replaced by a permanent mechanism adopted as part of the overall results of the Doha Round.

7 RTAs in GATT/WTO Dispute Settlement: State of Play

In a number of provisions, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) refers to a 'measure' taken by one member as a potential target of another member's complaint. It is also true that the WTO dispute settlement procedures have normally been used for challenging domestic measures including laws, regulations or practices but not treaties as such. The question of whether RTAs as such are justiciable under the GATT/WTO system has been dealt with in a number of disputes.

In the pre-WTO period, this issue was addressed in three unadopted panel reports. In EC-Citrus, the USA complained about tariff preferences granted by the EC on citrus products from certain Mediterranean countries within the framework of Article XXIV agreements. The panel noted that working parties that had reviewed these agreements failed to produce conclusive findings as to their conformity with GATT provisions, rendering the legal status of the agreements unclear. Holding that 'the examination—or re-examination—of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES', the panel concluded that in the absence of a decision by the CONTRACTING PARTIES on this matter, it would not be appropriate for the panel to determine the conformity of agreements with Article XXIV.[36]

The GATT compliance issue emerged again in EEC (Member States)-Bananas I, where the EC claimed that its tariff preferences for bananas from African, Caribbean, and Pacific countries were accorded under the Lome Convention and justified by Article XXIV. Referring to the findings reached in EC-Citrus, the EC argued that this panel had to refrain from the examination of the Lome Convention, as this issue would fall within the CONTRACTING PARTIES jurisdiction under article XXIV: 7(b).[37] The panel first considered whether dispute settlement provisions (Article XXIII) could apply to matters that were under Article XXIV review. It concluded that even assuming that the procedures of Article XXIV prevail over those of Article XXIII, this would be true only in those cases where 'the agreement for which Article XXIV was invoked was prima facia the type of agreement covered by this provision, that is, on the face of it capable of justification under it'.[38] Having found that the Lome Convention providing for unilateral tariff preferences

[36]GATT Panel Report, European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, L/5776, 07 February 1985, unadopted, paras. 4.6 and 4.15.

[37]GATT Panel Report, EEC-Member States' Import Regimes for Bananas, DS32/R, 03 June 1993, unadopted, para. 219.

[38]Ibid., para. 367.

could not qualify as a Free Trade Agreement (FTA) in the sense of Article XXIV tariff preferences, the panel concluded that Article XXIV justification was not valid here.[39] Although the 'Article XXIII–XXIV' relationship was not crucial in the present case, the panel noted that if a measure related to Article XXIV could not be examined in dispute settlement procedures, 'any contracting party, merely by invoking Article XXIV, could deprive other contracting parties of their rights under Article XXIII'. It also referred to the panel's authority to handle balance of payment disputes in spite of the existence of multilateral procedures under Article XVIII: B GATT.[40]

In the subsequent case of EEC-Bananas II, the panel observed that the Article XXIV: 7 procedures applied only to customs unions, FTAs, or interim agreements leading to either formation. Because the Lome Convention included many non-GATT contracting parties contrary to Article XXIV: 5 that authorised only RTAs 'as between the territories of contracting parties', this agreement did not fall within the framework of Article XXIV: 7 and Article XXIII, the EC could not rely on Article XXIV defence.[41] In the WTO period, the justiciability issue was clarified to a significant degree. In Turkey-Textiles, Turkey claimed that its quantitative restrictions imposed on Indian textiles and clothing products were necessary to complete the formation of the Turkey—EC customs union and thus justified under Article XXIV. The panel noted that these measures arising from Article XXIV agreements (that is, the customs union in the present case) were challengeable under dispute settlement procedures as provided for in paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 (hereinafter the 'Understanding on Article XXIV').[42]

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs union, free-trade areas or interim agreements leading to the formation of a customs union of free-trade area (Emphasis added).

The panel, however, declined to make a GATT/WTO compatibility assessment of the entire customs union on the grounds that the matter would be within the purview of the Committee on Regional Trade Agreements (CRTA) rather than the panel's jurisdiction. Moreover, the panel also considered that pursuant to the principle of judicial economy the compatibility assessment was not necessary to address India's claims. Thus, it simply assumed, *arguendo*, that the customs union was compatible with the requirements of Articles XXIV: 8(a) and 5(a) and moved

[39]Ibid., paras. 368–372.

[40]Ibid., paras. 365 and 367.

[41]GATT Panel Report, EEC-Import Regime for Bananas, DS38/R, 11 February 1994, Unadopted, paras. 156–164.

[42]WTO Panel Report, Turkey—Restrictions on Imports of Textile and Clothing Products (Turkey-Textiles), WT/DS34/R, adopted 19 November 1999, para. 9.49–9.51.

on to examine the quantitative measures.[43] The Appellate Body disagreed with the panel and held that Article XXIV justification for an illegal WTO measure was valid, provided that the following conditions were met:

> First, the party claiming the benefit of this defense must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV, and, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these condition must be met to have the benefit of the defense under Article XXIV.[44]

Accordingly, the Appellate Body 'would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled', because 'it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there is a customs union'.[45]

The Appellate Body's conclusion indicates that RTAs as such qualify as actionable measures for the purpose of WTO dispute settlement. The justiciability of RTAs in the WTO, any member can bring a case targeting either (1) the RTA per se or (2) the RTA and a domestic measure taken in order to implement this RTA.

If an RTA is found to be a WTO violation, the WTO adjudicatory body would likely confine itself to a standard recommendation that the responding member (or several RTA parties who are targeted on the same charge) bring the measure into conformity with the relevant WTO rules without suggesting modes of implementation. The latter would be left to the discretion of the responding party. If the RTA per se is at issue, the responding country will have several implementation options such as proper rectification of the RTA, which would require a collective action of all the RTA parties, discontinuance of its participation in the RTA, obtaining WTO'S approval under Article XXIV: 10 GATT, or other appropriate steps to end the dispute. If a domestic measure implementing the RTA is at issue and the RTA is found to be 'failed' defence on the ground that this RTA does not fully comply with the relevant WTO provisions, then the withdrawal or alternation of the illegal domestic measures would suffice to implement the ruling of the Dispute Settlement Body (DSB). Finally, if both the RTA and the domestic measure are complained of, rectification of both the domestic measures and the RTA would be required.

In *Argentina-Footwear* (EC), the panel considered whether customs union members could apply safeguard measures in intraregional trade. In particular, it referred to the requirement of Article XXIV: 8 to eliminate 'other restrictive regulations of commerce' with respect to 'substantially all the trade' and the possibility of gradual formation of the customs union and concluded that these factors left Argentina and other countries of the Southern Common Market (MERCOSUR)

[43]Ibid., paras. 9.52–9.55

[44]WTO Appellate Body Report, Turkey—Restrictions on Imports of Textile and Clothing Products (Turkey—Textiles), WT/DS34/AB/R, adopted 19 Nov. 1999, para. 58.

[45]Ibid., paras. 59–60.

with the option of imposing intra-trade safeguard measures.[46] The Appellate Body, however, reversed the panel's findings on the grounds that (1) Argentina did not rely on Article XXIV defense for violation of a GATT provision, and (2) the panel did not consider whether the safeguard measures had been introduced upon the formation of the customs union that fully meets the requirements of paragraph 8(a) and 5(a) of the GATT.[47] However, the Appellate Body's reasoning is partly doubtful, as the panel report records clearly suggest that Argentina did, in fact, invoke Article XXIV.[48] Thus, only the second reason seems to be relevant here. In any event, since the panel failed to carry out the WTO compatibility test (included in the second reason) and this issue was not appealed, the Appellate Body successfully avoided this issue.

In *US-Line-Pipe*, the panel held that exclusion by the USA of imports from Canada and Mexico—the US partners under the North American Free Trade Agreement (NAFTA)—from global safeguards might be authorised by Article XXIV as a measure necessary for elimination of 'other restrictive regulations of commerce' within the NAFTA, provided that the NAFTA complies with paragraph 5 and 8 of Article XXIV. It was for the United States, the party relying on Article XXIV defence, to bear burden of proof for demonstrating the compliance.[49] In this regard, the United States argued that the NAFTA provided for elimination of all duties on 97% of the parties tariff lines representing more than 99% of trade flows, and with respect to eliminating 'other restrictive regulations of commerce', the NAFTA applied 'the principles of national treatment, transparency, and a variety of other market access rules to trade among the parities'. In support of this United States referred to several documents summited to the CRTA for review.[50] Korea (complainant), however, that the NAFTA failed to comply with Article XXIV: 8 because of the absence of a final decision of the CRTA on this matter.[51] The panel sided, however, with the United States saying that:

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[46]WTO Panel Report, Argentina—Safeguard Measures on Imports of Footwear (Argentina—Footwear (EC)), WT/DS121/R, adopted 12 January 2000, paras. 8.96–8.102.

[47]WTO Appellate Body Report, Argentina—Safeguard Measures on Imports of Footwear (Argentina—Footwear (EC)), WT/DS121/AB/R, adopted 12 January 2000, para. 110.

[48]WTO Panel Report, Argentina—Footwear (EC), supra n. 20, para. 8.93. Argentina claims that it could not impose safeguard measures against imports from MERCOSUR countries because Article XXIV of GATT as well as secondary MERCOSUR legislation prohibits it from doing so. With respect to Article XXIV of GATT, Argentina emphasises that Article XIX of GATT is not listed in Article XXIV: 8(a)(i) or (b) of GATT among the exceptions from the requirement to abolish all duties and other restrictive regulations of commerce on substantially all trade between the constituent territories of a customs union or a free trade area. Therefore, it is, in Argentina's view, incompatible with the purpose of Article XXIV: 8 of GATT to impose safeguard measures within the MERCOSUR customs union.

[49]WTO Panel Report, United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Pipe from Korea (US—Line-Pipe), WT/DS202/R, adopted 8 Mar. 2002, para. 7, 142.

[50]Ibid.,

[51]Ibid., para. 7.143

> In our view, the information provided by the United States in this proceedings, the information submitted by the NAFTA parties to the Committee on Regional Trade Agreements ('CRTA') (which the United States has incorporated into its submissions to the Panel by reference), and the absence of effective refutation by Korea, establishes a prima facie case that NAFTA is in conformity with Article XXIV: 5(b) and (c), and with Articles XXIV: 8(b). Concerning Articles XXIV: 8(b) we do not consider that the fact that the CRTA has not yet issued a final decision that NAFTA is to compliance with Articles XXIV: 8 is sufficient to rebut the prima facie case established by the United States.[52]

Accordingly, the panel simply relied on evidence of prima facie compliance, by virtue of absence of a rebuttal, without reviewing, on its own, whether the NAFTA was indeed an agreement within the sense of Articles XXIV, which could justify the US measures. Later, Korea appealed the panel's finding that the USA could rely on Articles XXIV defence. However, the Appellate Body found the panel's conclusion 'moot' and with 'no legal effect' because the exceptions under Article XXIV would have been relevant only if the parallelism requirement had been met. As the Appellate Body already found the US measures as inconsistent with the parallelism requirement, it declined to rule on whether Articles XXIV defence was available to the USA. Obviously, the Appellate Body avoided consideration of the Article XXIV issue raised by Korea by exercising judicial economy, though this stance would run counter to Article 17.12 DSU that requires the Appellate Body to 'address each of the issues raised'… during the appellate proceeding. Another weak point is that the Appellate Body failed to explain why only 'parallel' safeguard measures are eligible for Article XXIV defence. In any event, if parallelism is indeed a separate requirement and if RTA members could rely on Article XXIV to justify any GATT violation, it would not be irrational to invoke Articles XXIV for non-compliance with the parallelism requirement under the Safeguard Agreement that in turn elaborates Article XIX GATT.[53]

In *Brazil-Retreaded Tyres*, Brazil imposed an import ban on retreaded import tyres while excluding MERCOSUR countries from this measure. Having found that the import prohibition was inconsistent with Articles XI: 1 GATT (general prohibition of quantitative restrictions) and was not justified under Article XX(b) (authorization of measures for the protection of human health and life), the panel found it unnecessary to examine the EC's separate claims under Articles I: 1 and XIII: 1 GATT and corresponding defense by Brazil under Articles XXIV and XX(d) GATT.[54] The EC later appealed this matter and requested the Appellate Body to complete the legal analysis on these issues (including the alleged justification under Article XXIV) in case that the Appellate Body upholds certain panel conclusions. As the Appellate Body reversed the relevant panel's finding and thus the condition on which the EC's appeal was predicated was not fulfilled, the Appellate Body

[52]Ibid., para. 7.144.

[53]See Joost Pauwelyn, 'The Puzzle of WTO Safeguards and Regional Trade Agreements', Journal of International Economic LAW 7 (2004): 121–123.

[54]WTO Panel Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, adopted 17 December 2007, paras. 7.454–7.456.

declined to complete the legal assessment, though it disapproved of judicial economy invoked by the panel.[55] Accordingly, despite the EC's criticism of the panel 'for not verifying' whether MERCOSUR is a valid customs union within the meaning of Article XXIV[56] and conflicting views of the parties on this issue[57] the panel's exercise of judicial economy and the Appellate Body's refusal to consider the conditional appeal left the Article XXIV issue un-tackled.

[55]WTO Appellate Body Report, Brazil—Measures Affecting Imports of Retreated Tyres (Brazil—Retreated Tyres), WT/DS332/AB/R, ADOPTED 17 Dec. 2007, paras. 255–257.

[56]Ibid., para. 32.

[57]Ibid., paras. 47–50 (EC's submission) and paras. 76–81 (Brazil's submission).

Chapter 22
Joint Action by the Contracting Parties (Article XXV)

Article XXV is reproduced below:

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.
2. The Secretary General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.
3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.
4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.
5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement: Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

   (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
   (ii) prescribe such criteria as may be necessary for the application of this paragraph.

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1 General

Joint Action or decision-making under the GATT 1947 was devised in such a way that the contracting parties of the GATT when acting jointly were designated as the CONTRACTING PARTIES who were supposed to meet from time to time for the purposes of giving effect to those provisions of the GATT which involved joint action as well as facilitating the operation and furthering the objectives of GATT. Authority for joint action by the CONTRACTING PARTIES is provided for in the following provisions of the GATT 1947.

Articles II: 6(a); VI: 6(b); VII: 1 and 4(c); VIII: 2; X3: c; XII: 4(b) to (d) and 5; XII: 4; XIV: 2; XV: 1, 2, 3, 5, 6, 7, 8; XVI: 5; XVII: 4(C); XVIII: 6, 7, 12, 14, 16, 19, 22; XIX: 2, 3; XX: (h), (j); XXII: 2; XXIII: 2; XXIV: 7, 10; XXV: 1, 5; XXVII: 1, 4; XXVIII bis: 1; XXI; XXX: 2; XXXIII; XXXVII: 2(b); XXXVIII: 1, 2; Annex I, Notes Ad Articles XII: 4, XVIII: 15, 16, and XXVIII: I.

An action taken in accordance with the terms of an article could be effected by a decision approved by the CONTRACTING PARTIES and duly recorded.[1]

Under the GATT 1947, CONTRACTING PARTIES have followed different procedures for resolving questions of interpretation, such as Chairman's rulings, decisions by the CONTRACTING PARTIES, adoption of Reports of Panels or working parties including interpretations, and decisions by the Council to interpret the GATT or to adopt reports including interpretations. Questions of interpretation were often resolved by the Chairman of the CONTRACTING PARTIES giving a ruling, either at the request of a delegate or at his own initiation towards the end of a discussion. These rulings sometimes did not meet the dissenting opinions, and sometimes were expressly accepted, or put to roll call vote. In many instances, the CONTRACTING PARTIES have adopted decisions, resolutions or recommendations relating to a specific matter. Sometimes such decisions included elements interpreting the GATT Article XVIII: 2 which expressly give contracting parties the power to 'give rulings'. The contracting parties have adopted many reports of Panels or Working Parties including the interpretation of GATT. (See Chapter III—Settlement of Disputes Mechanisms of this book). After 1968, the GATT Council has been adopting reports. The Director General or his representative has been giving legal opinions on request by the contracting parties.

After the establishment of WTO, GATT 1994 has been integrated with the WTO legal regime. As such it is the WTO who provides the common institutional framework for the conduct of trade relations among its Members and GATT 1994 with other Multilateral Trade Agreements are integral parts of the Marrakesh Treaty establishing the WTO. However, GATT 1994 is legally distinct from the GATT 1947. Rather GATT 1994 has replaced GATT 1947 but the jurisprudence evolved under GATT 1947 shall continue to operate to the extent that it does not infringe the scope of GATT 1994. For further details of the decision-making powers of WTO, see Chap. 2 of this book.

[1]GATT/CP.2/SR.21, p. 4

2 Scope of the Waiver Under Paragraph 5 of Article XXV

The scope of the waiver from the obligations imposed on a contracting party under GATT 1947 was the subject matter of dispute in 1952 in the case of 'The European Steel and Coal Community', the precursor of EEC. The Working Party while considering the request of six countries to participate in the European Coal and Steel Community held that the text of paragraph 5(i) of Article XXV is general in character and it allows the contracting parties/Members to waive any obligations imposed upon the contracting parties by the GATT in exceptional circumstances not provided for in the GATT, and places no limitations on the exercise of that right. As the CONTRACTING PARTIES found the European Coal and Steel Community objectives broadly consistent with the objectives of the GATT, a waiver was granted.[2]

In 1956, the CONTRACTING PARTIES developed a procedure to be followed for granting waivers under Article XXV or Part I or other important obligations of the GATT, which are as under:

(a) Applications for waivers from Part I or other important obligations of GATT, should be considered only if submitted with at least thirty days' notice. In exceptional circumstances this requirement may be waived.
(b) The applicant country is supposed to give full consideration to representations made to it by other contracting parties and engage in full consultation with them.
(c) The contracting parties should give careful consideration to any representation that such consultation has proved unsatisfactory, and should not grant a waiver in cases where they are not satisfied that the legitimate interests of other contracting parties are adequately safeguarded.
(d) Any decision granting waiver should include procedures for future consultations on specific action taken under a waiver, and where appropriate, for arbitration by the contracting parties.
(e) Any decision granting waiver should also provide for an annual report, and where appropriate for annual review of the operation of the waiver.[3]

The effect of a waiver is that the restrictions found to be inconsistent with the GATT obligations but conforming to the terms of the waiver does not prevent the contracting parties from bringing a complaint under Article XXIII: 1(b) of the GATT. However, it is up to the complaining party to demonstrate the nullification and impairment of benefits accruing to it under the GATT.

Acceptance, Entry into Force and Registration (Article XXVI)

The text of Article XXVI (Acceptance, Entry into Force and Registration) is reproduced as under:

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[2]G/35, Adopted on 10 November 1952, 1S/85, 86, paras. 2–3.

[3]L/769, Adopted on 30 November 1957, 65/36, 38, paras. 8–10.

1. The date of this Agreement shall be 30 October 1947.
2. This Agreement shall be open for acceptance by any contracting party which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.
3. This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary General of the United Nations, who shall furnish certified copies thereof to all interested governments.
4. Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary [By the decision of 23 March 1965 the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director General"] to the Contracting Parties, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.
5. (a) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Director General to the CONTRACTING PARTIES at the time of its own acceptance.
   (b) Any government, which has so notified the Director General under the exceptions in sub-paragraph *(a)* of this paragraph, may at any time give notice to the Director General that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Director General.
   (c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.
6. This Agreement shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with Director General to the Contracting Parties on behalf of governments named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.
7. The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

General

The acceptance, entry into force and registration of GATT 1947 in Article XXV provided for definitive acceptance of the GATT by those contracting parties specified in Article XXVI: 2. GATT 1947 was to remain open for acceptance by any contracting party which on 1 March 1955 was a contracting party or was negotiating with a view to accede to this Agreement. All others had to accede under Article XXXIII by way of accession. Any Government not a party to the GATT 1947 could accede on terms to be agreed by such government and the CONTRACTING PARTIES by a majority of two-thirds decisions. Protocols of accession provided that the government, having become a contracting party agreeing to apply provisionally the GATT, will have the right to accede to the GATT on the terms specified in the accession protocol.

There could be reservation to the acceptance pursuant to Article XXVI if such an acceptance was accompanied by a reservation to the effect that Part II of the GATT will be applied to the fullest acceptance not inconsistent with legislation which existed on 30 October 1947 or the contracting party attaching such a reservation would submit as soon as possible after its acceptance to the GATT, pursuant to Article XXVI, a list of principal legislative provisions, covered by such reservation.

The accession to GATT 1947 was not only cumbersome but also full of loop-holes which gave contracting party the entire *alibi* not to apply GATT 1947 definitively.

After the establishment of WTO, a Member that has accepted or acceded to the WTO Agreement is bound definitively by GATT 1994 as defined in Annex-IA of the WTO Agreement, which provides in its Article II: 2 that the agreements and associated legal instruments included in Annex 1A, 2 and 3 are integral parts of the Agreement and binding on all Members. Further, the legal instruments through which the contracting parties apply the GATT 1947 were thereby terminated one year after the entry into force of WTO Agreement, i.e. January 1995.

Withholding or Withdrawal of Concessions (Article XXVII)

The text of Article XXVII (Withholding or Withdrawal of Concessions) is reproduced as under:

Any contracting party shall at any time be free to withhold or to withdraw, in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

General

Tariff protocols to which the concessions negotiated in rounds of multilateral trade negotiations have been attached to the GATT have included provisions permitting participants to withhold or withdraw, in whole or in part, concessions with respect

to any product for which the principal supplier is any other participant in the negotiating round or any government having negotiated for accession during the negotiating round, whose schedule has not yet become a Schedule of GATT. Similar provision also appears in Marrakesh Protocol to the GATT 1994.[4]

Modification of Schedules (Article XXVIII)

A. ***The text of Article XXVIII (Modification of Schedules) is as under:***

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period that may be specified by the contracting parties by two-thirds of the votes cast), a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest in such concession, modify or withdraw a concession included in the appropriate schedule annexed to this Agreement.
2. In such negotiations and agreements, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.
3. (a) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

[4]See paragraph 3 in each of the following:
Geneva (1967)—Protocol (Results of Kennedy Round); 15S/6; Geneva (1979) Protocol 26S/4, and Protocol Supplementary to the Geneva (1979) Protocol, 26S/6 (Results of Tokyo Round). See also paragraph 4 of the Marrakesh Protocol.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

(a) Such negotiations and any related consultations shall be conducted in accordance with the provisions of paragraphs 1 and 2 of this Article.
(b) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3(b) of this Article shall apply.
(c) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.
(d) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3(b) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation. If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4(a) to have a principal supplying interest and any contracting party determined under paragraph 4(a) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in Paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraphs 1–3.

If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

B. ***Text of Ad Article XXVIII***

Ad Article XXVIII

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the first day following the expiration of such other period and, unless the CONTRACTING PARTIES have again specified another period, subsequent periods will be three-year periods following the expiration of such specified period.
2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party 'may. . modify or withdraw a concession' means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed.
3. Not earlier than six months, nor later than three months, prior to 1 January 1958, or to the termination date of any subsequent period, a contracting party wishing to modify or withdraw any concession embodied in the appropriate Schedule should notify the CONTRACTING PARTIES to this effect. The CONTRACTING PARTIES shall then determine the contracting party or contracting parties with which the negotiations or consultations referred to in paragraph 1 shall take place. Any contracting party so determined shall participate in such negotiations or consultations with the applicant contracting party with the aim of reaching agreement before the end of the period. Any extension of the assured life of the Schedules shall relate to the Schedules as modified after such negotiations, in accordance with paragraphs 1, 2 and 3 of Article XXVIII. If the CONTRACTING PARTIES are arranging for multilateral tariff negotiations to

take place within the period of six months before 1 January 1958, or before any other day determined pursuant paragraph 1, they shall include in the arrangements for such negotiations suitable procedures for carrying out the negotiations referred to in this paragraph.

4. The object of providing for the participation in the negotiation of any contracting party with a principle supplying interest, in addition to any contracting party with which the concession was originally negotiated, is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated or would in the judgement of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party. It would therefore not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest.
5. Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.
6. It is not intended that provision for participation in the negotiations of any contracting party with a principal supplying interest, and for consultation with any contracting party having a substantial interest in the concession which the applicant contracting party is seeking to modify or withdraw, should have the effect that it should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.
7. The expression ‘substantial interest’ is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

Paragraph 4

1. Any request for authorisation to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.
2. It is recognised that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their economies or as an important source of revenue, normally to negotiate for the modification or withdrawal of concessions only under paragraph 1 of Article XXVIII, might cause them at such time to make modifications or withdrawals which in the long run would prove unnecessary. To avoid such a situation, the CONTRACTING PARTIES shall authorise any such contracting party, under paragraph 4, to enter into negotiations unless they consider this would result in, or contribute substantially towards, such an increase in tariff levels as to threaten the stability of the Schedules to this Agreement or lead to undue disturbance of international trade.
3. It is expected that negotiations authorised under paragraph 4 for modification or withdrawal of a single item, or a very small group of items, could normally be brought to a conclusion in sixty days. It is recognised, however, that such a period will be inadequate for cases involving negotiations for the modification or withdrawal of a larger number of items and in such cases, therefore, it would be appropriate for the CONTRACTING PARTIES to prescribe a longer period.
4. The determination referred to in paragraph 4(d) shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them unless the applicant contracting party agrees to a longer period.
5. In determining under paragraph 4(d) whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment

C. ***Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994***

Members hereby *agree* as follows:

1. For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e., exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is however agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a

redistribution of negotiating rights in favour of small and medium sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.

2. Where a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26-28) shall apply in these cases.
3. In the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII) or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation.
4. When a tariff concession is modified or withdrawn on a new product (i.e., a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia,* production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.
5. Where a Member considers that it has a principal supplying or a substantial interest in terms of paragraph 4, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession, and at the same time inform the Secretariat. Paragraph 4 of the above mentioned "Procedures for Negotiations under Article XXVIII" shall apply in these cases.
6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

(a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10%, whichever is the greater; or
(b) trade in the most recent year increased by 10%.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7. Any Member having a principal supplying interest, whether as provided for in paragraph 1 above or in paragraph 1 of Article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members concerned.

General

The fundamental principle permeating the GATT is the reduction of tariffs and a contracting party which is the original Member of GATT or accedes later to the GATT as a Member is supposed to offer tariff concessions or reductions in its tariff schedule. In order to induce extensive tariff concessions in the initial 1947 round of GATT tariff negotiations, the duration of so-called firm validity of concessions was limited to three years. Under the original arrangement all tariffs were, therefore, open for renegotiations on 1 January, 1951,[5] which was extended to 1 January, 1954.[6] The period of 'firm validity', was subsequently extended to July 1952 and to 1 January, 1958.[7] On each occasion, it was possible for an individual contracting party not to sign the declaration of continued 'firm validity' and thereby remain free to renegotiate its concessions.

The negotiating procedures prior to the Kennedy Round of tariff negotiations (1967) were 'selective product by product' negotiations resulting in a concession consisting of agreement to (1) lower tariffs or a 'binding' of a present low tariff rate, (2) a base date for each participant's existing tariff rules, with an obligation not to increase tariffs or restrictive measures in force on the base date as a means of improving one's bargaining power prior to negotiations and (3) the 'principal supplier rule' whereby each country would be expected to consider the granting of tariff or preference concessions only on products of which the other members… are, or are likely to be, principal suppliers…". This last rule grew out of the problem that faced bilateral negotiations when through the most-favoured-nation obligation, a third country would profit from the tariff concessions between two negotiating parties without giving any reciprocal concessions.

The second and third round of tariffs were held at Annecy, France in 1949 and Torque, England in 1950 followed by fourth round at Geneva (1956) and the fifth Dillon Round (1960–61).[8]

[5]Basic instruments, Vol. II (1952), p. 30.
[6]Ibid., 2nd Supp. (1954), pp. 22, 61.
[7]Ibid., 3rd Supp. (1955) p. 30
[8]John H. Jackson, World Trade and the Law of GATT 217–248 (1969).

The procedure used in all these rounds for tariff negotiations was that each party would submit a 'request' list of items to those other parties from whom tariff concessions were desired, i.e. normally those nations to which the requesting party was a substantial exporter of the item. Each party would then submit 'a concession' or 'offer' list of the concessions it was willing to make if its requests were satisfied, which would be followed by hard-core bargaining to negotiate those items of interest to the two nations. These negotiations were made known to other negotiating countries and since MFN would generalise the concessions, the granting party would ask the other parties to grant concessions equivalent to the value of the residual benefits accruing to them as a result of original concessions. As concessions were technically tentative until the entire negotiation was completed, each party would appraise the totality of its own concessions against the totality of all other concessions before agreeing to the package. The whole process of negotiations was supervised by a Committee comprised of representatives from each of the negotiating participants. Each contracting party would finally notify to the GATT Secretariat which would put the concessions into effect.[9]

3 Across-the-Board Tariff Reductions

The Kennedy Round of Tariff Negotiations was conducted on the basis of a "linear method of tariff negotiations" which meant that tariffs would be reduced across-the-board" by 50% except those which have been excepted and tabled by the country/ countries by September 10, 1964.[10] The exception list would be subjected to scrutiny and would require justifications as "necessitated only by reason of overriding national interest".[11]

The Tokyo Round (1973–79) followed the tariff cutting formula of Kennedy Round and concessions were thus in most cases not the result of bilateral negotiations.[12] Decisions taken at the end of the Kennedy Round and Tokyo Round provided that the rights of the initial negotiators would accrue to the contracting party that had the main supplying role at the time of a particular negotiation of a bound item. The principal supplier would have the same rights as the initial negotiator would have under Article XXVIII. As the concessions resulting from the Kennedy Round and Tokyo Round had come up for negotiation in connection with the introduction of Harmonised System of Tariff Classification it had proved necessary to have a similar rule for the concessions resulting from those renegotiations.[13] After the Harmonised System of Tariff Nomenclature was adopted, many

[9]Ibid., p. 220.

[10]GATT, 13th Suppl; BISD 109 (1965).

[11]Supra note 8, p. 221.

[12]26S/202.

[13]L/6367, 35S/336, see also report of the Committee on Tariff concessions, 353/29–30.

contracting parties have conducted Article XXVIII negotiations with respect to their tariff schedule. It was also adopted that 'a contracting party shall be deemed for the purpose of the GATT to be a Contracting party with which a concession has been initially negotiated if it had during the representative period prior to the time when the question arose a principal supplying interest in the product concerned'. This does not affect initial negotiating rights which are the result of bilateral negotiations and which have been duly notified.[14]

Paragraph 7 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994 provides as follows:

> 7. Any Member having a principal supplying interest whether as provided for in paragraph 1 above or in paragraph 1 of article XXVIII, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the Members Concerned.

4 Principal Supplier Rights Where a Concession Affects a Major Part of a Contracting Party's Exports

Note 5 Ad Article XXVIII: 1 provides that the CONTRACTING PARTIES 'may exceptionally determine that a contracting party has principal supplying interests if the concession in question affects trade which constitutes a major part of the total exports of such contracting party'. Further paragraphs 1 and 2 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 provide that for the purposes of modification or withdrawal of a concession, the Member who has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. Further, when a Member considers that it has a principal supplying interest in terms of paragraph 1, it should communicate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession and at the same time inform the Secretariat.[15]

It is further clarified by paragraph 3 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of the GATT 1994 that, 'in the determination of which Members have a principal supplying interest (whether as provided for in paragraph 1 [of the Understanding] or in paragraph 1 of Article XXVIII or substantial interest, only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, 'trade in the affected product

[14]Ibid.,

[15]Paragraph 4 of the Procedure for Negotiations Under Article XXVIII, adopted on 10 November 1980, BISD 27S/26-28 shall apply in these case.

which has taken place under non-contractual preferences shall also be taken into account if the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of negotiation for the modification or withdrawal of the concession, or will do so by the conclusion of that negotiation'.

5 Negotiating Rights and Trade in New Products

The negotiating rights of Members of tariff concessions in relation to new products have been provided in paragraphs 4 and 5 of the Uruguay Round of Understanding on the Interpretation of Article XXVIII of the GATT 1994 as follows:

4. When a tariff concession is modified or withdrawn on a new product (i.e., products for which three years trade statistics is not available), the Member possessing initial renegotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter-alia*, production capacity, and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, 'new product' is understood to include a tariff item created by means of a breakout from an existing tariff line.
5. When a Member considers that it has a principal supplying or substantial interest in terms of paragraph 4, it should formulate its claim in writing, with supporting evidence, to the Member proposing to modify or withdraw a concession and at the same time inform the Secretariat. Paragraph 4 of the 'Procedures for Negotiations under Article XXVIII shall apply in these cases'.

6 Renegotiation and Institution of a Tariff Quota

Article XXVIII: 2 provides that, 'In such negotiations and agreements, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than provided for in the GATT prior to such negotiations'. However, paragraph 6 of the Uruguay Round of Understanding on the Interpretation of Article XXVIII of the GATT 1994 clarifies it as follows:

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the

level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

(a) the average annual trade in the most recent representative three year period, increased by the average annual growth rate of imports in the same period or by 10%, whichever is greater; or
(b) trade in the most recent year increased by 10%.

In no case shall a Member's liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7 Procedures for Negotiations

The procedures for negotiations under Article XXVIII are as follows:

1. A Contracting Party intending to negotiate for the modification or withdrawal of concessions in accordance with the procedures of Article XXVIII paragraph 1 which are also applicable to negotiations under paragraph 5 of that Article should submit a notification to that effect to the Secretariat which will distribute the notification to all other contracting parties in a secret document. In the case of negotiations under paragraph 4 of Article XXVIII, the request for authority to enter into negotiations should be transmitted to the Secretariat to be circulated in a secret document and included in the agenda of the next meeting of the Council.
2. The notification or request should include a list of items, with corresponding tariff line numbers, which it is intended to modify or withdraw indicating for each item the contracting parties, if any, with which the item was initially negotiated. It should be indicated whether the intention is to modify a concession, or withdraw it, in whole or in part, from the schedule. If a concession is to be modified, the proposed modification should be stated in the notification circulated as soon as possible thereafter to those contracting parties with which the concession was originally negotiated and those which are recognised, in accordance with paragraph 4 below, to have a principal or a substantial supplying interest. The notification or request should be accompanied by statistics of imports of products involved, by country of origin, for the last three years for which statistics are available. If specific or mixed duties are affected, both values and quantities should be identical, if possible.
3. At the same time as the notification is transmitted to the Secretariat or when the authorisation to enter into negotiations has been granted by the Council or as soon as possible thereafter, the contracting party referred to in paragraph 1 above should communicate to those contracting parties, with which concessions were initially negotiated, and those which have a principal supplying interest, the compensatory adjustment which it is prepared to offer.

4. Any contracting party which considers that it has a principal or substantial supplying interest in a concession which is to be subject of negotiation and consultation under Article XXVIII should communicate its claim in writing to the contracting party referred to in paragraph 1 above and at the same time inform the Secretariat. If the contracting party referred to in paragraph 1 above recognises the claim, the recognition will constitute a determination by the contracting parties of interest in the sense of Article XXVIII: 1. If the claim of interest is not recognised, the contracting party making the claim may refer the matter to the Council. Claims of interest should be made within ninety days following the circulation of the import statistics referred to in paragraph 2 above.
5. Upon completion of each bilateral negotiation, the contracting party referred to in paragraph 1 above should send to the Secretariat a joint letter on the lines of the model in Annex A attached hereto signed by both parties. To this letter shall be attached a report on the basis of the model in Annex B attached hereto. The report should be initiated by both parties. The Secretariat will distribute the letter and the report to all contracting parties as a secret document.
6. Upon completion of all the negotiations, the contracting party referred to in paragraph 1 above should send to the Secretariat, for distribution in a secret document, a final report on the lines of the model in Annex C attached hereto.
7. Contracting parties will be free to give effect to the changes agreed upon in the negotiations as from the first day of the period referred to in Article XXVIII: 1 or in the case of negotiations under paragraph 4 or 5 of Article XXVIII, as from the date on which the conclusion of all the negotiations have been notified as set out in paragraph 6 above. A notification shall be submitted to the Secretariat, for circulation to Contracting Parties, of the date on which these changes will come into force.
8. Formal effect will be given to the changes in the schedule by means of certification in accordance with the decision of the CONTRACTING PARTIES OF 26 March, 1980.
9. The Secretariat will be available at all times to assist the governments involved in the negotiations and consultations.[16]

Tariff Negotiations (Article XXVIII bis.)

The text of Article XXVIII bis (Tariff Negotiations) is reproduced as under:

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of

[16]C/113 and Corr. 1, 27S/26-29. The Annexes are not printed in the BISD and can be found in C/113.

individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (a) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.
   (b) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

   (a) the needs of individual contracting parties and individual industries;
   (b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and
   (c) all other relevant circumstances, including the developmental, strategic and other needs of the contracting parties concerned.

Ad Article XXVIII bis

Paragraph 3

It is understood that the reference to fiscal needs would include the revenues aspect of duties and particularly duties imposed primarily for revenue purpose, or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

General

Since GATT 1947, eight 'rounds' of Multilateral Tariff and Trade Negotiations including the Uruguay round have been concluded within GATT 1947 and 1994, although GATT does not lay down any special procedures for the launching of negotiations nor any rule for their organisation has been laid. At best, under Article XXV: 1 the contracting parties have the general power of taking 'joint action', with a view… for furthering the objectives of the General Agreement under Article XXVIII bis:1, the CONTRACTING PARTIES are authorised to sponsor tariff negotiation Article XXVIII (bis) recognises that customs duties often constitute serious obstacles to trade and as such they need to be negotiated on a reciprocal and mutually advantageous basis so that there is a substantial reduction of the general level of tariffs and other charges on imports and exports, particularly the reduction of high

tariffs as high tariffs discourage the importation of even minimum quantities. These reductions in tariffs are to be conducted in furthering the objectives of the GATT and the varying needs of individual contracting parties as the reduction of tariffs expands international trade. CONTRACTING PARTIES have in view of the above importance of customs duties sponsored multilateral negotiations from time to time.

The reduction of tariff negotiations on a reciprocal and mutually advantageous basis can be carried out on a selective product-by-product basis or by the application of multilateral procedures as seen in the preceding Article XXVIII. These negotiations are to be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The bindings against increase of low duties or of duty-free treatment shall in principle be recognised as a concession equivalent in value to the reduction of high duties.

It is recognised in the tariff negotiations that the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another. However, all such multilateral negotiations should take into account, (a) the needs of individual contracting parties, (b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes and (c) all other relevant circumstances, inducing the fiscal, developmental, strategic and other needs of the contracting parties.

8 Reciprocity as Regards Developing Countries

As already noted that the principle underlying GATT tariff negotiations is the exchange of reciprocal and mutually advantageous concessions, the developed countries should not expect reciprocity for commitments made by them in the negotiations to reduce or remove tariff and non-tariff barriers to trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. However, it has been recognised that there is a need to take special measures in the negotiation to assist the developing countries in their efforts to increase their export earnings and promote their economic development and when appropriate for priority attention to be given to products or areas of interest to developing countries including the maintenance and improvement of Generalised System of Preferences. The developing countries require special and differential (S&D) treatment in the areas of negotiations when it is feasible and appropriate.[17]

[17]Participation of less-developed countries in Trade negotiations, a Note by the Executive Secretary, March 1961, Report of the Committee III, L/1435, 10S/167, Annex. A, 10S/172, paras. 3–4; Tokyo Round Declaration (1973), 20S/19, 21, paras. 5–6.

Having regard to the special economic difficulties and the particular development, financial and trade needs of the least developed countries, the developed countries are expected to exercise utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to trade of such countries.[18]

The above special and differential treatment has been reiterated in the Ministerial Declaration on the Uruguay Round, agreed at Punta-del-Este on 20 September 1986 while launching the Uruguay round, *inter alia*, the developed countries do not expect reciprocity of commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. Developed contracting parties shall not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

Less developed countries expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.[19]

The Relation of this Agreement to the Havana Charter (Article XXIX)

The text of Article XXIX (The Relation of This Agreement to the Havana Charter) is reproduced as under:

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I–VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it, in accordance with their constitutional procedures.
2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.
3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.
4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force: *Provided* that the provisions of Part II other than Article XXIII shall be replaced, *mutatis mutandis*, in the form in which they then appeared in the Havana

[18]The Decision on 'Differential and More Favourable Treatment, Reciprocity and Fuller participation of Developing Countries', negotiated in the Tokyo Round (28 November 1979), L/4903, 265/203, 204, paras. 5, 6.

[19]L/3335/21, paras. (iv–v)

Charter; and *Provided* further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.
6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

9 General

The GATT was drafted during the intermediate stages of the negotiations of the ITO Charter. The General Agreement was intended to serve as a framework for tariff concessions negotiated in the first round in 1947 and was intended to continue in existence even after the entry into force of the ITO Charter. The function of Article XXIX was twofold: it determined the relationship between the charter and the General Agreement, and it provided that after the final version of the rules in Part II of the General Agreement had been negotiated during the Havana Conference, and after the Havana Charter had entered into effect, this version would automatically supersede Part II of the General Agreement. However, the Havana Charter never entered into force.

With the establishment of WTO and GATT 1994 superseding the GATT 1947, this Article appears to have become redundant.

Amendments (Article XXX)

Article XXX (Amendments) reads as under:

1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

10 General

As GATT 1947 has been superseded by the GATT 1994 and is an integral part of WTO, the procedures for amending the GATT 1994 are contained in Article X of the WTO.

Any Member of the WTO may initiate a proposal to amend the provisions of GATT 1994 by submitting a proposal to the Ministerial Conference. The Council for Trade in Goods which oversee the functioning of GATT 1994 (Article V of the WTO) may also submit a proposal to amend the provisions of GATT 1994. Within a period of ninety days after the proposal for amending the GATT 1994 has been formally tabled at the Ministerial Conference, the Ministerial Conference may take decision of submitting the proposed amendments to the Members for acceptance, unless the Ministerial Conference decides for a longer period of ninety days by consensus. In case the amendments relate to Articles I and II of GATT 1994, and consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of Ministerial Conference within the stipulated period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Amendments to Article I and II shall take effect only upon acceptance by all Members for acceptance. Amendments to other provisions of GATT excluding Articles I and II which are of a nature that would alter the rights and obligations of the Members in respect of Articles other than I and II shall take effect upon acceptance by two-thirds of the Members and thereafter by each other member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective is of such a nature that any member who has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of Ministerial Conference. Amendments to GATT other than those specified above, which would not alter the rights and obligations of the Members shall take effect

for all Members upon acceptance by two-third of the Members.[20] Any Member accepting an amendment shall deposit an instrument of acceptance with the Director-General of the WTO within the period specified by the Ministerial Conference.[21]

Withdrawal (Article XXXI)

The text of the Article XXXI (withdrawal) is reproduced as under:

Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or of paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement, or may separately withdraw on behalf of any of the separate customs territories for which it has international responsibility and which at the time possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement. The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Director-General of the United Nations.

11 General

As GATT 1994 has replaced the GATT 1947 and is subject to the jurisdiction of WTO, the WTO Agreement on Withdrawal (Article XV) will apply which says, 'Any Member may withdraw from this Agreement. Such Withdrawal shall apply to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director General of the WTO'. In other words, any Member of WTO is automatically a Member of GATT 1994 and thus is bound by Article XV of the WTO for any withdrawal from GATT 1994.

Contracting Parties (Article XXXII)

The text of Article XXXII (Contracting Parties) is reproduced as under:

1. The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.
2. At any time after the entry into force of this Agreement pursuant to paragraph 6 of Article XXVI, those contracting parties which have accepted this Agreement pursuant to paragraph 4 of Article XXVI may decide that any contracting party which has not so accepted it shall cease to be a contracting party.

[20]Article X: 1, 2, 3 and 4 of the WTO Agreement.

[21]Ibid., Art X: 7.

12 General

With the establishment of WTO, the original Member and Membership have been defined in Article XI of the WTO Agreement which enumerates that the contracting parties to GATT 1947 on 1 January 1995 (the date of entry into force of WTO Agreement) and the European Communities which accepted the WTO Agreements and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATS are the original Members of the GATT. The least-developed countries recognised as such by the United Nations are required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.[22]

Accession (Article XXXIII)

The text of the Article XXXIII (Accession) is reproduced as under:

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the Contracting Parties. Decisions of the Contracting Parties under this paragraph shall be taken by a two-thirds majority.

13 General

As the GATT 1947 has been replaced by the GATT 1994 as Annex 1 of the WTO Agreement, the procedure of accession as provided in Article XII of the WTO Agreement applies. Article XII of the WTO Agreement provides that, 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this [WTO] Agreement and the Multilateral Trade Agreements may accede to this [WTO] Agreement on terms to be agreed between it and WTO. Such accession shall apply to this [WTO] Agreement and the Multilateral Trade Agreements annexed thereto. Decisions on accessions shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the members of the WTO. On occasions when the General Council of the WTO has to decide matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement

[22]As on January 2006, WTO had 149 members, 123 original and the other 26 acceded to the Agreement. See Article XI of the WTO Agreement.

respectively, the General Council has to seek a decision in accordance with Article IX: I. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by the General Council by establishing a working party on accession on behalf of the Ministerial Conference. The working party will examine the application for accession to the WTO under Article XII and submits to the Working Party/Ministerial Conference recommendations including the draft protocol of Accession.[23]

Annexes (Article XXXIV)

The text of the Article XXXIV (Annexes) is reproduced as under:

The annexes to this Agreement are hereby made an integral part of this Agreement.

14 General

As WTO Agreement and the Annexes to it are a single undertaking dealing with original membership, accession, non-application of the Multilateral Trade Agreements between particular Members, all WTO Members are bound by all rights and obligations in the WTO Agreement and its Annexes 1, 2 and 3. The GATT 1994 replacing GATT 1947 is a Multilateral Agreement covered in Annex-1A of the WTO Agreement and as such is an integral part of WTO Agreement. It is binding on all Members. GATT 1994 has entered into force as part of the WTO Agreement and Marrakesh Treaty 1994 is binding on all WTO Members.

Non-application of the Agreement between Particular Contracting Parties (Article XXXV)

The text of the Article XXXV (Non-Application of the Agreement between Particular Contracting Parties) is as under:

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:
   (a) the two contracting parties have not entered into tariff negotiations with each other, and
   (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.
2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

[23]WT/ACC/1, para.

15 General

The Article XXXV is replaced by Article XIII of the WTO Agreement. Article XIII of the WTO (Non-Application of Multilateral Trade Agreements between Particular Members) conceives of four ways of non-application of Multilateral Trade Agreements between particular Members. The four conceived ways are:

(a) The WTO Agreements and the Multilateral Trade Agreement in Annexes 1, 2 and 3 are not applicable between any member and any other member, if either of the members, at the time either becomes a member, does not consent to such application.
(b) The above said non-application can be invoked between original members of the WTO which were contracting parties only where under Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of WTO Agreement.
(c) Non-application can also be invoked between a member and another member, which has acceded under Article XII of the WTO Agreement only if the member not consenting to the application has so notified the Ministerial Conference before the approval of the Agreement on the terms of accession by the Ministerial Conference.
(d) The Ministerial Conference has the power to review the non-application in particular cases at the request of any member and can make appropriate recommendations.

The WTO Agreement and the Multilateral Trade Agreements in Annexes 1, 2 and 3 are not applicable between any Member and any other Member, if either of the Members, at the time either becomes a member, does not consent to such application.[24] The above said non-application can be invoked between original Members of the WTO, which were contracting parties only where under Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of WTO Agreement. Non-application can also be invoked between a Member and another Member who has acceded under Article XII of the WTO Agreement only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the Agreement on the terms of accession by the Ministerial Conference. The Ministerial Conference has the power to review the non-application in particular cases at the request of any Member and can make appropriate recommendations.

[24]Article XIII, I of WTO Agreement.

Chapter 23
Trade and Development (Articles XXXVI–XXXVIII)

The texts of the Article XXXVI (Principles and Objectives); XXXVII (Commitments) and XXXVIII Joint Action are reproduced as below:

Article XXXVI, Principles and Objectives

1. The contracting parties,
   (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less developed contracting parties;
   (b) considering that export earnings of the less developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less developed contracting parties for essential imports, the volume of their exports and the prices received for these exports;
   (c) noting that there is a wide gap between standards of living in less developed countries and in other countries;
   (d) recognising that individual and joint action is essential to further develop the economies of less developed contracting parties and to bring about a rapid advance in the standards of living in these countries;
   (e) recognising that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures—and measures in conformity with such rules and procedures—as are consistent with the objectives set forth in this Article;
   (f) noting that the CONTRACTING PARTIES may enable less developed contracting parties to use special measures to promote their trade and development; agree as follows.
2. There is need for a rapid and sustained expansion of the export earnings of the less developed contracting parties.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_23

3. There is need for positive efforts designed to ensure that less developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.
4. Given the continued dependence of many less developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilise and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.
5. The rapid expansion of the economies of the less developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less developed contracting parties.
6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less developed contracting parties, there are important interrelationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less developed contracting parties assume in the interest of their economic development.
7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less developed countries.
8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties.
9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Article XXXVII, Commitments

1. The developed contracting parties shall to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible—give effect to the following provisions:

   (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less developed contracting parties, including customs duties and other restrictions which

differentiate unreasonably between such products in their primary and in their processed forms;

(b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less developed contracting parties; and

(c) (i) refrain from imposing new fiscal measures, and

(ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less developed contracting parties, and which are applied specifically to those products.

2. (a) Whenever it is considered that effect is not being given to any of the provisions of subparagraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of subparagraph (a), (b) or (c) of paragraph 1 shall be examined.

(ii) As the implementation of the provisions of subparagraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

(a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less developed contracting parties, to maintain trade margins at equitable levels;

(b) give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less developed contracting parties and collaborate in appropriate international action to this end;

(c) have special regard to the trade interests of less developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less developed contracting parties as a whole.
5. In the implementation of the commitments set forth in paragraph 1–4, each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

Article XXXVIII, Joint Action

1. The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.
2. In particular, the CONTRACTING PARTIES shall:

(a) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less developed contracting parties and to devise measures designed to stabilise and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

(b) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;

(c) collaborate in analysing the development plans and policies of individual less developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organisations, and in particular with organisations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;

(d) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;
(e) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonisation and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; and
(f) establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part.

1 General

The introduction of Part IV, Trade and Developments and its Articles XXXVI to XXXVIII, in GATT 1947 in the year 1965 was essentially a reaction to the establishment of UNCTAD in the year 1964 as the chief spokesperson of the less developing countries wherein all the aspects of international economic relations including GATT was subjected to intense debate and criticism. The UNCTAD was conceived to promote international trade especially to accelerate the economic development, particularly of the developing countries keeping in view the functions performed by existing international economic institutions including GATT. The developed countries took the first opportunity of subverting the UNCTAD by proposing the amendments as Part IV to GATT which is designed to go beyond the traditional field of GATT. Some provisions in Part IV are replete with the objectives of UNCTAD, and some are mere exhilarations devoid of legal obligations. However, from the point of view of drafters, 'This part showed clearly that the promotion of the trade of less developed countries and the provision of increased access for their products in world markets were among the primary objectives of the Contracting Parties'. These objectives have been set forth in Article XXXVI, whereas Article XXXVII conceives of commitments in the field of commercial policy which contracting parties are committed to promote.[1] Consequently, Article XXXVIII provided for joint action by the contracting parties, both within the framework of the GATT, and in collaboration with other intergovernmental bodies, for furthering the objectives of GATT.[2]

[1] Avtar Krishen Koul, The Legal Framework of UNCTAD in World Trade 44 (A.W. Sijthoff, 1977).

[2] 25S/SR.5, The Protocol amending the GATT to introduce a Part IV on Trade and Development, was done on 09 February 1965, entered into force on 27 June 1967.

It was felt that although developing countries have largely been benefited by the increase in world trade but the benefits have been uneven. The Uruguay Round had provided a significant opportunity for developing countries to increase their share in trade, because of the integration of sectors previously outside the GATT system (such as agriculture and textiles) into WTO rules, and because the Round had dealt with internal policies (and not just border measures) that restricted trade. Also, in future, the developing countries would have to make greater commitments in the WTO as the developing countries account for 25% of world trade. Part IV was litigated in GATT but in almost all cases it was held that it did not establish specific and precise legal obligations.[3]

2 Committee on Trade and Development

The Committee on Trade and Development was established in 1965 with the mandate; (a) to keep under continuous review the application of the provisions of the Part IV of the GATT; (b) to carry out, or arrange for, any consultation which may be required in the application of the provisions of Part IV; (c) to formulate proposals for furthering the objectives of Part IV; (d) to decide question of the eligibility whether a contracting party can be considered less developed; (e) to formulate proposals for furthering the objectives of Part IV; and (f) to carry out such additional functions as may be assigned to the Committee by the Contracting Parties.[4] The Committee on Trade and Development since 1965 has been carrying on with various activities which have been fruitful to strengthen the GATT.[5]

The WTO General Council established the Committee on Trade and Development superseding the GATT Committee on Trade and Development, 1965 and provided new terms of reference for the WTO Committee on Trade and Development which are as under:

1. 'To serve as a focal point for consideration and co-ordination of work on development in the WTO and its relationship to development-related activities in other multilateral agencies'.
2. 'To keep under continuous review the participation of developing country Members in the multilateral trading system and to consider measures and

[3]Working Party Report on 'United Kingdom Temporary Import Charges' (1964-66), L/2395, paras. 16 and 17; Working Party Report on 'the Trade Arrangement between India, the United Arab Republic and Yugoslavia' (1968), L/4635 Adopted on 30 July 1973, 20S/230, 235, para. 1, Panel Report on 'Norway–Restrictions on Imports of Certain Textile Products' (1980), L/4959, Adopted on 18 June 1980, 27S/119, 125–126, para. 15, and Panel Report on 'United States—Imports of Sugar From Nicaragua' (1984), L/5607, Adopted on 13 March 1984, 31S/67, 74, para. 4.6.

[4]13S/75-76

[5]For a survey of the various activities of the Committee on Trade and Development, see regular Committee reports published in BISD Series.

initiatives to assist developing country Members, and in particular the least developed country Members, the expansion of their trade and investment opportunities, including support for their measures of trade liberalisation'.

3. 'To review periodically, in consultation with the relevant bodies of the WTO, the application of special provisions in the Multilateral Trade Agreement and related Ministerial Decisions in favour of developing country Members, and in particular least developed country Members, and report to the General Council for appropriate action'.
4. 'To consider any question which may arise with regard to either the application or use of special provision in the Multilateral Trade Agreement and related Ministerial Decisions in favour of developing country Members and report to the General Council for appropriate action'.
5. 'To provide guidelines for, and to review periodically, the technical co-operation activities of the WTO as they relate to the developing country Members'.
6. 'The Committee will establish a programme of work which may be reviewed as necessary each year'.

Special and Differential Treatment (S&D) for less developing and least developed countries has been affirmed in Doha Declaration as… 'an integral part of the WTO Agreements… taking into account specific constraints faced by these countries… which shall be reviewed with a view to strengthening them, making them more precise, effective and operational'.[6] After Doha, the S&D negotiations were carried forward in Hong Kong Ministerial Declaration (2005) which adopted the five LDCs agreement-specific proposals. The five proposals are: understanding in respect of waivers of obligations under GATT 1994, Decision on measures in favour of least developed countries, Agreement on Trade-Related Investment Measures, etc. These and other proposals are on the negotiating table of WTO.

[6]WTO, WT/MIN(01)/DEC/1, Doha Ministerial Declaration, adopted 14 November 2001.

Chapter 24
WTO Agreement on Agriculture

1 The Background

Agriculture remains one of the most highly protected areas of international trade as the trade in agricultural goods was governed by exceptions to the General Agreement on Tariffs and Trade, 1947. It was barely touched by successive rounds of tariff negotiations in the GATT. The reasons are not hard to find. On the one hand, the GATT was highly successful in reducing tariffs and barriers to international trade in industrial goods, the lack of political will on the part of the developed countries as well as to protect their domestic agriculture from international competition especially in North America and Europe, did not allow GATT to interfere in the international agriculture market; and on the other hand, the two special rules of GATT 1947 dealing with agriculture trade, namely Article XI: 2(c)(i) on quotas and Article XVI: 3 on export subsidies which could have freed agriculture from tariff and non-tariff barriers, were not allowed to be pressed in action by the interested developed countries.

The developed countries' governments sought and found different ways to justify high barriers against agricultural imports. Article XI: 2(c)(i) was originally supposed to provide legal shelter for the quantitative restrictions maintained in agriculture by the USA, however, when they turned out to be inconsistent with that provision, the USA asked for a waiver in 1955, on the ground that USA could not participate in GATT if her farm sector is exposed to GATT rules. The European countries after the establishment of EC Common Agricultural Policy withdrew all tariff bindings on agricultural products and raised tariffs on agricultural products at whatever levels it wished. The European Community (EC) adopted a regime of variable tariffs which was a more effective device than that of quotas. In the areas of domestic subsidies, although the GATT rules do not restrict the use of such subsidies and left the contracting parties enough of latitude in using domestic subsidies, particularly on those products where tariffs were not bound, the peripheral rules that did exist did not seem to be enforced strictly against those agricultural subsidies that were GATT-illegal.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_24

The economic case for not applying GATT 1947 discipline to agricultural sector was essentially in the nature of farm sector which is susceptible to vagaries of nature and the demand of food consumers to have a steady supply of quality food at stable prices. It is a known fact that agricultural sector is highly politicised for both farmers and consumers. Few governments can summon the political will and courage to play active role in the farm sector. For example, the total measure of government support to agriculture for all Organisations for Economic Cooperation and Development (OECD) countries producer support estimates or PSE increased from US$247 billion during the period 1986–1988 to US$400 billion in 1999.

Agricultural subsidies and import quota cost European Union taxpayers and consumers close to US$100 billion during 1986–1988, figure that increased to US $130 billion by 1998. For the USA, the increased costs climbed from US$42 billion during 1986–1988 to US$48 billion in 1998.

Agricultural policies in OECD countries

	PSE 1986–1988 (billions)	PSE: 1999 (billions) 1986–1988	As % of total farm income	As % of total farm income 1999
Canada	US$5.6	US$3.9	34	20
EU	US$95	US$114	44	49
Japan	US$53.6	US$58.9	67	65
USA	US$41.8	US$54	25	24

The above table[1] illustrates that with the single exception of Canada, the Quad Members of the World Trade Organization (Canada, the EU, Japan, and the USA) have made little headway in disciplining their use of farm subsidies. On the other hand, Australia and New Zealand had phased out all farm subsidies by 1992.[2]

Further, a Joint World Bank/OECD study estimated that if developed countries terminated domestic and export farm subsidies, food prices would rise resulting in a shift of food production to lower-wage developing countries. OECD countries would experience a net annual economic gain of US$50 billion (approximately) and developing countries US$12 billion.[3]

For 1999, producer support estimate (PSE) for all OECD countries was estimated to be US$283 billion or 40% of the total value of gross farm receipts. As a result of increases during 1998 and 1999, support to producers in 1999 returned to their 1986–1988 level. Government regulation in Canada of food products such as chickens, eggs, and dairy products, make their cost twice as much for the same products in the USA. The USA in 1989 paid US$2.5 billion in commodity bonus

[1]Source: OECD, Agricultural Policies in OECD Countries, 162–63, (2000).

[2]Ibid.

[3]UNCTAD, Agricultural Trade Liberalisation in the Uruguay Round: Implications for Developing Countries (2000).

under the Export Enhancement Programme (EEP) to agriculturists boosting the export sales of US$8.5 billion in agricultural products to 65 countries.[4]

Against this backdrop, agricultural trade was the most contentious issue in the entire Uruguay Round of tariff negotiations. As the Uruguay Round progressed, the issue of agricultural trade and government subsidies to the agricultural sector came dangerously close to wrecking the Round. By the end of the Uruguay Round and with the concluding of Marrakesh Treaty, 1994, easiest issues of agriculture were resolved and the difficult issues still remain unsolved. Further, negotiations on the outstanding issues were to resume in 1999, irrespective of whether a new Millennium Round of broad based WTO negotiations was agreed upon by the members of WTO (Article 20 of the Agreement on Agriculture).

In November 1999, the WTO Ministers met in Seattle and in 2003 met in Cancun but failed to agree on an agenda for a general round of trade talks. However, the agricultural negotiations have commenced and are on track. There are some extremely complex questions such as regulations pertaining to trade in genetically modified organism which has also crept in after the conclusion of Uruguay Round.

2 WTO Agreement on Agriculture: An Analysis

A. Three Pillars of the WTO Agreement on Agriculture

The Agreement on Agriculture as already said is a modest first step towards serious reform of international rules governing trade in agricultural products. The Agreement is built on three pillars:

(i) increased market access for agricultural products;
(ii) commitments to reduce domestic subsidies on agricultural production; and
(iii) commitments to reduce export subsidies on agricultural products.

The Preamble to the Agreement conceives long-term objectives of the WTO members to establish a fair and market-oriented agricultural trading system that includes substantial reductions in agricultural support and protection. Further, in implementing these commitments on market access, developed countries would take fully into account the particular needs and conditions of developing country members by providing for them greater opportunities and terms of access for their agricultural products in the markets of the developed country members of WTO.

There is a further commitment of fullest liberalisation of trade in tropical agricultural products. These commitments as a reform programme are to be made in an equitable way among all WTO members taking into account non-trade concerns, including food security and the need to protect the environment; having regard to

[4]US DA, GAO Tell Senate Panel, EEP Programme Should Continue as Effective Trade Tool, 7 Int'l Trade Rep. (BNA) (1990), p. 291.

the agreement that special and differential treatment for developing countries is an integral element of these negotiations and also to take into account the possible negative effects on the implementation of programme on the least developed and net food-importing developing countries. The objectives of the Uruguay Round negotiations are set out in the agricultural sector in the Ministerial Declaration on the Uruguay Round[5] and the long-term objectives of the reform process has been set in Mid-Term Review of the Uruguay Round.[6] The Agreement on Agriculture consists of twenty-one Articles with five Annexes.

B. Market Access

For the last fifty years, the agricultural sector in international trade has been subjected to innumerable non-tariff barriers which have taken various shapes and forms such as quotas, variable import levies and voluntary import and export restraints. To remedy this situation, the Agreement on Agriculture requires:

1. a guaranteed minimum access level for all agricultural products;
2. the 'tariffication' of non-tariff barriers into tariff equivalents; and
3. the use of tariff rate quotas to ensure that the market access commitments are honoured.[7]

WTO members in the Agreement on Agriculture have agreed to minimum access opportunities for products which are not significant imports of specific member countries. Access was based on three per cent of domestic consumption in 1995 and increasing it to 5% by 2000. If import volume is greater than these thresholds, current market access levels are to be maintained. The minimum access commitments are designed to allow a modest level of trade in agricultural products to occur, where previously non-tariff barriers effectively blocked such trade, and/or where the new tariff equivalents are so high that they would continue to block all such access.

(i) *Tariffcation Process*

The tariffication process although is an important step for liberalisation of agricultural trade in future WTO negotiations, yet it is far from a satisfactory solution. Guidelines for the calculation of tariff equivalents are contained in Annex 5 of the Agreement.[8] The tariff equivalent is generally the difference between the internal and external price for the product, expressed as an *ad valorem* or specific duty rate. The external price is the average f.o.b. unit value price set by major exporters of the product, adjusted by adding insurance and freight costs.[9]

[5]BISD 33S/19, Part I, Section D.
[6]MTN. TNC/11, pp. 6–7.
[7]Article 4.
[8]See Annex 5.
[9]Attachment to Annex 5 (2).

The internal price is the prevailing wholesale price in the domestic market.[10] Article 4 of the Agreement on Agriculture prohibits members from maintaining, resorting to or reverting to non-tariff measures, old or new in order to eliminate the adverse effect that non-tariff barriers have had on agricultural trade. The process of tariffication requires members of the WTO to convert existing non-tariff measures into ordinary customs duties and to find them. Non-tariff measures identified in the Agreement include minimum import prices, quantitative import restrictions, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties regardless of whether those measures were grandfathered under GATT 1947, maintained under GATT 1994 waivers, or listed in a country's Protocol of Accession to GATT 1994.[11]

In the tariffication of the WTO Agreement on Agriculture tariff rate quota replaces non-tariff barriers with tariff rate quota. Under a tariff rate quota, one tariff rate applies to imported products up to a stated amount. The higher tariff rate applies to imported products in excess of that amount.

Thirty-seven WTO members have tariff rate quotas listed in their schedules with a total of 1,371 individual tariff quota commitments.[12] The average quota fill rate for the period 1995–1999 has been approximately 63%, that is, about one-third of all quotas are not fixed in any given year. In addition, a significant number of quotas are reserved for specific countries and a great deal of flexibility exists with respect to the administration of those quotas that are open to all exporters. The fact of the matter is that world exports of agricultural products are concentrated in a handful of WTO members. A WTO member will assess duties on agriculture imports that are in excess of the minimum or current access level commitments for the imported product. For example, assume that during 1996–1998 a WTO member limited imports of butter to 10,000 tons, (subject to a tariff of 4% *ad valorem*) with the result that the WTO member's domestic market price for butter was 75% above the world market price. Under tariffication, that WTO member might establish a tariff rate quota for butter with an in-quota quantity of 10,000 tons and in-quota tariff rate of 4% *ad-valorem* and apply an over-quota tariff of 75% *ad-valorem.*

(ii) ***Tariff reduction***

Under the WTO Agreement on Agriculture, the developed countries were required to reduce agricultural tariffs by an average of thirty-six per cent on a simple average basis over a six-year period ending in 2000. In the case of developing countries, the average reduction was to be 24% over a ten year period ending in 2004. The lower in-quota duty rates generally will not be reduced. All customs duty rates are to be bound, with developing countries establishing ceiling bindings where no bindings

[10]Attachment to Annex 5(4).

[11]Article 4.2.

[12]WTO, Committee on Agriculture, Tariff and Other Quotas, Background Paper by the Secretariat, G/AG/NG/5/7 (23 May 2000), p. 2.

existed before the Uruguay Round. Least developed countries commit to tariff bindings on agricultural products, but are not required to make any further commitments to reduce tariffs.

In addition to the average tariff reductions, a minimum 15% tariff reduction must be made for each tariff line (ten per cent in the case of developing countries). In order to meet the overall thirty-six per cent tariff reduction commitments, members of WTO have reduced duties on import-sensitive agricultural products by fifteen per cent minimum and made greater reduction on products that are either less import-sensitive or in which there is little trade.[13]

C. Commitments on Domestic Subsidies

Article 7 of the Agreement on Agriculture read with Annex 2 to the Agreement comes to grips on the trade-distorting aspects of domestic subsidies in the agricultural sector. The Agreement categorises domestic subsidies by placing them in three boxes: an exempt green box (permissible and non-countervailable); an excluded blue box (permissible, countervailing if they cause injury, but not subject to reduction commitments); or an amber box (permissible but countervailing if they cause injury, and subject to reduction commitments). There is no prohibited or red-box category for domestic subsidies. Article 3.2 of the Agreement imposes a standstill on the use of domestic subsidies; subject to the provisions of Article 6, a member shall not provide support in favour of domestic producers in excess of commitment levels specified in Section I of Part IV of the Schedule. Further having frozen the use of domestic subsidies, members agree in Article 6 of the Agreement to reduce their domestic subsidies in accordance with Part IV of the member's Schedule submitted at the conclusion of the Uruguay Round. For developed countries, that commitment is a reduction of the remaining non-exempt domestic subsidies by twenty per cent from levels existing during 1986–88 base period in six equal annual instalments. Developing countries are required to make reductions of 13.3% over ten years.[14] Least developed countries are not obliged to make any reduction, but must bind their levels of support.[15] Once all exempt duties have been accounted for and excluded, WTO members calculate their non-exempt domestic subsidies using a methodology called the Aggregate Measurement of support or 'AMS'. Exempt subsidies and the AMS are discussed below. Once the reductions get implemented, members thereafter agree to bind their reductions in a Final Bound Commitment Level.

[13]Brosch, K.J. 'The Uruguay Round Agreement on Agriculture' in Harvey M. Applebaum and Lyn M. Schlitt (eds). The GATT, the WTO and the Uruguay Round Agreement: Understanding the Fundamental Changes 865 (1995).

[14]Article 15.2.

[15]Ibid.

D. Exempt 'Green Box' Subsidies

The Green Box subsidies are such subsidies which have a minimum trade-distorting effect and as such are exempt from GATT/WTO disciplines.[16] Annex 2 of the Agreement on Agriculture provides that in order to qualify as an exempt or green box domestic subsidy two threshold requirements are to be met:

1. The subsidy in question must be provided through a publicly funded government programme that does not involve transfers from consumers; and
2. The subsidy must not have the effect of providing support to producers.[17] Annex 2 lists twelve types of exempt subsidies, including the following:

   – Generalised government service programmes in areas of research, pest and disease control, and training;
   – Domestic stockpiling for food security and domestic aid purposes;
   – Direct payment to producers in the form of decoupled income support (support that is not tied to production);
   – Governments financial participation in income safety net and crop disaster insurance;
   – Structural adjustment assistance provided through producer retirement programmes;
   – Structural adjustment assistance provided through resource retirement programmes;
   – Structural assistance provided through investment aids; and
   – Payments under environment and regional assistance programmes.[18]

E. Excluded 'Blue Box' Subsidies

Article 6 of the Agreement on Agriculture, in addition to the green box subsidies exempted under Annex, 2 listed above excludes from the Aggregate Measurement of Support (AMS) calculation three other categories of domestic subsidies that have been described as 'blue box subsidies';

1. Certain developing country subsidies designed to encourage agricultural production;
2. Certain *de minimis* subsidies, and
3. Certain direct payments aimed at limiting agricultural production.

Article 6.2 of the Agreement excludes three types of government assistance, whether direct or indirect, from the AMS calculations:

– Investment subsidies which are generally available to low income or resource-poor producers in developing member country;
– Investment subsidies which are generally available to agriculture;

[16]Article 6.1.

[17]Article 2.1.

[18]Annex 2.2–2.13.

– Subsidies to agricultural producers to encourage diversification from growing illicit narcotic drugs.

In keeping with the *de-minmis* subsidies, Article 6.4 excludes from the AMS calculation;

1. Product-specific domestic subsidies where the subsidy does not exceed 5% of that member's total value of production of a basic agricultural product during the relevant year; and
2. Non-product-specific domestic subsidies where such subsidies do not exceed 5% of the value of that member's total agricultural production. The applicable percentage for developing countries is 10%.

The third type of 'blue box' subsidy is the direct payments made under production-limiting programmes and are excluded provided;

1. They are based on fixed area and yields;
2. They are made on 85% or less of the base level of production; or
3. They are livestock payments made on a fixed number of head [Article 6: 5(a) of the Agreement].

A WTO member may confer both green box and blue box subsidies on its farmers; however, the important distinction between excluded subsidies and exempt green box subsidies is that blue box subsidies are actionable under an importing member's countervailing law, whereas green box subsidies are not.

3 The Aggregate Measurement of Support (AMS) Calculation

Under the Agreement on Agriculture, all non-exempt, non-excluded domestic subsidies are calculated and reduced to a single figure, the Aggregate Measurement of Support (AMS).

Article 1(a) of the Agreement defines the AMS as follows:

> The annual level of support expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product, or non-product-specific support provided in favour of agricultural producers in general, other than the support provided under programmes that qualify as exempt from reduction under Annex 2 of this Agreement, which is:
>
> (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a member's Schedule; and
> (ii) with respect to support provided during any year of the implementation period and thereafter, calculated with the provisions of Annex 3 of this Agreement, taking into account the constituent data and methodology used in the tables of supporting materials incorporated by reference in Part IV of the member's Schedule.

The 'basic agricultural product' in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a member's Schedule and in the related supporting material.[19]

AMS subsidies include both budgetary outlays and revenue foregone by governments.[20] Fees paid by producers are deducted from the AMS. A specific AMS expressed in monetary terms is established for each basic agricultural product. Once the AMS has been calculated, subsidy reductions of 20% for developed countries over the six years from 1995 and 13.3% for developing countries were implemented over 10 years. Least developed countries were not required to make any reduction.

Although AMS is calculated on a product by product basis, the commitments for reductions apply to the aggregate amount. This allows countries flexibility to shift support from one product to another, though they are required to keep within outer ceiling limits.

4 Export Subsidies in the Agreement on Agriculture

Article 3.3 of the Agreement provides that a member:

> Shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified herein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

The Agreement on Agriculture, therefore, tightens its hold on export subsidies by prohibiting export subsidies in two instances:

1. Products that never received export subsidies in the 1986–90 base period may not receive them in the future; and
2. Export subsidies not listed in Article 9.1 are not permitted.

Article 9(1) lists the following export subsidies subject to reduction commitments:

(a) the provision by governments or their agencies of direct subsidies, including payments-in-kind to a firm, to an industry, to producers of an agricultural product, to a co-operative or other association of such producers, or to a marketing board, contingent on export performance;
(b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;

[19]Article 1.

[20]Article 1(e).

(c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;
(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export production and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;
(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
(f) subsidies on agricultural products contingent on their incorporation in exported product.

By the end of the implementation period, a member must be in full compliance with its budgetary and quantity reduction commitments.

5 Prevention of Circumvention of Export Subsidy Commitments

Article 10 of the Agreement on Agriculture prevents circumvention of the export subsidy reduction commitments in four ways. One, members agree not to circumvent the export subsidy reduction commitments through food aid except in conformity with Article 10(1); two, members agree to work towards the development of internationally agreed disciplines on export credits, export credit guarantees, and export insurance programmes.[21] Third, any member who claims that any quantity exported in excess of a reduction commitment level is not subsidised must establish that no export subsidy, whether listed in Article 9 or not has been granted in respect of quantity of exports in question. Fourth, export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments, nor shall non-commercial transactions be used to circumvent such commitments.

6 Disciplines on Export Prohibitions and Restrictions

Where any WTO member institutes any new export prohibition or restrictions on foodstuffs in accordance with paragraph (2) of Article XI of GATT it is incumbent on the member to observe the following provisions:

[21] Article 10.2.

(a) the member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing member's food security;
(b) the member has to give notice in writing before instituting an export prohibition or restriction in advance to the Committee on Agriculture[22] communicating the nature, and duration of such a measure, and shall upon request consult other member/members and provide information to the member's who have a substantial interest as importer with respect of any matter related to the measure in question.

The above provision does not apply to a developing country member, unless the measure in question in taken by a developing country member which is a net food-exporter of the specific food stuff concerned.[23]

7 Peace Clause-Hold Back Subsidies

Article 13 catalogues the exemptions during the nine-year implementation period ending 2006. During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures:

(a) domestic support measures that conform fully to the provisions of Annex 2 to the Agreement on Agriculture shall be:

    (i) non-actionable subsidies for purposes of countervailing duties;
    (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and
    (iii) exempt from actions based on non-violation or impairment of the benefits of tariff concessions accruing to another member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994.

(b) Legal action against domestic and export subsidies under:

    (i) Member's countervailing duty law;
    (ii) the Agreement on Subsidies and Countervailing Measures; or
    (iii) Article XXIII of GATT on the basis of 'adverse effects', 'serious prejudice' or 'non-violation nullification and impairment, may be brought only under the following circumstances:

First, all green box domestic subsidies are exempt under all three types of legal action. Second, all non-exempt domestic subsidies that do not grant support to a specific product in excess of the amount received during the 1992 marketing year

[22]As established under the Agreement.
[23]Article 12(2).

are exempt from action under (ii) and (iii). However, they are not exempt under (i) if they cause injury to a domestic industry producing a like product, in which case, they may be subject to an importing member's countervailing duty law. Third, all non-exempt domestic subsidies exceeding reduction commitments are subject to action under (i), (ii) and (iii). Fourth, export subsidies that conform to the Agreement's reduction commitments are exempt from action under (ii) and from 'adverse effects' and 'serious prejudice' actions under (iii) but are subject to a GATT 'non-violation' and nullification 'impairment' action. If they cause injury to a domestic industry producing a like product, they also are subject to an importing member's countervailing duty law, but 'due restraint has to be shown in initiating any countervailing measures'. Fifth, all export subsidies exceeding reduction commitments are subject to action under all three types of legal action.

8 Doha Development Agenda (DDA) and Agriculture

Since October 2005, the WTO Members have been reviewing the development aspects of the Doha Round of negotiations. As agricultural plays an important role in the development of many WTO Members especially developing countries and LDCs and even if the share of agriculture exports in total world merchandise was 6% in 2008, the developing countries share of this trade is more than half and the agriculture exports originating from developing countries has been increasing over time since 2002. It is fairly well understood that the world agricultural producers are facing high tariff barriers and competitions from producers that receive high levels of domestic and export-related support, reduction of such trade barriers and removal of protectionism would culminate in important gains for developing country agricultural producers. The three pillars of agricultural negotiations—market access, domestic support and export competition need to be revised in terms of Doha Development Agenda. Market access in the agricultural negotiations is highly complex as some Members of the WTO see a link between market access and flexibilities, in particular, that an increase in flexibilities (defensive interests) lead to a curtailing of market access (offensive interest). Market access has the maximum potential of delivering real economic benefit to Members as tariff barriers are reduced, an access through tariff rate quotas is expended, the Members of WTO shall be benefited as it would lead to expanding export volumes and revenues. Some Members of the WTO stress the need for liberalisation of trade in tropical products as one of the key elements of the development dimension of the Doha Round. Many developing countries are concerned about the likely impact of tariff reduction on rural livelihood and consequently on their food security concerns in particular if domestics support levels remain high in some countries. Therefore, the vulnerable less developing countries argue for flexibility on reduction on tariff especially for Special Products and through Special Safeguards Mechanisms (SSM), which would provide the ability to increase tariff when there is a decline in import price or an increase in import volumes. Preference-receiving developing

countries and LCDs are also concerned that tariff reductions by preference-granting countries will result in significant preference erosion, especially since preferential access arrangements play a vital role in terms of their ability to export and earn foreign exchange, thereby contributing to the development of their economies. In respect of domestic support, the developing countries argue that the domestic support policies distort the agricultural trading environment and contribute to the lower world prices, including the decline of commodity prices which has a negative impact on producers not receiving subsidies. If developing countries further reduce the tariffs, while other countries continue to maintain significant level of expanding on Amber and Blue Box subsidies would mean increase in competitions for their domestic producers from subsidised producers in other countries. In respect of export competitions many of the developing countries believe that the export subsidies of all kinds are the most egregious form of trade-distorting support and for non-subsidising countries, the export subsidies provide a highly artificial competition which needs to be eliminated including export credits, non-genuine food aid and trade-distorting practices of exporting state trading enterprises. By 2010, the secretariat of the WTO had identified areas of progress and the gaps.[24]

Specific issues of interest to developing countries in terms of Doha Development Goals can be catalogues as under:

(a) Market access

- Improved market access to developed countries;
- Improved market access to other developing countries (south-south trade) but with less than full reciprocity in the negotiations, which includes undertaking lesser tariff reductions and/or tariff quota expansion commitments relative to those to be undertaken by developed countries;
- Fullest liberalisation of trade in tropical agricultural products and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;
- Addressing problems relating to tariff erosion;
- Addressing the issues of tariff escalation and the issue of tariff simplification;
- Improving the administration of tariff rate quotes;
- Lifetime of the existing special agricultural safeguard (SSG); and
- Appropriate S&D treatment for developing countries, including the flexibility to designate an appropriate number of products as Special Products guided by indicators based on the criteria of food security, livelihood security and rural development needs, and the establishment of a Special Safeguard Mechanism.

[24]WTO, WT/COMTD/W143/Rev. 5, 2010.

(b) Domestic support

- Substantial reductions in trade-distorting support in developed countries, in particular for cotton;
- Enhanced Blue Box criteria to ensure that this category of support is less distorting than Amber Box support;
- Review and clarification of the Green Box criteria to ensure that such measures have no, or at most minimal, trade-distorting effects on production while ensuring that programmes of developing countries that meet this fundamental requirement are effectively covered;
- Product-specific limits on the Amber Box and Blue Box to help prevent the accumulation of support on a few products; and
- Appropriate S&D, including lesser reductions in trade-distorting support and the flexibility to provide certain types of investment and input subsidies.

(c) Export competition

- Elimination of all forms of subsidies;
- Developing appropriate rules in respect of short-term export credits, export credit insurance or guarantee programmes (export credits, etc. with repayment terms of more than 180 days are to be eliminated), exporting STEs, with special consideration for the monopoly status for STEs in developing countries and on food aid, whilst ensuring that these disciplines have appropriate provisions for differential treatment of least—developed and net food-importing developing countries; and
- Appropriate S&D, including longer time frames to eliminate all forms of their export subsidies (to those developing countries that have reduction commitments in this area), extension of the provisions contained in Article 9.4 which provides an exemption from reduction commitments for certain types of export marketing and transport coasts.

Special and Differential treatment (S&D) for less developing countries means duty-free and quota-free market access for at least 97% of products originating from LDCs. Given the importance of cotton for a number of developing countries and LDCs, the Doha Development Agenda puts emphasis on cotton and even Hong Kong ministerial conference had agreed that developed countries would give duty-free and quota-free access for cotton exports from LDCs. The Sub-Committee on cotton is actively pursuing this matter. Other issues of concern to various developing and LDCs include monitoring and surveillance mechanisms to ensure the implementation of Members Commitment on lower prices of commodity, removal of tariff escalation, the elimination of tariff duties for commodity products under GSP, the elimination of non-tariff barriers and the particular problems being faced by small and vulnerable economies.

The Doha Development Agenda envisages that substitutable reductions and trade-distorting domestic support and the elimination of all forms of export subsidies would make old prices more realistic.

The Doha Round and its nearly decade-long negotiation stalemate is attributable to the diametrically opposed perception of the Round between developed and developing countries. The developed countries especially USA and those of the EU, tend to consider the advancement of Doha Round to be liability than a goal. Ascribing to the Doha crises its uncommon developmental label for a trade round, developed countries realised that with a narrow agenda centred to give market access to poor countries, little incentive was offered to leading trading nations to compromise. The developing countries on the other hand condemn this approach and view the Doha Round as eventually reducing or eliminating the old unfair protection by the developed countries which could not be solved in the Uruguay Round.

It cannot be denied that the current global economic crisis will force the international community to conclude the Doha Round successfully. Ironically, the widespread protectionist reactions from both developed and developing countries alike have heightened the vital importance of a well operating multilateral trading system. It is imperative for developing countries to rethink about their understanding of the Doha Round which under no circumstances would be panacea for their low economic performance. The developing countries especially the low-income developing countries should (a) realise that without taking active developmental initiatives, no substantial benefit would accrue to them; (b) conventional development mantras such as S&D treatment at the WTO counter would not benefit them much; and (c) the developing countries should open their trade more aggressively to reap the benefits of open trade which will compel the developed countries to open up their markets.

The Doha failure would inflict serious blow to WTO and multilateral trading system and developing countries in particular. The Doha failure is a WTO failure in that 'commitment to free trade is weakening' and protectionist sentiments are already beginning to arise. In fact, EU and USA are competing with each other in increasing the farm subsidies. EU for example has recently decided to pour lavish export refunds (subsidies) on its dairy farmers, despite the fact that such subsidies are clearly against the current Doha agricultural draft.

9 Non-agriculture Market Access (NAMA)

In terms of non-agricultural market access (NAMA), parameters of the DDA, projects that NAMA negotiations offer the promise of improved and secure market access conditions through new tariff reductions and binding for a large share of developing countries exports in both developed and developing markets. It means that the reduction and eliminations of tariff peaks, high tariff and tariff escalations that remained in developed countries from the Uruguay Round on products originating in developing countries would open up valuable new market access opportunities. (In 2008 a less than half of developing countries exports of non-agricultural products went to developed countries market). In terms of

South-South trade, the importance of developing countries as market for the exports of other developing countries has been demonstrated by the 8% increase from 2000 to 2008 from 37 to 40% of total South-South trade. The preferential duty-free, quota-free access for LDCs is key to their development goals. Developing countries in NAMA have often called for flexibilities and some matters allow them lower tariff cuts or exemption thereof or reduction commitment in order to take account of S&D and the principal of less than full reciprocity in reduction commitments.

The developing countries are arguing for 'Policy Space' to preserve their flexibility in setting their import tariff in a manner that allows them pursue their developments goals including industrialisation and diversification of their economies. The other argument put forth by some developing countries is for protection of infant industries by tariff as these countries lack public funds to provide subsidies. For the prevention of loss and tariff revenues some developing countries argued that if the bound duties are negotiated, the risk of revenue loss is less.

The NAMA negotiations and its modalities should not lead to further marginalisation and de-industrialisation of the less LDCs economies. The status of these negotiations appears to be ambitious but workable. The Swiss formula put before the WTO working conference in March 2010 has been more or less acknowledge to buffet the tensions from the trade-off between ambitions and flexibilities. However, the Swiss formula does not appear to be appealing to majority of the LDCs, for the reason that NAMA negotiations are far beyond the compass of Swiss formula. The chairman of the NAMA negotiation in his March 2010 report pointed out two main outstanding issues in the negotiation '(I-The level of ambitions) and (II-Certain countries specific flexibilities)' for developing countries applying the Swiss formula.

The general consequences of the developing countries for NAMA negotiation can be catalogued as under:

- Bring down tariff peaks, high tariffs and tariff escalation in developed country markets (improve access in developed country markets);
- Bring down tariff peaks, high tariff escalation in other developing country markets (improve South-South trade);
- Duty-free and quota-free access for LDCs while ensuring that LDCs are only required to increase their level of bindings and not to apply the formula or to participate in sectorals;
- Reduce or eliminate NTBs;
- Preserve 'policy space';
- Provide adequate protection for infant industries;
- Preserve unbound duties;
- Address non-reciprocal preferences; and
- Prevent tariff revenue losses.

The long-term gains from NAMA liberalisations have been estimated to reach from US$54.2 to US$276.8 billion.

Under the proposed draft NAMA modalities, developed countries would have to slash all their dutiable bound duties, which are at, or very close to, their MFN applied levels, which would result in significant reduction of more than 60% on average in the MFN applied duties.

10 WTO, Ninth Ministerial Conference and Bali Package

The ninth ministerial conference held in Bali in December 2013 was to identify small package of proposals on which there was a good chance of reaching agreement. This comprised three main components: trade facilitation, agriculture, and development issues, with the latter widely seen by many developing countries as necessary to balance the trade facilitation. The outcome of lengthy negotiation before Bali gave impetus to agreeing by the WTO members that the developing countries obligations in relation to trade-distorting domestic support to traditional staple through existing public stock holding programmes for food security purposes should not be challenged before the DSB.

In order to avoid quarrels intersea the member states the Bali package provides certain transparency obligations and safeguard measures to limit the negative effect that the stocks acquired could potentially have on the food security of other members and on global markets. These include, (i) the fact that peace clause only covers existing public stock holding programs as on the day of this agreement, (ii) that countries should ensure that stock procured under such programme does not adversely affect the food security of other members, although it is not clear how compliance will be monitored and enforced.

Of the other agriculture-related agreements, the text on the handling of persistently under-filled tariff rate quotas received most attention. The Agreement provides for monitoring of TRQ fill rates and adjustment of the administrative methods when fill rates remain low for three consecutive years. It will be applied for six years, until the 12th WTO Ministerial Conference and unless decided differently then, the mechanism will remain in place. It excludes developing countries from any obligation, primarily reflecting China's inability to abandon the state control of imports and exports at this stage. The USA, Guatemala, El Salvador, Dominican Republic and Barbados have reserved the right to stop implementing the mechanism after six years. On export competition, following heated debate in the pre-Bali period on the nature of Bali outcome (Political declaration or a legal commitment) and on its coverage (exports subsidies and credits or other measures with equivalent effect), members agreed to a political commitment not to increase export subsidies in agriculture and reaffirmed the final objective of eliminating all forms of export measures which may have the 'equivalent effect' of export subsidies, including export credits, state trading and food aid. In light of persistently high food prices, and therefore large food imports bills for many developing countries, the issue of equivalence needs to be carefully assessed to ensure that importing countries are not negatively affected by the disciplining of export credits or food aid.

Some key features of the development-related decisions include agreements (preferential rules of origin for least developed countries) on preferential rules of origin and on improving the level of duty-free, quota-free market access for least developed countries exports to developed countries and developing countries in a position to provide such access. These provisions could provide potentially significant opportunities for some LDC exporters. In addition, a monitoring mechanism on S&D treatment could promote more effective use of flexibilities available to developing countries on cotton, the C4 countries (Mali, Burkina Faso, Chad and Benin), to launch the cotton initiative in 2003, proposed the elimination of all cotton trade-distorting policies in developed countries by the end of 2014. The final compromise reached foresees biennial discussions on the trade aspects of cotton policies enhancing transparency and monitoring relating to the three pillars of the AOA in terms of the specific implications for cotton producers.

11 The Future

The Agreement on Agriculture is a first step in the ongoing process of reform in international trade in agriculture. The Preamble to the Agreement makes it clear that the WTO members' long-term objective is a substantial reduction in government support and protection of the agricultural sector and accordingly the members to the Agreement have agreed by orienting negotiations in future also.[25] Article 20 obligates the member nations of WTO to consider the following issues in further negotiation in this sector;

(a) the experience… from implementing the reduction commitments;
(b) the effects of the reduction commitments on world trade;
(c) non-trade concerns, special and differential treatment to developing countries and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the Preamble to the Agreement; and
(d) what further commitments are necessary to achieve the above mentioned long-term objectives.

The future negotiations for reducing the tariff and non-tariff barriers to agricultural sector in international trade appears to be bleak as demonstrated in the Cancun Summit of 2003 and Hong Kong meet of 2005 and Ninth Ministerial Conference held at Bali commonly known as Bali Package, 2013. The reasons are that the developed countries have taken different and varied postures in liberalising the agricultural sector. The European Union for that matter supports continuation of blue box subsidies as a useful tool to limit production and reform domestic agricultural policies under the CAP. The EU is primarily focusing on limiting export

[25]Article 20.

credits for sales of agricultural products, i.e., government guarantees for short- and medium-term loans to foreign purchasers of agricultural products, but wants to maintain blue box subsidies. It also wants to include in the negotiations the issue of animal welfare, in particular highly intensive production patterns for poultry and pigs, as part of ongoing agricultural negotiations.[26] The USA on the other hand would like to eliminate blue box subsidy category and instead would like to introduce two categories of domestic support; exempt and non-exempt. The USA proposes new rules to substantially reduce trade distortions but at the same time asks for exemption to support programmes that promote sustainable agriculture in a way that minimises trade distortions. The US proposals can be catalogued as; reduction of tariff levels among countries and ultimately to eliminate or substantially reduce tariffs; eliminate the special safeguard provisions of the Agreement to end the exclusive import and export rights of state trading enterprises; reduce to zero all export subsidies; put all domestic subsidies into two categories (exempt and non-exempt) and to give special and differential treatment to developing countries in the area of preferential market access, special exemption for domestic support measures and technical assistance.

For developing countries especially India, market access to international trade in agriculture through the reduction of tariffs cuts on products of export interest, is the major concern. Developing countries at Cancun criticised the green box category of exempt subsidies. The developing countries demonstrated that although developed countries committed to reducing domestic support by 24%, yet the overall support has increased multifold. For example, the EU increased green box subsidies from roughly US$10 billion in 1986–88 to US$25 billion in 1996. The USA also doubled the green box subsidies from US$24 to US$51 billion. Within the OECD member countries, the total level of support (i.e., green box, blue box, AMS and *de-minimis* support) increased from US$247 to US$274 billion. Many developing countries including India would like that green box subsidies should be eliminated as they provide opportunities of abuse for being non-transparent and lack rigorous definition. As the present structure of three subsidy boxes in the Agreement creates many loopholes, the developing countries have proposed that all domestic support subsidies should be closed into one category with a common level of support for all countries, e.g. 10% of production.

Developing countries especially India want the due restraint clause to continue in force in order to provide a predictable legal environment when they can export agricultural products. Further, the developing countries want to exclude certain sensitive products from the domestic support commitments. India has expressed

[26]See WTO, Committee on Agriculture, European Committee Proposals, Animal Welfare and Trade in Agriculture, G/AG/NG/W/19 (28 June 2000) and also [G/AG/NG/W/16 (23 June 2000).

concern over non-trade issues, connected to the reform of agricultural trade. These non-trade issues fall under the rubric of 'multifunctionality', a shorthand expression for agriculture's role in environmental protection, land use, food security, food safety and quality, rural development, and animal welfare. India wants negotiators to address issues of food security and the role that agriculture plays in rural development and employment.[27]

[27]See WTO, Committee on Agriculture, Fourth Special Session of the Committee on Agriculture, 15–17 Nov. 2000; Statements by India, 4/Ag/NG/W/70 (18 January 2001).

Chapter 25
WTO Agreement on Textiles and Clothing

1 Introduction

Textiles and clothing are the products which mostly are exported by developing countries, and they are important item of their exports, at the same time they constitute a substantial percentage of world trade. The development of textile and clothing industry is an indispensable stage of industrialisation for developing countries. The share of textiles and clothing in total manufacturing value added and employment in the developing countries are also substantial. This demonstrates that developing countries have a significant international comparative advantage in the textiles and clothing sectors and underlines the importance of this sector for their export interests.

The special framework of rules for international trade in textiles was evolved over a period of nearly a quarter of a century. In order to protect their textile and clothing industries from the increasing competition from developing countries, the developed countries in early 1960s succeeded in making the developing countries accept their argument that a special arrangement should be made for trade in textiles and clothing to give them 'breathing space' to adjust their industries. Nevertheless, since then this special arrangement had continually been renewed.

What began as Short-Term Cotton Arrangement developed into the Multifibre Arrangement (MFA) covering almost 50% of world exports in textiles and clothing. The restrictive and discriminatory nature of MFA contradicted the concept of comparative advantage, which is the philosophy of the multilateral trading system embodied in the GATT. To distort the international competition in textiles trade, MFA served only to slow down the development process and diversification of the economies of the developing countries. The continued existence of the MFA was one of the major influences eroding the credibility of the international trading system. Thanks to the efforts of the developing countries, 'textiles and clothing' was included as an item in the Uruguay Round of multilateral trade negotiations with a key objective to formulate modalities that would permit the eventual

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integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, contributing to the objectives of further liberalisation of international trade.

2 Background of the MFA and Its Implication

(a) Background of MFA

Since early 1960s, when developing countries began to develop comparative advantages in the textiles and clothing sector, developed countries sought a special arrangement for GATT contracting parties which would permit them to escape certain GATT obligations and to negotiate quantitative restraint arrangement on a discriminatory basis. By alleging that their markets would be disrupted, the developed countries obtained agreement to treat textiles and clothing as exceptions to the GATT rules, and to allow them to impose import restrictions on a selective basis. It began as the Short-Term Cotton Arrangement (1961), then the Long-Term Cotton Arrangement (LTA), (1962) and then eventually became the Multifibre Arrangement (1974). The comprehensive arrangement—The Arrangement Regarding International Trade in Textiles—which later came to be known as Multifibre Arrangement covered restraint on three fibre products—cotton, wool and man-made fibre as against LTA which covered only cotton products.

The MFA of 1973 (hereinafter called MFA I) which lasted for four years recognised the unsatisfactory situation in global commerce involving textiles at that time. The basic objectives MFA I were to expand trade, to reduce barriers, to liberalise world trade in textile products and to avoid disruptive effects in individual markets. The principle aim of this Arrangement was to promote the economic and social development of the developing countries and to secure a substantial increase in their export earnings from textile products. Under certain circumstances, safeguard measures were allowed as long as the rights and obligations of the Contracting Parties under GATT were not affected.

The concept of market disruption was introduced in MFA I with the purpose of reducing the degree of subjectivity. In practice, however, there was a growing tendency among importing countries to consider imports from developing countries as disruptive. The lack of an effective enforcing mechanism led to loose application of the market disruption concept and created more confusion than clarity. As a result, the importing country acting unilaterally had considerable discretion when imposing restrictions upon imports. The market disruption concept paved the way for institutionalised derogation of the fundamental principles and rules of the GATT, thus creating an imbalance of rights and obligation.

Any restraint was to be the result of consultations and could only be introduced for one year. The restraint level was not to be lower than the level of actual imports or exports of such products during the twelve-month period… preceding the month in which the request for consultation was made. Once these measures were renewed

or extended for another year, the restraint level would be that for the preceding twelve months, increased by not less than 6 months.

The main feature of the MFA I was to provide legal basis for VERs (Voluntary Export Restraints), bilateral agreements on mutually acceptable terms, which was grounded in the elimination of real risk of market disruption. As real risk was not specifically defined, its use was more flexible than the actual market disruption requirement of Article 3. This development was welcomed by importing countries. It is not surprising that, in practice, Article 4 actions were more often used than Article 3 actions. There was no formal notification required for such agreements. The participating countries were to only communicate to the Textile Surveillance Body (TSB) full details of their agreements. As the determination of market disruption caused considerable difficulties, the real risk thereof could never be determined by the TSB. Its effectiveness in supervising Article 4 safeguard measures was limited.

MFA II extended MFA I for four years until 31 July 1986, but it did not alter the text. A 'jointly agreed reasonable departure' clause was introduced, which allowed the participants to depart from particular elements in particular cases. This provision was neither specified nor limited to special provisions and allowed the conclusion of more restrictive agreements. In MFA III, this clause was eliminated.

MFA III extended the provisions of MFA II for a period of another four years, and it introduced a modified safeguards mechanism. Paragraph 10 of MFA III allowed importing countries to further restrict imports already covered by existing MFA quotas by taking what is called an 'anti-surge action' when difficulties arose from 'consistently underutilised larger restraint levels'. This meant that if the restraint level (quota) was larger than the actual import level, but the imports were increasing sharply and substantially and caused or threatened serious and palpable damage to domestic industry, an anti-surge action could be imposed bilaterally or unilaterally in the absence of a mutually acceptable arrangement. Such a provision threatened the interests of exporting countries and undermined Article 3.3 of MFA I.

MFA III was extended for a further period of five years until 31 July 1991. For the following three and half years, MFA IV was in force which finally expired on 31 December 1994. For the first time, the recognition of the GATT rules as the final objective was introduced. The serious and palpable damage provision in MFA II anti-surge provision was replaced by an even more ambiguous real difficulties provision, and constantly underutilised larger restraint levels was no longer a precondition. Whether this more open-ended provision represented less restrictiveness or more discretion depended on the bargaining power of the parties involved.

Under MFA II and III, the importing countries started to expand the coverage of restrictions on non-MFA fibres which was considered to be inconsistent with the MFA. This practice was legalised under MFA IV, and the products covered were extended to vegetables fibres, blends thereof and blends containing silk.

MFA did not achieve its aim of trade expansion, reduction of barriers and liberalisation of world trade in textile products. On the contrary, the MFA tended to

freeze market shares, imposed immense costs upon the consumers and authorised restrictions that have been used exclusively against imports from developing countries. The objectives expressed in the MFA could not be achieved with instruments that violated the basic GATT principles necessary for trade liberalisation. Originally, the MFA laid great emphasis on the rights and duties of both the importing and exporting countries, later it became a tool serving interests of only the importing countries.

(b) **Implications of the MFA**

The textiles and clothing sector is one area where developing countries have a comparative advantage. Textiles and clothing comprise one of the largest components of a developing country's exports of manufactures to the world. But as trade in this sector has been subjected to long-standing market constraints and discrimination by the developed countries, the sector in developing countries never had the opportunity to compete freely. With every extension of the MFA, the restrains were intensified and the country and the product coverage enlarged. The bilateral agreements concluded under the MFA became increasingly restrictive. The importing countries also tended to resort to additional restrictive measures despite quota restrictions already in operation under the existing arrangement. An increased usage of several new MFA measures tended to erode further the original trust which developing countries placed in the MFA. What started as a deal turned out to be a misdeal?

3 Results of the Uruguay Round Negotiations

There was no consensus among experts on whether the developing countries suffered a loss from the MFA or whether the damage caused by QRs was compensated for by the rent transfer. During the years of the MFA regime, world trade in textiles and clothing expanded by less than the average growth rate of world trade. It was obvious that the MFA was an expensive and ineffective tool to protect the textiles industry in the developing countries, and that this regime had to be abolished. Thus, the textiles issue became one of the top priorities in the Uruguay Round Negotiations.

The GATT Uruguay Round negotiations in the area of textiles and clothing aimed to secure the integration of the sector in the GATT on the basis of strengthened GATT rules and disciplines by phasing-out MFA. It was agreed that all existing Article 4 MFA actions (bilateral agreements) shall be notified to the Textiles Monitoring Body (TMB) and shall be governed by Agreement on Textiles and Clothing (ATC), otherwise such agreements would be terminated forthwith. Article 3, MFA actions (unilateral measures) shall not be in effect for more than twelve months. During the ten years following the entry into force of the WTO, 51% of textiles and clothing products will gradually, in three steps, be included into GATT 1994. In a fourth step, the remaining products—49 %—shall be integrated overnight. The Agreement will contribute to restoring the price mechanism as the

principal guide in consumption and production decisions. This will allow patterns of trade and investment to better reflect the comparative advantage of the countries and contribute to achieving economic efficiency.

4 Major Elements of the Agreement on Textiles and Clothing

The brief Preamble to the Agreement recalls the relevant objectives of the Uruguay Round.[1] It aims to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also contributing to the objective of further liberalisation of trade. Unlike other Agreements, the Textiles and Clothing Agreement has a specific and definite task, extending only over the transition period of 10 years.

A. Membership of the Agreement

Through the principle of the 'single undertaking', the provisions of the ATC are binding upon all WTO members. The principle, introduced by Uruguay Round, implies that all Agreements except Plurilateral Agreements are binding upon all members. This effectively brings to an end the code approach, introduced in the Tokyo Round, which implied that governments could choose the agreements to which they decided to become signatories. This meant that in addition to the MFA signatories, the Agreement is automatically applicable to former non-MFA signatories. The countries who did not participate in the MFA can opt for the gradual integration approach contained in the Agreement, provided they notify their actions under the integration programme to Textile Monitoring Body (TMB). Alternatively, they may decide to fully integrate the textiles and clothing regime into the multilateral trading system at once, which would be the most preferred decision from a trade liberalisation perspective. In doing so, the importing countries could treat the textiles and clothing products like any other goods under GATT/WTO rules.

Another consequence of the Agreement being part of the WTO's dispensation is that bilateral restrictions applied under MFA by members of the WTO to non-members who are signatories to the MFA will be discontinued. Members may, and are likely to, seek or continue to apply bilateral or other restrictions to major exporters of textiles and clothing that are not party to the Agreement in order to prevent a surge in imports which would disrupt markets.

B. Product Coverage

The precise product coverage of the Agreement is given in its Annex,[2] which runs to more than 30 pages listing each product defined by Harmonised Commodity

[1] See Preamble of the Agreement on Textiles and Clothing.

[2] See the Annex attached to the Agreement which covered items regulated by the Agreement.

Description and Coding System (HS) codes at six-digit level. This includes all textiles and clothing products that were subject to MFA or MFA-type restraints in at least one importing country when the Agreement was negotiated. The transition process is to proceed simultaneously on two tracks, first the removal of products from Agreement, so that they are covered by the normal GATT rules, and second, the enlargement of quotas for products that are still restricted. Both these processes are to take place in three successive stages lasting three, four and three years. The dates at which the main changes are to take place are stated in terms of months after the entry into force of WTO, but are, in fact 1 January of the years 1995, 1998, 2002 and 2005. Separate provisions cover each phase.

C. Integration of Textiles and Clothing[3]

The provisions setting out the integration process are mentioned in paragraphs 6–8 of Article 2 of the ATC. The MFA will be phased out in fourteen stages over a ten year period. Once a product is integrated, it automatically becomes subject to the GATT rules and loses recourse to any of the transitional provisions of the Agreement on Textiles and Clothing. In stage I at least 16% of the total import volumes in 1990 had to be integrated by 1 January 1995. At the beginning of the fourth year and eighth year, a further minimum 17 and 18%, volume, respectively, of the reference volume level will be integrated. On the first day of the eleventh year, i.e. 1 January 2005, all remaining restrictions must be removed potentially a maximum of 49% of the reference import volumes. Members are free to integrate more products on faster pace.

The gradual integration foreseen under the terms of the Agreement implies that until the end of the transition period, only 51% of total textiles and clothing trade will be integrated into GATT 1994. The remaining 49% will be integrated in one move at the very end of the lifespan of the Agreement. This is referred to as 'backloading', where much of the integration is deferred to a later stage. Policy-makers are likely to feel strong pressure from domestic industry to delay the integration of sensitive products to the end of the process, thus preventing foreign competition on domestic markets.

Japan, Switzerland and Sweden had already dismantled their MFA restrictions and, therefore, de facto do not apply any quotas. These countries had the option of integrating textiles and clothing into the GATT 1994 rules according to ATC, which also allowed invoking safeguard measures under the terms of ATC.

D. Elimination of Remaining Restrictions[4]

With regard to other, non-MFA restrictions, whether they are consistent with GATT 1994 or not, members had to notify these to the Textiles Monitoring Body (TMB) within sixty days following the entry into force of the Agreement. Non-MFA restrictions may take different forms, such as import licensing programmes,

[3]Article 2 of the Agreement.

[4]Article 3 of ATC.

quantitative restrictions, price surveillance systems and bilateral agreements with non-MFA participants. The programme shall provide for the phasing-out of all restrictions within a period not exceeding the duration of the Agreement, i.e. ten years. In Turkey-Textiles case[5], India claimed that the measures under examination violated the provisions of ATC, as the measures adopted by Turkey are new measures and were not authorised by the ATC, which has no GATT justification. Turkey, on the other hand, claimed that the measures under examination were not new, since the EC had similar restrictions in place when Turkey and EC formed their Customs Union, and such restrictions were justified under GATT. The Panel noted that since, immediately before the date of the entry into force of the ATC, Turkey did not have any MFA restrictions in place; it could not make any notification pursuant to Article 2 of the ATC. The Panel refused to accept Turkey's argument that its measures were not new because the EC had similar measures in place.

In order to smoothen the transition process for each stage, the Agreement specifies growth rates of quota levels of products remaining under restriction. During the first three years, the annual growth rate will be 16% over and above the quota level that prevailed in the period immediately preceding the entry into force of the Agreement, and reflected in the bilateral agreements under MFA (Article 2). During the second stage, the growth rate for respective restrictions in stage I will be increased by at least 25%. During the third stage, the growth rate for respective restrictions in stage II will be increased by at least 27%. Differences between quota levels widen considerably in the last three years of the transition period, as the growth rates under the terms of the Agreement increase. Provided these quotas are filled, the growth rates will have a real impact on trade and affect the level of integration, both in absolute and in relative terms. At the same time, higher import levels will create more competition in textiles and clothing in the importing countries and thus cause additional pressures for carrying out the adjustment necessary to face this new competition.

The treatment of MFA and non-MFA restrictions in terms of the conditions attached to their phasing out are quite different: MFA restrictions must be phased out according to a timetable established in the Agreement and leading to the full integration of this sector into the multilateral trading system, whereas members applying non-MFA restrictions will have to either eliminate such restrictions within one year or submit a programme of integration to the Textile Monitoring Body (TMB). The TMB may make recommendations to the member concerned with respect to such a programme, although it does not have the authority to give binding directions. This could imply that countries may delay the elimination of such restrictions until the final stages of the transition period, thus adding to the 'back loading' of the Agreement.

[5]Turkey—Restrictions on Imports of Textile and Clothing Products, Panel Report, WT/DS34/R, Adopted 19 November 1999, as modified by the Appellate Body Report WT/DS34/AB/R, DSR 1999: VI.

E. Safeguard Measures under the Agreement[6]

The Agreement provides in Article 6 that, during the transitional period, a specific safeguard mechanism shall be available if surges in imports of a product (a) not currently under restraint and (b) not yet integrated into GATT 1994 cause, or actually threaten, serious damage to domestic producers. Unlike the GATT safeguard rules in Article XIX, this transitional safeguard, which the Agreement states 'should be applied as sparingly as possible', permits measures to be taken against injurious imports of particular products from particular sources. The right to use transitional safeguards is tied to the obligation to apply integration programmes. Each WTO member is, therefore, required to make its position clear by formally notifying whether it wished to retain the right to use such safeguards. In USA—Underwear case,[7] India submitted that USA did not have the option of claiming a situation of actual threat of serious damage in July 1995, after having determined in March 1995 that there was a situation of serious damage and having requested consultations on that basis. India argued that all the data necessary in terms of the provisions of Article 6 of the ATC had not been provided by the USA. The data provided did not indicate that there had either been situation of serious damage or actual threat of serious damage to the USA. The Panel noted that Article 6.2 conditioned the application of a transitional safeguard action on the finding that a product is being imported in such increased quantities as to cause serious damage or actual threat thereof, to the domestic industry. The Panel, therefore, concluded that since USA failed to demonstrate adequately that its domestic industry suffered serious damage, it has failed to comply its obligations under Article 6 of the ATC.

In USA—Blouses case,[8] India argued that ATC required demonstration that the increase in imports was causing serious damage or actual threat thereof. India claimed that USA has failed to demonstrate any causal link between the rising imports and declining production. USA, on the other hand, argued that the ATC does not provide any methodology for collecting data and claimed that its demonstration was reasonable. The Panel concluded that importing country is free to choose the method, but at the same time it must demonstrate that it had addressed the issue.

Indian cotton textiles especially cotton-type bed linen was subjected to definitive anti-dumping duties by the European Communities (EC) after the Committee of the Cotton and Allied Textile Industries of the EC Federation of National Producers Association of Cotton Textiles Products—complained to the EC that cotton-type bed linen originating from India is dumped in the European Communities markets. On 13 September 1996, the European Communities established 1 July 1995 to 30

[6]Article 6 of ATC.

[7]United States—Restrictions or Imports of Cotton and Man-Made Fibre Underwear, Panel Report, WT/DS24/R, Adopted 25 February 1997, as modified by the Appellate Body Report, DSR 1997: I.

[8]United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Panel Report, WT/DS33/R, 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R and Corr. 1, DSR 1997: I.

June 1996 as the investigating period, and the investigation of dumping covered during this period. The examination of injury covered the period from 1992 till the end of the investigating period.

The Appellate Body reversed the Panel's findings that the EC did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The Appellate Body found, instead, that in respect of import volumes attributable to exports or producers that were not examined individually in the investigation, the European Community had failed to determine the 'volume of dumped imports', on the basis of 'positive evidence' and an 'objective examination' as required by Articles 3.1 and 3.2. The Appellate Body found that the panel had properly discharged its duties under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. The Appellate Body recommended that the DSB request the European Communities to bring its measure into conformity with its obligations under Anti-Dumping Agreement. On 24 April 2003, DSB accordingly adopted the Appellate Body Report and the corresponding Panel Report, as modified by the Appellate Body Report.[9]

The rules governing transitional safeguard measures, in Article 6, are more stringent than those which governed restrictions under the MFA. The importing member has to determine formally that the domestic industry is seriously damaged, or threatened by serious damage. That total imports of the product concerned are increasing, and that the damage is in fact caused by the increased imports and not by other factors such as changes in technology or consumer tastes. Transitional safeguard measures are to be applied 'on a Member to Member basis'—that is, against a particular supplying member. Imports of the product from that member must have increased sharply and substantially both in absolute terms and relative to other imports. Except in highly unusual and critical circumstances, where delay would cause damage which would be difficult to repair, consultations must then normally follow before action is taken. Whether a restraint is agreed bilaterally or is imposed unilaterally no restriction applied may be lower than the actual level of imports from that source during a recent 12-month period, and the action taken may not remain in place for more than three years. If the measure is in place for more than one year, permitted growth shall normally be no less than 6%. When the transitional safeguard clause is used, more favourable treatment shall be given to least developed countries, small suppliers, new entrants and re-imports from outward processing.

[9]European Communities—Anti-Dumping Duties in Imports of Cotton-Type Bed Linen for India, Recourse to Article 21.5 of the DSU by India, Notification a Settlement Dispute (DSU) WT/DS141/1609/01/2003.

5 Circumvention and Procedures for Penalties[10]

Circumvention of restrictions has been a major concern for members of the MFA, as it effectively undermined the provisions of the MFA. Article 5 clearly specifies the process of consultation, the nature of collaboration expected, the possible remedies that an importing member can apply and recourse that can be made to the TMB. Circumvention includes such practices as trans-shipment, rerouting, false declaration concerning country or place of origin which frustrate the implementation of the Agreement. Procedural provisions aim at assisting members in reaching mutually satisfactory solutions to deal with such circumvention.[11] Members must cooperate fully to establish the relevant facts including exchanging documents and facilitating plant visits and contacts. Members agree to take action to the extent necessary to address the problem, including legal action against circumvention practices within their territory.[12] Any actions, including the denial of entry of goods, may be taken after consultation between the members concerned and shall be notified to the TMB with full justification. If a mutually satisfactory solution is not reached, any of the members concerned may refer the matter to the TMB for prompt review and recommendations.

The determination of circumvention is by no means easy, as it is related to the question of what constitutes a domestic product. This includes primarily the determination of the origin of the product and whether substantial transformation has occurred. Rules of Origin provisions can vary from one product to another and also between countries.

6 Textiles Monitoring Body

The Council for Trade in Goods established the TMB to supervise the implementation of the Textiles and Clothing Agreement.[13] The TMB is a standing body composed of an independent chairman and 10 persons, balanced and broadly representative of the WTO membership. Its members rotate at intervals and discharge their functions on a personal basis, that is, not on behalf of a particular member. They are appointed by WTO members designated by the Council for Trade in Goods, the parent body of the TMB.

The TMB has a conciliatory and semi-judicial role. It examines all measures taken under the Agreement, and their conformity with the Agreement's rules including member's programmes for integration and liberalisation, as well as restraint measures taken under special safeguard clause. It makes recommendations

[10]Article 5.
[11]Article 5.2.
[12]Article 4.
[13]Article 8.

and findings on these matters, which members shall endeavour to accept in full. If they cannot, and if after further review by the TMB the matter remains unresolved it can be pursued under the WTO's dispute settlement procedures. At the end of each stage of the integration process, the TMB will have to prepare a comprehensive report on the implementation of the Agreement, to be transmitted to the Council for Trade in Goods. Thus, the responsibilities of the TMB are broadly similar to those previously empowered in the Textiles Surveillance Body (TSB) under MFA Agreements.

7 Termination of ATC[14]

The Agreement on Textiles and Clothing itself explicitly provides for its own termination. The Agreement and all restrictions covered by it 'shall stand terminated' on 1 January 2005, 'on which date the textiles and clothing sector shall be fully integrated into GATT 1994'. It concluded with the statement: 'There shall be no extension of this Agreement'. The Agreement terminated on 1 January, 2005.

8 Policy Implications of the Implementation of the Agreement

With the termination of the Agreement, the eventual restoration of market principles to trade in textiles and clothing enhances specialisation based on the relative comparative advantage of producers, and is thus likely to affect the patterns of trade, production and investment. The dismantling of the MFA and ATC contributes to encouraging trade liberalisation and to strengthening of the integrity of the system by accepting that textiles and clothing will be treated like any other manufactured good. The integration of this sector into the multilateral trading system is one of the major achievements of the Uruguay Round negotiations. It has effectively brought to an end the GATT-legitimised discriminatory quantitative restrictions, which lasted for over four decades and caused inefficiencies in the economy. It will now contribute further to shaping the new world trading system.

[14]Article 9.

Chapter 26
WTO Agreement on Sanitary and Phytosanitary Measures (SPS)

1 General

The basic obligations for members of the world trading regime have not changed since the GATT 1947 came into being. Members must give equal treatment to exports from all members, and members are barred from discriminating between locally produced and imported products. Exceptions were allowed for tariffs on specific products, which were 'bound' at specific levels. Numerous other 'general exceptions' were also allowed for many national policy purposes, such as protection of human, animal or plant life or the conservation of exhaustible natural resources. But those general exceptions—Article XX of GATT—were described only briefly.

For the last thirty years as the attention to non-tariff measures has grown and the 1979 Tokyo Round agreements, which resulted from the seventh round of negotiations, included a separate 'standards code' that imposed discipline on technical barriers to trade. But the code, like the GATT, was backed by little enforcement; although all GATT members were bound by the GATT's core rules, they were largely free to pick and choose among 'code' rules. The result of the Tokyo Round's 'GATT a la Carte', most experts agree, had little effect on lowering technical barriers to trade.

The failure of earlier efforts was addressed in Uruguay Round of negotiations. By 1986, the year that the Uruguay Round began, nearly 90% of US food imports were affected by non-tariff barriers to trade, up from only 57% in 1966. Exporters had a growing interest in taming these barriers.

The most important element of the WTO concerning sanitary and phytosanitary measures protection is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The Agreement's central purpose is to promote international trade by limiting use of SPS measures as disguised barriers to

A. K. Koul, *Guide to the WTO and GATT*,
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trade. The Agreement's basic rights and obligations[1] underscore that WTO members have the right to impose SPS measures as necessary "for the protection of human, animal or plant life or health.[2] But members may not arbitrarily or unjustifiably discriminate between members when imposing SPS policies on imported products; nor may members use SPS measures as disguised barriers to trade.[3] These basic rights and obligations are quite general and thus efforts to interpret them have focused on the more detailed provisions of the SPS Agreement in particular Article 5 of the Agreement.

In addition to restraining the SPS policies that countries may develop on their own, the SPS Agreement urges members to implement international standards. The Agreement's Agreement' preambles underscores preamble the underscores goal: the "goal: *Desiring* to further the use of harmonized sanitary and phytosanitary measures between members, on the basis of international standards, guidelines, and recommendations developed by the relevant international organizations…". The Agreement declares that "Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations.[4] When a member imposes SPS measures that conform with international standards, guidelines, or recommendations, those measures will automatically be "presumed to be consistent with the relevant provisions of this Agreement".[5] However, countries may introduce measures that are stricter than international standards "if there is a scientific justification, or as a consequence of the level of [SPS] protection a member determines to be appropriate in accordance with the relevant provisions… of Article 5.[6]

Thus, WTO members face a choice. The member may simply implement international standards where they exist or it may deviate from those standards. In order to examine how the Agreement affects the SPS measures that countries implement, it is necessary to examine both outcomes: (1) how international

[1]SPS Agreement, Article 2.

[2]Article 2.1, 2.2.

[3]Article 2.3.

[4]Article 3.1.

[5]Article 3.2.

[6]SPS Agreement, Article 3.3. The SPS Agreement also includes a footnote at this point: For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

SPS Agreement, Article 3.3 n. 2. Although the obligations and reasoning are a bit convoluted, this footnote has been interpreted as meaning that measures that deviate from international standards are acceptable if based on a risk assessment—that is, if they meet the requirements of Article 5, which includes the requirement of a risk assessment (Article 5.1). In plain language, Article 3 promotes harmonization with international standards, and Article 5 allows countries to escape the straitjacket of international standards, provided that an assessment of risks is the first step in setting such stricter SPS measures.

standards are established and (2) what exceptions permit a country to deviate from those international standards.

Before turning to international standards and exceptions, it is important to note that the SPS Agreement includes several important obligations that extend the Agreement's influence beyond simply the setting of SPS levels and measures. In principle, the SPS Agreement also allows exporters broad latitude when determining the SPS measures that are needed to meet the level of SPS protection that importers demand. More specifically, Article 4 of the Agreement requires that importers accept the SPS measures of exporters "as equivalent, even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of [SPS] protection".[7]

Assuming that exporters have an interest justifying the least trade restrictive measure, this 'equivalence' requirement could automatically ensure that SPS rules are not more discriminatory than necessary; 'equivalence' could also open markets without requiring actual harmonization. In another context, the creation of the European Community's single market concept (e.g. 'mutual recognition') created a strong market—opening dynamics by allowing legal protection from any European country into any other European national market.[8] The agreement also requires that countries make their SPS policies transparent both through publication and creation of national "enquiry points" that can answer any reasonable question about that country's SPS rules.[9] If that system operates properly, then exporters will find it easier to comply with an importer's SPS rules, which should promote trade. Transparency is also essential to the making use of the "equivalence" requirement described above. In addition, the Agreement creates an international "SPS Committee" that meets on a regular basis to consider relevant topics and periodically review the performance of the SPS Agreement.[10] That Committee is a forum for discussion of potential conflicts between WTO members, which may help prevent some disputes from escalating. It also adopts documents that guide interpretation and implementation of the Agreement.

[7]Article 4.1. The SPS Agreement also includes a specific application of the "equivalent" requirement, which is especially important for SPS measures, to pest and disease-free areas. Article 4.1. Countries that can demonstrate that all or some of their country is free from a hazard are allowed to circumvent SPS measures that are intended to block diseases on products from that country. Article 6.3.

[8]For commentary on mutual recognition as a strategy for opening markets and its relationship to, See generally Linda Horton, Mutual Recognition Agreements and Harmonization, 29 SETON Hall L. Rev. 692, 708–29 (1998).

[9]Articles 5.8, 7 and Annex B.

[10]Article 12.

The Agreement allows least developed countries to delay implementation of the Agreement for five years,[11] allows other extensions, and empowers the SPS Committee to grant temporary extensions and relief from the Agreement's obligations in cases of hardship.

2 The Exceptions

One of the most controversial aspects of the debate over opening trade has been the fear that free trade will force all countries to harmonize their national standards into a straitjacket of international standards. Donning the straitjacket, skeptics argue, could force nations to adopt stricter SPS measures than they would otherwise want. That might force member nations to spend resources on sanitary and phytosanitary protection that they could have devoted to other purposes such as economic development. On the contrary, the straitjacket could force countries that already have tight SPS measures to relax them, leading perhaps to 'downward harmonization' if international standards merely mirror the lowest common denominator. The latter has been the most controversial aspect because existing SPS measures are generally much tighter in the advanced industrialized countries, which is also where most of the active SPS public interest groups are located. Harmonization, they fear, will require compromising hard-won rules that protect consumers and the environment.

Because of this heated debate, fully under way when the WTO agreements were negotiated, the SPS Agreement permits countries to adopt SPS production policies that are *stricter* or *weaker* than international standards. Rather than requiring harmonization to a common international standard, the SPS Agreement imposes discipline on both the *level* of SPS protection that countries seek and the *measures* they impose to attain those levels. The Agreement and disputes over interpretation of the Agreement have underscored that any country may set the *level* of SPS protection that it determines to be 'appropriate'. The SPS Agreement does impose some discipline on the level of SPS protection, but most of the effort to discipline SPS policies under the Agreement has taken that level as given and focused on the measures that countries use to achieve that level.

3 SPS Levels and Measures that are Stricter than the International Standard

Clearly, the SPS Agreement is mainly intended to discipline SPS measures that cause an unjustified barrier or restriction on trade because they are *stricter* than international standards. Indeed, Article 3.3 explicitly carves out an exception to the

[11] Article 14.

goal of harmonization for SPS measures that are stricter than international standards. Article 3.3 requires that a member must be able to provide "scientific justification" for choosing a higher level of SPS protection.[12] Similarly, Article 2.2 requires that SPS measures be based on "scientific principles".[13] These general requirements are quite broad, and thus, in practice, the Panels and Appellate Body decisions have turned to Article 5 for a more detailed description of what constitutes acceptable "scientific" basis when a country sets its SPS levels and measures.[14]

Article 5 requires that SPS measures be "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, *taking into account risk assessmen t techniques developed by the relevant international organizations*".[15] It requires that members take into account available scientific evidence.[16] When performing risk assessments, countries must account for economic factors, such as potential loss in production or sales, if a pest or disease enters the country as well as the cost-effectiveness of different measures that could limit such risks.[17]

Article 5 also underscores that the Agreement does not address every aspect of SPS protection. Rather, it concerns only those SPS policies that affect trade. It urges countries to minimize the negative trade effects of SPS measures.[18] It requires that countries avoid "arbitrary or unjustifiable distinctions" in their level of SPS protection "*if such distinctions result in discrimination or a disguised restriction on international trade*".[19] Article 5.6 requires that countries not impose SPS measures that are "more trade-restrictive than required to achieve [the level of SPS protection that the member deems appropriate].[20] A footnote to Article 5.6 declares that a measure would be inconsistent with Article 5.6 if an alternative is found that passes each of the three tests: (a) it is "reasonably available", (b) it achieves the member's appropriate level of SPS protection, and (c) it is "significantly less restrictive to trade" than the SPS measure contested.[21]

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[12]Article 3.3.

[13]Article 2.2.

[14]Article 5. EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, 180, WT/DS26/AB/R & WT/DS48/AB/R (Jan. 16, 1998), which argues that "Article 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1". In addition, the same report notes that Article 2.3 must be read together with Article 5.5—the former declares a general obligation, and the latter elaborates "a particular route" for determining whether the general obligation has been met. Ibid., 212.

[15]SPS Agreement, Article 5.1.

[16]See SPS Agreement, Article 5.2.

[17]Article 5.3.

[18]Article 5.4.

[19]Article 5.5 (emphasis added).

[20]Article 5.6.

[21]Article 5.6 n. 3.

These critical provisions in Article 5 essentially yield four rules that countries must follow when they impose SPS measures that deviate from international standards (or when no international standards exist):

(1) The country must obtain a risk assessment;
(2) The SPS measures imposed must be "based on" that risk assessment;
(3) The country must not discriminate or create disguised trade barriers by requiring different levels of SPS protection in comparable situations; and
(4) The measures must not be more restrictive of trade than necessary to reach the level of SPS protection that the country desires.[22]

The exact meaning of these four requirements is not obvious. Nonetheless, Article 5 is the linchpin of the SPS Agreement—it puts discipline on SPS protection policies that countries adopt without requiring the politically impossible task of harmonization.

There is a curious tension in Article 5 and other related provisions of the SPS Agreement.[23] These provisions, and Article 5 in particular, are mainly concerned with ensuring that countries base their SPS *measures* on risk assessment and that they should not adopt measures that are more restrictive to trade than necessary. These provisions are largely silent on the level of SPS protection that a country seeks. Indeed, as already mentioned, the SPS Agreement repeatedly underscores that countries are free to set their own level of SPS protection, even if that level of protection is different from the level that would be afforded by international standards.[24] The only provision in the SPS Agreement that specifically constrains the *level* of SPS protection that a country may set is Article 5.5 which requires that countries seek comparable levels of SPS protection in comparable situations.[25] Thus, to determine whether a country's level of SPS protection is legitimate, one must *look inside the country itself*—at whether the country consistently seeks a particular level of SPS protection. It is possible to interpret the requirement that SPS *measures* be based on a risk assessment[26] as a requirement that a country's SPS *levels* also be based on risk assessment. Indeed, how can one logically assess the risks of SPS measures without assessing the risks associated with the level of

[22]Article 5.1–5.7.

[23]The other related provisions are, in particular, Articles 2 and 3 and the definitions in Annex A. See SPS Agreement, Articles 2, 3 and Annex A.

[24]Articles 2.1, 3.3.

[25]Article 5.5. There is a small qualifier to this statement. Article 3.3 also says that members may impose SPS measures "which result in a higher level of [SPS] protection" if one of the two conditions is met: the measures are based on a "scientific justification" or the measures are in conformity with Article 5. The concept of "scientific justification" is defined in a footnote such that, in practice, "scientific justification" means based on a risk assessment. The provisions for risk assessment are outlined in Article 5 and in Annex A ("definitions") of the SPS Agreement. Thus the discipline on the level of SPS protection that a country may establish funnels through Article 5, and the only part of Article 5 that explicitly addresses the level of SPS protection is Article 5.5.

[26]SPS Agreement, Articles 5.1, 5.2, 5.3, 5.7.

protection as well? Levels and measures are two sides of the same coin.[27] This remains a hotly contested issue because it concerns perhaps the most politically sensitive aspect of the SPS Agreement, i.e. whether it will encroach on a nation's sovereign right to determine its own SPS protection level.

4 SPS Measures that are Weaker than the International Standard

The other exception to harmonization is the reverse of the first: nations may adopt SPS measures that are less strict than international standards. The requirements in Article 5 that standards be based on risk assessment and take into account available scientific evidence apply whether standards are stricter or looser.[28]

So far, none of the formal WTO disputes has addressed SPS measures that are less strict than international standards. Two reasons probably explain why the problem has not arisen: (1) the issue is most prominent in developing countries, many of which are still in transition to full implementation of the SPS Agreement; and (2) for many products, weak SPS measures are much less of a threat to trade than strong measures. But it is conceivable that this type of exception will come under closer scrutiny and tighter discipline in the future. Indeed, for manufactured goods, such as processed foods, there is often a substantial premium in efficiency for producers that can export to a market governed by a single standard. Lax standards, even if applied equally to local and imported products, could favour local producers and harm imports that are produced according to more expensive standards that prevail in the rest of the world market. Using this argument, an alliance of global exporters and environmentalists may discover that the SPS Agreement is a very powerful tool—it could pry open local markets that are 'distorted' by weak SPS standards and force a higher level of SPS protection. Whether the SPS Agreement is used in this capacity remains to be seen; such case probably will be rare because demonstrating the existence of a trade effect from weak SPS measures is difficult and bringing up disputes is costly.

[27]This is especially evident in the ECs meat hormones ban and Australia's ban on imports of fresh and frozen salmon, which are the only two cases where a country's level of SPS protection has been challenged directly. In both cases, the level of protection that the importing country sought was zero risk because the country had imposed a ban on imports. Thus testing whether the bans were consistent with the requirement to base SPS measures on risk assessment was, de facto, a test of whether the goal of zero risk was based on risk assessment. See generally EC Meat Hormones, Appellate Report, Supra note 14, Australia—Measures Affecting Importation of Salmon, Report of the Panel, 6.1-130, WT/DS18/R (June 12, 1998).

[28]The only provision of the SPS Agreement that explicitly applies to national SPS standards that are stricter than international standards is Article 3.3.

5 International Standards

While most of the SPS Agreement is focused on exceptions, its principal objective —stated in the preamble—is to promote harmonization of national standards.[29] The SPS Agreement explicitly urges countries to adopt the standards set in three international processes: the *Codex Alimentarius* Commission (food safety), the International Office of Epizootics (animal safety), and the various organizations and processes that operate under the International Plant Protection Convention (plant safety). It also empowers the SPS Committee to identify other appropriate standards, guidelines, and recommendations.

A. The Codex Alimentarius Commission

Codex Alimentarius Europaeus was established in 1958 to help harmonize methods for testing food safety in Europe. At the same time, the World Health Organization (WHO) and Food and Agriculture Organization (FAO), spurred by the European dairy industry, created a committee to harmonize milk standards and thus open trade in milk and milk products. In 1962, WHO and FAO loosely merged these activities into the *Codex Alimentarius* Commission (Codex).

The *Codex Alimentarius* Commission's mandate was to develop and adopt food standards that would allow firms and countries to realize their self-interest: world trade in safe food products. From the outset, the emphasis was on participation and consultation, especially with industry. The architects of the Codex system hoped that it would lead these stakeholders to harmonize their activities without the need for international enforcement. Thus, Codex standards are developed by committees of government representatives through an eight-step cycle.[30] Technical Committee evaluate evidence and elaborate standards, which are then subjected to the approval of the full *Codex Alimentarius* Commission, which meets every two years. That process of elaboration and approval typically occurs twice (within the eight steps, steps three through five and steps six through eight are a spin cycle), with the goal of ensuring wide input and consensus. Although governments have the only formal voting power, participation in the committee and Commission meetings has been open to any stakeholder; yet only rarely have consumer and other public interest groups attended the committee meetings where standards are elaborated. The process is driven by industry, and the vast majority of Codex standards attract essentially no attention from other interest groups.

The *Codex Alimentarius* Commission adopts three types of standards: (1) commodity standards, which define what qualifies as a particular commodity (e.g. what

[29]Two statements in the preamble make this point: "Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard…" and "Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards…". In contrast, the preamble does not mention risk assessment or rules to govern deviations from international standards as principal objectives.

[30]See Codex Alimentarius Commission Procedural Manual (9 ed. 1955).

is a 'canned peach' or "natural mineral water'), (2) residue standards, which define acceptable levels of pesticides and food additives and (3) codes of conduct and other guidelines that recommend, for example, good practices in the use of veterinary drugs or methods for risk assessment. To date, the *Codex Alimentarius* Commission has adopted more than 3000 standards. The other type of Codex norm —codes of conduct and guidelines—has been intended to augment application of the core standards rather than act as principal standards themselves. In some cases, these looser guidelines have been adopted when agreement is not possible on a commodity or residue standard. However, if the SPS Agreement is interpreted broadly, then these looser norms may be treated as 'international standards', which would give them potentially binding application. However, that matter of legal interpretation has not been resolved or tested in any WTO disputes.

The process of setting commodity standards has given practically no attention to risk assessment because most of the work of the Codex focuses on the physical attributes of the commodity that indirectly determine food risks; moreover, there are no procedures for setting 'acceptable risks'. The commodity standards are intended to codify what is considered to be good practice for supplying safe food. Thus, de facto risk assessment—where it exists—enters the Codex commodity standards from the 'bottom up' through existing industry practice and standards. The committee members themselves provide the needed expertise—committees are represented mainly by government regulators and industry representatives who are best able to define characteristics of a safe canned plum or frozen pea. In practice, this organic process led to haphazard commodity standards. Some commodity standards included excessive detail about the attributes of foods that were not necessary for food safety and merely entrenched existing industrial practices. To remedy this problem, a major review and revamping of Codex commodity standards is under way.[31] The goal of that review is to simplify the standards and focus them on safety-related attributes of food products. However, the revamping is not intended to determine particular risk levels that would govern the standard-setting process.

So far, none of the WTO disputes related to SPS measures has involved a Codex commodity standard. How such cases might be handled remains uncertain.

The incorporation of the Codex into the WTO gives standards a binding force and may increase the danger that commodity standards will be used for industrial promotion and not only securing food safety. However, the danger has been longstanding, and incorporation into the WTO has brought other changes that reduce that tendency—in particular, because the Codex is now applied in world trade, the *Codex Alimentarius* Commission has eliminated regional Codex standards. Previously, when some Codex standards were set regionally, it was easier for coalitions that favoured protectionism to control the process because like-minded industrial interests were often concentrated in particular regions.

[31]John S. Eldred & Shirley A. Coffield, What Every Food Manufacturer Needs to Know: Realizing the Impact of Globalization on National Food Regulation, 52 Food & Drug L.J. 31, 34 (1997).

Voluntary standards and the acceptance procedure were designed to give states and stakeholders maximum control over which standards they adopted, in turn dampening potential conflicts. Today, after the incorporation of Codex into the WTO, standards are no longer viewed as completely voluntary. Moreover, for purposes of the SPS Agreement, a standard is now considered 'adopted' when it has been approved by the *Codex Alimentarius* Commission. The requirement of acceptance, which previously was how a country ensured that no Codex standard would be imposed against its wishes, no longer plays a role.

B. **The International Office of Epizootics**

The Office International Des Epizooties (OIE) is an international governmental body established in 1924 with the purpose of protecting animal health. As of January 2006, one hundred sixty-seven countries were members of the OIE. It serves as the umbrella for numerous commissions that prepare codes, protection strategies, and manuals. Some commissions work on specific diseases (e.g. fish diseases or foot and mouth disease); others work on problems of specific geographical regions. The OIE periodically revises the *International Animal Health Code*, which applies to mammals, birds, and bees; it is also the model for a separate *International Aquatic Animal Health Code*. Both Codes include the requirement that countries analyse and manage risks of diseases that are transmitted across borders via international trade and give special attention to adopting measures for controlling diseases that minimise adverse effects on trade. As with the SPS Agreement itself, the Codes also require that countries make their risk analysis transparent and be able to justify their import decisions. In short, the Codes thus provide a basis for establishing quarantines and other sanitary measures and for adjusting the severity of such measures according to the economic risks. However, the requirements only strictly apply to diseases listed in each Code; the lists are incomplete and thus, offer only a starting point—countries are free to identify other diseases and regulate risks associated with them as well.

In addition to the Codes, the OIE also produces guidelines for disease testing and surveillance programs and serves as a clearing house for current information on particular diseases (e.g. outbreaks). The work of these commissions is approved by the International Committee, the OIE's main decision-making body. The OIE is also the umbrella for numerous other collaborations that help develop reference standards; various working groups promote debate that could lead to standards in areas such as biotechnology and wildlife.

C. **International Plant Protection Convention**

The International Plant Protection Convention (IPPC) entered into force in 1952 and was amended in 1979. It is intended to promote international coordination of measures necessary to limit the spread of plant diseases. The IPPC obliges countries to identify, assess and manage risks to plants, including risks from plant pests that are carried through international trade. 'Guidelines for Pest Risk Analysis', developed within the framework of the IPPC, provide detailed information on how

to assess and manage pest risks and require that countries develop import restrictions for protecting plant safety in conjunction with a broader plan for risk management.

The Convention requires nations to create official plant protection organizations that perform inspections, conduct research and disseminate information. (Most countries would have created such organizations even without the Convention). As with the SPS Agreement, it requires that countries adopt phytosanitary measures only to the extent necessary for phytosanitary protection. Countries must use the least restrictive trade measures, avoid unnecessary delays during inspection and quarantine and ensure that phytosanitary measures are transparent.[32] The IPPC probably aids coordination of national plant protection policies, although some of that would occur anyway among those countries that want to coordinate. However, it is but it has not engaged in detailed standard setting to the degree of the *Codex Alimentarius* Commission or the OIE.

6 The Jurisprudence as Evolved by the DSB on SPS Agreement

The jurisprudence in relation to the interpretation of the SPS Agreement in the five cases decided by the DSB is instructive in relation to the SPS standards obligatory on members of the WTO.

The three cases: the European Community's Ban on Import of Bovine Meat Produced with Growth-Hormones (EC Meat Hormones)[33]; Australia's Ban on Imports of Fresh and Frozen Salmons (Australian Salmon)[34]; and Japan's Ban on Imports of Numerous Varieties of Fruits and Nuts (Japan Agricultural Products).[35]

The first case concerns an EC Directive, imposed in 1981 and strengthened in 1988 and 1996, to ban imports of meat from animals that had been administered natural or synthetic hormones. Exceptions were allowed for hormones that are used for the rapeutic purposes but not hormones used to promote growth in cows. American, Canadian and other beef producers used hormones to accelerate growth that reduced costs and yielded higher-quality meat. The central issue was whether

[32]The statements here apply strictly to the International Plant Protection Convention, Dec. 6, 1951, 150 U.N.T.S. 67 (with revisions that came into force in 1991). A new Revised IPPC was adopted by the FAO Conference in 1997. It has now entered into legal force as in 2005.

[33]EC Meat Hormones: Complaint by United States, Panel Report, WT/DS26/R/USA, Adopted 13 Feb. 1998, DSR 1998: III as modified by the Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998: I.

[34]Australia—Measures Affecting Importation of Salmon, Panel Report, WT/DS18/Rev Corr. I, Adopted 6 Nov. 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998: VIII.

[35]Japan—Measures Affecting Agricultural Products, Panel Report, WT/DS76/R, Adopted 19 March 1999, as modified by the Appellate Body Report, WT/DS76/AB/R, DSR 1999: I.

EC ban concerning six hormones was *ultra-vires* the SPS Agreement, given the fact that *Codex Alimentarius* Commission had not proscribed the six hormones as health hazards. The EC argued that SPS Agreement explicitly allows WTO members to adopt standards that are stricter than international norms if those standards are based on an assessment of risk. EC argued further that although scientific studies had suggested no objective risk, but there were incidents which made consumers suspicious of eating beaf administered by hormones.

The Panel ruled against the EC on three counts. First, the EC's measure was illegal because more permissible international standards exist for hormones. Article 3.1 of the SPS Agreement lays down that 'members shall base their SPS measures on international standards', the EC was under an obligation to respect the international standards.

The Appellate Body, however, overruled the Panel and held that a measure can be based on international standards without conforming to those standards. The Appellate Body held that as the purpose of Article 3 of the SPS Agreement is to promote the use of international standards while allowing countries to deviate from those standards if those deviations conform to Article 5 which pertains to risk assessment. Second, as the Panel had ruled that the EC measure was not based on a risk assessment as required under Article 5.1 of the SPS Agreement, the Appellate Body concurred as the EC had obtained some risks of the hormones. The Appellate Body emphasised that the risk assessment need not be based entirely on research in the physical sciences, nor must risk assessment examine only quantitative risks. However, the EC measure failed because the EC had not applied risk assessment techniques to the particular risks that the EC claimed were the basis of its SPS measure. The EC had argued that misuse of hormones as growth promoters could cause excessive risks and thus all use of hormones for growth promotion must be banned. The Appellate Body concluded that EC had not actually presented an assessment of such risks.

The effect of this Appellate Body ruling is that there is not only a procedural requirement to obtain risk assessment, but the requirement that an SPS measure be 'based on' a risk assessment is a substantive obligation that there should be a rational relationship between the measure and the risk assessment. The fact that all of the valid risk assessment showed that 'good practice' application of growth hormones was safe—and the failure to examine the risks that the EC claimed would result in harm to consumers—meant that the EC measures failed the "rational relationship test".[36]

Third, the Panel found that the EC had violated Article 5.5 of the SPS Agreement by demanding different levels of SPS protection in comparable situations. Notably, the EC allowed carbadox and olaquindox to be used as antimicrobial feed additives that promoted the growth of pigs; yet the EC banned the use of hormones as growth promoters in cows, although the hormones resulted in similar (or lower) risks to humans. The Appellate Body overturned that decision by

[36]EC—Meat Hormones, supra note 33.

declaring that the SPS level required by a country would be incompatible with Article 5.5 if it failed *each* of the following tests: (1) the country did not require comparable levels of protection in comparable situations, (2) the failure to apply comparable measures in comparable situations is arbitrary and unjustifiable, and (3) such measures result in discrimination or a disguised restriction on international trade.[37] The Appellate Body found that the EC had, indeed, applied different SPS levels in comparable situations and thus failed the first test. The EC ban also failed the second test because the EC could not justify the difference in treatment. But the Appellate Body argued that the third test—whether "arbitrary or unjustifiable" differences in SPS levels harmed trade—was most important, and the complainants provided insufficient evidence that the EC measure failed that test. Allowing carbadox and olaquindox as feed additives on the one hand while barring hormones for promoting growth in cows on the other was not by itself evidence of a disguised barrier to trade. Erecting a trade barrier was not the purpose of the EC rules that created this incongruous situation; in the words of the Appellate Body, the "architecture and structure" of the EC Directives was not discriminatory or a disguised restriction on trade. The EC applied the same level of SPS protection (with a ban on hormones as growth promoters) equally to imports and domestic production. Nor had the United States or Canada submitted adequate evidence that the different treatment had resulted in "discrimination or a disguised restriction on international trade".[38]

The second case, Australian-Salmon concerned the Australian regulation banning importation of frozen salmon in order to prevent twenty-four fish borne diseases from spreading into Australian's pristine environment. It was felt that many of the diseases could adversely affect trout fish which are vital to Australian sport fishing and tourism as well as small front aquaculture industry. The diseases could also, it was argued harm the Atlantic salmon aquaculture farms. To combat the threat, Australia required heat treatment for all imports from regions where fish might become infected with the diseases.[39]

The Office International des Epizooties (OIE) listed two of these diseases in the *International Aquatic Animal Health Code* category of fish diseases that are particularly dangerous threats for spreading. Such transmissible diseases 'are considered to be of socio-economic and/or public health importance within countries and that are significant in the international trade of aquatic animals and aquatic animal products'. The OIE also listed four of the diseases in a category of fish diseases that are less well understood but are potentially dangerous. For diseases on either list, the OIE Guidelines for Risk Assessment require countries to undertake analysis to examine the disease risks associated with the importation and to tailor particular import controls to the real world situations in the country. The remaining diseases were not listed by OIE and thus no special OIE guidelines were applicable.

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[37]Ibid., pp. 241–245.

[38]EC—Meat Hormones, supra note 33, pp. 236–246.

[39]Australia—Measures affecting Salmon, supra note 34, 8.91.

Canada, a major exporter of fresh and frozen salmon, challenged Australia's regulation. Canada did not dispute that Australia had the right to preserve a pristine environment, that is, in the words of the SPS Agreement, Australia had the right to determine its own 'appropriate level of SPS protection'. But, Canada argued, the quarantine was arbitrary because Australia did not apply similarly strict quarantine measures against other disease risks. None of the several existing risk assessments supported the Australian argument. As the EC argued in the Meat Hormones case, Australia maintained that although the risks were low it could not be certain that headless eviscerated fish would not spread disease.

The Panel and Appellate Body ruled against the Australian measure largely on three grounds. First, the Appellate Body determined that Australia's ban on imports of fresh and frozen Canadian salmon was not based on an assessment of risks.[40] In doing so, the Appellate Body established a "three-pronged" test for what would qualify as a risk assessment: (1) identification of the diseases and possible biological and economic consequences of their entry or spreading; (2) evaluation of the likelihood of entry, establishment, or spreading; and (3) evaluation of the impact of SPS measures on the likelihood of entry, establishment, or spreading of the diseases. Australia's 1996 Final Report, which established the ban on imports of fresh and frozen salmon, met the first requirement. But the Appellate Body said that Australia had failed to meet the other two requirements. This finding overturned the Panel, which had ruled that the 1996 Final Report did constitute a "risk assessment". The Panel had followed the cue of the earlier Appellate Body report on EC Meat Hormones, which had suggested that the requirement of the SPS Agreement be "based on an assessment" that allowed WTO members to include many diverse factors. But the Panel had wrongly assumed that the permissive standard also meant a low threshold for what qualified as a "risk assessment". The Panel concluded that the 1996 Final Report "to some extent evaluates" the risks and risk reduction factors and thus qualifies as a risk assessment, but the Appellate Body established a stronger test for compliance.[41]

The Panel and Appellate Body found that the salmon import ban was a disguised restriction on trade.[42] Both the Panel and the Appellate Body stressed that Australia was free to determine its own level of SPS protection; however, they found that Australia did not apply that high level of protection in other comparable situations. By allowing imports of bait and ornamental fish, Australia exposed itself to greater risk than if it had permitted salmon imports. Not treating these comparable risks in comparable ways revealed that the salmon import ban was a disguised restriction on trade. To reach this decision, the Panel applied the three-step test that the Appellate Body had developed in the EC Meat Hormones case: (1) it decided that the situation of disease risks from salmon imports was comparable with the disease risks from ornamental and bait fish because they involved similar diseases, media, and modes

[40]Ibid., pp. 135–136.

[41]Australia—Measures Affecting Salmon, supra note-34, 8.91.

[42]Ibid., 8.160.

of propagation; (2) such different treatment for salmon and diseases risks was "arbitrary or unjustifiable", and (3) the different treatment for salmon resulted in a disguised restriction on international trade. The Appellate Body agreed. Whereas the third element of the test failed in the EC Meat Hormones case, the evidence was much stronger in the salmon case. The evidence included the fact that the draft of Australia's salmon rules would have permitted the importation of ocean-caught Pacific salmon under certain conditions. However, the final rule, issued after stakeholders such as the Australian salmon industry based on substantially the same risk assessment information, barred imports. That factor, compounded by many other "warning signals", led the Panel and Appellate Body to decide that the imports ban was indeed a disguised restriction on trade.

The Panel decided that the particular SPS measure required by Australia-heat treatment of salmon prior to export to Australia was more trade-restrictive than necessary and thus violated Article 5.6 of the SPS Agreement.[43]

The third case concerns a Japanese regulation that required exporters of various fruits and nuts to submit each new variety they intended to export to Japan to an extensive regime to verify that fumigation with methyl bromine would effectively kill the eggs and larvae of coddling moths.[44] The case focused on four species (apples, cherries, nectarines, and walnuts) but potentially had application to others. Varietal testing was needed, Japan argued, because the most effective treatments might vary not only with the characteristics of the fruits/nuts but also the season of harvest. Coddling moths exist in different forms (e.g., eggs, larvae, adults) in different seasons. Different varieties have different harvest times, and thus Japan argued that test results for one variety were not applicable to another.[45] The United States challenged the requirement as not being based on an assessment of risks; it also argued that the varietal testing requirement imposed excessive costs and delays and thus was more trade-restrictive than required. The United States contested only the measures that Japan had applied; it explicitly did not question Japan's right to determine its "appropriate level of SPS protection", that is, for Japan to ensure that its pristine islands remain free of coddling moth.[46]

The Panel found that Japan's testing requirements were inconsistent with the SPS Agreement for three reasons. First, the varietal testing requirement was not based on a risk assessment. In particular, the Panel concluded that "it has not been sufficiently demonstrated that there is a rational or objective relationship between the varietal testing requirement and the scientific evidence submitted to the Panel".[47] Japan claimed that its goal was to ensure that new varieties would impose no danger of coddling moth infestation that was greater than the infinitesimal risk of infestation from varieties that had already undergone extensive testing. Each variety

[43]Ibid., 139–178.

[44]Japan—Measures affecting agricultural products, supra note 35, Panel Report p. 80.

[45]Ibid., Panel Report.

[46]Ibid., 2.23–2.24.

[47]Ibid., 8.27.

must be tested individually, Japan argued, because there may be a chance (although extremely small) that differences between varieties of fruits and nuts could lead to ineffective treatments that would let a coddling moth slip through. However, the Panel found that "so far not a single instance has occurred in Japan or any other country, where the treatment approved for one variety of a product has had to be modified to ensure an effective treatment for another variety of the same product". Moreover, the United States as well as experts advising the Panel had shown that varietal differences did not influence the efficacy of quarantine methods, and Japan had not presented adequate evidence to the contrary.[48]

The Appellate Body endorsed the conclusion that the Japanese testing requirement was not based on a risk assessment. Echoing Article 2.2 of the SPS Agreement, the Appellate Body found that the testing requirement was maintained "without sufficient scientific evidence".[49] However, as in the hormones and salmon cases, the Appellate Body also avoided creating any standard for "sufficient" or "rational relationship". Instead, they found that "[w]hether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.[50]

Japan argued that Article 5.7 allowed countries to adopt stringent measures when 'relevant scientific evidence is insufficient'. The Panel underscored that Article 5.7 is an exception to the general risk assessment obligations of the SPS Agreement (i.e. Articles 2.2 and 5.1) that applies only to *provisional* measures. The language of Article 5.7 itself suggests that such provisional measures must meet four cumulative requirements:

(1) the measure is imposed where "relevant scientific information is insufficient";
(2) the measure is adopted "on the basis of available pertinent information";
(3) the member must "seek to obtain the additional information necessary for a more objective assessment of risk"; and
(4) the member must "review the… phytosanitary measure accordingly within a reasonable period of time".[51]

The Panel concluded that Japan had failed on at least both the third and fourth requirements.[52]

Second, the Panel also found that the varietal testing requirement was more trade restrictive than necessary and thus violated Article 5.6 of the SPS Agreement. Because there is no significant difference in the efficacy of fumigation techniques across different varieties of the same product, alternative measures—such as setting

[48]Ibid., 8.19–8.27.

[49]Ibid., supra note 35, Appellate Body Report, p. 76.

[50]Japan—Measures affecting agricultural products, supra note 35, p. 84.

[51]SPS Agreement, Article 5.7.

[52]Supra note 35, Panel Report 8.49–8.60.

fumigation requirements on the basis of the easily measured "sorption level" of new varieties, rather than a full re-testing of each variety—would be less restrictive of trade yet still achieve the level of SPS protection that Japan requires. However, the Appellate Body overturned this ruling because it was based on evidence marshalled by the Panel itself and thus the Panel had over-stepped its authority.

Finally, the Panel and Appellate Body found that Japan had violated the requirement to make its SPS measures transparent, especially the requirement in Article 7 that members publish their SPS measures.[53] The Japanese varietal testing requirement was based on numerous de facto rules that were not easily understood by outsiders, which made it difficult for exporters to understand and comply with the requirements of the Japanese market.

In EC—Measures Affecting the Approval and Marketing of Biotech Products,[54] the measures at issue were the de facto moratorium imposed by EC on the importation and marketing of biotech products, product special measures imposed under the moratorium and individual safeguard measures imposed by particular EC Member States separately form the moratorium. The Panel found that both de facto moratorium and the product specific measures involved 'undue delay'. That is to say, the EC had not complied with procedural requirements in the SPS Agreement, under Article 8 and Annex C(1)(a) of the Agreement, to act without 'undue delay', because of the way in which applications for the approval of biotech products had been stalled within the EC bureaucracy. This meant that the Panel declined to make findings under the substantive requirements in Articles 2(2), 5(1), 5(5) and 5(6) of the SPS Agreement.

The Panel's approach to the EC Member States safeguard measures is key because it is here that the most important questions relating to the development of scientific knowledge over time are to be found. Individual safeguard measures banning genetically modified products had been put in place by Austria, Greece, France, Germany, Italy and Luxembourg. Each safeguard measure had been notified to the European Commission. The Commission in each case had requested the opinion of the relevant EC Scientific Committee on the safeguard measure. In each case, the relevant EC Scientific Committee had reaffirmed its own earlier assessment, or that of another EC Scientific Committee, that the products did not present any risk to human health or the environment.

The Panel decided against EC as EC had already reviewed the safeguard measures imposed by individual Member States, and that the EC Scientific Committees have considered sufficient evidence to come to the conclusion. Therefore, EC could not rely on Article 5(7) to buy time for further scientific studies to be done. Accordingly, as the safeguard measures were not saved by Article 5(7), and were found not to be based on risk assessment, they were in breach of Article (1) of the SPS Agreement.

[53]Ibid., Panel Report, pp. 8–116 And Appellate Report, p. 108, 143.

[54]WT/DS 291, 292, 293.

In Canada—Continued Suspension of Obligations in the EC-Hormones Dispute[55] and US—Continued Suspension of obligations in the EC—Hormones Dispute,[56] the EC asserted that the ongoing suspension of obligations against the EC following the EC—Hormones case should no longer be permitted as the EC was now in compliance with the SPS Agreement, taking into account new scientific evidence. The WTO Dispute Settlement Panel rejected the EC argument. The Panel found that in order for scientific information and evidence to become insufficient, there had to be a 'critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant previously sufficient, evidence now insufficient'. The Panel considered that there was no such 'critical mass' in relation to any of the five hormones in question. The Appellate Body considered that the Panel's development of the test had been influenced by the existence of international standards in relation to the safety of growth promotion hormones, yet the EC had the right to adopt a higher level of protection than was set down in these standards. The Appellate Body reversed the Panel's findings that such a test applied in all cases where such standards existed. The WTO Panels have, therefore, opted to examine SPS compliance through the lens of Article 5(1).

7 Summary

Of the three international standard-setting bodies explicitly mentioned in the SPS Agreement, only one, Codex, has been extremely active in setting standards for particular SPS hazards. The other two OIE and IPPC mainly established procedural obligations to conduct risk assessment and adopt SPS measures that are not excessively restrictive of trade, but those obligations are also enshrined in the SPS Agreement. Additionally, all three also codify norms of good practice that include the requirement to base SPS standards on risk assessments. But those norms are quite broad. They play little role in the detailed process of deciding whether a nation has complied with the SPS Agreement. Even in the *Codex Alimentarius* Commission—where the long experience in setting standards would suggest also long experience in applying risk assessment in formulating those standards, the actual practice of risk assessment is neither transparent nor codified. Indeed, the lack of codifcation is perhaps one reason why agreement has been possible. Risks have been assessed and standards have been set mainly through a bottom-up process that mirrors the risk-averse practices in advanced industrial nations.

[55]WT/DS 321/R.

[56]WT/DS 320/R.

Chapter 27
WTO Agreement on Technical Barriers to Trade (TBT)

1 General

The dramatic shift in the focus of trade policy concerns from the barriers that lie at the border to the barriers which exist within the border has lead the municipal governments regulate and protect public health and safety of their citizens and environment, and such regulations vary from state to state. The governments by such regulations have the potential of protecting domestic industry from international competition. Even in the absence of intentions for protectionist measures on the part of lawmakers, due to lack of coordination, mere differences in regulatory or standard-setting regimes can function to impede trade. It has thus become increasingly difficult to delineate the boundaries between a nation's sovereign right to regulate and its obligation to the international trading community not to restrict trade gratuitously.

Therefore, the search for the right balance between disciplining protectionist measures and allowing member states to maintain regulatory autonomy has characterised the evolution of the GATT rules namely Articles I, III, XI and XX of GATT, the Technical Barriers to Trade Agreement (TBT) and the Sanitary and Phytosanitary Measures Agreement (SPS).

Obligations of non-discrimination in internal regulation, including the internal regulations at the border, occupy a primary position in the GATT and TBT Agreement. Article III: I and 4 of the GATT provide:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_27

> than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The broad purpose of Article III is to prohibit "protectionism",[1] a concept which is yet to be defined. Also, the 'aims-and-effects' approach of underpinning the subjective interest is not conceived in the Article. The main objective of Article III is to assess the measure, its structure and its overall application, to ascertain whether it is applied in a way that affords protection to domestic products.[2] The text of Article III: 4 reflects the general principal of paragraph 1 of Article III to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship in the market place between the domestic and imported products involved, so as to afford protection to domestic production.[3] For a violation of Article III: 4 to be established, the complaining member must prove that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use' that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products. The word 'affecting' connotes measures or regulations which affect the specific transactions, activities and uses that must conform to the obligations not to accord less favourable treatment to imported like products.[4]

The prohibition against discrimination in the national treatment obligation can apply only when imported or domestic products are 'like' and that 'likeness' under Article III: 4 is a determination about the nature and extent of a competitive relationship between and among products. In order to arrive at such a determination, four criteria such as (a) the physical properties of the product in question; (b) their end uses; (c) consumer tastes and habits *vis-à-vis* those products; and (d) tariff classification are the determining factors to arrive at the competitive relationship between products.[5] At the same time, Article I of GATT provides that for all matters referred to in paragraph 4 of Article III, any advantage, favour, privilege or immunity granted by any member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other members. The reading of Article III: 1 and 4 with Article I makes it clear that regulatory distinctions by a member are violative of Article III only if it modifies the conditions of competition

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[1]Japan—Taxes on Alcoholic Beverages II, WT/DS/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Adopted 1 November 1996 at p. 16.

[2]Ibid. , p. 28.

[3]Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos containing products, WT/DS135/AB/R, Adopted 5 April 2001, at para. 98.

[4]Appellate Body Report, USA—Tax Treatment for Foreign Sales Corporations—Recourse to Article 21.5 of the DSU by the EC, WT/DS108/AB/RW, para. 208; Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, Adopted 10 Jan. 2001, para. 133.

[5]Appellate Body Report, EC—Asbestos, WT/DS135/AB/R, para. 101.

in the relevant market to the detriment of imported products[6] so as to afford protection to like domestic products.

Less favourable treatment is distinguishable from differential treatment as the class of foreign goods must be treated less favourably than the class of domestic like products and the differential treatment (regulatory) is predicated, either intentionally or unintentionally, on the foreign character of the products.

The regulatory discrimination is justifiable under Article XX which provides certain exceptions enumerated from (a) to (j) and are subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or should not amount as a disguised restriction on international trade.[7]

2 Tokyo Round

Among the limited membership agreements or codes that were negotiated in the Tokyo Round of the 1970s, the Agreement on Technical Barriers to Trade, 1979, proved to be one of the most successful often referred as the Standards Code or the TBT Agreement which was signed by 47 countries.

Standard Code was established and elaborated on the principles first introduced in the OECD Guiding Principles and the Code applied to all products, including industrial and agricultural products. The Code reiterated the national treatment obligations of the contracting parties and sought to ensure that technical regulations and standards were not adopted 'with a view to creating obstacles to international trade'. Contracting parties were urged to work towards the international harmonisation of standards and were obliged to adopt such internationally accepted standards, unless inappropriate for reasons which included, national security, the protection of human, animal and plant, health, technological problems and climatic and geographical factors. Its main provisions prohibited discrimination and protection of domestic production through specification, technical regulations and standards; it also proscribed the preparation, adoption and application of regulations, specifications and standards in a manner more restrictive than necessary; and it urged signatories to base their national measures on international standards and to collaborate and co-operate towards harmonization of such national norms.

The Code made it obligatory to the members to specify standards in terms of their performance rather than design or descriptive characteristics, which meant avoidance of the potential creation of artificial distinctions based on the intricacies of product design rather than their actual effect. In the event that a contracting party

[6]Appellate Body Report, Korea—Various Measures on Beef, WT/DS161/AB/R, para. 137.

[7]Appellate Body Report, USA for Reformulated and Conventional Gasoline, WT/DS2/AB/R, Adopted 20 May 1996; Appellate Body Report, Korea—Various Measures on Beef, WT/DS161/AB/R; Appellate Body Report, EC—Asbestos, WT/DS135/AB/R.

did choose to adopt a standard which differed from an international standard or where no such standard existed and that standard may have affected trade, GATT Secretariat should be notified of the same.

The Standards Code for the purpose of conformity assessment provided that the imported products should be accepted for testing under conditions no less favourable than those accorded to like domestic or imported products and that such procedure should not be more complex or time consuming than the treatment accorded to like domestic products. The Code also strongly encouraged parties to adopt a mutual recognition policy, wherever possible, for test results, certificates and marks of conformity of other parties.

For the standards which created unnecessary obstacle to international trade, the Code offered a clear articulation that those standards are not permitted. But the Code has offered no set criteria in order to determine the dividing line between necessary and unnecessary obstacles to trade. The Code remained silent on this crucial issue. Thus, although the Code was viewed as a helpful first step to reduce the trade restricting effect of divergent domestic standards, regulations and conformity assessment procedures, still its effectiveness was lowered by the fact that it did not address the issue of what exactly constitutes an unacceptable standard. This meant that the complaining party had the formidable onus of either having to prove deliberate protectionist intent or to demonstrate that the measure went beyond what was necessary. Furthermore, the Standard Code had failed to stem disruption of trade in agricultural products caused by proliferating technical regulations.[8]

3 The Uruguay Round

The Uruguay Round elaborated the Tokyo Round Standards Code into two separate agreements dealing with standards. First, was the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) governing measures designed to protect human, animal and plant life and health. Second, was the Technical Barriers to Trade Agreement (TBT Agreement) covering other technical standards and measures not covered by the SPS Agreement. Under the umbrella provision of the WTO, all parties to the GATT are obliged to adhere to both these Agreements. Pursuant to Article II: 2 of the WTO Agreement, the SPS and TBT Agreements are integral parts of the WTO Agreement binding on all members. Therefore, they have the same basic legal status as the General Agreements on Tariffs and Trade 1994. They are co-equal sources of WTO law.

An analysis of the SPS Agreement and TBT Agreement raises interesting technical issues regarding their relationship with GATT and with one another. These technical issues overlay important substantive matters regarding the precise

[8]Donna Roberts, Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations, 1 J.I.E.L.2 (1998), 377, 380.

disciplines applicable to national regulations. Moreover, the determination of the applicable WTO law will affect the WTO's relationship with other treaties. For instance, whether or not there is a conflict between the WTO Agreement and the Bio-safety Protocol of the Biodiversity Convention may depend on which WTO provision of the SPS or TBT or GATT agreements is applicable to a specific set of facts and circumstances. The applicable WTO law is itself determined by the specific aspects of the measures challenged, the nature of the disciplines imposed by each provision and the relationship between these provisions.

4 Agreement on Technical Barriers to Trade: An Analysis

(i) Purpose of TBT Agreement

The TBT Agreement has been framed to address issues such as (a) standards that differ from international norms are employed as a means to protect domestic producers; (b) restrictive standards which are written to match the design features of domestic products, rather than essential performance criteria; (c) unequal access to testing and certification systems between domestic producers and exporters in most nations; (d) failure to accept test results and certifications performed between domestic producers and exports in most nations; (e) continuous failure to accept test results and certifications performed by competent foreign organisations in multiple markets; and (f) lack of transparency in the system for developing technical regulations and assessing conformity in most countries.

The TBT Agreement is essentially a response to two broad policy considerations; first, technical regulations and standards including packaging marketing and labelling requirements, as well as procedures for testing and certifying compliance with these regulations and standards, should not create unnecessary barriers to international trade; second, WTO members must nevertheless be able to protect national security, prevent deceptive practices and protect human health or safety, animal or plant life or health and the environment. Both these considerations are developed in the Preamble to the Agreement, along with two others, i.e., the role that international standards can play in transferring technology from developed to developing countries and the difficulties that developing countries may face in drawing up technical regulations and standards, applying them and assessing the conformity of products with them.[9]

(ii) Scope and Coverage of the Agreement[10]

Article 1.3 of the TBT Agreement provides that the Agreement applies to all products, including industrial and agricultural products; however, Article 1.5 of the Agreement clarifies explicitly that it does not apply to sanitary and phytosanitary

[9]See the Preamble, the Agreement on Technical Barriers to Trade.

[10]Article 1.

measures. Those measures are subject to the provisions of SPS Agreement. The TBT Agreement also does not apply to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies. Article 1.4 of Agreement provides that such specification is subject to the provisions of the Agreement on Government Procurement.

The TBT Agreement covers technical regulations, standards and conformity assessment procedures, as defined in Annex I of the Agreement.[11] This could include, for example, regulations governing packaging, recycling or disposal of products, eco-labelling criteria, water or electrical efficiency criteria for household appliances, product noise regulations and specifications for children's toys. In terms of affirming the right of members to set such standards at the level they deem necessary, the Preamble to the TBT Agreement does not prevent the country from taking measures necessary to ensure the quality of its exports or for the protection of human, animal or plant life or health, of the environment or for the prevention of deceptive practices, subject to the requirement that they are not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade and are otherwise in accordance with the provisions of this Agreement.

(iii) Structure and Principles of TBT Agreement

The structure of the TBT Agreement is quite straightforward. It covers three sets of activities which are carried on at several different levels. The first covers the activities related with preparation, adoption and application of technical regulations, which is addressed by Articles 2 and 3 of the TBT Agreement. Article 2 covers provisions for central government bodies for preparation, adoption and application of technical regulations, whereas Article 3 affirms the responsibilities of WTO members towards relevant local and non-governmental bodies. The second set of activities concerns with preparation, adoption and application of standards by standardising bodies and that is covered by Article 4. Article 4 sets out the principles applicable by all standardising bodies to accept and comply with the Code of Good Practice.

Annex 3 of the TBT Agreement deals with the Code of Good Practice for preparation, adoption and application of standards. The third set consists of confirming and certifying that regulations and standards have been complied with. The conformity assessment procedures include not only testing and certification but also sampling, inspection, evaluation, registration, accreditation and approval which are covered by Articles 5 and 6 for central government bodies, and by Articles 7 and 8, respectively, for local government and non-governmental bodies. Article 9 of the Agreement deals with the obligations of members to formulate and adopt international systems and regional systems for conformity assessment guidelines. For such assessment and guidelines, the Agreement applies basic WTO and GATT principles such as non-discrimination, transparency and consultation.

[11] Article 1.

(iv) MFN and National Treatment Principles of GATT 1994 and TBT Agreement

The MFN principle provided by Article III of GATT 1994, technical regulations, standards and procedures for conformity assessment are to be applied to products imported from other WTO members in a manner no less favourable than that accorded to 'like products' of national origin and to like products originating in any other country. In fact, the core principles of GATT are given priority. The regulations, standards and procedures must not be prepared, adopted or applied with the intention or effect of creating unnecessary obstacles to trade.

In Japan—Alcoholic Beverages I,[12], the Panel declared that the broad purpose of Article III is to prohibit protectionism. The Panel also rejected the 'aims-and-effects' approach to the obligation of national treatment, at least as a search for subjective intent. The Panel further stated that it is possible to examine objectively the underlying criteria used in a particular tax structure, and its overall application to ascertain whether it applied in a way that affords protection to domestic products.

Article 2.1 of the TBT Agreement in the similar vain of Articles III and I of GATT requires: 'treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country'. However, it is worth noting that the TBT Agreement has no equivalent of Article XX. Rather, it has a more expansive formulation of Article XX influenced by modern policy concerns and the body of jurisprudence which has interpreted this section. Article 2.1 reiterates a commitment to the cornerstone principle of MFN and national treatment.

(v) Technical Regulations[13]

The TBT Agreement generally distinguishes between central government measures, local government measures and non-governmental measures. Like the Standards Code, the Agreement generally obligates each WTO member to make such reasonable measures as may be available to it to ensure compliance by local governments and non-governmental bodies with specified provisions of the Agreement.

Technical regulation has been defined in the TBT Agreement, as a document which lays down products characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.[14]

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[12]Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverage: Panel Report, Adopted 10 November 1987 BISD 345/83.

[13]Article 2.

[14]Annex 1.1.

The term "technical regulation" has been interpreted in EC—Asbestos case[15] wherein the measure at issue was a French decree, prohibiting the sale in France of asbestos and products containing asbestos fibres because of dangers to human health but provided certain exceptions to those prohibitions. The Panel first examined the part of the decree containing the prohibitions and concluded that it was not a technical regulation because it did not define the 'characteristics' of specific products. The Panel then examined the part of the decree containing the exceptions and concluded that it was a technical regulation because it was product specific. The Panel did not, however, analyse the decree under the TBT Agreement because Canada made no claims under the part of the decree containing the exceptions.

The Appellate Body, however, concluded that the French decree should have been 'examined as an integrated whole'. It ruled that the decree was a 'technical regulation' because the products covered by the measure are identifiable, compliance with the prohibitions is mandatory and the exceptions set out applicable administration provisions, with which compliance is mandatory for products with certain objective 'characteristics'.

(vi) Regulations Applicable to Central Government[16]

Article 2 provides rules regarding the preparation, adoption and application of technical regulations by central government bodies. Article 2.1 articulates the Agreement's core discipline, namely that each member must refrain from using technical regulations in a discriminatory manner. Article 2.2 of the Agreement provides that all members will have to ensure that all technical regulations do not create unnecessary obstacles to international trade. For this purpose, the technical regulations are not to be more trade-restrictive than necessary to fulfil a legitimate objective; taking account of the risks non-fulfilment would create. But the term legitimate objective has not been defined in the Article. Rather it provides an open-ended, illustrative list of the legitimate objectives. This includes national security requirements, prevention of consumer deception and protection of human health or safety, animal or plant life or health and the environment. The protection of domestic production will not come under legitimate objective. For assessment of the risks, Article 2.2 provides that available scientific and technical information and related processing technology can be analysed.

An illustration of an alternative measure that may not fulfil a government's legitimate objective would be where a government seeks to protect consumers who suffer severe allergic reactions to a particular chemical found in insect repellent. Requiring cans of insect repelant to carry a label warning of the presence of the substance may not adequately protect consumers that are either illiterate or who do not know they are allergic.

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[15]European Communities—Measures Affecting Asbestos and Asbestos-Containing Products. Panel Report, WT/DS35/R and Add. 1, Adopted 5 April 2001, as modified by the Appellate Body Reports, WT/DS 135/AB/R.

[16]Article 2.

The obligation mentioned in Article 2.2 is similar to the obligation in Article 5.6 of the SPS Agreement. The Agreement's negotiators intended this obligation to operate in a manner similar to Article 5.6 of the SPS. Thus, in order for a WTO member to show that another government's technical regulation is more trade-restrictive than required, the member would need to show that there is another measure that:

- is reasonably available to the government;
- fulfils the government's legitimate objectives; and
- is significantly less restrictive to trade.

If a member adopts an international standard, a rebuttable presumption is created that the standard does not create an unnecessary obstacle to trade.[17] Whenever a relevant international standard does not exist or the technical content of a proposed regulation is not in accordance with the relevant international standard and if the technical regulation may have a significant impact on trade to other members; Members are obliged to publish a notice in a publication at an early stage so as to enable interested parties and other members to become acquainted with it and to provide opportunities for other members to make comments in writing on the proposed regulation.[18] Members must allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting countries to adapt their products or methods of production to the requirements of the importing members.[19]

(vii) Regulations Applicable to Local and Non-Governmental Bodies[20]

Under the TBT Agreement, Central Governments are fully responsible for the observance of the Agreement by local government. The central governments are obliged to formulate and implement positive measures and mechanisms in support of observance of the Agreement by state and all local governments. Such positive measures and mechanisms include informing state and local governments regarding the provisions of the TBT Agreement and assisting them in understanding its provisions.

The TBT Agreement requires that all state or local governments apply TBT provisions in framing regulations. It does not require that state or local governments must adopt or comply with central provisions. The Agreement simply holds the central government responsible for ensuring that state and local measures comply with the rules set out in the TBT Agreement. Just like central governments, state or local governments also are free to maintain or change their laws, subject to the provisions of the TBT Agreement. Nothing in the TBT Agreement precludes states from maintaining or adopting measures that are more stringent than the central

[17] Article 2.4.
[18] Articles 2.5 and 2.9.
[19] Article 2.12.
[20] Article 3.

governments. A suit cannot be maintained by the central government against a state under the TBT Agreement on the ground that its standards are stricter than those of the central government.

Under the TBT Agreement, state and local governments can maintain measures for the promotion, safety and protection of human, animal, or plant life or health, or the environment or consumers. The TBT Agreement, and any measures taken there under to secure observance by state and local governments of provisions of the Agreement, will in no way diminish or empower the constitutional or legal rights of state and local governments to adopt, maintain, or apply measures to protect public health and the environment.

Nothing in the TBT Agreement requires the federal governments to take legal action against state measures that dispute settlement panels may determine to be inconsistent with trade obligation. In the case where state rules are successfully challenged under the TBT Agreement, the central governments will work co-operatively with the states to seek a satisfactory resolution of the matter.

(viii) Code of Good Practice[21]

Under the TBT Agreement it is the obligation of the members to ensure that their central government standardising bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards as mentioned in Annex 3 of the TBT Agreement.[22] The central governments of all the members will have to ensure that they are taking reasonable measures for the compliance of standards by all local governments. The members encourage all their local authorities for complying with the provisions of the Code of Good Practice.

The Code of Good Practice for Preparation, Adoption and Application of Standards extends the coverage and most of the disciplines of the TBT Agreement to all voluntary standards set by the central government, local government and non-governmental standardising bodies. The obligations of members with respect to compliance of standardising bodies with the Provisions of Code of Good Practice continue to apply whether or not these other standardising bodies formally accept the Code or not.

(ix) Harmonization of Technical Standards

The TBT Agreement emphatically encourages the efforts to be made by WTO members to harmonise technical regulations, standards and conformity procedures in order to minimise obstacles to trade created by diverse national practices. The Agreement suggests three approaches to achieve the process of harmonization (see footnote 22).

If relevant internationally agreed standards exist, members are urged to use them as a basis for harmonising their technical regulations or standards, unless the international standards would be inappropriate or ineffective for the legitimate

[21]Article 4.

[22]Annex 3.

objectives pursued [Article 2.4]. Similar encouragement is given to use any international guides or principles that may have been drawn up for conformity assessment.

As an inducement, the TBT Agreement creates a rebuttable presumption that regulations prepared in accordance with international standards do not create an unnecessary obstacle to trade.[23] The Agreement also simplifies notification requirements for regulations and requirements based on such standards.[24] Technical regulations may go above or below international standards of participation in a international standards body and reliance on their work as basis is encouraged, deviations from international standards is not prohibited.

The TBT Agreement does not impose absolute obligation on its members to use international standards, or force countries to accept lowest common denominator standards of protection to safety or the environment. On the other hand, the Agreement encourages the members to participate in the work of international standardising bodies.[25]

The TBT Agreement provides that the members should give positive consideration for accepting as equivalent to their own, technical regulations of other members, provided they are satisfied that these regulations adequately fulfil the policy objectives of their own regulations.[26]

The Agreement encourages members to negotiate agreements for mutual recognition of conformity assessment, and calls on the members to accept, whenever possible, the result of conformity assessment procedures in other members, provided they are satisfied that those procedures give an assurance, equal to that of their own procedures, that technical regulations or standards have been met. Further, it suggests some criteria that include compliance with guides or recommendations issued by international standardising bodies to establish that relevant conformity assessment bodies in the exporting country have the necessary technical competence.[27]

(x) Conformity Assessment Procedures[28]

Articles 5 and 6 of the TBT Agreement expand and update disciplines regarding central government conformity assessment procedures and central government recognition of the results of conformity assessment procedures carried out by other WTO members. The Standards Code of Tokyo Round applied to only testing whereas the TBT Agreement applies to all aspects of conformity assessment, including laboratory accreditation and quality system registration.

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[23] Article 2.5.

[24] Article 2.9 and Article 5.6.

[25] Articles 2.6 and 5.5.

[26] Article 2.7.

[27] Article 6.

[28] Articles 5 and 6.

Article 5.1 of the TBT Agreement requires each member of WTO to provide suppliers from other WTO countries access to conformity assessment procedures that are no less favourable than that accorded to domestic suppliers and to avoid adopting procedures that create unnecessary obstacles to international trade. It represents a departure from the Standards Code, defining access to induce the possibility of having conformity assessment activities undertaken at production facilities and to receive the mark like certification of the system. The conformity assessment procedures should not be more strict or be applied more strictly than is necessary to give the importing member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

Article 5.2 of the TBT Agreement sets out the detailed list of rules governing conformity assessment procedures, such as fees, the processing of applications and complaint mechanisms to ensure that they do not discriminate against imported products or create unnecessary obstacles to trade. Like the Standards Code, the TBT Agreement also allows reasonable spot checks of an imported product to determine its compliance with a standard or technical regulation.[29]

Article 5.4 of the Agreement requires each government to use international guidelines or recommendations for conformity assessment procedures unless such guidelines or international recommendations or relevant parts are inappropriate on the grounds of national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment. Fundamental climate or other geographical factors or fundamental technological or infrastructure problems can be the appropriate grounds for non-compliance.

The TBT Agreement further provides that each of the Members take appropriate measures to make the conformity procedures harmonise with international standardising bodies of guides.[30] It requires from all members to publish promptly all conformity procedures to enable interested parties to become acquainted with them.[31]

(xi) Recognition of Conformity Assessment Procedures[32]

Article 6 of the TBT Agreement concerns the acceptance by central government of the results of conformity assessment procedures, such as laboratory data, undertaken in other member countries. Article 6.1 requires the members, whenever possible to accept the results of conformity assessment procedures in other WTO members but subject to the satisfaction that these procedures offer an assurance of

[29]Article 5.3.
[30]Article 5.5.
[31]Article 5.8.
[32]Article 6.

conformity with applicable technical regulations or standards to their own procedures. The TBT Agreement encourages both mutual recognition agreements and direct participation in conformity assessment procedures as a means to ensure that procedures are equivalent and results are acceptable.

(xii) **Procedures for Assessment of Conformity by Local Government and Non-Governmental Bodies**[33]

Articles 7 and 8 of the TBT Agreement deal with the procedures for assessment conformity for local and non-governmental bodies. Article 7 provides that all members take reasonable measures as may be available to them to ensure compliance of local governments to comply with the provisions of Articles 5 and 6. It requires that central government takes appropriate measures for applying the measures at local levels. For the application of these procedures at local governmental level, the central government must take measures to encourage the local government to apply the procedures.

Article 8 of the TBT Agreement provides that all Members take reasonable measures available to them to ensure that non-government bodies comply with the provisions of Articles 5 and 6. For this, the central government encourages the non-governmental bodies to act in a manner consistent with the provisions of Articles 5 and 6.

5 International and Regional Systems[34]

Article 9 of the TBT Agreement deals with the formulation and adoption of international system for conformity assessment where a positive assurance of conformity with technical regulation or standards is required. It also ensures that members take all such reasonable measures in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. It prohibits members from taking any measures which have directly or indirectly any adverse effect in the manner mentioned in Articles 5 and 6.

6 Transparency Obligations

The TBT Agreement creates two transparency obligations to ensure that advance knowledge of technical regulations, standards and conformity assessment is available to all WTO members, so that the private sector has the proper time to adjust themselves to the changing policies. The first obligation is essentially

[33] Articles 7 and 8.

[34] Article 9.

passive. It requires from each member to ensure that a national enquiry point exists which can respond to all reasonable enquiries from other members.[35] The enquiries about technical regulations adopted or proposed by central, local or by non-governmental bodies, any standard, procedures, any agreement, location of notices published can be done by each member. It also ensures that any enquires addressed to an incorrect enquiry point promptly be conveyed to correct enquiry point. Further, it allows the members to establish more than one enquiry points to answer all reasonable enquiries.

The second obligation is to submit notifications of changes in these conformity assessment measures and procedures. If proposed technical regulations or procedures for conformity assessment prepared by members are not the same as international standards or are based substantially on such standards, and if they may have a significant effect on the trade of other WTO members, they must be notified, generally, at least 60 days before adoption. Other members may then comment on them, and the comments are to be taken into account before the regulations or procedures are adopted.

7 Technical Assistance to Other Members[36]

The TBT Agreement includes a number of provisions in Article 11, on technical assistance by members to help other members in preparing technical regulations, setting up national standardising bodies and in participating in international bodies. In providing technical assistance in these matters, the priority will be given to the developing countries, more particularly to the least developed country members. The assistance given will be on mutually agreed basis. The WTO developed members provide reasonable technical assistance in arranging for the developing country members regulatory bodies. It also provides the methods by which technical regulations can be best met.

8 Special and Differential Treatment of Developing Country Members[37]

Article 12 of the TBT Agreement goes into greater detail on the treatment of developing and least developing countries. It provides for differential and more favourable treatment to developing country members. It directs the Members to give particular attention to the interests of the developing country members' rights and obligations taking into account the special development, financial and trade needs of

[35]Article 10.1.

[36]Article 11.

[37]Article 12.1.

these groups. It provides special attention to the developing country members in implementation and operation of this Agreement's institutional arrangements.[38]

The TBT Agreement ensures financial and trade needs of the developing countries in the preparation and application of technical regulations, standards and conformity assessment procedures.[39] The Agreement protects the rights of the developing country members in adopting certain technical regulations, standards or conformity assessment procedures for the preservationReservation of indigenous technology and production methods and processes compatible with their development needs keeping in mind their particular technological and socio-economic conditions. Therefore, developing countries are not expected to use international standards as a basis for their technical regulations or standard, including test methods which are not appropriate to their development, financial and trade needs.[40] The TBT Agreement directs the members to take such reasonable measures as may be available to them to ensure that international standardising bodies and international system for conformity assessment are organised and operated in a way which facilitates active and representative participation of relevant bodies in all members, taking into account the special problems of developing country members. Upon the request of developing country members, members are also directed to take appropriate action in preparing international standards.

The TBT Agreement also recognises the institutional and infrastructural problems of the developing country members in the field of preparation and application of technical regulations, standards and conformity assessment procedures. Further, it recognised that special development and trade needs of developing country members, as well as that their stage of technological development, may hinder their ability to discharge fully their obligations under the Agreement. Accordingly, with a view to ensuring that developing country members are able to comply with this Agreement, the Committee on Technical Barriers to Trade is enabled to grant, upon request, specified, time limited exceptions in whole or in part from obligations under the Agreement. While considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity standards procedures, the special development and trade needs of the developing country member, as well as its stage of technological development, which may undermine its ability to discharge fully its obligations under the Agreement. The Committee in particular, will take into account the special problems of the least developed country members.[41]

[38]Article 12.2.

[39]Article 12.3.

[40]Article 12.4.

[41]Article 12.8.

9 Institutions, Consultations and Dispute Settlement

(i) The Committee on Technical Barriers to Trade[42]

Article 13 of the TBT Agreement establishes a Committee on Technical Barriers to Trade, comprising representatives from each WTO member. The meetings of the Committee are held at least once a year. The purpose of the Committee is to afford members the opportunity of consulting on any matters relating to the operation of the Agreement or furtherance of the objectives of it. It can carry out such responsibilities as assigned to it under the Agreement or by the members. The Committee has been empowered to establish working parties or other bodies as may be appropriate for carrying out such responsibilities as may be assigned to them by the Committee.

Article 13.3 makes it clear that work under the TBT Agreement should avoid duplicating work already under way in other technical bodies. The Committee has been empowered to examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country members on national and international standards.[43]

(ii) Consultation and Dispute Settlement

Article 14 of the Agreement provides that all consultations and settlement of disputes with respect to any matter affecting the operation of the Agreement will be settled under the auspices of the DSB. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding will apply to all disputes. A dispute settlement panel may establish a technical expert group to provide advice or technical questions. This technical expert group will be governed by the provisions that have been outlined in Annex 2 of the TBT Agreement.[44]

The dispute settlement provisions can be invoked in cases where a member considers that another member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 of GATT and its trade interests are affected significantly.[45]

10 Reservations

Article 15.1 of the TBT Agreement allows the members to declare their reservations. But this provision is not absolute. Without the consent of other members, reservations cannot be entered into in respect of any of the provisions of the Agreement.

[42]Article 13.
[43]Article 12.10.
[44]Annex 2.
[45]Article 14.4.

11 Review

Each member of the WTO under Article 15.2 is obliged to inform the Committee of measures in existence. Any changes in such measures will have to be notified to the Committee. The Committee has been empowered to review the implementation and operation of the Agreement annually taking into account its objectives. The Committee is further empowered to review the operation and implementation of the Agreement. The review includes the operation and implementation of the Agreement plus the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of the Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations without prejudice to the provisions of Article 12 of the Agreement. This review was done in 1997 and thereafter every three years a separate review is done. The Committee, where appropriate, can also submit proposals for amendments to the text of the Agreement to the Council for Trade in Goods.[46]

12 The GATT Versus TBT

The TBT Agreement lacks an explicit provision relating to the GATT. The TBT provisions often add to those of Article III of the GATT. The Appellate Body in EC—Asbestos[47] observed that 'although the TBT Agreement is intended to further the objectives of GATT 1994; it does so through a specialised legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on members that seem to be different from, and additional to, the obligations imposed on members under the GATT 1994'.

Any reading of the TBT Agreement and GATT must not be such as to discourage compliance or reduce incentives to comply with the more stringent requirements of the TBT Agreement. As with the SPS Agreement, it would be best if compliance with the TBT Agreement gives rise to a presumption of compliance with GATT. The compliance with an international standard under Articles 2.4 and 2.5 of TBT Agreement can lead to presumption of compliance with Article 2.2 of the TBT Agreement and not simply the presumption of necessity provided by Article 2.5. The use of such international standards *de facto* leads to the conclusion that the domestic TBT measure is necessary for the purpose of Article XX. The same is also generally true for any measure that complies with the Article 2.2 of the TBT Agreement.

Since the TBT Agreement adds different obligations as compared to GATT possibly, it indicates that it is in violation of the GATT principle. A technical regulation that complies with Articles 2.1 and 2.2 of the Agreement is likely to be

[46]Article 15.4.

[47]WT/DS 135/AB/R.

compatible with Articles III and XX of GATT. But if the necessity test under Article 2.2 of TBT Agreement is somehow less stringent than that of for example, Article III combined with Article XX of GATT, one may conceive of incongruent results under TBT and GATT.

The scope and meaning of Article 2.1 are similar to that of Articles III and I of GATT, and a single technical regulation could be a *prima facie* violation of Article III but may be justified under Article XX of GATT. It will also be in violation of Article 2.1 of the TBT Agreement without any possibility of justification even if the same regulation is found not in violation of Article 2.2 of the TBT Agreement. Article 2.2 cannot be invoked as a defence to a violation of Article 2.1 This view has been affirmed by the Appellate Body in EC—Asbestos case.[48] The Appellate Body had concluded that the TBT Agreement is applicable to the measure at issue but decided not to complete the analysis under that agreement. The Appellate Body concluded that the measure can in any case be justified under Article XX of GATT.

While the TBT Agreement allows members to base their TBT regulations on 'any legitimate governmental policies', Article XX of GATT contains a closed list of policies. Therefore, it is conceivable that a measure based on a policy not listed in Article XX can be considered not more restrictive than necessary pursuant to Article 2.2 of TBT, while not being able to find any provisional justification under any of the sub-paragraphs of Article XX of GATT. Unless the TBT Agreement is understood as specialized law to the exclusion of GATT, the GATT provisions continue to apply while the TBT Agreement may also be applicable.

13 SPS Versus TBT

The WTO Agreement on the Applications of Sanitary and Phytosanitary Measures [SPS] and the TBT are in many ways related. Both agreements recognise the right of WTO member countries to establish technical regulations and to apply those regulations to imported products. Both circumscribe that right by laying down rules governing the development and application of such regulations, using a certain number of similar provisions. For the most part, the coverage of the two agreements is complementary to each other. Indeed, the TBT Agreement defines its scope in part through reference to the SPS Agreement.

Nevertheless, there are fundamental differences between the two agreements. While the SPS Agreement explains the general exception contained in Article XX (b) of GATT, the TBT Agreement explains the obligations contained in GATT Article III. In other words, the SPS Agreement establishes the principles upon which a member's right legitimately asserts that the measures are 'necessary to

[48]EC—Asbestos, WT/DS 135/AB/R.

protect human, animal or plant life or health from certain specified risks'. The TBT Agreement, on the other hand, is not a defence; it enumerates the particulars of the national treatment obligations that members are under, when they impose technical requirement or standards. This means that a measure that is not intended to address a particular health or safety risk is susceptible to challenge under either the GATT or the TBT Agreement, without any affirmative defence. A measure directed at a specified health or safety risk, however, would be adjudged under the SPS agreement, which effectively incorporates the general exception of Article XX (b).

The scope of the SPS Agreement is well defined and relatively narrow. Consequently, it was possible for Uruguay Round negotiators to agree on certain objective standards of legitimacy for all SPS measures and to turn those standards into binding disciplines. The coverage of the TBT Agreement on the other hand is extremely broad and diverse, and it is difficult to develop firm, objective disciplines that could apply to the entire range of measures covered. Consequently, the TBT Agreement contains few substantive obligations and none that go substantially beyond those already spelled out under GATT. Article 2.2 essentially repeats the national treatment obligation from GATT Article III. Article 2.2, the most important provision in the TBT Agreement, requires members to ensure that technical regulations are 'not more trade restrictive than necessary to fulfil a legitimate objective'. This obligation is so general of necessity because of the broad range of measures covered that it is difficult to apply. It is a useful discipline only in the most egregious cases, and such cases could also be prosecuted under GATT Articles II (Schedule of Concessions), III (National Treatment), or XI (Elimination of Quantitative Restrictions).

Article 1.5 of the TBT Agreement provides that it does not apply to sanitary or phytosanitary measures, as defined in the SPS Agreement. The TBT Agreement covers all technical regulations, other than those that are sanitary or phytosanitary measures as defined in the SPS Agreement. This means that the purpose of a measure whether or not it is applied to protect against pests and diseases, as well as foodborne dangers, is central to the division of jurisdiction between the TBT agreement and SPS agreement. Article 1.4 of the SPS Agreement provides that nothing in the SPS Agreement affects rights under the TBT Agreement, with respect to measures not covered by SPS. Article 1.5 of the TBT Agreement provides that the TBT Agreement does not apply to SPS measures. Thus, where the SPS Agreement applies by its terms, the TBT Agreement would be inapplicable and *vice versa*. It is, however, possible that aspects or components of a specific measure can be covered by the SPS Agreement while others would be covered by the TBT or GATT, depending on how one defines measures.

14 Conclusion

The TBT Agreement had only a limited role in addressing the underlying cause to trade disputes. To date, regulatory issues have mainly been addressed from the viewpoint of their potential to constitute disguised trade restrictions. There have been no dispute settlement findings based on the Agreement. Indeed, only once has a member raised arguments on the TBT Agreement in panel proceedings in European Communities—Measures Concerning Meat and Meat Products (Hormones)[49] and in that case the Panel found that the Agreement was not applicable to the dispute.

For facilitation of international trade, international standardisation bodies play a crucial role. However, the TBT Agreement's Code of Good Practice relating to standards does not apply to international standardisation bodies.

The TBT Agreement does not effectively address the issue of how exactly a panel could go about delineating a validly different standard from a trade restricting one. While the benchmark of an international standard is clearly given, the subject of risk assessment is not addressed, unlike the comprehensive provisions outlined by the SPS Agreement. This means that if a member adopts a standard which is more stringent than the international standard, it is not required to be justified on the basis of scientific evidence.

There is also a concern among consumer groups that such legislation functions to constrain the ability of members to set technical regulations and standards at levels they deem appropriate, thereby undermining national political sovereignty and policy autonomy. The TBT Agreement strives to promote international policy convergence, the welfare implications of which are highly ambiguous in many cases.

Since there is involvement of greater number of players in conformity assessment procedures at every level, there appear a greater chance for duplication of its efforts, a failure to share information and the establishment of excessively complicated procedures. Further, there exists significant variation in the conformity assessment procedures among the members of the WTO.

[49]EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by the USA, WT/DS26/R/USA, Adopted 13 Feb. 1998 as modified by the Appellate Body Report, WT/DS26 AB/R, p. 699; see also EC—Trade Description of Sardines; Appellate Body Report, WT/DS231/AB/R, DSR 2002: VIII.

Chapter 28
WTO Agreement on Pre-shipment Inspection

1 Introduction

The subject of pre-shipment inspection is closely linked with customs valuation, but is covered by a completely new Agreement, the Pre-Shipment Inspection Agreement (PSI). In order to verify the quality, quantity, price of goods which a country imports or to assure the respect of their regulations concerning exchange rates and capital, countries have recourse to pre-shipment inspections which takes place within the territory of the exporting country and is carried out on behalf of the importing country by private entities having the necessary technical expertise. Exporting countries many a time had complained that these inspections on occasions are applied in a discriminatory manner and also restrict trade.

The PSI Agreement concluded within the framework of the Uruguay Round defines in very detailed manner inspections which are acceptable as well as those which are not acceptable. It also outlines the manner in which the practice of transfer pricing may be controlled. On a procedural level, the Agreement provides for exporting countries that they must submit to the decision of the entities which are engaged in the inspection activities to an independent arbitration in case the exporting countries are not satisfied with the inspection entities.

PSI Agreement's main aim is to establish a framework of rights and obligations, based on non-discrimination and transparency that provide guidelines for the use of inspection firms, mentioned as entities in the Agreement and for the work of these firms in verifying quality, the quantity, the price, including currency exchange rates or customs classification of goods to be exported to the territory of the user member. The Agreement also provides procedures for resolving disputes that may arise between traders and inspectors.

The Agreement recognises the need of some developing countries to make use of pre-shipment inspection 'for as long and in so far as it is necessary to verify the quality, quantity or price of imported goods'. It assumes, however, that inspection entity will be a private company. The use of private specialist companies to inspect

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goods before they are shipped, so as to be certain that contractual specifications have been met, is already a accepted phenomenon in international trade dealings. Increasingly, however, developing countries have made presentation of a 'clean report of findings' from a designated pre-shipment inspection firm a condition for clearing imports through customs or for releasing foreign exchange to pay for imports. The purpose is primarily to check that the real value of the goods matches their declared value.

Some countries have made pre-shipment inspection a condition for a large proportion of imports, while others require it only for specified imports, such as those for government use. From the point of the view of the developing countries, the real aim is to prevent fraud and also to reinforce their own customs administrations, ensuring that value is not under or over-declared. The under-declaration, unless detected, will result in lower duties being imposed that may result in the loss of revenue. On the other hand, over-declaration provides an opportunity for illegal export of capital.

The concern of the exporters is that these inspections may hamper trade by increasing their costs and causing delays. The imposed changes in valuation amount to interference in the contractual relationship between buyer and seller. A sensitive point of governments is that these inspections take place in the exporting countries, on behalf of importing countries. These concerns were originally raised in GATT in the Committee responsible for the Tokyo Round Customs Valuation Code.

A number of governments around the world, principally in developing countries, employed commercial inspection companies to verify the customs classification and value of goods to be shipped to their markets. Typically, such firms operate at seaports and airports in developed countries, including the USA, where they examine exporter claims concerning the quality, quantity, price, currency exchange rate, and financial terms and customs classification of goods awaiting capital.

The Agreement is primarily designed to require WTO members employing or mandating the use of such firms (user members) to ensure that the inspection activities of the companies they employ are reasonable and do not interfere with legitimate trade. It also carries obligations for user members, who are expected to ensure fulfilment of the obligations through their contractual agreements with inspection agencies. It also ensures for the protection of confidential exporter's information. Unreasonable delays in inspection are minimised. The inspection firms use uniform price verification methodologies. The Agreement also creates a forum for binding arbitration to resolve grievances lodged by exporters against PSI firms.

The PSI Agreement applies to all pre-shipment inspection activities carried out on the territory of any member. Such activities include any contracted or mandated activity by the government or any government body of a member country. For the purpose of the Agreement, the term 'user member' means a member of which the government or any government body contracts for or mandates the use of pre-shipment activities. The Agreement defines pre-shipment inspection as 'all activities relating to the verification of the quality, quantity, the price, including currency exchange rate and financial terms and or the customs classification of

goods to be exported to the territory of the user member'.[1] Any entity which is contracted or mandated by a member to carryout pre-shipment activities is pre-shipment entity.[2]

2 Obligations of User Members[3]

The core of the Agreement lies in Article 2 which provides obligations of user members, which accounts for more than half of the total text. Article 2 requires user members to undertake a range of obligations in respect of activities carried out by PSI firms on their behalf.

(a) **Non-discrimination**[4]

The PSI Agreement ensures that all pre-shipment activities are carried out in a non-discriminatory manner. It is obligatory on the part of each member to ensure that the procedures and criteria employed in the conduct of activities relating to pre-shipment are objective in nature and are applied on an equal basis to all exporters affected by such activities. They have also to ensure that uniform performance of inspection is carried out by all the inspectors of the pre-shipment entities contracted or mandated by them.

(b) **Requirement from Government**[5]

The Pre-shipment Inspection Agreement ensures from every user member that they must meet the national treatment requirements of GATT Article III: 4. In other words, the user member should not apply rules on sales, use, etc., stricter than would apply to domestic products.

(c) **Site of Inspection**[6]

The PSI Agreement ensures from all user members that all activities related to pre-shipment including the issuance of a Clean Report of Findings or a note of non-issuance are performed in the customs territory from which the goods are exported. The note of non-issuance will also be issued from the site from which goods are exported. The inspection for all complex goods can be done in the customs territory in which goods are manufactured. If both parties agree, then the inspection can also be done in the customs territory in which goods are manufactured.

[1] Article 1.3.
[2] Article 1.4.
[3] Article 2.
[4] Article 2.1.
[5] Article 2.2.
[6] Article 2.3.

(d) Standards Employed in Inspection[7]

The standard adopted in the inspection activities can be determined by the seller and the buyer of the purchase agreement so that quality and quantity of the exporting goods are maintained. In the absence of such agreements, the standard employed for inspection will be relevant international standard. An international standard is a standard adopted by a governmental or non-governmental body whose membership is open to all members, one of whose recognised activities is in the field of standardisation.

(e) Transparency[8]

Article 2 also imposes a number of requirements on user members to ensure that PSI activities are conducted in a transparent manner. User members must ensure that PSI firms provide exporters with all information necessary for the exporters to comply with inspection requirements. When requested by the exporter, PSI entities will have to provide the actual information related to pre-shipment activities. This information includes reference to law and regulations of the user member relating to pre-shipment activities which also includes procedures and criteria used for inspection and for price and currency exchange rates verification purpose.

The additional procedural requirements or changes in existing procedures cannot be employed to a shipment unless the exporter concerned is informed of the changes made at the time of inspection date. However, in emergency situations of the types addressed by Articles XX and XXI of GATT 1994, such additional requirements or changes can be applied to a shipment before the exporter has been informed. But this does not relieve exporters from their obligations in respect of compliance with import regulations of the user members. The user members under the Agreement have to publish promptly all applicable laws and regulations relating to pre-shipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

(f) Protection of Confidential Business Information[9]

The PSI Agreement requires user members to ensure that pre-shipment inspection entities treat all information received in the course of the pre-shipment inspection as business confidential to the extent that such information is not already published, generally available to third parties or otherwise in the public domain. For this, all pre-shipment entities will have to maintain certain procedures. No member can disclose confidential information the disclosure of which jeopardise the effectiveness of the pre-shipment inspection programme or would prejudice the legitimate commercial interest of particular enterprises, public or private.

The PSI Agreement further ensures that pre-shipment entities do not divulge confidential business information to any third party; however, they can share this

[7]Article 2.4.

[8]Article 2.5–2.8.

[9]Article 2.9–2.13.

information with the government entities that have contracted or mandated them. All confidential business information for which the entities are engaged must be safeguarded properly. PSI firms or entities may share such information with user members only to the extent that it is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

The user members must ensure that pre-shipment inspection entities do not require exporters to provide information regarding:

(i) manufacturing data related to patented, licensed or undisclosed processes or to processes for which a patent is pending;
(ii) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;
(iii) internal pricing, including manufacturing costs;
(iv) profit levels;
(v) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question.

(g) Conflict of Interest[10]

The PSI Agreement requires user members to ensure that PSI entities maintain procedures to avoid conflict of interest between pre-shipment inspection entities and any related entities of the pre-shipment inspection entities in question, such as parent or subsidiary companies. In addition, governments are to ensure that PSI entities avoid conflict of interest with unrelated firms also.

(h) Avoiding Delays[11]

User members must also ensure that pre-shipment inspection entities avoid unreasonable delays in the inspection of shipments. The Agreement also ensures that once an entity and exporter agree on an inspection date, the pre-shipment inspection must be conducted on that date unless it is rescheduled on a mutually agreed basis or the inspection entity is prevented from doing so by the exporter or by *force majeure*. *Force majeure* means irresistible compulsion or coercion, unforeseeable course of events excusing from fulfilment of contract.

Under the Agreement, user member, following the receipt of the final documents and completion of the inspection, ensures that inspection entities within five working days, either issue a 'Clean Report of Findings' or provide a detailed written explanation specifying the reasons for non-issuance. In the case of non-issuance inspection, entities will have to give the exporters opportunity to present their views in writing, and if exporters request for reinspection, arrange for reinspection at the earliest mutually convenient date. On the request of the exporter, a PSI entity must further undertake a preliminary verification and promptly inform the exporter of the results of price and foreign exchange rate.

[10]Article 2.14.
[11]Article 2.19.

(i) Price Verification[12]

The PSI Agreement also requires user members to ensure that PSI entities apply certain criteria to prevent over-invoicing and under-invoicing and fraud. For example, user members must require PSI entities to base their price comparisons on the price of identical or similar goods offered for export from the same country of exportation under comparable conditions of sale, in conformity with customary commercial practices and net of any standard discounts, making appropriate allowances for the terms of the sales contract.

Furthermore, governments must ensure that PSI entities do not base their price verification on the selling price of goods produced in the country of importation, the price of goods from a country other than the actual country of exportation, the cost of production or an arbitrary or fictitious price or value.

(j) Procedure for Appeals[13]

The Agreement requires from user members to ensure that pre-shipment inspection entities establish procedure to receive, consider and render decisions concerning grievances raised by exporters. All information regarding the procedure adopted by these entities must be made available to the exporters. The user members are further required to ensure that the inspection entities designate certain officials for proper discharge of the inspection. The exporters are under obligation to give all information concerning the specific transaction in question, the nature of grievance and a suggested solution. The designated officials are required to take decisions as soon as possible after receipt of the documents concerned.

3 Obligations of Exporter Members[14]

The PSI Agreement requires from all exporting members to ensure that their laws and regulations relating to pre-shipment inspection activities are applied in purely non-discriminatory manner. For maintaining transparency, exporter members are required further to publish all applicable laws and regulations relating to pre-shipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them. If requested by any user member, exporter members are directed under the Agreement to provide technical assistance towards the achievement of the objectives of this Agreement on mutually agreed terms. Such technical assistance can be given on a bilateral, plurilateral or multilateral basis. Such assistance includes *inter alia*, tariff and customs administration reforms, simplification and modernisation of systems and procedures and the development of an adequate, legal, administrative and physical infrastructure.

[12]Article 2.20.

[13]Article 2.21.

[14]Article 3.

4 Binding Arbitration[15]

Article 4 of the Pre-shipment Agreement calls for the establishment of a system of binding arbitration for grievances that cannot be resolved through the appeals process mentioned in Article 2 paragraph 21 of the Agreement. The Agreement encourages the pre-shipment inspection entities and exporters to resolve their disputes on mutual basis.

The arbitration panel must be constituted on mutually agreed basis. The arbitration system will be jointly administered by the International Chamber of Commerce and the International Association of Pre-shipment Inspection Companies. Decisions by the three member arbitration panel—comprising a panellist selected by each side, plus an independent trade expert—must be rendered within eight working days of the request for independent review, unless the parties otherwise agree. The results are binding on the exporter and the inspection entities both. Costs will be apportioned according to the merits of the case. Although a review by the independent entity is conceived, yet the parties can carry a dispute under the Agreement as the governments preserve the right to take disputes about the operation of the Agreement to the normal dispute settlement procedures of the WTO.

5 Review, Consultation and Dispute Settlement[16]

Article 6 of the Agreement allows for its first review after two years of coming into force of WTO and thereafter every three years. In 1996, a Working Party was established to conduct the review of the Agreement. The Working Party issued three reports, all of which have been approved by the General Council. Article 7 of the Agreement provides that upon request a member can consult other members with respect to any matter affecting the operation of the PSI Agreement. In the case of dispute among members, Article 8 of the Agreement provides that all disputes be settled according to Article XXII of GATT and the WTO Understanding on Dispute Settlement.

6 Committee

The Agreement on Pre-Shipment Inspection is unusual among the WTO Agreements in not having a special Committee established to look after it. Instead, it is supervised directly by the Council for Trade in Goods.

[15]Article 2.21.

[16]Article 8.

7 Conclusion

In conclusion, it is fair to say that pre-shipment inspection of goods in international trade has become increasingly common as developing countries supplement their port of unloading customs inspections by requiring importers to employ private inspectors to verify price, quality and other characteristics of goods in the country of origin. However, the working of the Agreement has also been criticised as members have complained that the Agreement is not being properly utilised for the purposes for which it was crafted, and there is a possibility that it may take the shape of one of the non-tariff barrier in international trade in future.

Chapter 29
WTO Agreement on Import-Licensing Procedures

1 Introduction

The Agreement on Import Licensing Procedures is a straightforward set of principles for applying trade policies and is intended to prevent licensing from being an obstacle to trade in itself. The Agreement establishes disciplines on users of import licensing systems to ensure that the procedures do not by themselves restrict trade; rather, it aims to simplify, clarify and minimize the administrative requirements necessary to obtain import licences.

The Agreement recognises the paramount importance of automatic import licensing so that such licensing should not be used to restrict trade, should be implemented in a purely transparent and predictable manner, so that transparency to the administrative procedures and practices used in international trade by member nations is maintained. It also promotes fair and equitable application and administration of procedures and practices for import licensing that should be applied purely in a neutral and non-discriminatory manner.

Member nations generally use import licensing for applying quantitative or other import restrictions, or as a means only of keeping track of imports, usually for statistical purposes. Licenses for the first purpose are classified as non-automatic, because they will only be issued if an applicant is allocated a part of whatever import quota is available. Issuance of the second category of licences is normally automatic. The Agreement contains general provisions that apply to both kinds of import licensing, as well as provisions that apply specifically to non-automatic or automatic licensing.

2 General Provisions

Article 1 of the Import Licensing Procedures defines import licensing as administrative procedure used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for

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custom purposes) to the relevant administrative body as a prior condition for importation into the custom territory of the importing member. The provisions seek to reduce the scope for discrimination or administrative discretion in the application of both kinds of licensing. Rules are to be neutral in application and administered fairly and equitably. All rules, as well as relevant information about who is eligible to apply for a licence, where the application should be made and which goods are subject to licensing must, whenever practicable be published by members 21 days prior to the effective date of the requirement, and in all events not later than the effective date. At least, 21 days notice should be given of changes. Licence application and renewal forms should be kept simple. Only such documents and information be demanded which are really required. The application and renewal procedures are to be made very simple. Applicants are provided 21 days or in some case more to respond if there is a closing date. They should consult or approach only one administrative body.

Applications are not refused for minor errors of documentation. There is not a single provision for undue penalties for minor mistakes and omissions. Licenced imports are accepted even if they show minor variations from the license, in value, quantity or weight, provided these variations are consistent with normal commercial practices. No penalty greater than necessary to serve merely as a warning will be imposed in respect of any omission or mistake in documents if they have been made without fraudulent intent or gross negligence.

The foreign exchange necessary to pay for licensed imports must be made available to licence holders on the same basis as for goods which need no licence. With regard to security exceptions, the Agreement on Import Licensing provides that provisions of Article XXI of GATT will apply. The Agreement does not provide for member countries to disclose confidential information which impedes law enforcement or otherwise would be contrary to the public interest or would be prejudicial to the legitimate commercial interests of the particular enterprise. It does not matter whether these enterprises are public or private. The Agreement will apply equally to both the enterprises. The Agreement will not discriminate between the two. Although the precise terms of Article 1:1 do not say explicitly that licensing procedures for tariff quotas are within the scope of *Licensing Agreement*, a careful reading of that provision leads to that conclusion. In cases where licensing procedures require the submission of an application for import licensing as a prior condition, the importation of that product possible at a higher out of quota tariff rate without a license does not alter the fact that a licence is required for importation at the lower in quota tariff rate.[1]

The Preamble to the *Licensing Agreement* stresses that the Agreement aims at ensuring that import licensing procedures are not utilized in a manner contrary to the principles and obligations of GATT 1994 and are 'implemented in a transparent and predictable manner'. Moreover, Articles 1.2 and 3.2 make it clear that the *Licensing Agreement* is also concerned, with, among other things, preventing trade

[1]EC—Bananas III, Appellate Body Report, WT/DS27, paras. 193–195.

distortions that may be caused by licensing procedures. It follows that wherever an import licensing regime is applied, these requirements must be observed. The requirement to prevent trade distortion found in Articles 1.2 and 3.2 of the Licensing Agreement refers to any trade distortion that may be caused by the introduction of operation of licensing procedures and is not necessarily limited to that part of trade to which the licensing procedures themselves apply. There may be situations where the operations of licensing procedures, in fact, have restrictive or distortive effects on that part of trade that is not strictly subject to that procedures.[2]

By its very terms, Article 1.3 of the *Licensing Agreement* clearly applies to the *application and administration* of import licensing procedures and requires that this application and administration be 'neutral… fair and equitable'. Article 1.3 of the *Licensing Agreement* does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3—including the preamble,

Article 1.1 and, in particular, Article 1.2 of the *Licensing Agreement*—support the conclusion that Article 1.3 does not apply to import licensing *rules*.

Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 as interpreted by this Agreement.

As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing *rules*, *per se*. As is made clear by the title of the *Licensing Agreement*, clearly this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes.

We conclude, therefore, that the Panel erred in finding that Article 1.3 of the *Licensing Agreement* precludes the imposition of different import licensing systems on like products when imported from different members.[3]

3 Automatic Import Licensing

Automatic Import Licensing as defined in Article 2 means where approval of the application is granted in all cases and where there is no restrictive effect on trade. It is acceptable "whenever other appropriate procedures are not available… and as long as its underlying administrative purposes cannot be achieved in a more appropriate way".[4] However, automatic import licensing escapes the tighter rules governing non-automatic licensing only if it meets the following qualifying conditions:

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[2]Ibid. , paras. 197–198.

[3]EC—Bananas III, Appellate Body Report, WT/DS 27, paras. 193–195.

[4]Article 2.2: (b).

(i) any person, firm or institution which fulfill the legal requirements of the importing member for engaging in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences;
(ii) applications for licences must be acceptable on any working day before the goods are cleared through customs;
(iii) applications in due form must be approved either immediately or within 10 working days.

Developing countries which were not signatories of the earlier code are given up to two years from becoming a WTO member to meet the last two of above requirements.

Thus, according to the provisions of the Agreement the members recognise that automatic licensing is necessary whenever other appropriate procedures are not available. It can be given as long as the circumstances which give rise to its introduction prevail and as long as its underlying administrative purposes cannot be achieved in a more appropriate way.

4 Non-automatic Import Licensing

The Agreement on Import Licensing defines non-automatic import licensing as licensing which does not fall within the definition contained in Paragraph 1 of Article 2 of the Agreement. In other words, the licensing which is not automatic will be called non- automatic licensing. The central requirement under the Agreement is that such licensing shall not restrict or distort trade any further than the measures it applies. The procedures under non-automatic licensing must correspond in scope and duration to the measures they are used to implement. It should not be in any manner burdensome administratively, than which is absolutely necessary to administer the measure.

Enough information must be published for traders to know the basis on which licenses are given. The governments with a trade interest have the right to ask for detailed information about how licenses have been distributed and about trade in the concerned products. If the members are administering import quotas, information must be published about the size or value of the quotas, and the dates to which they apply. If the quotas are allocated among supplying countries, all interested supplying members must be informed, and the requirement of publication also applies. In case of early opening of quota, the information must be published in such a manner as to enable governments and traders to become acquainted with them.

Any person, firm or institution which fulfills the legal and administrative requirements is equally eligible to apply and to be considered for a licence. If the licence has not been given, the person, firm or institution has a right to appeal or review. The appeal or review shall be heard in accordance with the domestic legislation or procedures of the importing member. The period for processing the

application will be done on the basis of first-come first served basis. It must be cleared within 30 days of the filling of the application and in no case more than 60 days if all the applications are heard simultaneously.

The Agreement provides that the validity of the licence shall be for a reasonable period only. It cannot be so short as to preclude imports. The period of the validity of the licence must not preclude imports from distant imports, except in special cases where imports are necessary to meet unforeseen short-term requirements.

In administering quotas, the members must not prevent importation from being effected in accordance with the issued licenses. The members are directed by the Agreement not to discourage the full utilization of quotas. In issuing licences, the members can take into account the desirability of issuing licences for products in economic quantities. While issuing licences, the members can consider the import performances of the applicant. In this matter, the applicant's past performances can be taken into account before issuing a licence. If the licences have not been used fully, members can examine the reasons for it and take into account these reasons before issuing any new licences. Consideration of new importers and their desirability can be the factors which can be examined before allocating the licences. Special consideration should be given to those importers importing products originating in developing country members and in particular, the least developed country members.

In the case of quotas administered through licences which are not allocated among supplying countries, licence holders are free to choose the source of imports. In the case of quotas allocated among supplying countries, the licence shall clearly stipulate the country or countries.

5 No Transition Period

The Agreement on Import Licensing Procedures has no transition period. It has already come into full effect. Only those developing countries have been conferred two years extra time that were not party to the earlier code negotiated during 1970. These developing countries have been given two year extra time to fulfill the requirements of the Agreement.

6 Committee on Import Licensing

The Agreement on Import Licensing provides for the establishment of a committee known as the Committee on Import Licensing. This committee consists of representatives of each of the members. The committee has been empowered to elect its own chairman and vice-chairman. The committee meets as and when it is necessary for the purpose of affording members the opportunity of consulting on any matters relating to the operation of this Agreement or for the furtherance of the objectives of the Agreement.

7 Notification of Changed Rules

Article 5 of the Import Licensing Procedure provides that any new or changed import licensing procedures have to be reported within 60 days of publication. This information regarding import licensing procedures includes many other things like list of products, information on eligibility, the administrative bodies which seek applications, indication whether the licensing procedure is automatic or non-automatic, the expected duration of the licensing procedure, etc. In case of automatic import licensing procedures, the notification must contain their administrative purpose, and in case of non-automatic procedures, the indication of the measure which is being implemented through the licensing procedure. The members are obliged to notify the committee, the information the publication of which is required under paragraph 4 of Article 1 of the Agreement.

Any interested member who considers that another member has not been notified of the institution of licensing procedure or changes may bring the matter to the attention of other members. If notification is not made thereafter also, a member can notify the licensing procedure or the changes therein. This notification can also include all relevant and available information.

8 Consultation and Dispute Settlement

Article 6 of the Agreement on Import Licensing Procedures provides that any consultation and the settlement of disputes with respect to any matter which affects the operations of the Agreement shall be decided, subject to the provisions of Article XXII and XXIII of GATT 1994 which have been elaborated and applied by the Dispute Settlement Understanding.

9 Review of the Implementation and Operation of Agreement

Article 4 of the Agreement establishes a Committee on Import Licensing which comprises of the representatives of each of the members. This committee has been empowered to review the implementation and operation of the Agreement, at least once in every two years, taking into account the objectives and the rights and obligations mentioned therein in the Agreement. For the review of the workings of the Agreement, the Secretariat prepares the factual report based on the responses of the annual questionnaire on import licensing procedures and other relevant information which is available to it. The report works more like a synopsis containing the information and in particular indicating the changes or developments during the period under review. Members are under an obligation to complete the annual

questionnaire on import licensing procedures promptly and in full. Subsequently, the Committee on Imports Licensing will have to report the Council for Trade in Goods of the developments that occurred during the period of such review.

10 Reservations to the Agreement

Article 8 of the Agreement on Import Licensing Procedures provides for the declaration of reservations by the members to the Agreement. But this does not mean that the members are having an absolute right to declare their reservations on any of the provisions of the Agreement. Reservations to any of the provisions of the Agreement cannot be entered into without the consent of the other members of the Agreement.

Once entered into this Agreement, every member must ensure that its law, regulations and administrative procedures are in conformity with the provisions of the Agreement. Any changes made to the laws, regulations and administrative procedures relating to the Agreement must be brought to the notice of the Committee on Import Licensing, this includes the administration of such laws and regulations also.

Chapter 30
WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)

1 General

The TRIPs Agreement, together with the 1968 Stockholm Conference that adopted the revised Berne and Paris Conventions and created the World Intellectual Property Organization (WIPO) , is undoubtedly the most significant milestone in the development of intellectual property in the previous century. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) along with General Agreement on Trade in Services (GATs) constitutes the most innovative elements in the whole negotiating round of Uruguay. The scope of TRIPs is in fact much broader than that of the previous international agreements dealing with intellectual property. It covers not only all areas already (sometimes only partly) protected under existing agreements, but also giving new life to treaties that failed in protecting for the first time rights that did not benefit from any multilateral protection. In addition, the TRIPs Agreement enshrined detailed rules on one of the most difficult aspects of intellectual property rights, i.e. the enforcement.[1]

Multilateral agreements on the protection of intellectual property can be traced back to late nineteenth century. One of the earliest multilateral agreements for the protection of intellectual property rights was the Paris Convention signed in 1883 and revised many times followed by the Berne Convention for the Protection of Literary and Artistic Works signed on 9 September 1886. Both these conventions are the two principal international intellectual property agreements administered by WIPO which is a specialised agency of the United Nations whose mandate is to promote the protection of intellectual property universally.

The Paris convention for the Protection of Intellectual Property 1983 was last revised at Stockholm on 14 July 1967 which is known as Stockholm Act of the Convention. The Berne Convention for the Protection of Literary and Artistic Work 1886 was last revised at Paris on 24 July 1971. Besides these two principal

[1]See generally, Daniel Gervais, The TRIPs Agreement Drafting History and Analysis, Sweet & Maxwell (1998).

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_30

conventions, WIPO also administers some 23 intellectual property treaties jointly with UNESCO and the International Labour Office. It also administers the Rome Convention on the Rights of Performers, Broadcasters and Producers of Phonograms also known as 'neighbouring rights'.

The perceived problems with the above treaties dealing with intellectual property rights were threefold:

(a) Some standards were weak and vaguely specified. The Paris Convention, for example, essentially required only national treatment in each member's patent laws and grant of priority rights.
(b) They provided no effective procedures for settling IPRs disputes and were therefore only statements of intention on the part of signatory nations. Departures from the Paris Convention guidelines covering compulsory licence issuance, for example, were common in national laws.
(c) It was difficult to renegotiate the conventions rapidly and flexibly enough to handle new technologies, such as integrated circuits, software and electronic database, which were straining classical conceptions of intellectual property protection. Among many developed economies, these technical advances were pushing forward changes in IPRs, which evolve dynamically in any event, but the WIPO conventions were seen as hardbound.[2]

Based on these perceptions, the negotiations in the Uruguay Round used the existing conventions as a logical point of departure. As a first step, they looked at each one and decided which provisions should be included into the future TRIPs Agreement. All of the substantive provisions of Paris and Berne conventions and IPIC Treaty were incorporated by reference. Some new necessary rights were added.

Because of US dissatisfaction with the existing international intellectual property agreements, the USA was the prime mover to include the subject of intellectual property in the Uruguay Round. Inclusion of IPRs was strongly opposed by developing countries. In the end, it was agreed to include it into negotiations although with imprecise scope. When the negotiating structure for the Uruguay Round was established early in 1987, one of the negotiating groups was dedicated to TRIPs. By the time of the midterm review of the Uruguay Round in Montreal in December 1988, substantial consensus appeared to have been reached, but with Brazil and India leading the opposition, intellectual property remained one of the four areas on which agreement had not been reached along with agriculture, textiles and safeguards. In 1990, the European Community was the first to come forward with a draft of an agreement, with USA, Japan, Switzerland and then India on behalf of 14 developing countries followed the suit. The chairman of the negotiating group produced a composite draft agreement, but several important matters remained outstanding. Late 1990 saw the introduction of a comprehensive draft

[2]See generally, Keith E. Maskus, Intellectual Property Rights in the Global Economy, Institute for International Economics, (2000).

document by the negotiating group on which negotiations took place in 1991. The developed countries buried their differences; developing countries also withdrew their categorical opposition.

2 Objectives of the TRIPs Agreement

The TRIPs Agreement constitutes the most significant strengthening ever of global norms in the intellectual property area. Enforcement of TRIPs obligations amounts to marked movement towards international harmonisation of standards and a definite solidification of the international regime. The Agreement desires to reduce distortions and impediments to international trade by taking into account the effective and adequate protection of intellectual property rights. The TRIPs Agreement also ensures that measures and procedures for the enforcement of intellectual property do not become barriers to the legitimate trade interest.

The Preamble to the Agreement which talks about the objective of the Agreement is an integral part of it. It draws heavily upon the two Ministerial Declarations which preceded the Brussels meetings, i.e. the Punta-del-Este Declaration which launched the Round and the Mid-term Review Decision of April 1989. The second and third paragraphs constituting the preamble in fact contain the summary of the negotiating mandate. The preamble declares intellectual property rights as private rights. This was done to reaffirm that states are not, as a general rule, obliged to take action *ex officio* against violations of intellectual property rights, but that such matters should in principle be resolved between the private parties involved. This rule is particularly relevant in respect of criminal sanction.

The Agreement on TRIPs also reflects on the need to cater to the special needs of the developing and LDCs. Indeed, for many of them, full protection of intellectual property rights, including effective enforcement before national courts and administrative bodies, will necessitate changes not only to their laws but also their too well-rooted practices involving additional expenses. In that light, the contracting parties recognised the need for flexibility and the need to take into account the developmental objectives of these countries. The TRIPs Agreement talks about the need to establish mutually supportive relationship between the WTO and WIPO as well as with other relevant international organisations. TRIPs takes into account, *inter alia,* 'the need to promote effective and adequate protection of intellectual property rights'.[3]

[3]India—Patent Protection for Pharmaceutical and Agricultural Chemical Products-Complaint by the USA, Panel Report, WT/DS50/R. Adopted 16 January 1998, as modified by the Appellate Body Report, WT/DS50/AB/R.DSR 1998: I.

3 Structure of TRIPs Agreement

The TRIPs Agreement is straight forward in structure and largely concerned with applying basic principles to each area of intellectual property protection. The whole Agreement contains 7 parts and 73 articles covering all aspects of IPRs, their enforcement and institutional arrangements. The key provisions are listed hereunder in Table 1 with certain relevant comments.

Table 1 Substantive requirements of the TRIPs Agreement in the WTO

General obligations	Comments
1	**2**
1. National treatment	Applied to persons
2. Most-favoured-nation principle	Reciprocity exemptions for copyright; prior regional/ bilaterals allowed
3. Transparency	
Copyright and related rights	
4. Observes Berne Convention	Does not recognise moral rights
5. Minimum 50-year term	Clarifies corporate copyrights
6. Programs protected as literary works	
Data compilations protected similarly	A significant change in global norms
8. Neighbouring right protection for phonogram producers, performers	
9. Rental rights	A significant change in global norms
Trademarks and related marks	
10. Confirms and clarifies Paris Convention	
11. Strengthens protection of well-known marks	Deters use of confusing marks and speculative registration
12. Clarifies non-use	Deters use of collateral restrictions to invalidate mark
13. Prohibits compulsory licensing	
14. Geographical indications	Additional protection for wines and spirits
Patents	
15. Subject matter coverage	Patents provided for products and process in all fields of technology
16. Biotechnology	Must be covered but exceptions allowed for plants and animals developed by traditional methods
17. Plant breeders' rights	Patents or effective and generis system required
18. Exclusive right of importation	
19. Severe restrictions on compulsory	Domestic production can no longer be licences required; non-exclusive licences with adequate compensation

(continued)

Table 1 (continued)

General obligations	Comments
20. Minimum 20-year patent length from filing date	
21. Reversal of burden of proof in process patents	
22. Industrial designs	Minimum term of protection: 10 years
Integrated circuits designs	
23. Protection extended to articles incorporating infringed design	Significant change in global norms
24. Minimum 10 years protection	
Undisclosed information	
25. Trade secrets protected against unfair methods of disclosure	New in many developing countries
Abuse of IPRs	
26. Wide latitude for competition policy to control competitive abuses	Cannot contradict remainder of WTO Agreements
Enforcement measures	
27. Requires civil, criminal measures	Will be costly for developing countries and border enforcement
Transitional arrangements	
28. Transition periods	5 years for developing and transition economies; 11 for poorest countries
29. Pipeline protection for pharmaceuticals	Not required but a provision for maintaining novelty and exclusive marketing rights
Institutional arrangements	
30. TRIPs Council	Agreement to be monitored and reviewed
31. Dispute settlement	Standard approach with 5-year moratorium in some cases

4 General Provisions and Basic Principles[4]

(a) Nature and Scope of Obligations

Part I of the TRIPs Agreement sets out some broad obligations and principles. It further clarifies the relationship of the Agreement with the Paris and Berne Conventions and other agreements on intellectual property. The TRIPs Agreement sets minimum standards. It places no obstacles in the way of countries which may wish to go beyond TRIPs; it explicitly permits them to do so. The only condition imposed is that any additional level of protection must not contravene the provisions of the TRIPs Agreement. Article 1.1 of the TRIPs Agreement indirectly

[4]Part I.

emphasises the fact that the Agreement did not achieve all that some countries wished. This is reflected in the positive form used 'members may, but shall not be obliged to…' and 'nothing shall prevent parties from…'. Article 1.1 also implies that a country must take all necessary legal and administrative measures to ensure the application of the Agreement.

Article 1.2 of TRIPs Agreement defines intellectual property in a pragmatic way. It comprises the forms of intellectual property covered in the Agreement, namely copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information. This excludes from general TRIPs obligations forms of intellectual property not covered by TRIPs. It is also important to note that contrary to the Paris convention, TRIPs does not cover protection against unfair competition.

WTO membership is the fundamental element in the definition of 'nationals' to whom the treatment provided in TRIPs must be accorded. Article 1.3 requires members to accord the treatment provided for in the Agreement to the nationals of other members. It goes on to say that those nationals are to be understood as those natural or legal persons who would meet the criteria for eligibility for protection provided under the Paris Convention, the Berne Convention, the Rome Convention or the Treaty on Integrated Circuits. The benefits of the protection under TRIPs Agreement are meant to be given to private persons. In other words, when implemented, the protections are meant to give rise to enforceable private property rights, but the individuals must be nationals of the members of the WTO. However, with so many countries becoming members of the WTO, the need to determine nationality is not a big issue now.

(b) **Intellectual Property Conventions**

One of the most interesting features of the TRIPs Agreement is the use it makes of the established intellectual property conventions. In this respect, TRIPs identify the articles of the convention it wishes to apply, but it does not actually set them out in its text. Reference must be made to the conventions themselves. Article 2(1) requires that members comply with Articles 1 to 12 and 19 of the Paris Convention with respect to the standards concerning the availability, scope and use of rights, their enforcement, acquisition and maintenance and related interparties procedures. Articles 1 to 12 and 19 are the substantive provisions of the Paris Convention. The provision is drafted so as to create a positive obligation to comply, that is, to take the necessary steps to bring national legislation in line with the relevant provisions of the Paris Convention. Article 2(2) confirms the fact that TRIPs Agreement is a 'Paris Plus', 'Berne Plus' and 'Rome Plus'. The effect of the incorporation of the 'special agreements' provisions from Paris, Berne and Rome Conventions is to ensure that no provision of TRIPs is interpreted in a way detrimental to the rights holders concerned.

(c) **National Treatment**

One of the fundamental principles of TRIPs Agreement is the principle of national treatment. National treatment principle has been the standard in the field of

intellectual property since the inception of the Paris and Berne Conventions. Article 3:1 of the Agreement provides for the national treatment. It requires members to accord to the nationals of other members' treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property. National treatment permits countries, do not discriminate between foreigners and locals to vary the level of protection they give to intellectual property according to what they see as their needs at anyone time or in anyone sector. Yet, to the country which does provide protection, it may seem like any onerous requirement if one's own nationals do not receive the corresponding level of substantive protection in the foreigner's home country. The requirement of national treatment goes beyond those 'matters affecting the use of intellectual property right, specifically addressed in the Agreement'. It also applies to the matters which a member country embraces generally 'affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights'.

The requirement of national treatment under Article 3 is subject to the exceptions provided by WIPO conventions. In addition, an explicit exception to the broader coverage for national treatment is also made in respect of the rights to performers, producers of phonograms and broadcasting organisations. However, Article 3:2 limits the availability of exceptions which have been accommodated in relation to judicial and administrative procedures. Further, Article 3:2 says that these exceptions can only be used where they are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of the Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

(d) **Most-Favoured-Nation Treatment**

Article 4 of the Agreement on TRIPs introduces a new element in the international intellectual property framework, namely MFN principle. Under this system, well known in the multilateral trade arena, any advantage, favour, privilege or immunity granted to nationals of any other country must be accorded to nationals of all WTO members. The purpose of this rule is to ensure uniformity of the multilateral trade environment. The obligation of MFN to multilateralise extends to the benefits granted to any other country and not just members of the WTO, though the obligation itself is only owed to nationals of the members. Like the national treatment provision, it applies to member's protection of intellectual property rights specifically addressed in the agreement.

However, the principle of MFN treatment is not without exceptions. The principle is exempted for any advantage, favour, privilege or immunity accorded to any member, firstly from any international agreements on judicial assistance or law enforcement of a general nature. This exception is not particularly confined to the protection of intellectual property. Secondly, the exception is allowed if any advantage, favour, privilege or immunity granted is in accordance with the provisions of the Berne or Rome Convention to any member. Thirdly, if any advantage, favour privilege or immunity is related to rights of performers, producers of phonograms and broadcasting organisations that are not provided under the

Agreement, the principle will not be applicable. Lastly, a particularly significant exception from the most-favoured-nation clause is that regarding international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the Agreements establishing the WTO.

(e) **Exhaustion of Rights**

Article 6 of the Agreement is important due to its stress that the principle of exhaustion of rights is a necessary ingredient in balancing exclusive rights and needs of the markets. It is generally accepted in law that the holder of intellectual property rights in product exhausts those rights over the further distribution in a particular market once he has sold the product. The TRIPs Agreement states that whatever a member does in this respect cannot be challenged under WTO dispute settlement procedures, provided that the TRIPs national treatment and MFN obligations have been complied with. However, the Doha Declaration of 2001 has made some important changes to the concept of exhaustion of rights by affirming that for the purposes of public health and for providing medicines for HIV/AIDS, tuberculosis, malaria and other epidemics as well as developing new medicines, the members have the right to grant compulsory licence for achieving the above objectives.

5 Substantive Standards[5]

The heart of the Agreement lies in Part II which deals with the prescription of minimum standards which WTO members have to accord in respect of availability, scope and use of intellectual property rights in each of the seven basic areas. These areas are: (a) copyright and related rights; (b) trademarks; (c) geographical indications; (d) industrial designs; (e) patents; (f) layout designs (topographies) of integrated circuits; and (g) protection of undisclosed information.

A. **Copyright and Related Rights (Neighbouring Rights)**

Copyright protection is one of the means of promoting, enriching and disseminating the national cultural heritage. The development of a nation to a large extent depends on the creativity of its people; the encouragement of national creativity is a *sine qua non* for progress. The importance of copyright as a process of creativity as described in the preface to the Guide to the Berne Convention is as follows: 'copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The encouragement of intellectual creation is one of the basis prerequisites of all social, economic and cultural development'.

[5]Part II of the Agreement.

(i) Berne Conventions and TRIPs

The principal copyright standards under the TRIPs Agreement are those set by the Berne Convention. Article 9 of the TRIPs Agreement requires from WTO members to comply with Article 1 to 20 of the Berne Convention along with its Appendix. An exception to the obligation to comply with the substantive provisions of the Berne Convention is that the TRIPs Agreement does not in itself give rights or set obligations with respect to Article 6 *bis* of the Convention, which deals with what are known as 'moral rights'. These are the rights of authors to have their authorship acknowledged and to prevent their work from being changed in ways that distort or mutilate it. In USA—Section 110(5) Act dispute, the Panel made a finding on the relationship between the TRIPs Agreement and the Berne Convention 1971 and affirmed that the Berne convention had become part of the TRIPs Agreement and as provisions of that agreement have to be read as applying to WTO members, one should avoid interpreting the TRIPs Agreement to mean something different than the Berne convention except where this is explicitly provided for.[6]

The Agreement on TRIPs provided the teeth to the Berne Convention by bringing most of the provisions of the Convention under WTO dispute settlement mechanism. Earlier, the Convention was lacking authority with the power to interpret the provisions. The inclusion of the Appendix avoids a possible conflict between the Convention and the TRIPs Agreement. The main additions or clarifications in the Agreement from Berne Conventions are:

(a) a requirement to protect computer programmes as literary works under the Berne Convention, and also to protect databases or other compilations whose arrangement or selection makes them intellectual creations, even when the individual elements are not protected by copyright;[7]
(b) a requirement to give authors of computer programmes and films the right to authorise or prohibit commercial rental of their copyright works;[8]
(c) a requirement that limitations or exceptions to exclusive rights be limited to special cases that do not conflict with normal exploitation of the works concerned or unreasonably prejudice the right-holder's legitimate rights.[9]

(ii) Areas of Copyright Protection

Article 9.2 of the TRIPs Agreement explicitly mentions that copyright protections apply to expressions only. Ideas, procedures, method of operation and mathematical concepts are not entitled to copyright protection. The TRIPs Agreement for the first time lists the exclusions from copyright. It thus helps to delineate the scope of the Berne Convention. The Agreement obliges countries to protect all 'expressions' as

[6]United States—Section 110(5) of the US Copyright Act, Panel Report, WT/DS 160/R, adopted 27 July 2000.
[7]Art. 10.
[8]Art. 11.
[9]Art. 13.

a synonym of the term 'literary and artistic works'. Similarly, all computer programs whether in source or object code have been protected as literary works. Databases, whether in machine readable or other form, which by reason of selection or arrangement of their contents constitutes intellectual creations, are also protected as literary works. Such a copyright protection, however, does not cover the data or material itself, and it will not affect any copyright subsisting in the data or material itself.

(iii) **Neighbouring or Related Rights**

The Agreement on TRIPs also covers what is commonly referred as neighbouring rights' or 'related rights'. These rights are mentioned in Article 14 and are the rights of performers, producers of sound recordings or phonograms and broadcasters, when they are not covered by copyright. Largely these rights found mention in the Rome Convention but since the countries that joined the Convention are less, its application was affected. The TRIPs Agreement provided the first truly multi-recognition to the above-mentioned rights. Performers are required to have the possibility of preventing unauthorised sound recording or broadcasting of their performances and of copying of such recordings. Producers of sound recording must have exclusive rights over production of their recordings, as well as exclusive rental right for them. Broadcasters must have the right to prohibit unauthorised recording, copying of recordings and rebroadcasting of their broadcasts, or where this is not done, authors must have such rights over the subject matter of broadcasters.

(iv) **Rental Rights**

Article 11 of the Agreement on TRIPs provides that in respect of computer programs and cinematographic works, the WTO members are obliged to provide authors and their successors in title, the right to authorise or to prohibit the commercial rental to the public of originals or copies of the copyright works. A member is exempted from the obligation in respect of cinematographic works unless such a rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that member on author and their successors in title. In respect of computer programs, this obligation does not apply to rental where the program itself is not essential object of the rental.

(v) **Term of Protection**

Term of the protection of the work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of natural person and that term will not be less than 50 years from the end of the calendar year of authorised publication. Failing such authorised publication within 50 years from the making of the work, the term of protection will be 50 years from the end of the calendar year of making.

(vi) Limitations and Exceptions

Article 13 of the Agreement on TRIPs provides that limitations and exceptions have to be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. In interpreting Article 13, the Panel in US-Section 110(5) Copyright Act outlined its interpretive approach to this provision, specified the conditions for limitations or exceptions to exclusive rights and found that these conditions apply cumulatively. The Panel felt the need for giving a distinct meaning to each of the three conditions and to avoid a reading that could reduce any of conditions to 'redundancy or inutility'. The three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with anyone of the three conditions results in the Article 13 exception being disallowed.[10]

B. Trademarks

(i) *Protectable Trademarks Matter*

Unlike the WIPO administered agreements, the Agreement on TRIPs has defined the term 'trademark' in a very broad manner and does not limit the types of signs that may be considered a trademark. The focus of the definition clearly is on distinctiveness. The Agreement defines trademark as 'any sign or combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings'. Any sign including personal names, letters, numerals, figurative elements and combination of colours as well as any combination of such signs are eligible for registration as trademarks. Where the signs are not inherently capable of distinguishing the relevant goods or service, the registrability of such trademarks is also required but may be made dependent on distinctiveness acquired through its use. In addition, registrability may be limited to visually perceptible marks, thus probably excluding from mandatory registration of factory and soundmarks.

Apart from the ground of refusal contained in Article 15(1) of the Agreement, the grounds mentioned under the Paris Convention can also be used. The registrability of a trademark is made dependent on use, but not the filing of an application. In addition, failure to use may not be a ground for refusal before the expiry of three years from the date of application. Article 15(4) of the Agreement states that the nature of goods and services in no case should prevent registration of a mark. The language is similar to Article 7 of the Paris Convention. The principle underlying this provision is that intellectual property protection should not depend on whether the goods or services can legally be sold or provided within a country.

[10]USA—Section 110(5) of the US Copyright Act, Panel Report,WT/DS160R, adopted 27 July 2000.

The Agreement on TRIPs requires from each Member to publish trademark either before registration or promptly thereafter in order to allow third parties to oppose registration or obtain its cancellation. The Agreement introduces the first international requirement to provide for such optional opposition and cancellation procedures. Since the nature of the procedure has not been mentioned in the Agreement, it all depends on the national law of each WTO member.

(ii) ***Rights Conferred by Trademarks***

The Agreement on TRIPs requires from WTO members to grant the owner of the mark the exclusive right to prevent third parties from using the registered trademark in the course of trade for goods or services that are identical or similar to those in respect of which the mark is registered, where such use would result in a likelihood of confusion.

The provision adds a presumption of likelihood of confusion when an identical sign is used for identical goods or services. Granting new rights may of course affect situations existing at the time of entry onto force of such new rights.

Article 16.2 of the Agreement on TRIPs requires that Article 6 *bis* of the Paris Convention, dealing with well-known marks, is applied to services. But the TRIPs Agreement goes few steps further. While the Paris Convention does not set the criteria for determining whether a mark is well known, Article 16(2) requires that the competent authority shall take account of the knowledge in the relevant sector of the public, i.e. customers that can be considered to confuse the specific mark for the well-known mark. This knowledge includes knowledge which has been obtained as a result of the promotion of the trademark.

The TRIPs Agreement further provides protection against the dilution of a mark which includes detrimental use to a mark's reputation, its quality indication and the goodwill attached to it. The Agreement on TRIPs also protects the public against the confusing effects of the use of trademark. Article 16.3 deals with the use of certain well-known marks in relation to goods and services other than those for which the mark is registered, subject to two cumulative conditions: (a) that a link be made to the owner of the well-known mark and (b) that there is likely damage to the interests of the owner of the well-known mark.

(iii) ***Term of Protection of the Trademark***

The Agreement establishes a minimum term for the validity of the initial registration of mark and renewal thereof. For both, the period fixed is seven years. The Agreement in keeping with the established principles in other agreements in this field provides for indefinite renewals, as long as conditions for renewals are met.

(iv) ***Requirement of Use***

Article 19 of the TRIPs Agreement sets the condition imposed on WTO members which requires use to maintain a trademark registration. It provides that a trademark can be cancelled for non-use only after an uninterrupted period of at least three years of non-use. However, countries must permit a trademark owner to establish the existence of circumstances beyond his control which led to the non-use of the

trademark. Valid reasons for non-use set forth in Article 19 include import restrictions or other government requirements for goods or services protected by the trademark. Use of trademark by another person is recognised as use of the trademark for the purpose of maintaining a registration if such use is controlled by the trademark owner. Use of trademark in the course of trade must not be unjustifiably encumbered by special circumstances, such as use with another trademark, in special form or in a manner detrimental to its capability to distinguish the goods or services. Member countries may, however, require the firm or person producing the goods or services to include its trademark along with, but linked to, the trademark distinguishing the specific goods or services at issue.

(v) ***Licensing and Assignment***

The TRIPs Agreement prohibits compulsory licensing of trademarks. While compulsory licensing of patents is justifiable on the ground of public interest, it is not so with trademarks. The purpose of a trademark being its ability to distinguish the goods or services of one undertaking from those of another, it would not be proper to let the third party use that link without the consent of the trademark owner. The WTO members are free to determine their own conditions on the licensing and assignment of trademark. They also retain the right to determine conditions of transfer and assignment, including possible registration requirement.

C. Geographical Indications

(i) ***Protection of Geographical Indications***

The TRIPs Agreement defines geographical indications as indications which identify a good as originating in the territory of a member or a region or locality in that territory, where a given quality, reputation or other characteristics of a good are essentially attributable to its geographical origin. The Agreement provides protection to the interested parties with a legal means to prevent any use that misleadingly either indicates or suggests that goods originate in a geographical area other than their true place of origin and any use that constitutes the act of unfair competition within the meaning of Article 10 *bis* of the Paris Convention. In addition, member countries must either refuse or invalidate the registration of a trademark that contains a false indication of geographical origin of the product that misleads the public. It also prohibits the use of a geographical indication which although correctly reflects the origin of the goods nonetheless falsely represents to the public that the good originates in another geographic location.

(ii) ***Special Protection for Wines and Spirits***

The TRIPs Agreement provides the additional protection for geographical indications for wines and spirits. The Agreement prohibits using a geographical indication identifying wines or spirits for wines and spirits not originating in the place indicated by the indication even where the true origin of the wines and spirits concerned is indicated and or a translation is used and/or the indication is accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or ‘the like’. In the case of

homonymous geographical indications for wines, both indications must be protected. The WTO members are free to determine the practical conditions under which the homonymous indications in question can be differentiated from each other, while determining such products both indications must be given equitable treatment. If the solution adopted by a member prejudiced the producers of another member or could objectively mislead the consumers, it could be argued that member had failed to comply with this provision.

(iii) ***Exceptions to Geographical Indications Rule***

The Agreement on TRIPs provides some exceptions to deal with the situation where a geographical indication has already become a generic term in the local language or where there are other forms of established usage. Any indication identifying wine or spirits used in a continuous manner with regard to the same goods or services either (a) for 10 years preceding the signing of the Marrakesh Agreement on 15 April 1994 or (b) in good faith preceding that date may continue to be used by the same person, who must be a national or domiciliary of the country where the use took place. A WTO member is not obliged to bring a geographical indication conflicting with a pre-existing trademark under protection, provided the rights to the trademark have been acquired in good faith.

(iv) ***Further Negotiations on Geographical Indication Mark***

Articles 23 and 24 of the TRIPs Agreement provide for further negotiations on the subject. The Council on TRIPs, established under Article IV of the WTO Agreement, will oversee negotiations on a multilateral system of notification and registration of geographical indications for wines. Member countries will also negotiate on increased protection for individual geographical indications for wines and spirits.

D. **Industrial Designs**

(i) ***Requirements for Protection***

The Agreement on TRIPs requires from each member country to provide protection for independently created industrial designs that are new or original. A patent-like requirement of inventiveness or non-obviousness is not required. Parties may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. The Agreement permits the parties to provide protection that shall not extend to designs dictated essentially by technical or functional considerations.

Article 25 of the Agreement on TRIPs explicitly requires governments to provide protection for textile designs, either under an industrial design law or through copyright law. Textile designs, which typically have a short life cycle, exist in large numbers, are subject to copying and are given special attention. For obtaining protection, each member is obliged to ensure that cost, examination or publication does not unreasonably impair the opportunity to seek and obtain such protection.

(ii) ***Protection***

The owner of a protected industrial design is to have the right to prevent third parties from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. The Members may provide exceptions to the protection of industrial designs if such exceptions do not unreasonably conflict with normal exploitation of protected industrial designs and such measures do not unreasonably prejudice the legitimate interests of the owner of the protected design. The Agreement explicitly specifies that the protection available shall be at least for ten years. The owner of a protected design must be able to stop unauthorised third parties from making, selling or importing for commercial purposes, products which copy the design.

E. **Patents**

(i) ***Patentable Subject Matter***

On patentability, the Agreement on TRIPs lays down that patents shall be available in principle for any inventions, whether they concern about product or processes in all fields of technology. For this, the invention must be new, involve an inventive step and be capable of industrial application. The patentability of any product is based on the three usual criteria, i.e. novelty, industrial applicability and involving an inventive step. Footnote to Article 27 of the TRIPs Agreement makes it clear that whatever distinction one might have found in the past, the terms, 'useful' and 'non-obvious' corresponds to the latter two. In determining the eligibility of an invention to be patented and enjoyment of patent rights, the TRIPs Agreement prohibits discrimination based on whether the invention is locally produced or imported.

The above requirement of patentability is, however, subject to certain exceptions. Firstly, inventions may be excluded from patentability based on a risk that their commercial exploitation within their territory could endanger the public order or morality within the territory of the WTO member concerned. Examples given are the protection of human, animal or plant life or health. Avoiding serious prejudice to the environment is also a ground for exclusion from patentability. Secondly, Members may also exclude from patentability 'plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes'. However, members shall provide for the protection of plant varieties either by patents or by an effective *suigeneris* system or by any combination thereof. Members may also exclude from patentability any diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

(ii) ***Rights Conferred by Patent***

A patent confers exclusive rights to its holder, if the patent is a product, to exclude others from making, using, offering for sale, selling or importing that product. The third party without the consent of the patent holder cannot use it. If the subject

matter of patent is a process then patent holder has the exclusive right for preventing any third party from using, offering for sale, selling or importing for these purposes at least the product obtained directly by that process. The patent owners shall also possess the right to assign or transfer by succession, the patent, and also to conclude licensing contracts.

The Agreement on TRIPs puts stringent conditions on use of a patented invention without the authorisation of the right holder. This includes situations involving use of the invention by the government or use by a third party authorised by the government under a compulsory licence. These conditions, including special conditions applicable to semiconductor technology, will also apply to compulsory licensing of rights protecting integrated circuit and layout designs. Many WTO Members will be required to eliminate provisions that now subject patents to compulsory licences if the patented invention is not produced locally.

(iii) ***Exceptions to Rights Conferred by Patent***

Article 30 of the TRIPs Agreement provides limited exceptions to the exclusive rights conferred by a patent, provided such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner by taking into account the legitimate interests of the third parties. In Canada—Pharmaceutical Patent dispute,[11] the Panel addressed the basic structure of Article 30 and outlined the conditions for its application and then found that these conditions apply cumulatively. Article 30 establishes three criteria that must be met in order to qualify for an exception; (i) the exception must be limited; (2) the exception must not unreasonably conflict with the normal exploitation of the patent; (3) the exception must not 'unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties. All the three conditions are cumulative, each being a separate and independent requirement that must be satisfied. Failure to comply with any of the three conditions results in the Article 30 exceptions being disallowed.

(iv) ***Compulsory Licensing***

Compulsory licensing and government use of patent without the authorisation of its owner are allowed, but only subject to a list of conditions aimed at protecting the legitimate interests of the right holder. The Agreement on TRIPs incorporates Article 31, which provides the requirements that must be met ordering compulsory licensing. There are 11 principles listed in that Article:

(a) Licences must be granted only on a case by case basis.
(b) When ordering for compulsory licensing there must be prior consultation with right holder. However, in the case of national emergencies and non-commercial use, the need for prior negotiation does not apply;

[11]Canada—Patent Protection of Pharmaceutical Products Panel Report, WTDS114/R, adopted 7 April 2000.

(c) A compulsory licence should be liable to be revoked as soon as the purposes for which it was granted no longer justify the licence and are unlikely to recur;
(d) The scope of a compulsory licence must be proportional, i.e. limited to the purposes for which it was granted;
(e) Compulsory licences may only be granted for public non-commercial use or to remedy an anti-competitive practice;
(f) Compulsory licensing shall in all cases be non-exclusive;
(g) Rights derived from compulsory licensing cannot be transferred to a third party except for those cases in which the two parties jointly engage in business;
(h) Compulsory licensing for all practicable purposes should remain confined to ensure predominantly the supply of the domestic market of the WTO member granting the licence;
(i) When the situation that led to the setting of compulsory licensing has ceased to exist and there is no likelihood of recurrence, the compulsory licensing shall be terminated, provided the legitimate benefit of the licence is protected;
(j) The owner of the right shall be given an appropriate compensation;
(k) Decisions to grant, continue, renew compulsory licences as well as decisions concerning the level of the adequate remuneration of the patent owner must be subject to judicial review;
(l) Where a compulsory licence is given for exploiting a patent (the second patent), which cannot be exploited without infringement of another patent (the first patent), the invention claimed in the second patent shall involve an important technical advance. The owner of the first patent is entitled to a cross-licence on reasonable terms of the second patent and the authorised use for the first patent shall be non-assignable without including assignment of the second patent.

Article 31 of the TRIPs Agreement tries to strike a balance between two opposing interests—the interests of inventors and of technologically advanced countries and those of licences and of technologically less advanced countries.

(v) *TRIPs and Doha Declaration*

In pursuance of the Doha Declaration on the TRIPs and Public Health[12] followed by the Implementation Decision on its Paragraph 6 of 30 August, 2003, the WTO members on December 6, 2005 approved changes to the TRIPs Agreement in the form of Article 31 *bis* making permanent the decision on patents and public health.[13]

Article 31 *bis* essentially addresses the problem of compulsory licences which allows a country to issue a compulsory licence that covers drugs made and used

[12]Implementation of paragraph 11 of the General Council Decision of 30, August 2003 on the Implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health, WTO, Doc. 1P/C/41, 6 December 2005.

[13]Implementation of paragraph 11 of the General Council Decision of 30 August 2003 on the Implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health, WTO, Doc. 1P/C/41, 6 December 2005.

within the country's borders under circumscribed situations. However, for countries who do not produce or manufacture or have least capacity of manufacturing drugs and pharmaceutical products, the issuance of compulsory licence is a non-starter. The developing countries otherwise also hardly make use of compulsory licensing system of TRIPs as it involves lots of obstacles by way of administrative and legal infrastructure; fear of sanctions; use predominantly for domestic market; non-exclusive nature; and limited duration.

The Doha Declaration on Public Health of 2001 essentially recognised the stratification of TRIPs and the need to address issues concerning public health related to HIV/AIDS, tuberculosis, malaria and other epidemics which are more prevalent in the LDCs and least developed countries. Therefore, the general frame of Doha Declaration on public health recognised that WTO members can take measures to protect public health and access to medicines for all. WTO members have right to grant compulsory licences and have freedom to determine the ground upon which such licences may be granted. Members have full liberty of determining what constitutes national emergency or other circumstances of extreme urgency. Members are free to establish their own regime of exhaustion without challenge. However, it was also recognised that the Declaration may not be useful for members who have insufficient or no manufacturing capacity in the pharmaceutical sector for producing drugs. Thus, the Doha Declaration recognises for the first time that TRIPs may not be serving the cause of those countries who are facing public health problems and are not capable of providing medicines for public health diseases.

Article 31 *bis* allows waivers for non-application of Article 31(f) which limits compulsory licence predominantly to the supply of the domestic market. It will be waived for an exporting member when it is requested by an eligible member to supply products under compulsory licence issued in the exporting country. Similarly, the requirement of payment of adequate compensation to the right holder on compulsory licence under Article 31(h) is waived for the importing country.

The protocol amending the TRIPs defines in Paragraph I the 'pharmaceutical product', 'eligible importing member' and 'exporting member'. In order to give effect to Paragraph I of Article 31 *bis* to export pharmaceutical product to an eligible importing member(s), the Annex outlines the terms and conditions for the exporting and importing members. The eligible importing member(s) need to make a notification to the TRIPs Council which should:

(i) Specify the names and expected quantities of the product(s) needed;
(ii) Confirm that the importing member other than the least developed member has insufficient or no manufacturing capacity as established in accordance with the Appendix; and
(iii) Confirm in case of a pharmaceutical product patented in its territory that it has granted or intends to grant a compulsory licence in accordance with Article 31 and 31 *bis* and the provisions of this Annex.

The compulsory licence issued by the exporting member should contain the following details:

(i) The amount necessary to meet the needs of the eligible importing member(s) that may be manufactured under the licence and exported to the eligible importing member(s);
(ii) Clearly identify products produced under the licence and through specific labelling or marking. Suppliers should distinguish such products through special packaging or special colouring and shaping of the products, provided that such distinction is feasible and does not impact the prices significantly;
(iii) The licence is required to post on the website the following details before the shipment starts:

   (a) Quantities supplied to each destination; and
   (b) The distinguishing features of the product(s).

In addition, the exporting member is required to notify the TRIPs Council about the grant of the licence and the conditions attached to it. The information will relate to the details of the licence, the product(s) and the quantity, the importing country(ies) and the duration of the licence. The notification to be issued by the eligible importing member(s) need not be approved by a WTO body, but it will be made available publically by the WTO secretariat on its website. Reiterating paragraph 1 of the Decision, paragraph 3 of the Annex requires importing country to take measures to prevent diversion of products imported under the system. Paragraph 4 requires other members to take effective measures to prevent the importation of such products into their territories. Paragraph 5, 6 and 7 of the Annex restate paragraphs 6, 7 and 8 of the Decision related to exports to regional trading arrangement, transfer of technology and the annual waiver by the TRIPs Council. In the adoption of Article 31 *bis*, it was noted that certain members will not use the system as importing countries specified in the footnote.[14]

The new rules of Para. 6 system will be applicable where the product is patented in both the exporting and importing countries, both are required to grant compulsory licence, but if the product is not patented in the importing country but in the exporting country, only exporting country would grant the licence. Where the product is not patented in the exporting country, but in the importing country, new rules will not be used and the importing country will issue the regular compulsory licence under Article 31. Where the product is not patented in both the countries, the new rules are not used and the product may be imported from any manufacturer. The system will not be used if local production is feasible or voluntary licences have been issued by the patent holder or if no patent exists for the pharmaceuticals products in the exporting country, or the exporting country is not a member of the WTO.

[14]Countries mentioned in the footnote 3 of the Annex are: Australia, Canada, European Communities with its member state, Poland, Japan, New Zealand, Norway, Switzerland and the USA.

Article 31 *bis*, in accordance with Articles X: 3 of the WTO Agreement, will be formally built into the TRIPs agreement after two-thirds of the WTO members have accepted this change.

(vi) ***Terms of Protection and Revocation of Patents***

The term of protection available for a patent under the TRIPs Agreement must be at least 20 years from the filing of the application. The Agreement does not explicitly deal with one well-known difference between national patent systems, the adoption by some countries of the date of invention rather than the filing date as the date for determining priority between two claims for the same invention. The members should not discriminate according to the place of invention in the patent protection they give. In case of any revocation or of forfeiture of the registered patent, an opportunity for judicial review is available according to the standards as contained in Part III of the Agreement.

F. **Layout Designs (Topographies) of Integrated Circuits**

(i) ***Relation to Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty)***

The TRIPs Agreement requires WTO members to protect the layout designs (topographies) of integrated circuits in accordance with the provisions of the IPIC Treaty of 1989, together with some additional provisions. The TRIPs Agreement requires members to provide protection in accordance with Articles 2 to 7, except for Article 6(3), together with Articles 12 and 16.3 of the Treaty. The Articles of the IPIC Treaty referred in the Agreement define the scope of the protection, by defining the terms 'integrated circuit' and 'layout design topography'. The other provisions establish the obligation to protect layout designs (topographies), independently of whether the circuit is incorporated in an article and with a possible limitation to semiconductor integrated circuits.

Article 3(2) of IPIC Treaty defines the basic requirement for protection, namely originality. The first part of the definition used in the Treaty is not unlike the modern definition of the criterion used in the field of copyright, 'original in the sense that they are the result of their creators' own intellectual effort… but the second part is closer to the more objective industrial property test concerning novelty '…and are not common place among creations of lay-out designs (topographies) and manufacturers of integrated circuits at the time of their creation'. Article 4 of IPIC Treaty establishes the freedom in respect of the legal form to implement the protection. Article 5 contains the national treatment provision. Article 6 provides scope of the protection along with an exception to be made in respect of reproduction for private purposes or for the sole purpose of evaluation, analysis, research or teaching and applies such exception to what is commonly referred to as 'reverse engineering'. Article 6 allows one more exception for innocent infringements and exhaustion of rights. Article 7 allows WTO members to require local commercial exploitation and registration. Article 12 safeguards rights under the Paris and Berne Conventions, while Article 16(3) allows WTO members

to exclude layout designs existing at the time of entry into force of IPIC Treaty and not protected through other means or obligations of the member concerned.

(ii) ***Scope and Term of the Protection***

The TRIPs Agreement provides that WTO member must consider unlawful (if they are performed without the authorisation of the right holder) acts of importing, selling or otherwise distributing for commercial purposes a protected layout design. The protection extends to the circuits which incorporate them and the articles which incorporate those circuits, in so far as they continue to contain an unlawfully reproduced layout design. Exceptions are to be made, however, for certain innocent commissions of those acts. The term of the protection is to be not less than that of ten years, but protection may lapse after fifteen years.

G. Protection of Undisclosed Information

Trade secrets or know-how is also protected by the TRIPs Agreement. Article 39 of the TRIPs Agreement requires from each member country to provide protection to the holders of undisclosed information (trade secrets) provided the information is secret, has commercial value and has been subject to reasonable steps to keep it secret. The TRIPs Agreement says that members shall protect undisclosed information in the course of ensuring effective protection against unfair competition under Article *10 bis* of the Paris Convention.

Article 39(2) of the TRIPs Agreement defines the actual scope of the obligation, by specifying the conditions governing any disclosure of the information concerned namely;

(a) The information is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(b) The information must have commercial value because it is secret. In other words, the information must give competitive advantages; and
(c) The information must have been subject to reasonable steps under the circumstances, by the person lawfully in control of the information to keep it secret.

Whenever the above conditions are met, persons in control of the information must, under national law, have the possibility of preventing such information from being disclosed to, acquired by or used by others without their consent in a manner contrary to honest commercial practices. The footnote attached to Article 39.2 relating to the phrase ‘a manner contrary to honest commercial practices is nonetheless useful as it provides clear example of cases which must be considered as falling into the category of dishonest commercial practices. This is compatible with the traditional interpretation of Article 10 *bis* of the Paris Convention.

Article 39.3 of the TRIPs Agreement requires members to protect certain data submitted to government agencies. This provision has a wide potential. However, it was confined to data submitted as a condition of approving the marketing of

pharmaceutical or agricultural products which utilise new chemical entities. The data must be undisclosed test or other data, the origination of which involves a considerable effort. Article 39.3 requires this information to be protected primarily against unfair commercial use. In addition, members are obliged under the TRIPs Agreement to protect such data against disclosure except where necessary to protect the public or unless steps are taken to protect against unfair commercial use. This kind of information is vital to decisions about the release of potentially hazardous substances, and governments are often not in a position to generate such information themselves.

6 Control of Anti-competitive Practices in Contractual Licences

The Agreement on TRIPs recognises that practices in the licensing of rights can have adverse effects on trade and may hamper the transfer and dissemination of technology. The WTO members may take measures to prevent or control practices or conditions that may constitute abuse of rights and hamper competition. The Agreement provides a mechanism, whereby a country which wants to take action against practices involving companies of another WTO member can consult with that member to seek relevant information. The Agreement obliges the parties to give full and sympathetic consideration on requests form other parties for assistance to deal with anti-competitive practices of their nationals.

7 Enforcement of Intellectual Property Rights[15]

The enforcement provisions in the TRIPs Agreement represent remarkable first step forward in the protection of intellectual property rights. Berne and Paris Convention do say that those persons entitled to their protections should have legal remedies. But, with a few exceptions, they do not specify those remedies. The task of crafting a set of obligations which could apply both in civil law and common law countries was formidable. The enforcement provisions of the TRIPs Agreement set forth in some detail the procedures and remedies that each member must make available in its domestic laws to enable right holders to enforce the intellectual property rights established in Part III of the Agreement. In addition, the Agreement establishes performance requirements against which each member's fulfilment of its obligations to effectively enforce these intellectual property rights will be measured.

Part III of the TRIPs Agreement (Articles 41 to 61 inclusive) on enforcement contains five sections:

[15]Part III of the Agreement.

(a) General obligations (Article 41);
(b) Civil and Administrative Procedures and Remedies (Articles 42-49);
(c) Provisional Measures (Article 50);
(d) Special Requirements Related to Border Measures (Article 51-60);
(e) Criminal Procedures (Article 61).

The following is an overview of each of the five actions on enforcement.

(a) **General Obligations**

The TRIPs Agreement contains a general obligation on the members to make enforcement procedures available under their national laws so as to permit effective action against infringement. It insists on the expeditious remedies to prevent infringement and remedies which constitute an effective deterrent to further infringement. The process of enforcement procedures must be fair and equitable and not unnecessarily complicated, costly or involving unreasonable time limits or unwarranted delays. The procedure of judicial review must be there in the process.

(b) **Civil and Administrative Procedures and Remedies**

Article 42 of the TRIPs Agreement obligates Members to make civil judicial procedures available to right holders to enforce their intellectual property rights covered by TRIPs and in doing so requires members to provide what is generally referred to as 'due process'. The procedure includes

- Defendants must be given timely and detailed written notice of the basis of the claims against them.
- All parties should be permitted to be represented.
- Overlay burdensome requirements for mandatory personal appearances may not be imposed.
- All parties must be permitted to substantiate their claims and present all relevant evidence.
- Confidential information must be protected unless contrary to constitutional requirement.

Section II of the enforcement mechanism also contains measures to preserve evidence and impose civil damages and other remedies in intellectual property enforcement proceedings. The section also includes safeguards to protect parties from abuse of litigation procedures.

(c) **Provisional Measures**

Article 50 of the TRIPs Agreement requires that a court is given the authority to order prompt and effective provisional measures such as temporary restraining orders and preliminary or interlocutory injunctions. The purpose of this authority is to:

- Prevent an infringement from occurring and in particular to prevent the entry of goods into channels of commerce after their clearance by customs; and
- To preserve relevant evidence of infringements.

In addition, courts must have the authority to order *ex parte* seizure orders and preliminary injunctions where delay in obtaining such a measure is likely to cause irreparable harm to the right holder or where there is demonstrable risk of evidence being destroyed. In recognition of the extraordinary nature of provisional measures, right holders can be required to provide reasonable evidence to satisfy courts that they are indeed a right holder whose right is being infringed or that such infringement is imminent. The right holder can also be required to supply, to the authority that will execute the provisional measures, information necessary to ensure proper identification of the goods concerned. Where provisional measures are revoked or lapse due to inaction of the right holder, or it is found that there was no threat of infringement, the court shall, upon request of the defendant, order the applicant to compensate the defendant for any injury suffered.

(d) Special Requirements Related to Border Measures

The TRIPs Agreement contains special requirements on border measures aimed at preventing imports of goods which bear counterfeit trademarks or represent piracy of copyright material. Counterfeiting and piracy are the most blatant form of infringement of intellectual property rights. The border measures provisions apply, as a minimal international norm to counterfeit trademark and pirated copyright goods. Article 51 of TRIPs obligates members to adopt procedures under which a right holder may apply in writing to either administrative or judicial authorities to suspend release by the customs authorities of counterfeit trademark and pirated copyright goods. The preferred means of dealing with both is to attack the problem at source, by catching the counterfeiters and pirates where they produce the goods.

However, action to seize goods at the border, using the resources of customs authorities, offers a backup method of fighting this illegal trade when the products concerned are exported from one country to another. Members may adopt similar procedures for infringements of other intellectual property rights and adopt corresponding procedures concerning the export of infringing goods.

A right holder wishing to initiate procedures to suspend release of goods by customs authorities is required to provide adequate evidence to make a *prima facie* case showing an infringement of his intellectual property right. A right holder who suspects that counterfeit or pirated goods are about to be imported must apply in writing for action to be taken, giving *prima facie* evidence of infringement and providing enough information for the customs authorities to identify the goods concerned. For their part, the authorities must inform the right holder of their nature of action. The remedies available must not do any harm to the right holder. The measures adopted should not in any manner be used to legitimate trade. If any injury is caused to the right holder, a reasonable compensation should be paid to him.

(e) Criminal Procedures

Because the profit margins to be realised by producers of trademark counterfeit goods and pirated copyright goods are so enormous, monetary damages frequently are insufficient to deter such activity. Accordingly, Article 61 of the TRIPs Agreement requires that criminal procedures and penalties must be at least applied to wilful trademark counterfeiting and to copyright piracy on a commercial scale. Imprisonment or monetary fines must be consistent with the level of penalties applied for crimes of corresponding gravity and must be applied as a deterrent. The remedies for wilful trademark counterfeiting and copyright piracy on a commercial scale must include seizure, forfeiture and destruction of the infringing goods and of the materials and equipment used in their manufacture.

8 Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures[16]

Article 62 of the TRIPs Agreement fills a lacuna in the intellectual property framework. Although the existing conventions in this field did contain rules for facilitation of the acquisition of rights in third countries, there were no general rules for their application and Article 62(1) can be considered 'a chapeau' to the whole Article. It says that acquisition rules apply to all rights protected in Sections 2 to 6 of Part II. Copyright and other related rights have been excluded owing to widespread absence of mandatory registration. Undisclosed information has also been excluded due to the variety of forms of protection that apply to it and also due to the absence of registration. As regards other rights, the rules set out in Article 62 apply where reasonable procedures and formalities are required as a condition for the acquisition or maintenance of such rights.

Article 62(2) of the Agreement obliges WTO members to proceed expeditiously, with grant and registration procedures. While no fixed time is provided, a result-oriented benchmark is provided: the procedure should not constitute an 'unwarranted curtailment of the period of protection'. Article 63(3) applies the rules of Article 4 of the Paris Convention (concerning the right of priority) to service marks. In other words, the other provisions of the Paris Convention relating to rights acquisition and maintenance do not apply to service marks. Article 62(4) establishes important principles that apply to all acquisition, maintenance, revocation, opposition and cancellation. All such procedures must be fair and equitable, not necessarily complicated or costly or entail unreasonable time limits or unwarranted delays. All administrative decisions are subject to review by judicial or *quasi*-judicial authority.

[16]Part IV of the Agreement.

9 Transparency and Dispute Settlement[17]

(a) Transparency

The Agreement obligates members to assure compliance by requiring transparency. This obligation has the potential to require members to conform to a rule-based system of intellectual property. The Agreement requires the publication of all laws, regulations, final judicial decision and administrative rulings of general application. If publication is not practicable, they must be made publicly available. While notifying the obligation, the members must communicate all information in accordance with Article 6 *ter* of the Paris Convention. The Agreement directs WTO members to be prepared to supply laws, regulations, final judicial decisions and administrative rulings of general application and bilateral agreements to other members upon written request and to be given access to other members to specific judicial decisions, administrative rulings or bilateral agreements. The Agreement further allows WTO members to protect confidential information when disclosure could impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of specific enterprises, whether public or private.

(b) Dispute Settlement

Article 64 of the TRIPs Agreement makes it clear that disputes arising under the Agreement on TRIPs are to be settled under the terms of the WTO Dispute Settlement Understanding. However, as in the case of disputes involving trade in goods or services, it is only when a dispute reaches the stage of formal consultations, at which a subsequent request for a Panel is clearly likely, that it moves beyond the area of responsibility of the specialised Council concerned which in the case of TRIPs is the Council for TRIPs.

As regards, the new dispute settlement system, the principal provisions relating to the settlement of disputes are summarised in Table 2.

Table 3 lists the disputes in which Panel or Appellate Body Reports have been adopted where the provisions of the TRIPs Agreement were invoked.

10 Institutional Arrangements[18]

(a) Council for Trade-Related Aspects of Intellectual Property Rights

The Council for TRIPs has been established to monitor the operation of the TRIPs Agreement. The TRIPs Council while performing its function may seek assistance and information from any source it deems appropriate. The Council is also obliged

[17]Article 64.

[18]Part VIII of the Agreement.

Table 2 .

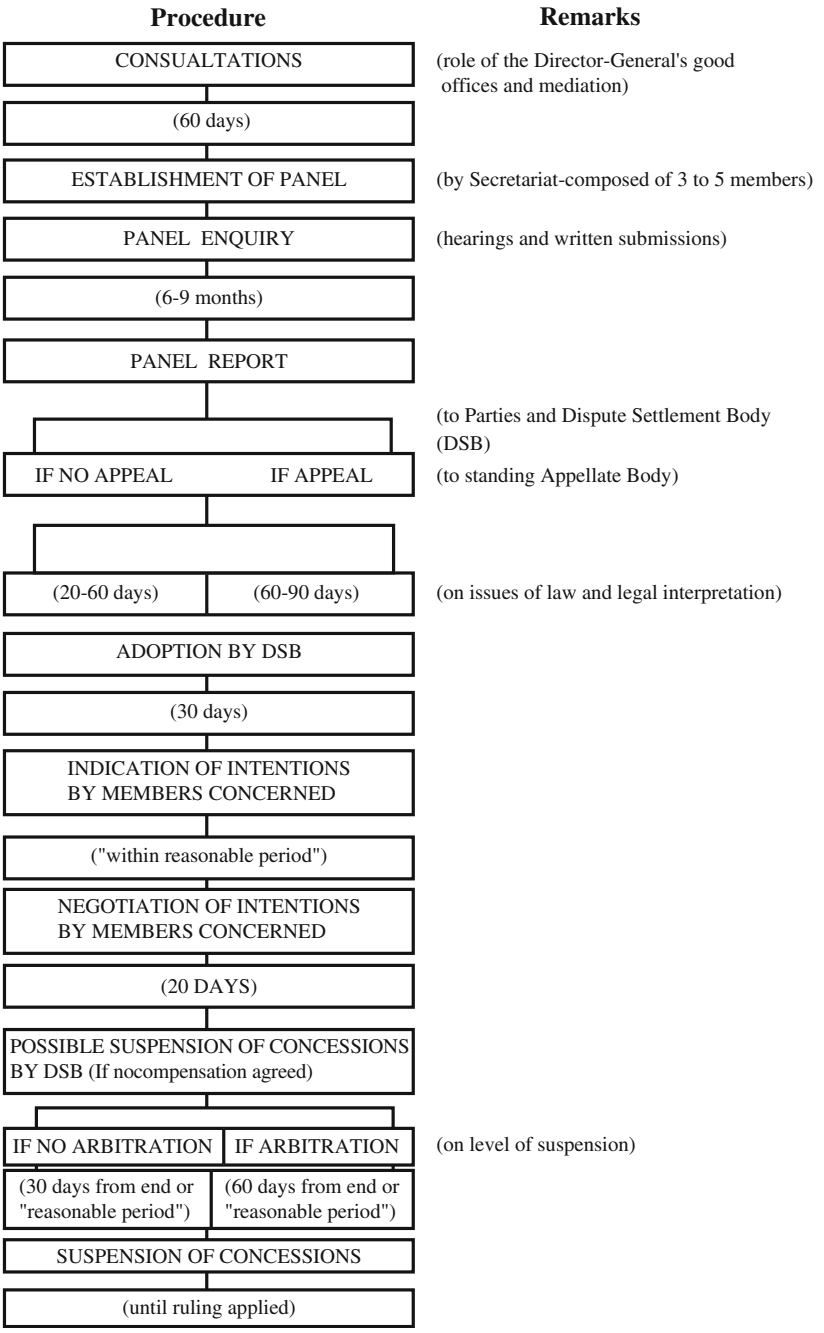
Procedure
Remarks
CONSUALTATIONS
(role of the Director-General's good offices and mediation)
(60 days)
ESTABLISHMENT OF PANEL
(by Secretariat-composed of 3 to 5 members)
PANEL ENQUIRY
(hearings and written submissions)
(6-9 months)
PANEL REPORT
(to Parties and Dispute Settlement Body (DSB)
IF NO APPEAL
IF APPEAL
(to standing Appellate Body)
(20-60 days)
(60-90 days)
(on issues of law and legal interpretation)
ADOPTION BY DSB
(30 days)
INDICATION OF INTENTIONS BY MEMBERS CONCERNED
("within reasonable period")
NEGOTIATION OF INTENTIONS BY MEMBERS CONCERNED
(20 DAYS)
POSSIBLE SUSPENSION OF CONCESSIONS BY DSB (If nocompensation agreed)
IF NO ARBITRATION
IF ARBITRATION
(on level of suspension)
(30 days from end or "reasonable period")
(60 days from end or "reasonable period")
SUSPENSION OF CONCESSIONS
(until ruling applied)

Table 3 .

No. Case name	Case number	Invoked Articles
1. India—Patents (US)	WT/DS50	Articles 27, 63, 70.8 and 70.9
2. Indonesia—Autos	WT/DS54	Articles 3, 20, 65
3. Canada—Pharmaceutical Patents	WT/DS114	Articles 27, 30, 33, 70
4. US—Sectional (5) Copyright Act	WT/DS160	Articles 9.1 and 13
5. India—Patents (EC)	WT/DS79	Articles 70.8(a) and 70.9
6. Canada—Patent Term	WT/D170	Articles 33, 62.1, 62.4, 65, 70.1 and 70.2
7. US—Sect. 221, Appropriation Act	WT/DS/176	Articles 2.1, 3.1, 4, 15.1, 16.1 and 42

to give assistance to the members in the context of dispute settlement procedures. The Council works only on a consensus basis and the issues on which consensus cannot be reached shall be sent to the WTO General Council. The Council has provided certain international institutional linkages with FAO, IMF, UPOV, OECD, UN, UNCTAD, WIPO, etc.

(b) **International Co-operation**

The TRIPs Agreement stresses the importance of the exchange of information on infringing goods, particularly the information about professional infringers. The Agreement expressly mentions the exchange of information between customs authorities with regard to stoppage of trade in counterfeit trademark goods and pirated copyright goods.

11 Emerging Issues

Just as intellectual property rights vary on functional grounds, their importance differs greatly among economic sectors. In order to understand the sources of pressure for change in global protection, it is useful to discuss the dependence of critical sectors on various forms of intellectual property rights. Most of the emerging issues that lead to the criticism of the Agreement are related to the relationship between the developed and developing countries. These issues are fundamentally affecting the pace of globalisation which need to be urgently addressed.

(a) **TRIPs and Biodiversity**

The issue arises from the interaction between international environmental laws in respect of biodiversity and the intellectual property law. One aspect of this issue yet

not explicitly addressed by international legal rules is the use for patenting a table technology that exploits genetic resources found in nature and abundant in developing countries. There is a concern that these genetic resources themselves are protected as intellectual property so that the contribution of farmers and local communities to their conservation can be compensated. A report of the WTO Trade and Environment committee appears to take the view that nothing in the TRIPs Agreement would prevent a member from requiring that a user of these resources provide compensation for their use.19

Thus, while a member would normally have to grant a patent on an innovation based on use of genetic resources in nature, it could decide to restrict access to the resources themselves in its domestic law. Yet it is possible that some kind of restrictions might be viewed as circumvention of TRIPs with respect to patent protection itself. In general, however to support the Trade and Environmental Committee's reading of the TRIPs Agreement, a right to unrestricted access to genetic resources in nature would amount to a claim to be able to patent and use exclusively the resources themselves, which is clearly not provided under the TRIPs criteria for patentability.

The provisions of the UN Convention on Biological Diversity 1992 (CBD) and TRIPs have been subject of heated debate both at WTO and the Conference of the Parties to the Convention. The main reason for the issue becoming so critical is that TRIPs Agreement classifies micro-organisms, microbiological and other biological processes as patentable but lacks clear provisions on biopiracy. This has led to a wide scale piracy of genetic wealth from developing countries. As a result of this rampant piracy, the developing countries are asking for the harmonisation of TRIPs Agreement with provisions of Convention on Biological Diversity. The developed countries like EU and US are opposing vehemently this demand.

(b) **TRIPs and Transfer of Technology**

Like Biodiversity Convention and its relationship with TRIPs, the issue of transfer of efficient and sustainable technology to technology deficient countries is debatable issue at the WTO level. The developing and LDCs are quite vocal on the issue of transfer of technology from multinational corporations of developed countries to the developing countries. The developed countries are reluctant in transferring their technologies to the less advanced countries as they do not want to end their monopoly which they command due to their superior technology.

The TRIPs Agreement provides for the transfer of technology to help the developing countries. Articles 7 and 8.2 of the Agreement clearly provide for the transfer of technology to the less developed countries.

However, even after being explicitly mentioned in TRIPs Agreement, the transfer of technology is still far from becoming a reality. The reasons are that the relevant WTO provisions are voluntary and are enumerated in the spirit of best endeavour. The developed countries under the WTO Agreements are not bound by any statutory obligation to transfer technology to developing countries. North-South technology transfer still remains an unrealised objective. The developing country industry is now calling for technology access and not market access through WTO.

(c) TRIPs and Unilateral Action

The continuing use by the USA of unilateral trade action, particularly under Sections 301 and Super 301, to deal with complaints about inadequate protection of intellectual property rights in developing countries simultaneously with the pursuit of dispute settlement in the WTO is an issue, which has wide consequences and needs to be addressed. It is arguable that even if unilateral action does not violate any specific provision of the GATT or the TRIPs Agreement, it may be in contravention of Article 23 of the DSU. This would seem to preclude unilateral action without reference to WTO dispute settlement, where the subject matter is covered by the TRIPs Agreement.

12 Conclusion

The formation of TRIPs Agreement which was fiercely contested has become a feature of new public international law. The whole document is a highly innovative document that breaks new ground to cover a field tangentially related to international trade that is not covered in the GATT 1994. The Agreement on TRIPs is not the first multilateral convention dealing with intellectual property rights. It draws substantially from existing conventions notably the Paris and Berne Conventions. It provides criss-cross referencing of these conventions. This reliance on the existing conventions helps the WTO to mediate the cognitive and normative demands being placed upon it by interlegality.

Nonetheless, the Agreement on TRIPs has firmed up the protection being made available for high technologies and commercial products. In the areas of patents and trademarks, the coverage has been further strengthened. In addition, the Agreement has confirmed protection for such key resources as computer software and secret information, which have previously been assimilated under very general provisions for international protection. Moreover, TRIPs are resolute in requiring members to provide effective means of enforcing the rights which it has nominated. Furthermore, to ensure the compliance more effectively it provides the process of dispute settlement which earlier conventions were lacking.

TRIPs model of intellectual property is very much one of the individual property rights freely assignable in the marketplace. Moral rights have not been stressed. The TRIPs have very little to offer to secondary producers and end users, even independent local inventors, developers, artists and performers who are not antagonistic to the notion of property rights. Nonetheless, it leaves spaces to cater for national sensitivities regarding the ownership of plants and animals or rights to control online communications. It provides openings for other international fora to re-enter the field. It provides concessions to counterbalancing regulation. It allows national legislators to attach limitations and exceptions to the rights. These allowances mediate the clash between differing attitudes to the use of intellectual resources.

Chapter 31
WTO General Agreement on Trade in Service (GATS)

1 Background

The General Agreement on Trade in Services (GATS), under the General Agreement on Tariffs and Trade (GATT) Uruguay Round, was a major step in unchartered terrain of liberalising trade in services. The signing of GATS has been an innovative attempt at constructing a realistic framework for liberalisation of trade in services. Until the last years of the twentieth century, the exchange of services across national frontiers did not figure prominently in international trade relations. Services were not mentioned in the GATT, negotiated in the years following the end of Second World War. Although the broader Havana Charter, as one of its purposes, sought, to encourage the demand of services as well as goods, it did not provide substantive provision for exchange of services.

The Treaty of Rome which established the EEC was the first international agreement dealing with liberalisation of trade in goods as well services. During the Tokyo Round, the efforts to include services were not intensively pursued. In the GATT Ministerial Meeting of 1982, after strenuous debate, the issue of services was for the first time placed on the agenda to consider whether any multilateral action in the shape of services is appropriate and desirable. The developed countries mainly USA and European Community favoured the inclusion of services in the GATT system. The developing countries, including India, vehemently opposed the inclusion of services in the GATT system. However, the pressure from the developed countries forced them to turn around.

When the Uruguay Round was launched in Punta del Este in 1986, a separate group on negotiations on services was created, 'with a view to expansion of such trade under conditions of transparency and progressive liberalisation', subject, however, to respect for the policy objectives of national laws and regulations applying to services. Since the architects of the Uruguay Round were not sure of the outcome of the negotiations on services, the negotiation on services was started separately, though linked to the original system of GATT. The rules and disciplines

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_31

governing trade in services were not in place until the Dunkel Draft of December 1991, and negotiations about commitments did not begin in earnest until 1992.

Several reasons may be cited for the difficulty in negotiating about barriers to trade in services. First, the very nature of the subject as the issue of services in international trade was very new one. The services sector was never on the agenda of any previous round negotiations. Even officials, economists and lawyers had not thought of services as tradable. As a result, it attracted little attention during the negotiations. Second, since the barriers to trade in services are not simple and obvious like tariffs on goods, they are difficult to identify, to clarify and to negotiate on the traditional basis of reciprocity.

Thirdly, the basis of regulating the services is provider rather than the product. The service providers always find the requirements of a foreign market inconsistent with the requirements of the home market. Fourthly, many cases like banking, insurance, travel agencies and other professional services require investment permanently or for extended periods of time. Issues of foreign investment and immigration often touch raw nerves, particularly in developing countries. Finally, when everyone was somewhat concerned about giving more than it got and about the free riders, the pattern of multilateral negotiations had evolved to a stage where a cross-sectorial multi-item negotiation was possible, with most participants roughly satisfied with the exchange, even when it would be hard to prove mathematical reciprocity. It was soon apparent that traditional GATT approach would not work. Only few general principles might be agreed upon such as transparency, consistency, possible national treatment, MFN treatment with some concession to existing rights. It was not clear whether states should opt out standard commitments for particular industries through a negative list or whether the commitments should apply only to a positive list of sectors for which states could opt in. At any event, the main negotiations, it became clear, would be about market access.

The plan that began to emerge mainly through the efforts of USA had two aspects. First, the General Agreement on Trade in Services would set out a few general principles; non-discrimination, national treatment, transparency for national rules and regulations and dispute settlement; and secondly, the proposed agreement would contain a list of particular service sectors to which states could subscribe, specifying which services they are prepared to submit for negotiations.

2 General Agreement on Trade in Services: An Analysis

GATS consist of 29 articles (32, if three *b is* articles are counted separately). The Agreement contains five components:

- concepts (Part I) and general obligations and disciplines (Part II) that apply across the board to measures affecting trade in services;
- specific commitments (Part III) on market access and national treatment that apply only to sectors inscribed in a member's schedule;

- a commitment by members to enter into successive round of negotiations aimed at progressive liberalisation (Part IV);
- institutional provisions (Part V) and final provisions (Part VI); and
- various attachments, mainly in the form of sectoral Annexes and Ministerial Declarations.

The preamble to the Agreement essentially states the considerations which shaped the negotiations. The Agreement acknowledges the growing importance of trade for the growth and development of the world economy. The establishment of a multilateral framework of principles and rules aimed at progressively opening up trade in services, and it should help the sector to grow rapidly and also to contribute to rapid development of the economy. The Agreement further aims at promoting the interest of all participants on a mutually advantageous basis and also to obligations. The Agreement further acknowledges the need of the developing countries to regulate the supply of services to meet national policy objectives. It also promises help to the developing countries in strengthening the capacity efficiency and competitiveness of their own domestic services.

A. **Scope and Coverage of GATS**

Part I, which consists of a sole article, i.e., Article I, defines the scope and coverage of the GATS. The Agreement 'applies to measures by members affecting trade in services' (Article 1.1). Services include any service in any sector except services supplied in the exercise of governmental authority.[1] The Agreement specifies 'measures by members' of central, regional or local governments and authorities as well as to measures taken by non-governmental bodies in the exercise of powers delegated to them by those governments.[2] 'A service supplied in the exercise of governmental authority', e.g., any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers has been specifically excluded from the scope of the Agreement.

B. **Modes of Supply**

For the purposes of the Agreement a comprehensive definition of trade in services in terms of four different modes has been provided[3] in the GATS. These modes help in understanding the special problems and regulatory issues that arise in international trade in service which have shaped the rules and principles embodied in the GATS. In addition, it also helps in understanding the specific commitments that members have undertaken in their schedules. It is also the key to much of the jargon habitually used by negotiators and others at home with GATS.[4]

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[1]Article 1.3(b) of GATS.

[2]Article 1.3(a) of GATS.

[3]See Barmard M. Hoekman, Market Access Through Multilateral Agreement: From Goods to Services, 15 World Economy 707 (1992).

[4]Guide to the Uruguay Round Agreements, The WTO Secretariat, Kluwer Law International, the Hague, London, Boston,164 (1999).

Mode 1

Mode 1 is the supply of a service 'from the territory of one member into the territory of another member'.[5] In the WTO jargon, this process is known as cross-border supply of services. It is in many ways the most straightforward form of trade in services, because it resembles the familiar subject matter of the GATT, not least in maintaining a clear geographical separation between seller and buyer. The cross-border supply occurs when neither the service supplier nor the service commander has to travel. Only the service itself crosses national frontiers.

Mode 2

Mode 2 is the supply of a service 'in the territory of one member to the service consumer of any other member'.[6] This mode is known as Consumption Abroad. Under this mode, the consumer travels to the supplying country perhaps for tourism or to attend an educational establishment or for repairing of a ship or aircraft outside its home country. Unlike mode 1, it does not require the service supplier to be admitted to the consuming country.

Mode 3

Mode 3 is the supply of a service 'by a service supplier of one member, through commercial presence in the territory of any other member'.[7] This mode is known as Commercial Presence. The establishment of branch offices or agencies to deliver such services as banking, legal service or communications is the examples of this mode. This mode is the most important in terms of future development. A large proportion of service transactions require that the provider and the consumer be locate at the same place.

Mode 4

Mode 4 is the supply of a service 'by a service supplier of one member through presence of natural persons of a member in the territory of any other members'.[8] Mode 4 is known as the presence of natural persons. It also means the admission of foreign nationals to another country to provide services there, when the supplier employ some foreign managers or specialists to the mode 3 and 4 combined together. Mode 4 may also be found alone, with no permanent commercial presence, and the visiting persons involved may be employees of a foreign service supplier or may be providing services as independent individuals. Even if the members undertake Mode 4 commitments to allow natural persons to provide services in their territories, they may still regulate the entry and stay of the persons concerned, for instance, visa requirements, as long as they do not prevent the commitments from being fulfilled.

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[5]Article 1.2(a).

[6]Article 1.2(b).

[7]Article 1.2(c).

[8]Article 1.2(d).

The definition of trade in services is therefore much broader than the traditional concept of trade used in the context of goods, which only involves cross-border transactions. It even goes beyond the transactions between the residents and non residents used to define the current account of the balance of payments, which excludes dealings requiring the establishment of a commercial presence by a foreign supplier.

3 General Obligations and Disciplines [Part II]

The second part of the GATS lays down the Agreement's general obligations and disciplines. These constitute the basic rules that apply to all members and to all services. Many of the key provisions of the GATT have a close equivalent in this part of the GATS.

(a) **Most-favoured-nation treatment**

Article II of GATS provides for the most-favoured-nation treatment clause which has direct parallels to the centrally important Article I of the GATT. It requires that members 'accord immediately and unconditionally to services and service suppliers of any other member, treatment no less favourable than it accords to like services and services suppliers of any other country'.[9] Under the MFN obligations, all countries, whether they have state-owned or privatised infrastructures, should allow access to their market on a non-discriminatory basis between service providers from different countries.

The MFN obligation has been the subject matter of both the EC—Bananas[10] and the Canada—Automotive Industry[11] disputes. Three issues were raised in these disputes: (a) what is the scope of MFN; (b) what constitutes less favourable treatment; and (c) to what extent likeness of service suppliers is affected by the mode of supply. The Panel report in EC—Bananas confirmed that the MFN obligation applies to all service sectors and suppliers regardless of whether specific commitments have been undertaken. The Panel affirmed that this provision prohibits both *de jure* and de facto discrimination. The Panel noted that the term 'less favourable treatment' appears in both Article II and Article XVII of the GATS. By striking a parallel with GATT Article III, the panel went on to state that the term must be interpreted in Article II GATS in the manner it is elaborated in GATS Articles XVII: 2 and 3. On appeal, the Appellate Body disagreed. The Appellate

[9]Article II.1.

[10]European Communities—Regime for the Importation, Sale and Distribution of Bananas—Complaint by the USA, Panel Report, WT/DS271R/USA, Adopted 25 September 1997, DSR 1997: II, as modified by the Appellate Body Report, WT/DS271AB/R, DSR1997: II.

[11]Canada—Certain Measures Affecting the Automotive Industry Panel Report, WT/DS1391R, WT/DS142/R, Adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R.

Body widened the ambit of the Panel's ruling by pointing out that all forms of de facto discrimination not only the one mentioned in GATS Article XVII are covered by GATS Article II. The two panel reports, EC—Bananas and Canada—Automotive Industry, addressed the issue of likeness under the GATS.

In EC—Bananas, the panel concluded that 'likeness' concepts developed in the GATT jurisprudence may carry over to GATS. In Canada—Automotive Industry, the Panel confirmed this and added that services may be 'like' even if delivered by different modes of supply. In both cases, however, the Appellate Body reversed the Panel without addressing the issue.

The GATS regime, however, contains one unique provision. Article II: 2 permits WTO members to 'maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of the Annex on Article II exemptions'. There was an obvious reason to include this provision in the Agreement. Prior to the Uruguay Round negotiations, many countries had entered into special reciprocal rights with other countries which they wished to honour. For this, an elaborate pattern of air traffic landing rights was expressly conceded in the Annex on Air Transport Services. A more ad hoc instance comprises the arrangements which have been made for co-production of films in the audio-visual services sector.[12]

Provision for MFN exemptions is, however, to have a more profound impact on the pattern of commitments. Legally speaking, members are permitted to maintain measures inconsistent with the MFN obligation simply by listing them. Again, there are some limits bound up with the decision to make commitments under the Agreement. The MFN exemption is not meant to retract from the commitments which a member can do in its schedule.[13] The Guide states 'where commitments are entered, therefore, the effect of an MFN exemption can only be to permit more favourable treatment to be given to the country to which the exemption applies than is given to all other members. Where there are no commitments, however, an MFN exemption may also permit less favourable treatment to be given.[14]

Thus, where the entry of some commitments is considered worthwhile, the MFN exemption provides scope to reward another country on the basis of material reciprocity by making further concessions to it. The result can be characterised as a baseline of MFN with a top-up of material reciprocity. Yet, while the MFN obligation is meant to be general one, this approach to exemptions allows a member, by choosing to make no commitments, to continue to operate exclusively on a bilateral or regional basis.

The Annex on Article II Exemptions of GATS laid down some formal conditions for the making of exemptions. Measures of the WTO members which are inconsistent with MFN obligations had to be entered into lists. These lists are attached to the Annex in the treaty copy of the GATS Agreement, which was settled

[12]See generally, Christopher Arup, The New World Trade Organisation Agreements—Globalizing Law Through Services and Intellectual Property (Cambridge University Press, 2000).

[13]*Ibid.*

[14]Guide, Legal Instruments, Vol. 28, Introduction P. IV.

at the Marrakesh Meeting of the Ministers. The GATS allowed members to apply for new exemptions after the WTO Agreements had entered into force. But these exemptions need to attract the support of three-fourths of all the member countries. The Annex provisions are also covered with the review and termination of the exemptions. Each exemption has to be terminated at one point of time. No exemption will run for more than ten years. The Council for Trade in Services is charged to review all exemptions that were granted initially for a period of more than five years.

Apart from services specified in individual MFN exemption lists, the only departure from it under the GATS is among the countries that are members of regional trading arrangements. Article V of GATS is modelled on Article XXIV of GATT, although the absence of services equivalent to import duties means that there is no distinction comparable to that between customs union and free trade areas. Article V rules on Economic Integration—permits any WTO member to enter into an agreement to further liberalise trade in services only with the other countries that are parties to such an agreement, provided the agreement has 'substantial sectorial coverage'; eliminates measures that discriminate against service suppliers of other countries in the group and prohibits new or more discriminatory measures. Recognising that action to open up services markets may well form part of a wider process of economic integration, the Article allows the liberlisation achieved to be judged in this light. The rules covered under Article V of GATS improves on their GATT equivalents in some spheres; e.g., 'substantial sectoral coverage' is much more clearly defined, since it disqualifies agreements that exclude any of the four modes of supply. Further, an approved agreement must be designed to help trade among its members, in an overall increase in the barriers they face in trading with the group in the service sectors or sub-sectors covered. If the establishment of the agreement, or its subsequent enlargement, leads to the withdrawal of commitments made to non-members, there must be negotiations to provide appropriate compensation. No compensation, on the other hand, is due from non-members for any trade benefits they gain from the agreement.

A relaxed exception from the MFN principle, as far as the movement of persons is concerned, is permitted by Article V *bis* of the GATS. Article V *bis* allows countries to take part in agreements which establish full-integration of labour markets.

(b) **Transparency and Fair Procedures**

Article III of the GATS contains a number of obligations aimed at ensuring a certain level of transparency with regard to member's measures. As with GATT, transparency is a core principle of GATS. The transparency obligation operates on three levels in the GATS. Firstly, it obligates each WTO member to promptly publish all relevant measures e.g., laws and regulations, of general application which pertain to or effect the operation of GATS.[15]

[15]GATS, Article III: 1.

Secondly, WTO members must also at least annually inform the Council for Trade in Services of the introduction of any new laws, or any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services covered by their specific commitments under the Agreement.[16] Finally, GATS further provides for the establishment of enquiry points by members for the purpose of responding to requests for information on the measures of general application. WTO members must respond to any request by other members.

However, members are exempted to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, whether public or private.[17]

(c) **Domestic Regulation and Mutual Recognition**

Non-tariff barriers to the services sectors are often prohibitive. Articles VI and VII of GATS lay the guidelines for WTO members to identify and negotiate the reduction of specific service sector non-tariff barriers, such as criteria for licensing, anti-competitive business practices and activities of monopoly providers. The members to the basic telecommunications negotiations set out guidelines in these areas.

Article VI obliges the members to ensure that in sectors where specific commitments have been taken, measures of general application affecting trade in service are administered in a reasonable, objective and impartial manner.[18] This obligation relates to the manner in which a measure is administered, and not to its substance per se. Article VI also contains certain disciplines relating to quantification requirements, technical standards and licensing requirements, which are numerous in the service sector. The Article also requires members to maintain or institute judicial, arbitral or administrative tribunals or procedures for the purpose of allowing impartial reviews of administrative decisions affecting trade in services. Furthermore, a member is obliged to issue, within a reasonable period of time after an application is made, a decision authorizing (or not) the supply of a service covered by the member's specific commitments.

The only work to date has been undertaken in the context of professional services and more specifically on a priority basis in the accountancy sector.[19] A working party has been established to prepare guidelines for mutual recognition of accountancy qualifications. These guidelines are not legally binding as they have not been integrated into the GATS. The GATS Council has also adopted

[16]GATS, Article III: 3.

[17]Article III *bis*.

[18]For the interpretation of a similar provision contained in Article X of the GATT, See Report of the Appellate Body, European Communities—Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, 13 July 1998, para. 115.

[19]See, WTO Working Party on Professional Services, S/WPPS/W/1, 12, 12/Rev.1, 14 and 14/Rev.1.

Disciplines on Domestic Regulation in the Accountancy Sector,[20] a document laying out the obligations of WTO members in the accountancy sector even if no specific commitments have been undertaken. The language in this document is only hortatory.

Article VII of GATS addresses licensing criteria as technical barriers to trade. This GATS Article distinguishes between the substance of the criteria and the procedure by which the criteria are implemented. The Article does not attempt to dictate what the specific criteria or standards of operation must be, so it is less strict than the technical barriers to trade limits under the GATT. The Article addresses the issue of the recognition by a host member of education or experience obtained, requirements met, or licences or certifications granted in another member. Such recognition is permitted and may result from unilateral recognition by the host member or from the other country concerned. The member recognising licences or certifications obtained in another member must give other interested members the opportunity to negotiate their accession to the Agreement on recognition or to demonstrate that the licences or certifications obtained in their territory should also be recognised.[21] Further, members shall not discriminate between countries in the application of its standards or criteria for the authorisation, licensing or certification of service suppliers, or a disguised restriction on trade in services. The recognition should be based on mutually agreed criteria.[22]

4 Monopolies and Exclusive Service Suppliers

Article VIII of the GATS imposes an obligation on members to ensure that monopoly suppliers of services in their territory do not in the supply of a monopoly service in the relevant market, act in a manner inconsistent with their obligations under Article II[23] and their specific commitments.[24] This obligation applies in respect of both public and private monopoly service suppliers.[25] Where a monopoly service supplier supplies services outside the scope of its monopoly rights, and a member has taken specific commitments in regard to those services, the obligation

[20]See, WTO, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64, 17 December 1988.

[21]GATS Article VII: 2.

[22]GATS Article VII, paras. 3, 5.

[23]MFN treatment obligation.

[24]GATS, Article VIII: 1.

[25]Monopoly supplier of a service is defined as any person, public or private that in the relevant market of the territory of a member is authorised or established formally or in effect by that service, GATS Article XXVII(h).

imposed on that member is to ensure that the monopoly service supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with the member's specific commitments.[26] These obligations are in particular aimed at preserving the integrity of the specific commitments taken by a member, *i.e.,* preventing that the market access granted by a member right through its specific commitments be rendered ineffective by the actions of monopoly service suppliers authorised by that member. After 1 January 1995, for any monopoly rights granted with regard to services covered by a member's specific commitments, that member must enter into negotiations with the other WTO members in order to reach an agreement on any necessary compensatory adjustment.[27]

The application of the obligations described above in respect of monopoly service suppliers is also extended to cases where a member formally or in effect authorises or establishes a small number of service suppliers and substantially prevents competition among those suppliers in its territory. Thus, the obligations of Article VIII apply in the context of oligopolies where competition is substantially prevented.

If business practices restrain or restrict trade in services, Article IX of the GATS requires consultations with a view to eliminating such practices which can be conducted at the request of any WTO member. A full and sympathetic consideration will be provided to the complaining member. The member addressed shall co-operate through the supply of publicly available non-confidential information of relevance to the matter in question.[28]

5 Payments and Transfers

Article XI of GATS contains certain obligations on payments and transfers that, needless to say, are important in the context of trade agreement on services that cover cross-border activities[29] as well as foreign direct investment.[30] Article XI: I provides that a member may not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.[31] This obligation finds application only where a member has taken specific commitments. The concept of 'payments for current transactions' covers payments for services, including financial

[26]GATS Article VIII: 2.

[27]GATS Articles VIII: 4 and XXI, paras. 2–4.

[28]GATS Article IX: 2.

[29]cf. the supply of services from the territory of one member into the territory of another member, GATS Article I: 2(a).

[30]cf. the supply of service by the service supplier of one member, through commercial presence in the territory of another member, GATS Article I: 2(c).

[31]GATS Article XI: 1.

services and the provisions of certain financial services like trade finance facilities. It does not cover payments for the purpose of transferring capital.[32]

Article XI further provides that the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the International Monetary Fund, the use of exchange actions which are in conformity with these Articles, are not affected. However, a member may not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions.[33] Again, this obligation applies only to the extent that a member has undertaken specific commitments.

6 Safeguards

Because of the limited nature of specific commitments under GATS, emergency safeguard measures have been left to future multilateral negotiations based on the principle of non-discrimination.[34] Restrictions to safeguard the balance of payments have been provided in the GATS. Article XII enumerates restrictions to safeguard the balance of payments. The provisions of this Article are similar to GATT Article XVIII: B. In the event of serious balance of payments and external financial difficulties or threat thereof the WTO members are allowed to adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments.[35] Developing countries, or countries in economic transition may use such restrictions

[32]Article XXX(d) of the Articles of the Agreement of the International Monetory Fund provides: 'payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation;

(1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
(2) payments due as interest on loans and as net income from other investments;
(3) payments of moderate amount for amortization of loans or for depreciation of direct investments; and
(4) moderate remittances for family living expenses.

The fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions'.

[33]GATS Article XI: 2. Under the Articles of the Agreement of the International Monetary Fund, a country is, as a general rule, free to regulate international capital movements. Article VI, Sect. 3 states: 'Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Sect. 3(b) and in Article XIV, Sect. 2'.

[34]GATS Article X: 1.

[35]GATS Article XII: 1.

to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for their programme of economic development or economic transition.[36]

However, the restrictions referred above are subject to following conditions:

(a) It shall not discriminate among its members;
(b) It shall be consistent with Articles of Agreement of the International Monetary Fund;
(c) It shall avoid unnecessary damage to the commercial, economic and financial interests of any other member;
(d) It must not be more restrictive than necessary in the circumstances; and
(e) It must be temporary and phased out progressively as the situation improves.[37] While determining the incidence of restrictions, priority may be given to supply of services which are more essential to the economic or development programmes.

However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector. Any restrictions adopted or maintained under Article XII of GATS must be promptly notified to the General Council. Periodic consultations for members maintaining restrictions under Article XII must be undertaken in the WTO, and the Ministerial Conference will establish procedures for such consultations. These consultations are further governed by the Committee on Balance of Payments of the WTO.

7 Subsidies

Along with safeguards, subsidies represent unfinished business under the Uruguay Round negotiations. Article XV of GATS provides that negotiations shall take place on subsidies affecting services and on the possible need for countervailing duties. The Article recognises that subsidies can distort trade in services. Negotiations on subsidies must recognise the interest of developing countries. A member adversely affected by another member's subsidy may request consultations with that member, and such consultations must be accorded sympathetic consideration.

8 Government Procurement

WTO members are exempted from the basic GATS obligations in purchasing services of their own use. However, the same GATS provision that specifies Articles II (MFN rule), XVI (market access commitments) and XVII (national treatment) rules is inapplicable to such purchases. The negotiations on government

[36] *Ibid.*
[37] GATS Article XII: 2.

procurement are expected to lead to commitments to open up some government purchases to foreign service suppliers.

9 GATS Exceptions to General Obligations

The GATS provision on general and security exceptions is perhaps the closest of all to their GATT equivalents. This reflects the fact that overriding considerations which are recognised as allowing a country to ignore specific international obligations will apply as strongly to one aspect of its trade as to another.

(i) **General Exceptions**

There are exceptions in Article XIV of GATS, similar to those in Article XX of GATT, that allow countries to adopt measures inconsistent with an obligation as long as measures are not disguised restrictions on trade. To begin with Article permits the adoption or enforcement of measures necessary to protect public morals, to maintain public order, or to protect human, animal or plant life or health.[38] A decision on Trade in Services and the Environment has charged a new committee to examine and report on the relationship between services trade and environment, including the issue of sustainable development, to determine whether these exceptions should be modified to take account of measures necessary to protect the environment.[39]

If environmental hazards increasingly fail to respect national borders, the other general exceptions begin to recognise the challenges to national regulatory competence of physically mobile or electronically dematerialised economic flows. A legitimate regulatory objective concerns assurance of the quality of services supplied. The GATS exceptions allow measures that are necessary to ensure compliance with rules or regulations relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts.[40] This exception also extends to the protection of the privacy of the individuals in relation to the processing and dissemination of personal data and also the protection of confidentiality of individual records and accounts.

The free flow of services internationally enhances opportunities to engage in tax avoidance. The GATS Article XIV(d) allows measures inconsistent with the national treatment, which aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members. In acknowledging examples of the measures which members have taken to protect their tax bases, a footnote to this exception provides an insight into the

[38]Article XIV(a) and (b).

[39]See generally, Christopher Arup, The New World Trade Organisation Agreements—Globalizing Law Through Services and Intellectual Property, (Cambridge University Press, 2000).

[40]GATS Article XIV(c)(i).

complexity of the arrangements in the field. The footnote spells out a number of wraps in which a country's taxation practices may treat foreigners differently from its own nationals. However, it must be appreciated that the exception only applies to the collection of taxes which are imposed on the services themselves or their suppliers. It does not acknowledge the broader role of service suppliers such as professionals play in constructing tax avoidance schemes and the need to regulate services supply on this basis.

The General Exceptions under Article XIV also covers measures inconsistent with the MFN obligation, provided the differences in treatment are the result of an agreement on the avoidance of double taxation.[41] The integrity of double taxation agreements is also protected by a later provision that prevents national treatment objections to a measure that falls within the scope of an international agreement relating to the avoidance of double taxation. But the double taxation agreements were forged largely to obviate the conflicting requirements which were experienced by those operating in more than one country. It is clear that globalisation is intensifying tax competition between countries.

Like the exceptions of Article XX of the GATT, the exceptions of Article XIV of the GATS reflect policy objectives that WTO members recognise as legitimate and that, upon meeting certain conditions, can be implemented without giving rise to a breach of the Agreement.[42] One must first determine whether the measure at stake falls within the ambit of paragraphs (a)(e) of Article XIV. If in the affirmative, then one must determine whether the measure also meets the requirements of the 'Chapeau', that is, whether it is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.[43] It must be emphasised here that under the 'Chapeau', what is at stake is not so much the questioned measure or its specific content, but rather the manner in which it is applied.[44] The purpose and object of the 'Chapeau' is essentially to prevent the abuse of the specific exceptions set out in paragraphs (a)(e).[45]

(ii) **Security Exceptions**

The security exceptions under the GATS are virtually identical with those of the GATT. Article XIV *bis* allows a member to withhold information or take actions that are necessary to its essential security interests. It allows a WTO member from

[41]GATS Article XIV(e).

[42]See, Report of the Appellate Body, USA—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, paras 135.

[43]With regard to the interpretation of similar terms in the context of GATT Article XX, See Report of the Appellate Body, USA—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 22 October 2001; Report of the Appellate Body, United States—Standards for Reformulated and Conventional Gasoline (US—Gasoline), WT/DS2/AB/R, 29 April 1996, p. 22.

[44]*Ibid*., p. 22.

[45]*Ibid.*

taking any actions which it considers necessary for the protection of essential security interests relating to the supply of services for the purposes of military establishment, relating to fissionable and fusionable materials and also action taken in the time of war or other emergency in international relations.[46] It also allows a WTO member to take appropriate action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security. The Council for Trade in Services is the body to which all WTO members are obliged to inform of the actions taken by them under security exceptions.[47]

10 Specific Commitments (Part III)

Part III of the GATS, entitled 'specific commitments', sets out the obligations relating to market access and national treatment. These obligations apply only where a member has taken specific commitments in a given service sector. For instance, a member will not be subject to these disciplines in respect of the supply of accountancy services, that is, if it has not included those services in its schedule of specific commitments annexed to the GATS. Where a member has included a service sector in its schedule, it may, in relation to that sector, have taken specific reservations for measures inconsistent with the national treatment obligation or the market access obligation.

(a) **Market Access**

Access by service providers of one state to the markets of other states is the central focus of GATS. But under GATS this access is not granted automatically. The GATS adopts an 'opt-in' or positive list approach, whereby members are bound only with respect of specific commitments by sector or sub-sector. The following types of measures which a WTO member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its schedule:

(i) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;[48]
(ii) limitations on the total value of service transactions or aspects in the form of numerical quotas or the requirement of an economic needs test;[49]

[46]GATS Article XIV *bis* (i)(b).
[47]GATS Article XIV *bis*: 2.
[48]GATS Article XVI: 2(a).
[49]GATS Article XVI: 2(b).

(iii) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic need test;[50]

(iv) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;[51]

(v) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;[52] and finally (vi) limitations on the participation of foreign capital in the terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.[53]

Thus, the market access of the GATS is a kind of foreign investment code—more extensive than any obligation thus for concluded in the GATT/WTO system. But its applicability depends to the extent a member state agrees to be bound.

(b) **National Treatment**

National treatment is a norm well within the ken of international trade, including the GATT, but it carries distinctive implications for services sectors. Article XVII: 1 states that:

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

The basic obligation as stated in Article XVII: 1 is very similar to that of national treatment rule in Article III of GATT 1994. But in the case of services, this commitment is limited only to the specific items mentioned in the schedule of the particular country. The national treatment norm creates both a goal and an obligation. It is a goal in the sense that each round of negotiations is meant to work towards commitments to national treatment. It is an obligation in the sense that members must accord national treatment in respect of all measures affecting the supply of services in the sectors inscribed in their schedules and subject to any conditions or qualifications set out therein. Members can thus prevent the operation of the norm by declining to inscribe sectors. But where a sector is inscribed, all such measures are caught by the norm unless and to the extent that conditions have been listed.

WTO members are obliged to meet the requirement of national treatment norm by according to foreign services and service suppliers either formally identical or

[50]GATS Article XVI: 2(c).

[51]GATS Article XVI: 2(d).

[52]GATS Article XVI: 2(e).

[53]GATS Article XVI: 2(f).

formally different treatment which it accords to its own like services or service suppliers.[54] Such formally identical or formally different treatment shall be considered to be less favourable if the members modify the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member.[55] In opting for such a test, the Agreement has made connections with the jurisprudence of the European Union as well as the earlier jurisprudence of the GATT itself. The USA—superfund[56] panel report first made the point that for GATT Article III to be violated, one need not show actual trade effects, since Article III (like GATT Articles II and XI) establishes competitive conditions. The findings of the panel report have been incorporated in GATS Article XVII: 3. The test is practical and realistic one. It is not necessarily that foreigners and locals are given formal equality, or what some commentators term facially non-discriminatory treatment, but what the treatment means effectively for the competitive relationship between them. The foreigner should enjoy equivalent opportunities to compete. It does not mean that member is under an obligation to ensure that foreigners enjoy success in the market place. It is only the opportunity to compete which should be equivalent so far as governmental measures are concerned. There are so many factors which are beyond the influence of host government's measures. Accessibility, familiarity, prejudice, loyalty and coming back of the goods are all factors that can influence consumers to favour local services. In this respect, a footnote to Article XVII cautions that 'specific commitments assumed under this Article shall not be construed to require any member to compensate for any inherent competitive disadvantages which results from the foreign character of the relevant services or service suppliers. It only exempts members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision. It does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.[57]

(c) **Additional Commitments**

Article XVIII of GATS provides for the WTO members to negotiate additional commitments (not additional restrictions) with respect to measures affecting trade in service not subject to scheduling under Article XVI or XVII. Such additional commitments include matters regarding qualifications, standards and licensing. All such additional commitments will be inscribed by the members in their schedule.

[54]GATS Article XVII: 2.

[55]GATS Article XVII: 3.

[56]United States—Taxes on Petroleum and Certain Imported Substances, Panel Report, Adopted 17 June 1987, BISD 345/136.

[57]Canada—Certain Measures Affecting the Automotive Industry, Panel Report, WT/DS139/R, WT/DS142/R, Adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS 142/AB/R, para. 10.298.

11 Preparation and Modification of Schedule

Any sector-specific commitments on market access or national treatment must be in a member's schedule, which is an integral part of GATS. By listing a service sector in its schedule, a member makes binding commitments to allow foreign suppliers into its market and to treat them the same as its domestic suppliers. The Agreement's approach to the listing of commitments has been characterised as a hybrid one.[58] Members first choose which sectors to list positively in their schedule of commitments. Within the sectors they inscribed, they must then decide which limitations or exceptions to place on national treatment and market access. The agreement is at its most voluntary, formally speaking, at the initial point of deciding whether to list a sector positively in a schedule of specific commitments. Thus, the onus is cast on countries taking part to delineate restrictions on the scope of the sectors they wish to reserve from the scrutiny of the agreement.

Once a sector is inscribed, the listing becomes more of a formal obligation. Article XX of GATS prescribes that each member set out in a schedule-specific commitments it undertakes to market access and national treatment with respect to sectors where such commitments are undertaken. Each schedule shall specify: (a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertaking relating to additional commitments; (d) where appropriate, the time frame for implementation of such commitments; and (e) the date of entry into force of such commitments. Thus, in listing a sector, a member attracts an onus to provide information about its remaining regulations. It should also have to determine which of those regulations it wishes to retain as a matter of policy.

Article XXI which is similar to GATT Article XXVII provides rules for the modification of the schedules. Once a commitment is made in a member's schedule, it cannot be withdrawn after the lapse of three years, unless the commitment was one that did not benefit any other member or the withdrawing member gives a compensatory adjustment in the case that there was a benefit withdrawn under Article XXI. If compensation is not given under this provision, the injured member can request consultation with the withdrawing member or utilise the dispute settlement mechanism of the WTO, which can result in required compensation.

12 Dispute Resolution Under GATS

Articles XXII and XXIIIlink the GATS to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Specifically, Article XXII: 1 provides support for consultations over matters arising under the Agreement. Article XXIII: 1 provides that any member which considers that another member

[58]Christopher Arup, The New World Trade Organisation Agreements—Globalizing Law Through Services and Intellectual Property, (Cambridge University Press, 2000) p. 104.

has failed to carry out its obligations or specific commitments under the GATS may have recourse to the Understanding with a view to reaching a mutually satisfactory solution. Article XXIII: 2 empower the DSB to suspend the application of a member's obligations or specific commitments if it considers the circumstances are serious enough to justify such action.

The GATS allows non-violation complaints. Article XXIII: 3 allows recourse to the Understanding if a member considers any benefit it could reasonably have expected to accrue is nullified or impaired by the application of a measure which does not conflict with the provisions of the Agreement. The Article specifies that, if there is nullification or impairment, the member will be entitled to a mutually satisfactory adjustment which may include the modification or withdrawal of the offending measure. In the event an agreement cannot be reached, suspension can be authorised.

There was a separate Ministerial Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services [(E/S/C/M/1); the Text of the adopted Decision can be found in S/L/2] which was adopted by the Council for Trade in Services on 1 March 1995. It provides for the establishment of a roster of panellists.

13 Council for Trade in Services

The Council for Trade in Services has been established under the GATS to further the objectives of the Agreement.[59] The Council has been empowered to establish such subsidiary bodies as it thinks appropriate for effective discharge of its functions.[60] The Council as well as the subsidiary bodies are open to all the members. The Council has established many subsidiary bodies for proper and effective workings of the GATS, i.e., Committee on Trade in Financial Services, Working Party on Professional Services as well as on Domestic Regulation. The Council has also been empowered to provide technical assistance to developing countries.[61]

14 Progressive Liberalisation of Services

Article XIX puts liberlisation in future perspective. The Article provided that by the end of year 2000, WTO members would enter into successive rounds of negotiations with a view to further liberalise the services sector. Article XIX is a guarantee that the initial GATS package was only the first form of continuing enterprise to be

[59]GATS, Article XXIV.

[60]GATS, Article XXV: 2.

[61]GATS, Article XXV: 2.

undertaken jointly by all WTO members, to raise the level of their services commitments towards one another. Moreover, the Article gives explicit assurance that in setting the guidelines for future negotiations, the Council for Trade in Service will decide how to handle two issues of great concern to developing countries. First, an issue essentially unsettled in the Uruguay Round in which it came up in the context of trade in goods as well as in services is the question of how countries should be given negotiating credit for efforts they may have undertaken to open up their markets to foreign service suppliers since the precocious round of multilateral negotiations. The other concerns the special treatment meted to the least developing countries. The negotiations will also pay due respect to the national policy objectives and take note of relative development of members. The developing countries will be provided more flexibility in undertaking market access and liberalisation commitments.

15 Movement of Natural Persons Supplying Services Under GATS

Along with the Annex relating to Article II Exemptions, the Annex dealing with Movement of Natural Persons Supplying Services under the GATS is the most important and permanent annex. GATS constitutes eight annexes all adopted on the same day on which GATS was signed. Annex on Movement of Natural Persons Supplying Services under the Agreement is covered by Mode 4. Under this Annex, two categories of measures are covered: (a) those affecting service suppliers of a member of the GATS, i.e., self-employed suppliers who obtain their remuneration directly from customers; and (b) those affecting the natural persons of a member who are employed by a service supplier or a member in respect of the supply of service.[62] The Annex explicitly declares that it will not apply to measures affecting individuals seeking access to the labour market of a member country, or to measures regarding citizenship, residence or employment on a permanent basis.

There are at least three dimensions to the Movement of Natural Persons from one country to another due to economic reasons, the period of stay, the levels of skills and the nature of the contract. Each dimension has some variation. An individual can move for a single day or migrate permanently, can possess no professional skills or be the master of a particular field, move as an independent professional or be transferred from headquarters to a local branch. The legal and economic implications of each type of movements vary.

The Annex further states that members may negotiate specific commitments that apply to the movement of all categories of natural persons supplying services under the Agreement. It goes on to say that natural persons who are covered by a specific commitment shall be allowed to supply the service in accordance with the terms of

[62]Annex.: 1 attached to GATS.

that commitment. But within their schedules, many countries apply limitations, both across the board and sector-specific, to the entry of natural persons into their territory. Horizontal entries often merely listed the exceptions to general controls on entry; sector-specific entries declared that this mode of supply is unbound.

The Annex on Movement of Natural Persons supplying services under the Agreement recognises the member's interest in screening those who enter its territory. In this regard, the Annex declares that the Agreement is not to prevent a member from applying measures to regulate the entry of natural persons into its territory, or their temporary stay in it.[63] This includes those measures necessary to protect the integrity of its borders, and to ensure the orderly movement of natural persons across them. This provision is subject to a proviso that such measures are not to be applied in such a manner as to nullify or impair the benefits accruing to any member under the terms of a specific commitment.[64] However, a footnote attached to the Annex makes it clear that the sole factor for requiring a visa for natural persons of certain members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitments.

The Annex on Movement of Natural Persons Supplying Services clearly seeks to keep the issue of migration out of the negotiations by stating that the Agreement will not apply to measures affecting natural persons seeking access to employment market of a member. Nor it will apply to measures regarding citizenship, residence or employment on a permanent basis. The Annex is said to apply only to measures affecting natural persons who are service suppliers of a member, and natural persons of member who are employed by a service supplier of a member, in respect of the supply of a service.

Developing countries are not happy over the exclusion of this issue from GATS. These countries which also include India want to keep this issue on the agenda as a counter to the calls by developed countries such as USA and EU countries for a social clause. The social clause asks commitment to core labour standards at home as the *quid pro quo* for market access abroad. The core labour standards are contentious where manufactured goods are traded; they can also become a factor when services themselves are tradable. Where service workers, such as construction workers, travel to the site of the consumers, an issue may be whether home or host labour standards are applied. The migration issue also provides a counterweight to the negotiations over financial and telecommunication services.

Despite the dramatic development in technologies for electronic delivery, natural persons supplying services still remain important for a range of services. Even in the field of software industry, the movement of service supplying personnel remains crucial despite the decline in onshore services. Nearly half of Indian software exports are supplied through the temporary movement of programmers to the client's sites overseas. Further, with the increase in the average levels of training and education, the industrial countries will feel the increasing scarcity of service

[63] Annex: I: 2.

[64] *Ibid.*

suppliers, in particular of moderately and less skilled labour. Keeping in mind the demand of caring occupations, personal services and a range of professional services, the demand for these service suppliers will increase further around the world.

16 Financial Services Under GATS

Financial services during the GATS negotiations got special treatment. It was realised that there is an urgent need to regulate banks, insurance companies and other providers of finance and financial information closely. Along with maritime transport services, basic telecommunications and Movement of Natural Persons Supplying Services, financial services were extended beyond the end of the Uruguay Round. The Agreement dealing with financial services is the only multilateral agreement that was negotiated without the participation of the USA. For some, this was deplorable, but this agreement proved that multilateralism can thrive even in cases where a major player is absent. The US joined it later and deposited its Schedule of Commitments in February, 1998.[65] In GATS to regulate trade in financial services, rules and disciplines are contained in three legal instruments: the GATS, the two Annexes on Financial Services and the Understanding on Commitments in Financial Services. The GATS contains the rules and disciplines applicable to all service sectors.

The Annex on Financial Services is an integral part of the GATS and is binding on all WTO members.[66] The Annex applies to 'measures affecting the supply of financial services'.[67] The use of the term 'affect' suggests that it had a broad scope.[68] The supply of financial services means the supply of those services through the four modes of supply identified in Article I: 2 of the GATS. However, the presence of natural persons is least important in this sector.

The term 'Financial Services' has been defined very broadly and in non-exhaustive manner in paragraph 5(a) of the Annex. A financial service is service of a financial nature offered by a financial service supplier of a member. It includes insurance and insurance-related services, such as life and non-life direct insurance. Insurance and insurance-related subjects are widely covered under GATS. It also includes reinsurance and retrocession, insurance intermediation such as brokerage and agency. Insurance services auxiliaries are also covered under financial services, i.e., consultancy, actuarial, risk assessment and claim settlement services. Banking and other financial services includes services, such as acceptance of deposits and repayable funds from public as well as lending of all types including

[65]GATS/SC/90/Suppl. 3, 26 February 1998.

[66]*cf.* GATS, Article XIX.

[67]Annex., para. 1(a).

[68]See, Report of the Panel, European Communities—Regime for Importation, Sale and Distribution of Bananas, WT/DS27/R/USA, 22 May 1997, para. 220.

consumer credit, mortgage credit, factoring and financing of commercial transaction along with financial services. Under financial services, banking services occupy a very prominent place. Besides the above banking-related transactions, it also covers credit charge and debit cards, traveller cheques and banker drafts, guarantees and commitments. All kinds of participation in issues of securities including underwriting and placement as agent come under financial services. Money brokering, asset management, such as cash or portfolio management and all forms of collective investment management, pension fund management, custodial, depository and trust services also come within financial services.[69]

A financial service supplier means any natural or juridical person of a member wishing to supply or supplying financial services. The 'public entry' has been excluded from the definition of financial service supplier.[70]

A 'public entity' has been defined under the Annex dealing with financial services as a government, a central bank or a monetary authority of a member or an entity owned or controlled by a member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, but it does not include an entity principally engaged in supplying financial services on commercial terms.[71] Thus, central banks will typically not be financial service suppliers under the GATS. Entities such as state banks will not be financial service suppliers either, provided their functions or activities principally are for governmental purposes.

[69]See Annex. XXXVII: 5(a) GATS

[70]Annex. XXXVII: 5(b), GATS.

[71]Annex., para. 5(c).

Chapter 32
WTO, Trade and Investment

1 The Background

International trade and investment are co-related, and the last decade has seen a dramatic increase in foreign direct investment (FDI), defined as ownership and control of a business or a part of a business in another country. Foreign direct investment is usually distinguished from portfolio investment, where a foreign actor purchases securities in a domestic company solely to earn a financial return, without any intent to own, control or manage the domestic firm.[1] Foreign direct investment generally takes one of the three forms; (a) an infusion of new equity capital such as a new plant or joint venture; (b) reinvested corporate new plant or joint venture; and (c) net borrowing through the company or affiliates.

According to UNCTAD Investment Report 1998, the global FDI stock, a measure of investment underlying international production increased fourfold between 1982 and 1994; over the same period, it doubled as a percentage of world gross domestic products to 9%. In 1996, the global FDI stock was valued at $3.2 trillion. Its rate of growth over the past decade (1986–96) was more than twice that of fixed capital formation, indicating an increasing internationalisation of production systems. The worldwide assets of foreign affiliates, valued at $8.4 trillion in 1994, also increased more rapidly than world gross fixed capital formation. Unlike the two previous investment booms in 1979–81 and 1987–90 (the first one being led by petroleum investments in oil producing countries and the second one being concentrated in the developed world), current boom is characterised by considerable developing-country participation on the inflow side, although it is driven primarily by investments originating in just two countries—the USA and the UK.

In recent years, many developing countries in pursuit of liberalising and globalising their economies have moved to dismantle many explicit barriers and disincentives (such as limits on the percentage of an enterprise that can be foreign

[1]N. Grimwade, International Trade: New Patterns of Trade, Production and Investment 144 (London: Routledge, 1989).

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_32

owned and on repatriation of profits), ownership by foreigners has become of increasing concern in some industrialised countries, especially in the USA, that traditionally complained about illiberal attitudes elsewhere towards foreign investment.[2] Further, the increased investment in Japan, by nationals of other industrialised countries, especially the USA, has focused attention on a range of domestic policies and practices in Japan that (including competition policies that provide few constraints on domestic gross ownership of enterprises) supposedly create obstacles to foreigners wishing to acquire business assets there.[3]

The issue of foreign investment is closely linked with the role of multinationals in the global political economy. Multinational corporations are being considered as powers unto themselves, capable of buying and intimidating governments, or at least with the capacity to spread production and other functions around the globe so as to exploit regulatory differences between states taking advantage of one country's cheap labour, another's tax heaven, and yet another's favourable rules on intellectual property, and perhaps creating a race to the bottom.[4] Others view the multinational corporations as a logical and desirable extension of the inherent logic of corporate advantage, combining the benefits of organising production within a single firm with the gains from free trade.

The controversy over foreign investment has surrounded measures that aim not to exclude investment but to direct it in a manner that benefits the economic development of the host country. In fact, measures aimed at challenging foreign investment to benefit the economies of host countries actually challenge two of the major assumptions that have traditionally underpinned hostility to foreign investment and the multinational firm: first, that foreign investment is necessarily harmful to development; and second the developing countries are powerless to determine the way in which foreign firms exploit their productive resources. Also of significance are incentives to attract foreign investment, such as tax holidays or subsidies.[5] Indeed incentives are often used in conjunction with export performance or local sourcing requirements and may have the effect of offsetting some or all of the disincentive effects of such restrictions or conditions on foreign investment.[6] From the perspective of neo-colonial economic theory, a world free of restrictions on the

[2]E. Graham and M. Ebert, 'Foreign Direct Investment and the U.S. National Security:Fixing Exon-Florio' (1991) (14) 245 World Economy; See also, R Kuttner, The End of Laissez Faire: National Purpose and the Global Economy After the Cold War, (New York: Knopt, 1991).

[3]See S. Ostry, 'Globalisation; Domestic Policies and the Need for Harmonisation, Centre for Study of Business and Public Policy', 12–18 (University of California, Santa Barbara January 1993).

[4]A.K. Koul, 'Multinational Corporations; Bonanza or a Source of illusion for the Developing Countries Economies', (2), 10–30 Review of Contemporary Law, Brussels (1981); See also A. Rugman, Inside the Multinational, The Economics of Internal Markets (New York: Columbia University Press, 1981).

[5]See A.J. Easson, 'The Design of the Incentives for Direct Investment; Some Lessons from the ASEAN Countries', International Business of Tax Law Programme, (University of Toronto, 1993).

[6]OECD, Investment Incentives and Disincentives (Paris: OECD, 1989).

movement of goods, services and capital, any measure that distorts the global allocation of productive resources, would reduce the world welfare.

However, within the GATT, the focus of attention has been on investment measures that have direct effects on trade in goods, such as measures that require or encourage foreign owned firms to discriminate between domestically produced and imported inputs in production in the host country (local content requirements) as well as measures that require that a certain percentage of a foreign firm's output be exported. The investment provisions of the Uruguay Round of Final Act would subject some investment measures with direct effects on trade to more explicit results against existing GATT norms.

2 The Havana Charter

The Havana Charter for International Trade Organisation (ITO) 1947, provided in a very scant manner, provisions on the encouragement of the international flow of capital for productive investment (Article 1:2) and in Article 11(1)(b), 'no Member shall take unreasonable or unsuitable action within its territory injurious to the rights or interests of nationals of other Members in the enterprise, skill, capital, arts or technology which they have supplied'. Whereas Article 12 (Chapter III) entitled, 'International Investment for Economic Development and Reconstruction', which stated, *inter alia*, that:

> The members recognise that international investment, both public and private, can be of great value in promoting economic development and reconstruction and consequent social progress… member has the right to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in internal affairs or national policies to determine whether and to what extent and upon what terms it will allow future foreign investment….

It was further recognised that the international flow of capital will be stimulated to the extent that members afford nationals of other countries opportunities for investment and security for existing and future investments. A member has the right to determine whether and to what extent and upon what terms it will allow foreign investment; to prescribe and give effect on just terms to requirements as to the ownership of existing and further investment; and to give due regard to the desirability of avoiding discrimination as between foreign investments.[7]

The Havana Charter, therefore, encouraged investment but recognised sovereignty of countries to regulate investment. It is fair to suggest that in the negotiations of ITO when a provision requiring member states to make just compensation

[7]See UN Conference on Trade and Employment, held at Havana, Cuba from 21 November 1947 to 24 March 1948, Final Act and Related Documents (Lake Success, N.Y. Interim Commission for the International Trade Organisation, 1948), UN Doc. E/Conf. 2/78); See also Clair Wilcox, A Charter for World Trade, 145–46 (1949).

for property taken into public ownership, subject to various exceptions was dropped from the final version of ITO as adopted at Havana, very little was achieved in arriving at international law of investment at the international trade level.

3 Multilateral Disciplines on International Investments: Pre-uruguay Round/WTO

A. BITS and NAFTA

Prior to the WTO Agreement on Trade-Related Investment Measures, there was no multilateral agreement comprehensively dealing with investment issues. However, trading parties commonly enter into so-called bilateral investment treaties (BITS) in which the core issues on the conditions of foreign investment, the standards of compensation in cases of expropriation and investor remedies are often incorporated in investment state arbitration mechanisms.[8]

Between 1959 and the end of the year 2001, more than 1100 bilateral investment treaties were concluded between developed and developing countries and a substantial number between developing countries *inter se*. Of the 1100 treaties, more than 800 have been concluded since 1987. Overall 155 countries were parties to BITs, covering every continent.[9]

At the regional-level EC/EU, integration process has emphasised complete liberalisation of investment and free movement of capital as one of the 'fundamental economic freedoms' agreed by member states of the Union.[10]

North American Free Trade Agreement (NAFTA) liberalised investment and movement of capital between Mexico, the USA and Canada and is modelled on the BITS in many ways and as such the principles governing investment in BITS are same as contained in NAFTA.

The essential normative order for investment in BITS is to promote greater economic co-operation between the parties and to encourage the flow of private capital and create conditions conducive to such flow.

(i) *The Contents of BITS*

The general requirement in the BITS is to provide that neither party shall mandate, as condition for the establishment, acquisition, expansion or operation of a covered investment satisfying any of the six performance requirements:

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[8]See generally, Richard B. Lillich and Burns Weston eds, The valuation of Nationalised Property in International Law(Weston eds. 1972); Richard B. Lillich, The Protection of Foreign Investment: Six Procedural Issues (1956).

[9]The figures are based on the Collection of BITS by the International Centre for the Settlement of Investment Disputes (ICSID).

[10]George Berman, Roger J. Goebel, William J. Davey, and Eleanor M. Fox, European Union Law,451 (2002).

(a) to achieve a particular level or percentage of local content or to give a preference to products of services of domestic content or source;
(b) to limit imports in relation to a particular volume of production, exports or foreign exchange earnings;
(c) to export a particular level or percentage of products or services;
(d) to limit sales in the party's territory in relation to a particular volume or value of production, exports or foreign exchange earnings;
(e) to transfer technology to a national company in the party's territory; or
(f) to carry out a particular type, level or percentage of research and development in the party's territory.

(ii) ***Fair and Equitable Treatment***

The BITS provides fair and equitable treatment as required under international law, and hence, no discrimination is allowed in respect of nationality or origin for matters such as access to local courts and administrative bodies, applicable taxes and administration of governmental regulations. Also a minimum international standards of behaviour is required for treatment of foreign investors even if no discrimination is palpable.[11]

(iii) ***Full Security and Protection***

BITS requires that the host governments should provide full security and protection to the investor, his property and person and also to defend these rights of the investor against any violations.[12]

(iv) ***Expropriation***

BITS contains provisions on expropriation, which is lawful and not inconsistent with the BITS provided, (i) it is carried out for a public purpose; (ii) it is not-discriminatory; (iii) it is carried out in accordance with due process; and (iv) it is accompanied by payment of compensation—in some treaties as qualified by the word 'just', 'prompt', adequate and effective compensation.[13] Many of these treaties also speak of 'expropriation' or nationalisation, 'of expropriation direct or indirect', or 'expropriation' 'nationalisation', of expropriation 'direct' or 'indirect' etc.

(v) ***Compensation***

The compensation criteria adopted in most of the BITS centres round the words 'prompt', 'effective' and 'adequate' compensation. Adequate compensation is defined as 'market value' or 'fair market value' before the expropriation/

[11]Metalclad Corporation versus United Mexican States, Final Award, 30 Aug. (2000), para. 99 ICSID case No. ARB (AF) 197/1.

[12]Asian Agricultural Produces Ltd. versus Republic of Sri Lanka, Award of 27 June, (1990), paras. 85–6; 30 I.L.M. 577 (1991), 41 CSID Rep. 246. (1997).

[13]See Andreas F. Lowenfeld. International Economic Law, Ch. 15, (Oxford University Press 2000).

nationalisation took place and is supposed to exclude any change in value occurring because the plan to expropriate had become known before the actual measure being undertaken. The typical example of adequate compensation can be found in BITS between Japan and China of 1988 which specifically incorporated that the compensation 'shall be such as to place the nationals and companies in the same financial position as that in which the nationals and companies would have been if expropriation, nationalisation or any other measures, the effects of which would be similar to expropriation or nationalisation… had not been taken. Such compensation shall be paid without delay. It shall be effectively realised and freely transferrable at the exchange rate in effect on the date used for the determination of the amount of compensation'.[14]

Prompt compensation means that interests accruing from the date of nationalisation shall be paid and included in any agreement. Some agreements, including the US Model Agreement, state that interest shall be paid at 'a commercially reasonable rate' for the currency in which the compensation is paid. Some BITS refer expressly to the London Interbank Rate (LIBOR).

Effective means is a form usable by the investor. The currency of payment must be freely usable or convertible into freely usable currency, without restrictions on transfer. Market bonds are acceptable, provided their actual value, as contrasted with their nominal value are acceptable, is equal to the compensation determined to be payable.

'Market value', 'Fair market value' or 'Just Compensation' or 'Genuine Value' are essentially synonymous and have been highly controversial for the reason that to determine these values, it is the specificity of the investment which will have to be carefully looked into to arrive at any of the above values. In the case of shares traded on a stock exchange, the price of shares on the relevant date may be taken to determine the market value of the investments. In cases of investment for large mining manufacturing units, it may be difficult to arrive at 'just compensation' for the fact that there may not be a willing buyer to determine the value. If the enterprise has a record of earnings over a representative period, negotiators or tribunals may attempt to arrive at going concern value, i.e. the present value of future earnings.[15] When an investment is expropriated or destroyed before it has been able to establish an earnings, or when it has failed to make a profit in the period prior to the nationalisation or destruction, arbitral tribunals tend to be sceptical about the claims of prospective earnings, and base their awards on the actual funds invested in the enterprise.

[14]Article 5(3) of the Agreement Concerning the Encouragement and Reciprocal Protection of Investment Between Japan and China, done at Beijing 27 Aug. 1989. Reproduced in 28, 1. L.M. 575 (1989).

[15]Supra note 13, pp. 476–493.

(vi) ***Dispute Settlement***

The settlement of disputes in the BITS is by way of arbitration which normally is taken under the International Centre for the Settlement of Investment Disputes (ICSID), provided both the home and host states are parties to the ICSID Convention. ICSID Convention 1966 is a convention for the settlement of investment disputes within the World Bank.[16] Many of the recent BITS provide alternatives to ICSID arbitration particularly for arbitration under UNCITRAL rules, and in some treaties for arbitration under the auspices of International Chamber of Commerce or under purely ad hoc arbitration if agreed by the parties to the dispute. The arbitral proceedings under BITS and NAFTA are purely confidential, and participation by non-governmental organisations or other *amicus curiae* has not been allowed.

4 The Multilateral Investment Guarantee Agency (MIGA)

The negotiating history of the Multilateral Investment Guarantee Agency (MIGA) reveals that the World Bank was interested in launching a multinational agency that would 'enhance the flow of capital and technology for productive purposes' to developing countries by improving the conditions for direct foreign investment and reducing and insuring against the political risks of such investment.[17] The World Bank's Board of Governors approved the MIGA Convention in 1985 which came into force in 1988.[18] By the end of 2001, MIGA had 22 industrial and 132 developing countries as members.

(i) **Risks Covered**

The risks covered under MIGA extend to the eligible investors who can purchase insurance against risks of inconvertibility of local currency, expropriation, breach of contract, and war and civil disturbance, including politically motivated acts of sabotage or terrorism.[19] To be an eligible investor, a person must be a national of a member country other than the host country, a corporation organised or established in such a country, or if it is incorporated in the host country, a corporation the majority of whose capital is owned by nationals of member countries. State enterprises are also eligible provided they are engaged in commerce. Eligible products can include new investments, as well as expansion, modernisation,

[16]See 575 U.N.T.S.159, entered in force 16 October (1966).

[17]For a detailed history, See, Ibrahim Shihata, MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency (1988).

[18]Convention Establishing the Multilateral Investment Guarantee Convention, 1508 U.N.T.S. 99.

[19]Article 11, MIGA.

restructuring and privatisation of existing investments, and in some circumstances loans made or guaranteed by holders of equity in the enterprise in question.[20]

(ii) MIGA and Investment Climate

As the MIGA Convention is adhered by more than 150 states, both developed and developing, and in terms of the objectives of the MIGA, i.e. to encourage the flow of investment for productive purposes among member countries as well as in guaranteeing the investment including the availability of fair and equitable treatment and legal protection for the investment, it is sufficiently clear that a uniform climate for investment across the member nations has been evolved.

The MIGA has a dual role of satisfying itself that appropriate investment conditions are available in the host country as well to encourage the amicable settlement of disputes between the investors and the host countries. The Agency has also to endeavour to conclude agreements with developing member countries, and in particular with prospective host countries. The Agency, with respect to investment guaranteed by it, has to provide treatment at least as favourable as that agreed by the member concerned for the most-favoured investment guarantee agency or state in an agreement related to investment. Such agreements are to be approved by special majority of the Board, which shall promote and facilitate the conclusion of agreements, among its members, on the promotion and protection of investment.[21]

MIGA Convention requires the agency to encourage developing countries to enter into BITS and join ICSID Convention or to adopt other criteria of an investor-friendly legal regime. MIGA Convention goes further that in case no protection is assured under the laws of a host country or a BIT, the Agency will issue a guarantee only after it reaches agreement with the host country pursuant to Article 23(b)(ii), in which investments guaranteed by the host country will receive MFN treatment.

MIGA Convention has adopted a fairly broad definition of 'expropriation and similar measures' and is clear that the focus is on the loss to the investor, not on the gain to the host government by proclaiming that, 'any legislative action or administrative action or omission attributable to the host government has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories'.[22]

Finally, MIGA covers 'any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach; or (b) a decision by such a forum is not rendered within such a reasonable

[20]Article 13, MIGA.

[21]Article 23, MIGA.

[22]Article 11(a)(11), MIGA.

period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations; or (c) such a decision cannot be enforced'.[23]

In sum, this World Bank Convention has improved the investment climate and has encouraged trans-border investments as a vehicle of world economic growth.

5 The International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and International Centre for Settlement of Investment Disputes (ICSID)

The World Bank's efforts for settling investment disputes not between states, but between private parties on one side and host states on the other hand, under the auspices of an institution which could act as a neutral empire led to the coming into force, the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[24] The Convention established the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank.

Under the ICSID Convention, both host and home country of the investor have to be parties of the Convention. The Convention is open to all member states of the World Bank, and with approval of its Administrative Council by a two-thirds vote, to any other state party to the Statute of the International Court of Justice (ICJ).[25] In order for the Convention to be applicable, a given investment dispute must be the subject of a consent to arbitrate under the auspices of ICSID, which may be given in an investment agreement at the time the project in question is undertaken, or in an *ad hoc* agreement after the dispute arises; however, a consent once given is not subject to revocation.[26]

Article25(2)(b) of the ICSID Convention defines 'National of Another Contracting State' to include not only a foreign corporation or other juridical entity but also 'any juridical person, which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the Convention. Article 26 provides that, unless otherwise stated, consent of the parties to arbitration under the Convention shall be deemed to exclude any other remedy. A contracting state may make a reservation to require the exhaustion of local administrative or judicial remedies, but typically host states have not done so. Correspondingly, home states of an investor are precluded from giving diplomatic protection or bringing an international claim in connection with a dispute subject to the Convention.[27]

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[23]Article 11(a)(iii), MIGA.

[24]575 U.N.T.S. 159 entered into force 16 October 1966.

[25]Article 67, ICSID Convention.

[26]Article 25(1), ICSID Convention.

[27]Article 27(1), ICSID Convention.

An arbitral tribunal under the ICSID Convention consists of three persons, one selected by each party to the dispute, (i.e. the host state and the investor) and the presiding arbitrator selected either by the parties or, if they cannot agree, by the chairman of ICSID, who is *ex officio,* the President of the World Bank. The pattern of choosing an arbitral tribunal follows the pattern of other international commercial arbitration except that Article 39 provides that the majority of arbitrators shall be nationals of states other than the host state or the home state of the investor.

(i) The Working of the Convention

By the year 2001, 149 states had signed the ICSID Convention and about 80 disputes relating to investment had been submitted to ICSID for arbitration or conciliation, 51 cases had been decided either by final award or by settlement in the course of the proceedings and 30 cases were in progress.

The Tribunal decides a dispute in accordance with such rules of law as may be agreed upon by the parties. In the absence of an agreement, the Tribunal applies the law of the Contracting State party to the dispute (including its rules of conflict of laws) and such rules of international law as may be applicable.[28]

The Tribunal first looks at the law of the host state and that law would in the first instance be applied to the merits of the dispute. Then the result would be tested against international law. That process would not involve the confirmation or denial of the host states law, but may result in not applying it where that law, or action taken under that law violated international law.[29] There are four situations where an ICSID tribunal would have occasion to apply international law, i.e. (i) where the parties have so agreed; (ii) where the law of the host state calls for the application of international law, including customary international law; (iii) where the subject matter or issue is directly regulated by international law, for instance a treaty between the host state and the home state of the investor; (iv) where the law of the host state or action taken under that law violates international law.

6 Multilateral Agreement on Investments (MAI)

The Multilateral Agreement on Investment (MAI) negotiations started as early as 1995 by a decision of a Ministerial Council of the OECD.[30] The OECD, a Paris-based inter governmental organisation for developed countries was interested in establishing a strong discipline on investment at the multilateral level in which integration of developed and developing countries investment interests would have been globalised.

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[28]Article 42 (1), ICSID Convention.

[29]Aron Brouchs, 'The Convention on the Settlement of Investment Disputes', 136 Recueil de cours 33 [Hague Academy of International Law (1972)].

[30]Ministerial statement of the Multilateral Agreement on Investment, Paris 17–26 May 1997, 45 SG/COM/NEWS (97).

A. Notable Features of the MAI Rules

The OECD Ministerial Council after the 1995 agreed that MAI should become 'a state-of-the-art agreement,[31] which meant that all recent achievements in existing investment frameworks should be integrated in MAI. MAI's approach essentially was to liberalise investment, remove barriers to investment and provide protection against expropriation and measures diminishing its value, and institute a dispute settlement system. The MAI negotiations although could not materialise into an international treaty and failed in 1998, yet the substantive issues continue to have a bearing on the open ended trade policies of the WTO as MAI could become part of the WTO legal regime. The issues can broadly be categorised as under:

(a) although investment creates jobs, foreign firms can, it is alleged, exert too much influence on the economic sectors of the host countries, specially in developing countries, unless they are subject to some controls;
(b) there are fears that investment liberalisation can lead to economic crisis, when in times of trouble, foreign investors may pull their money out of the host country; and
(c) the investment liberalisation is opposed because it is feared that multinational companies will use foreign direct investment to exploit workers in low-wage countries with inadequate labour standards.[32] It was further contended that the companies will invest in countries with low environmental standards and use their influence to attack efforts in these countries to improve environmental standards on the basis of earlier attempt to do so.[33]

The issues surrounding the dead MAI cropped up once again at the Ministerial Conference of WTO at Fourth Session at Doha, 2001 and agreed to undertake negotiations on trade and investment beginning in 2003[34] and continued at its third formal meeting since the Doha Ministerial Conference. The Working Group completed its review of the issues set out at Doha, the definite action is, however still awaited.

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[31]OECD, A Multilateral Agreement on Investment, Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CIMT), 65 OECD/GD/(95) (Paris 1995).

[32]See generally, Kenneth W. Dam, The Rules of the Global Game, 175(2001); Michael J. Trebilcock and Robert Howse, The Regulation of International Trade, 363 (2nd ed.,1999).

[33]Matalclad Corporation vs. United Mexican States, 40 I.L.M. 36 (2001) in which damages were awarded when company investment was in hazardous waste treatment facility approved by the Federal Government of Mexico which was latter blocked by local Mexican authorities; See also, Environmentalists' letters on MAI, 13 February 1997 reprinted in Inside U.S. Trade, 21 February 1997 Article 12–13.

[34]See generally, Yoshi Kodama, 'the Multilateral Agreement on Investment and its Legal Implications for Newly Industrialising Economies', 32(4) JWT 22–39 (1998).

7 Post Uruguay Round; WTO Agreement on Trade-Related Investment Measures; TRIMs

A. Uruguay Round Negotiations

Investment was a major issue during the Uruguay Round Negotiations. The negotiations in the context of GATS, TRIPS, Government Procurement and Subsidies as well as MAI and discussions at the WTO Working Group on Trade and Investment, have demonstrated that many countries continued to have concerns with providing right of establishment to foreign investment and consider it important to maintain flexibility in their economic and development policies. All multilateral negotiations on this subject since the Havana Charter have been marked by the reluctance to subject investment policies to international rules and disciplines. Although, Doha Declaration of 2001 of WTO kept investment issue alive on the WTO agenda, it cannot be ignored that a lot of negotiations have taken place in this sector as far back as Havana Conference/Charter and at the UN fora, notably the Commission on Trans-national Corporations (UN Commission on TNCS),[35] as well as the Tokyo Round Preparatory Committee for the GATT Ministerial Meeting[36] which finally led to the negotiations of trade-related investment measures of WTO as a result of Uruguay Round Negotiations, 1994.

Indeed, the Final Act of the Uruguay Round contains a number of provisions dealing with issues relating to investment liberalisation and protection. The bulk of such protections are found in two chapters of the Final Act of the Agreement on Trade-Related Investment Measures (TRIMs), and the GATS. A number of other chapters on the Final Act, namely the Agreement on Subsidies and Countervailing Measures, TRIPS and the Understanding on Rules and Procedures Governing the Settlement of Disputes, also contain provisions relevant to assessing the Uruguay Round's treatment of investment.

B. TRIMs Negotiations

While the TRIMs were negotiated under the Group of Negotiations on Goods (GNG) two basic issues cropped up, i.e. (i) whether the disciplines developed in this area should be limited by existing GATT articles especially Articles III and XI of GATT or expanded to develop an investment regime, and (ii) whether all or some of the TRIMs should be prohibited or should be dealt with on a case-by-case basis demonstration of direct and significant restrictive and adverse effects on trade. In the TRIMs negotiations, certain developed countries such as Japan and USA were interested to negotiate new rules with respect to various aspects of investment policy, notably incentives and performance requirements. The proposals of USA

[35]A.K. Koul, 'The Code of Conduct on Transfer of Technology; An Analysis in Legal Perspective', 141–162 Foreign Trade Review, (1985).

[36]Report of The Consultative Group of Eighteen, Doc. No. L5210, reprinted in GATT BISD 28th September 75–76 (1982).

and Japan were to the effect that not only international investment legal regime should be established but it should also allow multinational corporations a freedom to invest in full climate of freedom and least restrictions.

The USA enumerated the effects of TRIMs under categories such as (a) prevent, reduce or divert imports by limiting the sale, purchase and use of imported products; (b) restrict the ability to export by home and third country producers; and (c) artificially inflate exports from a host country, thereby distorting trade flows in world markets.[37] Therefore, the TRIMs had adverse trade effects, and this was a sufficient reason to make a case for applying general principles and disciplines to control them under Articles III and XI of GATT. It was further alleged that a number of regulatory performance requirements adopted by governments of host countries have trade distorting and inhibiting effects, such as requirements for local content, export performance, trade balancing, domestic sales, manufacturing, product mandating, remittance restrictions, technology transfers, licensing and local equity.

The EC proposals[38] focused on measures that had a direct and significant restrictive impact and a link to GATT rules identifying eight TRIMs that met the criterion of being directed at the exports and imports of a company with the immediate objective of influencing its trading patterns (local content, manufacturing, export performance, product mandating, trade balancing, exchange restrictions, domestic sales, and manufacturing limitations concerning components of the final product).

The developing countries position in the negotiations was little ambivalent. On the one hand, the developing countries asked for strict adherence to the mandate and for limiting the negotiations exercise to the effects of investment measures that had a direct and significant effect on trade[39] and on the other hand, to maintain maximum flexibility in respect of investment policies including remittance restrictions, technology transfer requirements, local equity requirements, licensing requirements, incentives to achieve economic growth, trade expansion, industrial, social and developmental objectives.

The developing countries' proposals went further by asking for *effects test* wherein evidence based on case-by-case examination of investment measures should be established to find out whether a direct and significant adverse effect on trade existed. In other words, a clear *link* would need to be demonstrated between the measure and the alleged effect; and if such a link was established, the nature and impact on the interests of the affected party would need to be assessed and appropriate ways and means would have to be found to deal with the demonstrated effects, including in relation to the treatment accorded when development aspects

[37]See submission by the U.S., Doc. MTN. GNG/NG12/W/1, W/2, W/4, W/5, W/6, W/11, W/14, W/15 and W/24.

[38]See submission by the EC, Documents MTN. GNG/NG 12.

[39]Doc. MTN. GNG/Ng12/4, pp. 11–12.

outweigh the adverse trade effects.[40] The rationale for the above proposals by the developing countries lies in the fact that they use a combination of investment incentives and performance requirements to pursue a variety of development objectives such as to orient resource allocations to sectors considered to have a particular growth potential; to build up a viable domestic private sector; to promote vertical integration; to attract foreign technologies or export-oriented investment; or to improve access to major markets and export marketing capacities. In many cases, since policy instruments to ensure free domestic competition are not sufficiently effective or enforceable *vis-a-vis* multinational corporations, investment measures are relied upon to correct market distortions created by these multinationals. In the present climate of globalisation, in which international competitiveness and liberal foreign direct investment are *sine-qua-non* for any development effort of the developing countries, and in absence of sufficient official aid, the developing countries are continuously in need of private investment which per se is in the hands of multinational corporations, the multinationals corporations obviously favour investment in the countries with the least number of restrictions.

8 TRIMs: An Analysis

TRIMs Agreement acknowledges explicitly that certain measures governing the treatment of investment have restrictive or distortive effects on trade. The Agreement, which applies only to investment measures related to trade in goods, provides that no signatories shall apply any TRIMs inconsistent with Articles III (National Treatment) and XI (General Elimination of Quantitative Restrictions) of GATT 1994. To this end, an illustrative list of TRIMs deemed to be inconsistent with the above Articles is appended to the Agreement. This list covers the following types of prohibited TRIMs:

(i) Those that require particular levels of local sourcing by an enterprise (i.e. local content requirements);
(ii) Those which restrict the volume or value of imports which an enterprise can buy or use to the volume or value of products it exports (i.e. trade balancing requirements);
(iii) Those that restrict the volume of imports to the amount of foreign exchange inflows attributable to an enterprise; and
(iv) Those which restrict the exportation by an enterprise of products, whether specified in terms of the particular type, volume or value of products or of a proportion of volume or value of local production.

[40]See Submission by Malaysia, Singapore, India, Mexico and Bangladesh-MTN.GNG/NG12/W/13,17,18,19 and 21.

Prohibited practices under the TRIMs Agreement include both those that are mandatory in nature and those 'with which compliance is necessary to obtain an advantage'. While the Agreement does not define the term 'advantage' (suggesting some potential overlap with provisions on prohibited subsidies found in the Agreement on Subsidies and Countervailing Measures), it is understood to cover all forms of advantages (including those that are tax related) and is thus more encompassing than the term subsidies.

The Agreement comprises of eleven Articles with one Annex.

A. National Treatment and Quantitative Restrictions

The Preamble of the Agreement recognised the fact that liberalisation of world trade requires facilitation of investment across international frontiers for the purposes of increasing economic growth of all trading partners including the less developed countries, that there was a need to balance the investment measures which have trade restrictive or distorting effects within the parameters of GATT. The coverage of the Agreement relates only to the trade in goods. The members to the GATT 1994 are obligated not to apply any TRIM which is inconsistent with the provision of Article III or Article XI of GATT 1994. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 Article III of GATT 1994 and the obligations of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in Annex I of this Agreement. The phrase 'investment measures' as reflected in the Agreement indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to foreign investment. Nothing in the TRIMs Agreement suggests that the nationality of the ownership of enterprise subject to a particular measure is an element in deciding whether that measure is covered by the Agreement. Since TRIMs Agreement is basically designed to govern and provide a level playing field for foreign investment, measures relating to internal taxes or subsidies cannot be construed to be a trade-related investment measure. Internal taxes or advantages are only one of the many types of advantages which may be tied to a local content requirement which is a principal focus of TRIMs Agreement. TRIMs Agreement is not concerned with subsidies and internal taxes as such but rather with local content requirements, compliance with which may be encouraged through providing any type of advantage. Nor in any case, internal measure would necessarily not govern the treatment of foreign investment.[41]

In examining whether the measures in question are investment measures, the Panel on Indonesia—Autos[42] reviewed the legislative provisions relating to the measures. The Panel concluded that the measures were 'aimed at encouraging the development of local manufacturing capability for finished motor vehicles and parts and components in Indonesia and that 'there is nothing in the text of the

[41]Indonesia—Certain Measures Affecting the Automobile Industry, Panel Report, 23 July 1998, DSR 1998: VI, para. 14.73.

[42]Ibid.

TRIMs Agreement to suggest that a measure is not an investment measure simply on the ground that a member does not characterise the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation'.

In examining whether the measures at issue in the dispute were trade-related, the Panel on Indonesia—Autos held that the local content requirements were necessarily trade related. If these measures are local content requirements, they would necessarily be 'trade related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade. An examination whether these measures are covered by Item (1) of the Illustrative list of TRIMs Annexed to the TRIMs Agreement, which refers among other situations to measures with local content requirements, will not only indicate whether they are trade related but also whether they are inconsistent with Article III: 4 and thus in violation of Article 2.I of the TRIMs Agreement.[43]

B. **Exceptions**[44]

All exceptions under GATT 1994 are applicable, as appropriate, to the provisions of TRIMs Agreement.

TRIMs Agreement is a full-fledged agreement in the WTO system. The TRIMs Agreement and Article III: 4 of GATT 1994 prohibit local content requirements that are TRIMs and therefore cover the same subject. But when the TRIMs Agreement refers to 'the provisions of Article III, it refers to the substantive aspects of Article III', i.e. ten paragraphs of Article III are referred to in Article 2.I of the TRIMs and not the application of Article III in the WTO context as such. Thus, if Article III is not applicable for any reason not related to the disciplines of Article III itself, the provisions of Article III remain applicable for the purposes of TRIMs Agreement. This view is reinforced by the fact that Article 3 of the TRIMs Agreement contains a distinct and explicit reference to the general exceptions to GATT. If the purpose of the TRIMs agreement were to refer to Article III as applied in the light of other (non-Article III) GATT rules, there would have been no need to refer to general exceptions.[45]

Moreover, it has to be recognised that the TRIMs Agreement, in addition to interpreting and clarifying the provisions of Article III where trade-related investment measures are concerned, has introduced special transitional provisions including notification requirements. This reinforces the conclusion that the TRIMs Agreement has an autonomous legal existence, independent from that of Article III. Consequently, since the TRIMs Agreement and Article III remain two legally distinct and independent sets of provisions of the WTO Agreement, we find that even if either of the two sets of provisions were not applicable the other one would remain applicable.[46]

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[43]Ibid.

[44]Article 3.

[45]Supra note 41, para. 14.60–14.61.

[46]Ibid. 14.62–14.63.

The Panel on Indonesia—Autos[47] found that the tax and tariff benefits contingent on meeting local requirements under the Indonesian car programmes constituted 'advantages' within the meaning of the Chapeau of paragraph 1 of the illustrative list of TRIMs and as a result were inconsistent with Article 2.I of the TRIMs Agreement.[48]

C. **Developing Country Members**[49]

Article 4 of the TRIMs conceives of concessions to less developing countries to deviate temporarily from the obligations as set out in Article 2 of the Agreement to the extent and in such manner as provided in Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments provisions of GATT 1994 and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 permit the member to deviate from the provisions of Article III and XI of GATT 1994.[50]

D. **Notifications and Transitional Arrangements**[51]

The TRIMs Agreement requires the mandatory notification of all non-conformity TRIMs covered by the Illustrative list[52] and maintained at the national or subnational levels and calls for their elimination over transition periods which vary according to member's levels of economic development, i.e. two years in the case of developed countries from entry into force of the WTO; five years for the developing countries, and seven years for the LDCs.

The Council for Trade in Goods has been authorised to extend the transition period for elimination of TRIMs for a developing or a LDCs' member which demonstrates particular difficulties in implementing the provisions of TRIMs Agreement that may include developmental, financial and trade needs also.

It is also obligatory on members not to modify the terms of any TRIMs which the member has notified to the Council on Trade in Goods as such a modification would increase the degree of inconsistency with the provisions of Article 2 of the TRIMs Agreement. The members are allowed to apply during the transition period the same TRIMs to a new investment in cases (i) where the products of such investments are like products to those of the established enterprises; and (ii) where necessary to avoid distorting the conditions of competition between the new investment and the established enterprise. Any TRIMs so applied to a new investment shall have to be notified to the Council for Trade in Goods.

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[47]Ibid.

[48]Ibid, para. 14.91–14.92.

[49]Article 4.

[50]BISD 265/205-209.

[51]Article 5.

[52]Annex I of the Agreement.

E. Transparency[53]

The TRIMs Agreement obligates the members to comply with their commitments on transparency and notification in Article X of GATT 1994, in the undertaking on 'Notification' contained in the 'Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 and in the Ministerial Decision on Notification Procedure as adopted on 15 April 1994. Each member is further obligated to notify the Secretariat of the WTO, of publications in which TRIMs may be found including those applied by regional and local governments and authorities within their territories.

It is further incumbent on the members to accord sympathetic consideration to request for information, and afford adequate opportunity for consultation, on any matter arising from TRIMs Agreement raised by another member. No member is required to disclose information in conformity with Article X of the GATT 1994 if such disclosure would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.[54]

The TRIMs Agreement established a Committee on Trade-Related Investment Measures whose membership is open to all members. The Committee elects its own chairman and vice-chairman and meets once a year and otherwise at the request of any member. The Committee has to carry out the responsibilities assigned to it by the Council for Trade in Goods. The Committee affords members an opportunity to consult on any matters arising or relating to the operation and implementation of TRIMs Agreement. The Committee further monitors the implementation of TRIMs and reports to the Council of Trade in Goods annually.

9 Consultation and Dispute Settlement[55]

The consultations and disputes arising out of TRIMs Agreement are to be decided in accordance with the provisions of Article XXII and XXIII of GATT, 1994 as elaborated and applied by the Dispute Settlement Understanding of the WTO.

The Panel in EC—Bananas III dispute examined the import licensing procedures of the European Communities under GATT Licensing Agreement and the TRIMs Agreement. The Panel found that the allocation of import licences to a particular category of operators was inconsistent with Article III: 4 of GATT 1994.[56]

In Indonesia—Autos case, the European Communities and the USA claimed that the Indonesian 1993 car programme, by providing tax benefits for finished cars

[53]Article 6.

[54]Article 7.

[55]Article 8.

[56]European Communities—Regime for the Importation, Sale and Distribution of Bananas, Panel Report, WT/DS 27/R ECU and Corr. I, Adopted 06 May 1999, DSR 1999: 11.

incorporating a certain percentage value of domestic parts and components, and for customs duty benefits for imported parts and components used in cars incorporating a certain percentage of value of domestic products, violated the provisions of Article 2 of the TRIMs Agreement and Article III: 4 of GATT 1994. The Panel on Indonesia—Autos found that the tax and tariff benefits contingent on meeting local requirements under the Indonesian car programme constituted 'advantages' within the meaning of Chapeau of paragraph 1 of the illustrative list of TRIMs and as a result were inconsistent with Article 2.1 of the TRIMs Agreement.[57]

In Canada—Autos case, the complainant raised claims pertaining to conditions concerning the levels of Canadian value added and the maintenance of certain ratio between the net sales value of vehicles produced in Canada and net sales value of vehicles sold for consumption in Canada. These claims were based upon both Article III: 4 of the GATT 1994 and the TRIMs Agreement. The Panel found that certain requirements concerning domestic value added were inconsistent with Article III: 4 of GATT 1994.[58]

In the India—Measures Affecting Automotive Sector, Complaint by the European Communities and the United States,[59] it was contended that India applied certain measures by way of local content and export balancing requirements were violative of Articles III, XI of GATT and Article 2 of the TRIMs Agreement. The Panel held that India's Auto Policy, 1997 was inconsistent with its obligations under TRIMs. Consequently, India has eliminated all such inconsistencies in its new Auto policy.

10 Review by the Council for Trade in Goods[60]

Article 9 provides for review of the TRIMs Agreement by the Council of Trade in Goods five years after the WTO was established, i.e. in January 1995 and propose to the Ministerial Council, the necessary amendments and also in course of the review, the Council for Trade in Goods was to consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

[57]Indonesia—Certain Measures Affecting the Automobile Industry, Panel Report, adopted 23 July 1998, DSR 1999: VI; Indonesia Certain Measures Affecting the Automobile Industry-Arbitration under Article 21.2(c) of the DSU, 07 December 1998, DSR 1998: IX.

[58]Canada—Certain Measures Affecting the Automobile Industry Panel Report, WT/DS/39/R, WT/DS/42/R, Adopted 19 June, 2000 as modified by the Appellate Body Report WT/DS/139/ARB/R, WT/DS/42/AB/R.

[59]WT/DS/46/R, (2000) and WT/DS175/R (2000); For India's Policy in this respect, See WT/TPR/100 (2002).

[60]Article 9.

The Council for Trade in Goods accordingly launched a review of the operation of the TRIMs Agreement.[61] However, the review awaits an outcome till date.

11 Inadequacies of the TRIMs Agreement

The TRIMs Agreement suffers from a number of limitations, chief among which are:

(i) that the Agreement makes a arbitrary decision of measures affecting trade in goods and services;
(ii) that the list of prohibited measures is very limited as compared, for example, to the more comprehensive ban on performance requirements found in the investment chapter (Article 11) of the NAFTA;
(iii) that it essentially codifies existing GATT jurisprudence, e.g. the 1984 panel on the administration of Canada's Foreign Investment Review Act (FIRA); and
(iv) that it grants members the right to temporarily deviate—in effect enjoy a waiver from GATT obligations to which they are already bound.

Despite the above limitations, the TRIMs Agreement has made a number of useful contributions such as:

(a) specific investment-related disciplines in multilateral trading system;
(b) transparency that is to result from the obligation to notify the existing non-conforming TRIMs, an obligation that would automatically extend to all TRIMs added in future to the illustrative list;
(c) the legal certainty provided by the obligations to eliminate notified TRIMs at the end of agreed transition period; and
(d) the acknowledgement that heightened policy interrelations in the field of trade, investment and competition will likely warrant more encompassing future work on investment and competition policy within the multilateral trading system.

12 Illustrative List[62]

TRIMs that are inconsistent with the obligations of national treatment provided for in Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, with which it is necessary to obtain an advantage, and which require;

[61] G/C/M/41, Sect. 7.

[62] Annex. 1 of TRIMs.

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of proportion of volume, or value of its local production; or
(b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports.

TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings with which it is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production generally or to an amount related to the volume or value of local production that it exports;
(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume, or value of products, or in terms of a proportion of volume or value of its local production.

13 Conclusion

Although in the last four decades, national and international legal policies and rules concerning trade and investment have repeatedly changed, the investment and its varieties have also undergone substantial transformation in its magnitude and content. In the national laws and policies, the trends towards liberalisation and increased protection to investment have gathered strength and the controls and restrictions have been relaxed in many countries. Non-discriminatory treatment after admission of investment either by way of FDI or portfolio is becoming the rule rather than an exception. Guarantees of non-expropriation and the free transfer of funds are increasingly growing. Therefore, the WTO TRIMs Agreement is welcome. However, the short falls of the Agreement, as pointed above, need to be rectified.

Chapter 33
WTO and Competition Policy

1 Introduction

As the tariffs have lost much of their importance, customs barriers worldwide are lessening, and increasing attention is being paid to the effects of anti-competitive markets and uneven application of competition laws on international trade. Litigations as reflected in recent high profile cases such as Kodak,[1] and U.S. Pipe and Tube industry[2] under Section 301 of the U.S. Trade Act of 1974,[3] demonstrate that there is a tremendous recognition within national governments and international organisations that application of competition law across the borders promotes international trade.[4]

The international community in WTO has identified competition policy as one of the new generation of trade issues to be addressed. Paragraph 20 of the Singapore Ministerial Declaration established a Working Group on Trade and Competition Policy. The Working Group has based its work on written contributions by members and on oral statements, questions and answers by members in the Group. The Singapore Declaration encouraged the Working Group to undertake its work in co-operation with UNCTAD and other appropriate intergovernmental fora, including IMF and IBRD to work out the theoretical dimensions of the competition policy in international trade.

A substantial issue of competition policy veers around the application of WTO principles of national treatment,[5] most favoured nations principle[6] and transparency

[1]See, Eastern Kodak Files 301 Petition Seeking Access for US Film in Japan, 12 Int'l Trade Rep. (BNA) 881–92 (May 24, 1995).
[2]See, Section 301 Petition Alleged Unfair Korean Steel Practices, 12 Int'l Trade Rep (BNA) 967, 978 (June 7, 1995).
[3]19USC S. 2411 (1988).
[4]See, e.g., US Trade Representative, 1995 National Trade Estimate Report on Foreign Trade Barriers 2 (1995).
[5]Article III, GATT 1994.
[6]Article I, GATT 1994.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_33

and their significance in any competition policy. In the context of globalisation, the importance of the above principles can hardly be doubted as these principles are the core principles to be focused in any competition policy. The competition policy and law of member governments have to be transparent and fairly and uniformly applied, and the WTO principles of transparency, fair trade and most-favoured nations cannot be overlooked for long by the member nations in their competition policies and laws.

Further, there is an intrinsic relationship in the GATT/WTO jurisprudence, that the competitive opportunities of members must be allowed in all fields of economic endeavour, be it goods, services and economic enterprises. The competition policy and laws of the members of WTO have to avoid distortions in the competitive process so that the international trade is not distorted for seeking undue market access. The competition policy may also provide a mechanism of addressing certain kinds of discriminatory policies and arrangements perpetuated by member governments to deny equal access and competitive opportunities to foreign competitors. The importance of fair trade and equal opportunity can best be achieved if the competition policy and law are universally modelled so that the nationality of an enterprise is subservient to international rules of competition.

As the WTO is based on transparency in the trade practices of member governments, the transparency in the competition policy is highly desirable both from the trade interests of public and private enterprises so that the competition policy and law are known in advance, uniform, impartial, reasonably administered and provide legal redressal. Generally, a number of instances are cited as anti-competitive practices which have restrictive or discriminatory effects which, *inter alia*, include collective boycotts of foreign goods, exclusionary actions by professional bodies or associations, abuses of dominant positions of enterprises intended to prevent the entry of new competitors, price-fixing mechanisms, export–import cartels and market sharing arrangements.

2 Articles VIII and IX of GATS[7]

Articles VIII and IX of the General Agreement on Trade in Services 1994 (GATS) do reflect the concern of WTO members of competition policy and law, although concerning the trade in services only, yet may be true in the case of trade in goods also as the trade in goods is intertwined with trade in services. Article VIII of the GATS provides how monopolies and service suppliers have to conform to the members obligations under Article II (Most-Favoured Nations Treatment)[8] and specific commitments.[9] Every Member, therefore, has to accord *unconditional and*

[7]Annex. IB of Agreement Establishing World Trade Organisation.

[8]Article II of GATS.

[9]Articles XIX and XX of GATS.

immediate treatment to the services and service suppliers of all members on a *most favoured nations* basis subject to exemptions in financial services, maritime transport services and basic telecommunications.[10]

Further, the monopoly power of the enterprise acting directly or through affiliates for supplying of services should not be abused in a manner which is inconsistent with the specific commitments of a member. The GATS provides a mechanism of Council for Trade in Services[11] who can oversee if a monopoly is abusing its power, and can ask the member to whom the monopoly belongs to supply information of such abuse. Any monopoly rights granted by a member to a service provider shall have to notify to the Council of Trade in Services after the GATS comes into force. There is an inbuilt mechanism in Article VIII of overseeing the abuse of monopoly of service providers in cases where a member may authorise to establish a small number of service suppliers and substantially prevent competition among those suppliers in its territory. The essence of the Article VIII is that monopolies and exclusive service suppliers whether existing or likely to be established should not be allowed to distort trade and should act fairly and on a most-favoured nation's basis.

Article IX[12] on the other hand, recognises that certain business practices of member nations of WTO in the service sector have likely impact of restraining competition and restraining trade in service sectors. It, therefore, recognises that members should enter into consultations in the eventuality of an allegation of unfair business practices and eliminating the same. The Article imposes responsibility on members to give a sympathetic consideration and supply relevant non-confidential information of the alleged practice and other information to find a satisfactory resolution of the unfair practice.

Article XVI of GATS[13] goes further and provides that for market access, besides providing most-favoured nations treatment, the member is forbidden both in entire territory or on regional basis, limitation on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; limitation on the total number of natural persons that may be employed in a particular service sector, or that a service sector may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas, or the requirement of an economic needs test; measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

[10]Annex. to Article II, Exemption, Article XXIX of GATS.

[11]Article XXIV of GATS 1994.

[12]Article IX of GATS 1994.

[13]Article XVI of GATS 1994.

The above list of limitations illustrates as to how market access in the service sector can be allowed to function which have trade maximising effects.

3 The Elements of Competition Law

A. Harmonisation—A Regional Economic Experience

Taking a clue from, harmonisation of competition policies in regional economic groupings such as European Union (EU), the Australian New Zealand Closer Economic Relations Agreement (ANZCERTA) and the North American Free Trade Agreement (NAFTA), which have directly or indirectly dealt with the issue of harmonising competition laws and practices among their members, harmonisation of competition laws and policies should occur at three different levels:

(a) Harmonising Substantive Law;
(b) Harmonising Procedural Requirements such as notification of Mergers and Acquisitions; and
(c) Harmonising Enforcement Practices.

(a) *Harmonising Substantive Law*

In most regional economic arrangements, involving industrialised countries, economic integration has occurred only after member nations have adopted competition laws and policies that are generally consistent *inter se* the region. After NAFTA came into existence, its members such as Mexico and Canada established a new legal regime based on economic efficiency and open market competition.[14] There are significant differences between US competition law and the new Mexican legal regime, but the thrust of the new law is more or less similar to US law. The new Mexican law, for instance, prohibits 'absolute' monopolistic practices such as price-fixing and agreements to restrict output, divide markets, or rig bids and treats such practices as unlawful.[15] Certain relative practices such as retail price maintenance, tying exclusive dealing contracts are unlawful if they unduly impede competition.[16] These practices are in line with US and Canadian practices, the thrust of these practices is to conform to the concept of competition law at a broader level.

So far as EU competition law and policy are concerned, the EU competition policy, *inter se*, is highly evolved and any future integration of other members in EU has to comply with EU competition law. The substantive law on competition

[14]Richard O. Cunningham & Anthony J. Rocca, 27 Law and Policy in International Business, 879–901 (1996).

[15]Allam Van Fleet, Mexico's Federal Economic Competition Laws: The Dawn of a New Anti-Trust Era, 64 Anti trust LJ, 183, 192–193 (1995).

[16]Ibid. at 193–194.

policy in the Treaty of Rome created a new competition policy that applies to all EU members.[17] The basic standards are set out in Article 85 dealing with regulations on restrictive agreements, and Article 86 dealing with restrictions on the abuse of a dominant position. Article 90 requires, subject to limited exceptions, that competition rules of the EU apply to public undertakings also and to undertakings that enjoy 'special or exclusive right'. Article 92 prohibits any aid granted by a member state or through state resources in any form whatsoever that distorts or threatens to distort competition. The competition law of EU and its application to member states existing or new entrants is complex and evolving. As a general rule, the EU law applies to all activities that have an appreciable effect on commerce within the EU.[18] Accordingly, if EU law prohibits a practice that appreciably affects commerce among EU members, but national law in the state where that conduct occurs permits the conduct, EU law would generally be applied by the national court. On the other hand, if EU law permitted a practice, but national law prohibited it, the more restrictive national law could apply, although the national court might decide to rely on EU standards to arrive at a just decision.[19]

To promote the uniform application of EU Competition Law, a supranational Court was established under the Treaty of Rome.[20] Article 177 obligates national courts to request an advisory opinion from the European Court of Justice (ECJ) on an application of EU competition law provisions arising under either the Treaty (e.g. Arts. 85 and 86), directives by the Council of Ministers, or decisions by the European Commission. The ECJ also has jurisdiction over cases brought against the Commission and the Council of Ministers for failure to carry out their responsibilities under EU law, as well as appellate jurisdiction over cases decided in the court of first instance, including cases involving competition claims.

The European Free Trade Association (EFTA) created in 1960 as an alternative to European Economic Community by members of Austria, Denmark, Norway, Portugal, Sweden, Switzerland, (Finland, Liechtenstein and Iceland joined EFTA subsequently), created a general competition policy similar to that created by the U. S. Sherman Act, under the EFTA Convention.[21] The EFTA Convention in Article 15 obligates the members not to enter into agreements which have, as their object or result, the prevention, restriction or distortion of competition within the Areas of Association and not to allow unfair advantage of a dominant position within the Area of Association. These types of anti-competitive conduct were declared to be incompatible with the EFTA Convention to the extent that they frustrated the benefits expected under the Convention.

[17]See EEC Treaty, Arts 85–94.

[18]See generally, Hans Smit & Peter E. Herzog. The Law of European Community (1995).

[19]Rupert M. Bondy, United Kingdom in World Antitrust Law and Practice, 25 (James J. Garrett ed. 1995).

[20]EEC Treaty, Art. 177.

[21]For Sherman Act, see 15 U.S.C Ss. 1–7 (1994).

Unlike the Treaty of Rome, however, the EFTA Convention did not prohibit the practices covered by Article 15, nor are Article 15 standards automatically incorporated into the national law of member states. Accordingly, private firms could not seek recovery for violations of Article 15, nor could enforcement agencies prosecute persons within their territory for specific violations of Article 15. The EFTA Convention thus created a framework for competition law and policy within which individual members maintained more discretion than in the EU.

The North American Free Trade Agreement (NAFTA), as already said, provides for harmonisation of competition policy and even Canada has revised its competition law in 1986 increasing its emphasis on civil enforcement prior to its joining Canada—US Free Trade Agreement.[22] The basic provision in Article 1501 of NAFTA provides that 'parties shall adopt or maintain measures to prescribe anti-competitive business conduct and take appropriate actions with respect thereto'. Additionally, Article 1502 permits a NAFTA party to designate monopolies but also impose limitations on the ability of those monopolies to engage in discriminatory or predatory conduct.

In the other EU Agreements more specifically with Bulgaria, the Czech Republic, Hungary, Poland, Romania and the Slovak Republic (so-called Europe Agreements entered between EU and the above Eastern European countries during 1991–93) creates a substantive competition standard applicable to trade between the Eastern European countries and the EU on the same legal analogy as that of EEC Treaty in Articles 85–95, i.e. prohibition on concerned practices, abuse of dominant position, applying basic competition law standards to public entities and prohibition of public aid that distorts competition. The Agreements establish separate Association Councils that are responsible for developing plans for implementing the new competition law standards. Implementation of the basic standards is scheduled to occur within three years from the date of entry into force of the agreements.[23]

From the standpoint of harmonisation of substantive competition law as provided in the regional economic groupings as discussed above, it can be inferred that the competition policies in these groupings are not uniform and there is a need to constitute a common and uniform regime which would prevent nations in these groupings to subvert competition laws in more than one way to favour domestic industries. There are possibilities of exclusionary conduct by monopolies or the pervasive use of vertical restraints by firms with market power to exclude unwanted competition from firms in other nations. The nations whose competition law is based on permissive or discretionary standards in these areas, its domestic industries might be able to erect trade barriers that defeat the purpose underlying the regional economic integration.

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[22]See generally, Glen G. MacArthur & Joan E. Neal, in James J. Garrett Ed, (1995).

[23]Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Republic of Poland, Dec. 16, 1991, 1993 O.J. 2 (L348).

(b) ***Harmonising Procedural Requirements***

Harmonisation of procedural requirements for the purposes of competition policy in the context of regional trade arrangements is sought in the area of state approval of mergers and acquisitions. As the structural reorganisation of regional markets is a major objective, regional arrangements usually result in cross-border investments[24] and where state approval or review procedures differ among the member states, uncertainties, costs and delays may discourage the cross-border transactions. Therefore, the harmonisation of merger controls and acquisitions may be done either by creating parallel procedures or by establishing direct enforcement co-operation or by creating single merger control entity.

The procedural harmonisation may also take place in the areas of service of process, discovery or reciprocal enforcement of court judgments. This harmonisation is useful for private enforcement through litigation as well as for governmental agencies who are vested with power to brook the competition law violations that are directed towards the state.

The harmonisation of procedural matters in EU goes to the extent that European Commission has to be notified of certain mergers, acquisitions and joint ventures meeting the definition of 'concentration' that have a community dimension.[25] National competition law generally does not apply to these transactions.

NAFTA makes no attempt to harmonise procedural rules such as those pertaining to mergers or acquisitions. The European Agreements which were signed between EU and Bulgaria, the Czech Republic, Hungary, Poland, Rumania and the Slovak Republic from 1991 to 1993, do not contain any provisions for coordinating procedures governing merger notifications and review. Nor do the agreements contain specific provisions governing the type or degree of co-operation between competition law authorities or other enforcement provisions.

(c) ***Harmonising Enforcement Practices***

The enforcement of existing competition law by the agencies of the governments in a regional co-operation setting is very important as the coordination in enforcement may result in more tangible results than efforts to fine-tune the substantive law. The harmonisation of enforcement practices at the bottom requires sacrificing some element of sovereignty, and it is only EU which provides extreme example of enforcement coordination and to an extent a sacrifice of sovereignty, in the creation of a supernational enforcement authority. It is the European Commission of the EC which is responsible for enforcing the European competition law throughout the EU.

Director General for competition, the branch of the commission in charge of the competition law enforcement, has the authority to conduct investigations anywhere in the EU.[26] A private party with a legitimate interest in a particular matter may apply to the commission to initiate an investigation. In addition, national

[24]See generally, Bela Balassa, The Theory of Economic Integration, 96–98 (1961).

[25]Council Regulation (EEC) 4064/89 of 21 December 1989.

[26]Council Regulation 17/62 Implementing Articles 85 and 86 of the EEC Treaty.

competition authorities may enforce EU competition law, so long as the commission has not already initiated investigations with respect to the same matter.

NAFTA so far as enforcement coordination is concerned provides that the parties will 'cooperate on issues of competition law enforcement policy, including mutual assistance, notification, consultation, and exchange of information relating to the enforcement of competition laws and policies in the free trade area'. Also parties shall consult from time to time about the effectiveness of measures undertaken by each party.[27] In addition, NAFTA created a dispute resolution procedure that contemplates consultations, review by the Free Trade Commission (consisting of cabinet level-representatives) and reference to arbitral panel. Disputes arising under the general competition provisions in Article 1501 (i.e. the parties' General Agreement to prescribe anti-competitive conduct) are specifically excluded from these dispute resolution procedures.

4 WTO and International Law of Competition Policy

It is necessary to conceive and develop a uniform law of competition and policy at the international level in which the anti-monopolistic practices may have to be defined in a rigorous manner and member nations must not be allowed to experiment or apply different competition law systems. Secondly, state-sanctioned export cartels, which most-industrialised countries authorise in the form of export association providing some degree of limited anti-trust exemptions for exports, should be subjected to the scrutiny of international rules and if possible prohibited. The other areas which need to be legislated internationally are the predatory or discriminatory pricing system which creates trade barriers and state subsidies and the conduct of state monopolies. Bid-rigging conspiracies by domestic firms have the potential to significantly raise contract costs or reduce output. Price-fixing by domestic competitors and resale price maintenance could have trade-distorting effects. Group boycotts may constitute a significant trade barrier to firms from other members.

The outbound effects of restraints include price-fixing, price predation by a monopolist in one country directed at firms in another country, or price discrimination between internal and export markets. These outbound restraints are most obvious sources of trade distortions and need to be harmonised, although the 'effects test' as developed by the U.S. and EU courts have to a great extent curbed the effects of these trade distortion methods.[28]

Predatory pricing and price discrimination raise special issues. To the extent that these practices affect only domestic trade, they are generally subject to regulation under domestic competition laws. In many cases, however, domestic laws may not

[27]Article 150 NAFTA, Dec. 17, 1992 US-Canada-Mexico, 32, ILM. 663.

[28]Hartford Fire Insurance Co. V. California, 113 Sct. 2891, 2909 (1993).

apply to these practices to the extent that they occur outside the country where the effects are felt. For example, the U.S. Robinson Patman Act, which prohibits price discrimination, applies only where the 'commodities are sold for use, consumption, or resale within the United States'.[29]

Many commentators have urged that anti-dumping laws should be replaced by harmonised standards relating to price predation and the basic argument is that dumping often is the result of market power created by entry barriers that protect domestic industries from external competition. Monopoly profits accumulated by these industries allow them to 'dump' products in other markets to establish market power in those other markets. If entry barriers in international trade are reduced that make dumping possible, dumping is less likely to occur. Furthermore, if international competition law among member states is enforced, any abuses of market power that do occur through predatory or discriminatory pricing can be challenged under the general international competition law of WTO.

So far as exclusionary practices that create market barriers are concerned, most competition laws recognise the basic principle that exclusionary conduct by firms that have market power should be prohibited. In the NAFTA countries, for example, Canadian law permits Canadian authorities to prohibit exclusive dealing arrangements that impede entry of competitors into the market.[30] Similarly, US law prohibits exclusive dealing by firms with market power if the effect of those arrangements is to significantly restrain competition; and the Mexican law treats exclusive marketing dealings arrangements as 'relative monopolistic practices that can be prohibited if used by firms with substantial market power'.[31]

State subsidies and other forms of state assistance to domestic industries are an obvious source of market distortions. Subsidies can have outbound effects (e.g. by allowing exporters to suppress prices in export markets) and inbound effects (e.g. by depressing domestic prices to a level that effectively bars entry by foreign producers). In addition, state-mandated price controls or export restraints may artificially depress domestic prices and thereby create market barriers. Other forms of government regulation, such as in the area of standard setting, may promote or authorise anti-competitive conduct or exclude competitors from other countries. Government procurement practices may favour domestic entities. State monopolies and state-owned entities also require special attention because of their potential to distort competition.

Internationalisation of competition laws and policy goes back to 1992 when Sir Leon Brittan, European Commissioner in charge of External Relations for the European Union, gave a call for such a measure at Davos World Economic Forum. European Commission accordingly appointed a Group of Experts who submitted a report in 1995 and suggested that international initiative should be built upon a foundation of agency to agency co-operation, including bilateral agreements with

[29]15 U.S.C S.13 (a) (1988 & Supp.1993).

[30]See, ABA Report on the Competition Dimensions of NAFTA (July 20, 1994).

[31]Ibid., 534.

positive comity; that rules should require transparency and non-discrimination; and that at a latter stage, states should agree to proceed to adopt common minimum rules for transactions and conduct of international dimensions, with a system of dispute resolution.

The above initiatives were carried to the WTO in 1996 at the Singapore Ministerial Meeting; that an initiative on trade and competition should be launched as a result WTO Working Group was established to study the interaction between trade and competition policy in order to gain a better understanding on the issues surrounding restrictive business practices and international trade. The Working Group focused on two topics: (1) ways to promote co-operation and communication among WTO members on competition policy, and (2) the contribution of competition policy in achieving WTO objectives, including the promotion of international trade.[32]

In anticipation of the WTO Ministerial Conference at Doha in November 2001, the European Union, Canada, Japan and others proposed that competition issues be included on the agenda of the next round of trade negotiations. The Doha Ministerial Declaration provides that the member states will undertake negotiations on competition policy after the Fifth Session of the Ministerial Conference (held in 2005), subject to explicit consensus on the modalities of negotiations. In the 'interim, the Working Group was to focus on clarifications of 'Core Principles', including transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary co-operation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.[33]

There is a growing literature on internationalisation of anti-trust, spanning from the days of International Trade Organisation of Havana Charter, 1947 down to the establishing of a WTO Working Group on competition policy in 1998.

Chapter V of the Havana Charter specifically dealt with 'Restrictive Business Practices' and addressed competition policy directly by stating: 'Each Member shall take appropriate measures and shall cooperate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievements of any of the other objectives set forth in Article I.[34]

This clearly demonstrates that competitive effects of certain business practices that existed in 1940s relative to today are reflective of the co-relationship between

[32]See, Report (1998) of the WTO Working Group on the Interaction Between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/2 (Dec. 8, 1998).

[33]WTO Ministerial Declaration 14 Nov. 2001, para. 23-5, WT/MIN (01/DEC/1 (20 Nov. 2001).

[34]Havana Charter, Chapter V, Article 46.

restraints of domestic markets to international trade restrictions. In addition, Article 46 of ITO, in paragraph 3,[35] prohibited the following practices:

(a) fixing prices, terms and conditions to be observed in dealing with others in the purchase, sale or lease of any product;
(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allowing customers, or fixing sales quotas or purchase quota;
(c) discriminating against particular enterprises;
(d) limiting production or fixing production quotas;
(e) preventing by agreement the developing or application of technology or intervention whether patented or unpatented;
(f) extending the use of rights under patents, trademarks or copyrights granted by any member to matters which, according to its laws and regulations, are not within the scope of such rights, or to products or conditions of production, use or sale which are otherwise not the subjects of such grants; and
(g) any similar practices which the Organisation may declare, by majority of two-thirds of the members present and voting, to be restrictive business practices.[36]

From the year 1947 when the ITO failed to come into existence and a stop-gap arrangement GATT 1947 replaced the failed ITO, there have been consistent efforts at the GATT in its earlier eight rounds to draw attention to the competition policy and unfair business practices. However, no substantial progress was ever allowed to be made for addressing the issues arising out of the competition across the nations. Recently, there is a growing literature dealing substantially with as to how internationalisation of antitrust has a bearing on globalisation, market integration, the limits of national law, and the challenges posed by supra-national agreement.[37] It is being said that competition policy poses problems of how to reconcile trilemma—economic integration, management and national sovereignty, which is a challenge to the WTO for working out an international law of competition and policy.

Any future effort at the WTO level should provide provisions which require members to keep markets free of commercial restraints that unreasonably block their markets. One way of keeping the markets of member nations of WTO free is that nations should adopt and enforce national competition laws. It is also necessary that for avoiding problems of indeterminate legal standards, the law of the country in which the exclusionary restraint operates could be designated as the applicable law, as long as it is a credible law that prohibits unreasonable blocking restraints.

WTO should develop international standards and rules wherein the trans-border cartels are prohibited and provide mechanism for discovery and enforcement

[35]Ibid.

[36]Clair Wilcox, A Charter for World Trade (1949).

[37]See D. Tarullo, 'Norms and Institution in Global Competition Policy' 94 Am. J. Int'l. 478 (2000) and E. Fox, 'Towards Antitrust and Market Access', 91 Am. J. Int'l (1997).

against the nationals of the states that have been injured by the cartels. WTO should also prohibit governmental measures which often facilitate cartels and market access restraints either by providing subsidies or otherwise.

There are other areas which need to be addressed by the WTO such as pre-merger notification systems to be rationalised by creating obligations of mutual recognition or use of a common clearing house, systems clashes would be alleviated by an agreed framework for modulating disputes, i.e. choice of law, states could be required to count costs outside as well as within their borders in assessing alleged anti-competitive conduct, at least in the case of clashes of jurisdiction; in general, states could be encouraged to analyse competitive problems in view of the total market impact, not merely their national interest; GATT principles of non-discrimination, as established in the service sector, against non-nationals and transparency could usefully apply to competition rules and their enforcement; and finally bilateral co-operation with suitable amendments could be multilateralised.

There is every possibility given the wherewithal of the WTO that competition law can be globalised so that national blinders are removed.[38]

[38]Andreas E. Lowenfeld, International Economic Law, 340–383 (Oxford University Press, 2002).

Chapter 34
WTO and Labour Standards

1 General

One of the most controversial issues that have taken the centre stage at WTO negotiations is how to accommodate the growing consensus of the WTO members, especially of the developed countries, on the labour standards within the framework of WTO system. Although the debate surrounding the issue is controversial, yet, in recent times it has been pushed to the top of international trade agenda by non-governmental institutions and labour unions which were reaffirmed at the Fourth Ministerial Conference in Doha, Qatar, of the WTO. Indeed, since GATT/WTO's inception, the USA and several of its allies have sought measures to address the concerns of labour interests in the west.

Between December 1993 conclusion and the April 1994 signing of the WTO Uruguay Round Agreements, the USA sought to have labour standards included in the discussions of factors affecting trade under the WTO regime. However, developing countries were having suspicions that such multilateral discussions were likely, at best, to undermine their comparative trade advantage arising out of labour costs; at worst to afford developed countries an issue that could be abused for patently protectionist purposes.

The principle negotiating objectives of the USA regarding workers' rights are:

(a) to promote respect for workers' rights, which when translated amounts to workers human rights;
(b) to secure a review of the relationship of workers' rights to GATT articles, objectives and related instruments with a view to ensuring that the benefits of the trading system are available to all workers; and
(c) to adopt, as a principle of the GATT, that the denial of workers right should not be a means for a country or its industries to gain competitive advantage in international trade.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_34

The Havana Charter/ITO of 1947 specifically referred to the labour standards as common interest of member nations for achieving and maintaining fair labour standards related to productivity and improving wages and working conditions of the labour. It also recognised that unfair labour conditions, particularly in export production, create difficulties in international trade and each member nation should take appropriate and feasible action in eliminating such conditions.

The International Labour Organisation (ILO) established in 1919 which is comprised of representatives of various governments, industry and organised labour, operates as a primary multilateral institution addressing labour concerns and up till date has passed numerous conventions affecting directly or indirectly the labour, its standards, welfare and other aspects of labour throughout the world.

In 1998, the ILO Declaration put at the centre stage four labour standards for enforcement by the member nations of the ILO. These four fundamental standards are:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.[1]

The OECD adopted similar language in 1996, but it limited abolition of child labour to 'exploitative' forms only.[2]

The ILO Conventions on Freedom of Association and Protection of Right to Organise (No. 87); Right to Organise and collective Bargaining (No. 98); Abolition of Forced Labour (No. 105) and Minimum Age (No. 138) are endorsed by number of countries. The ILO Convention of 'Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of June 1999 defines 'child' as anyone less than 18 years old, and identifies the 'worst forms' as slavery, debt bondage, forced or compulsory labour (including the use of children in armed conflict), prostitution, pornography, the use of children for illicit activities (e.g. narcotics production and trafficking), and work that is likely to harm the health, safety or morals of children.[3]

As these ILO conventions make it obligatory on the member states to take immediate and effective measures to eliminate child labour practices, the US Administration has incorporated these standards as prerequisites for less developing

[1]ILO, International Labour Conference, Declaration on Fundamental Principles and Rights at Work, 86th Sess. (June 1998).

[2]OECD, Trade, Employment and Labour Standards—a Study of Core Workers' Rights and International Trade 1691 (1996). (The debate about linkages between trade disciplines and labour standards is not new: Virginia Heary, Workers Rights and International Trade. The Social Clause, in Fair Trade and Harmonisation: Prerequisites for Free Trade? 177, 182–185. JagdishBhagwati and Robert E. Hudec eds. (1996) provides a historical account of the relationship between labour and trade policy)

[3]See, ILM 1215 (1999).

countries in extending trade benefits either under Generalised System of Preference (GSP) or other trade measures, although none of these measures can specifically be termed as having social or labour dimensions.

Again, the European Union's (EC) 'Social Charter' catalogues a broader list of labour rights such as freedom of movement, right to employment and working conditions, right to social protection, right to freedom of association and collective bargaining, right to vocational training, right to equal treatment both of men and women, right of information, consultation and participation, right to health and safety in workplace, protection of children and adolescents in employment, protection of elderly persons, and protection of persons with disability. Can the above workers rights, privileges and benefits be enforced and attained universality under the umbrella of WTO?

If the above labour rights are to be negotiated under the WTO, wage policy of labourers remains still more controversial as the ILO and the history of labour movement at the international level has conspicuously avoided any standardisation whether of equalisation, the living wage or wage increases through other labour standard improvements. The US policy-makers and others have publicly rejected equalisation or the idea of a global minimum wage, as it is inappropriate to dictate uniform levels of working hours, minimum wages, benefits or health and safety standards.[4]

Representatives of other countries also have made similar statements. For example, at WTO Ministerial Conference in November 1999, France's trade minister noted that, 'we are asking, that fundamental social standards be taken into account, not in order to establish a worldwide minimum wage, but in order to combat child labour and prison labour.[5]

2 Labour Standards: GATT/WTO Contexts

So far as GATT/WTO Agreements are concerned, Article XX of GATT 1994 explicitly refers to prohibiting imports of goods made with prison labour. As Article XX does not encompass the whole gamut of trade and labour standards, the proponents of a formal link between trade and labour standards recognise that developing countries gain an unfair advantage by not enforcing internationally recognised labour standards which assist them for producing goods cheaply and distort international trade. Also according to the proponents of human rights that workers and children in the developing countries are exploited and deprived of their fundamental rights by not providing the international protections (conceived by

[4]U.S. Secretary of Labour, Robert Reich's Statement in Gary S. Field, The Role of Labour Standards in U.S. Trade Policies in Social Dimensions of U.S. Trade Policies 167, 173 [Alan V. Deardroff & Robert M. Stern Eds, (2000)] quoting Secretary of Labour Robert Reich.

[5]Christian Sautter, Minister of Economy, Finance and Industry, France, Address at the WTO Ministerial Conference Seattle, 3rd Session (30 November 1999).

ILO) at their work places. They also assert that the WTO rather than ILO is the organisation best equipped to deal with this complex issue.

A. Trade and Wages

Labour, trade and wages are intertwined, as low-wage countries have over the years lowered the wages of unskilled workers in the industrialised countries. Trade based on low wages is often being considered illegitimate for the fact the low-wage countries protect core labour rights poorly.

Some studies have empirically testified to the fact that there are factors other than low-wage goods responsible for the lowering of wages of unskilled workers in the industrialised countries. The technological efficiency and spending in various sectors of economy including defence may drive up the demand for skilled labour at the cost of unskilled and thus create an imbalance between the two in wage structures.[6] There are scholarly studies which suggest that technological change rather than international trade is the driving force for the increased demand for non-production workers. In fact, some of these studies suggest that role of trade appears to be zero, since most of the trade between sector shifts in employment were due to defence spending.

Stolper–Samuelson theorem holds that when trade is conducted with an unskilled-labour-abundant country, the price of the unskilled-labour-intensive goods will decline domestically. Further, as production of skilled-labour-intensive goods rises, an excess demand for skilled labour emerges. The labour market resolves the imbalance by raising the relative wage paid to skilled workers as compared to unskilled workers.

Some scholars, however, have found quite the opposite occurring in the US economy in 1980s. The US manufacturing firms consistently substituted skilled labour despite its rising cost. Such a pattern of behaviour by firms is cost minimising only if there is a technological change rendering skilled labour relatively more productive. Furthermore, there does not appear to be any decline in the relative price of unskilled-labour-intensive production. Therefore, the connection between trade and factory production appears to be missing.[7] The growing wage inequality in developing countries is also instructive. Recent evidence finds increased wage dispersion in countries such as Chile, Columbia, Costa Rica, Mexico and Uruguay. If Stopler–Samnelson model were at work then we should have observed the opposite. Developing countries that export unskilled-labour-intensive goods should experience a convergence in the relative wages of skilled and unskilled workers rather than growing inequality. It, therefore,

[6]D. Brown, 'International Trade and Core Labour Standards: A Survey of the Recent Literature; Discussion Paper' 14 (Department of Economics, Tufts University 2000).

[7]Ibid.

proves that relative wages in the developing countries follow trends in industrialised countries and thus skilled-biased technical change is the driving force behind changes in the relative wages rather than international trade.

B. **The Race to the Bottom**

There is a fear among the developed countries that in case international standards are not developed and enforced in labour, a developing country may 'race to the bottom', to lower its standards to gain comparative advantage over a foreign exporter. According to E. Lee, the basic mechanism, which is expected to convey this, is the pressure to cut costs of production in search of higher export shares and fight off import competition. This is reinforced by the competition for foreign investment, where the lowering of labour standards is believed to attract potential investors. So long as some trading nations resort to such behaviour the remaining countries wishing to preserve higher labour standards are negatively affected. They are placed at a competitive disadvantage if they do not follow suit.[8] The empirical evidence as shown by Hepple suggests that the above perceived threats to high-labour standards countries are non-existent. Trade and investment flows are at best only minor factors for the rise in unemployment and wage inequality in the industrialised countries, and that the benefits from increased exports of skill-intensive goods and services outweigh the disadvantages of liberal trading regimens. The paradox is that free trade regimens are tending to inhibit the ability of states to support selected industries or to pursue redistributive social policies at a time when, as a result of globalisation, there is a greater need than ever before to help displaced workers acquire new skills and to reduce inequality and exclusion.[9]

C. Labour Standards and Developing Countries Competitiveness

The concern for developing countries for imposing upon them international labour standards rests chiefly on the argument that it will erode their comparative advantage which lies in paying low wages to their workers. Any demand that raises labour costs will deny developing countries their right to exploit their comparative advantage in international trade. Developing countries provide low wages because of low productivity, and the comparative advantage is the fallout of the relative abundance of low skilled labour. The imposition of labour standards on developing countries may not raise the cost of labour but may divert some of their money wage benefits as a consequence of which the workers in the developing countries may become worse off. The agreement that 'core labour standards' have a profound impact on trade standards is to some a myth, as low-standard countries will enjoy

[8]E. Lee, 'Globalisation and Labour Standards: A Review of Issues', 136 International Labour Review V. 2 174 (1997).

[9]B. Hepple, 'New Approaches to International Labour Regulations', (26) 356 Industrial Law Journal (December 1997, Special Issue).

gains in export market shares to the detriment of high-standard countries and also the fear that better labour standards would negatively affect the economic performance of the developing countries or their competitive position on world markets is not borne out by economic analysis.[10] International economists have always believed that linkages between varying international labour standards and international trade policy are at best tenuous.[11]

Beyond the crisis of the above debate, the developed countries especially the USA are determined to bring to the WTO the imposition of trade sanctions on countries that do not internationally recognise and enforce the labour standards. It is clear that developed countries which support a formal link between trade and international labour standards are against the ILO supervisory role on basic standards and would prefer to insert a social clause concerning labour in Article XX of the GATT 1994, which when violated would entitle a country to impose trade sanctions.

D. **Social Dumping and Labour Clauses**

Taking the clue from Article VI of GATT 1994, under which producers involved in a traditional anti-dumping claim demonstrating that an exported good is being sold at a price less than normal and injury to the domestic industry from the product sold is caused, i.e. sales lost or capacity reduced are being linked to poor labour standards by viewing it as giving firms unfair cost advantage over firms with higher labour standards and as such amounts to social dumping.[12] The social dumping for some analysts can be located directly in the language of anti-dumping code who argue that labour standards are one of the factors for calculations in anti-dumping provision,[13] which logically can encompass all adverse human highs practices including the labour practices. This is, however, too far-fetched.

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[10]See generally, 'Global Markets and the Global Village in the 21st Century; Are International Organisations Prepared for the Challenge, Speech delivered to the German Society for Foreign Affairs, (19 November 1999).

[11]K. Maskus, 'Should Core Labour Standards be Imposed Through International Trade Policy', Policy Research Paper 1 (World Bank Development Research Group, August 1977).

[12]Through this mechanism, child labour, for example, may be found to violate anti-dumping provisions of each treaty because employment of children artificially lowers production costs though giving the manufacturer an economic advantage for engaging in child employment; see Lena Ayub, Nike Just Does It—and why The United States should not. The United States International Obligation to Hold MNCs Accountable for Their Labour Rights Violations Abroad, 11 De Paul Bus. L. J. 395; 436 (1999). A parallel and sometimes overlapping effort has been undertaken to conceptualise how to keep labour standards provisions with other fundamental 'free trade' principles in the agreement, such as most-favoured-nations (MFN) clause; see Robert Howse, The World Trade Organisation and the Protection of Workers Rights, 3 J. Small and Emerging Business L. 131, 136–42 (1999).

[13]Ayoub, Ibid.

As a matter of fact, after the Agreement on Implementation of Article VI of GATT, the labour standards cannot be read in the framework of Anti-dumping Agreement.

E. Social Subsidisation and Labour Standards

Under Article XVI of GATT 1994 Subsidies code, some analysts attribute sub-standard labour laws and their inadequate enforcement as contrary to the provisions of WTO Agreement on Subsidies and Countervailing Measures 1994 because they give an unfair advantage to firms in countries with lower labour standards.[14]

Again the arguments are far-fetched as the Subsidies Code of the WTO imposes injury considerations and allows special treatment to developing countries and as such reading labour standards in Article XVI is not legally tenable.

F. Safeguards and Labour Clauses

Article XIX of GATT 1994 provides for a suspension of the obligations in whole or in part, or to withdraw or modify the concessions in case any product is being imported into the territory of a contracting party in increased quantities and conditions which causes or threatens to cause serious injury to the domestic producers of that country; and by analogy, can one read that inadequate labour standards may be the attendant cause of increases in exports and injury in Article XIX. As the developing countries have been given some protection from Article XIX application, no correlation between the excess exports and its injury in the domestic markets can be drawn, as it would open a Pandora's box to assess such a correlation.

G. Non-violation, Nullification or Impairment

Some theorists read labour standards into the provision of Article XXIII: 1(b) of GATT 1994, as it permits WTO members to bring action under the Dispute Settlement Understanding (DSU) if they believe that a benefit to which they are entitled under the Agreement has been 'nullified' or 'impaired' by the application by another contracting party of any measure, whether or not it conflicts with the provisions of the Agreement. The relevant portion of Article XXIII is reproduced below:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of …;

[14]Raj Bhala, 'Clarifying the Trade Labour Link', 37 Colum. J. Transnat. L. 11, 19 (1998). See also, Anjali Garg, Note, 'A Child Labour Social Clause Analysis and Proposals for Action', 31 N. Y.U.J. Int'L. & Pol. 473; 486 (1999).

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, … the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate arrangements.

The ILO Working Party has also argued that Article XXIII: 1(b) can be pressed for enforcement of international labour standards as it provides for multilateral negotiations and consultation rather than unilateral action.[15] However, some argue that if the labour standard is held to be not in conflict with GATT/WTO rules, only non-binding recommendations are possible as non-violation claims involve an 'exceptional remedy' and a complaining party must provide 'a detailed justification to back up its allegations'.[16]

3 WTO and Enforcement of Labour Standards

As the labour standards are at the centre stage of negotiations, the following problems may be faced by the WTO in accommodating the core labour standards.

Article XX (General Exceptions) of the GATT 1994 is considered as a proper candidate for tackling the problem of international labour standards for the reason that the language of Article XX permits the incorporation of enforcement of lax labour standards in contracting parties. As the Article XX allows countries to restrict imports which are necessary to protect public health, public morals, or the imported products made with forced labour, or to secure compliance with other GATT/WTO consistent laws, a broad reading of the Article could permit law linking trade to labour standards and that such a reading would be GATT consistent.[17]

[15]The Social Dimensions of the Liberalisation of World Trade, ILO Doc. GB. 261/WP/SLD/1 (November 1994).

[16]Janelle M. Diller & David A. Levy, Notes and Comments. 'Child Labour, Trade and Investment: Towards the Harmonisation of International Law', 91 Am. J. Int'l L. 663, 668 (1997) and Japan—Measures Affecting Consumer Photographic Films and Paper (Report of the Panel), WT/DS/44/R (31 March 1998).

[17]For further analysis, see Salman Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT', 10 Minn. J. Global Trade 62, 63 (2001); Charlovitz, 'The Moral Exception in Trade Policy', 38 Va. J. Int'l L. 689–724 (1998).

The above argument of including core labour standards in Article XX finds support in the WTO Rulings in the much publicised and criticised case United States Import Prohibition of certain shrimp and shrimp products.[18]

Commonly known as Shrimp-Turtle case wherein the US restrictions on imports of shrimp from countries that failed to mandate turtle excluder devices on shrimp boats, the Appellate Body stressed the importance of reading the WTO exceptions provision on the environment, 'in light of contemporary concerns of the community of nations' to include live animals, even if it did not encompass living species at the time of drafting. This decision has led some analysts to read in Article XX, the inclusion of labour clauses on the analogy of labour, health, or public morals as exceptions in Article XX on the premise that core labour standards articulated by ILO and adopted at multilateral trade negotiations after WTO treaty, as contemporary concerns of the community of nations.[19]

It is possible to negotiate labour standards within the parameters of Article XX as it would not offend the sensitivities of less developing countries. Because this Article is altogether distinctively different from other Articles of GATT in the sense that it does not require any injury test or calculation for the imposition of sanctions under the GATT/WTO trade measures taken as safeguards, or against subsidies or dumping. What is required is that the importing country has experienced injury, harm or threatened harm to its domestic producers, traditionally demonstrates and demanded by concrete evidence linking the trade practices to quantitative data such as lost sales, capacity reductions or layoffs. For producing such market effects, the offending practice must confer some tangible 'economic benefit' on the foreign producer. In the case of labour standards to be put as general exception in Article XX, and as already discussed uniform fair wage are out of discussion, it is the real wage which stands as the prime mechanism through which such economic impact would be delivered, producers would in theory reap the benefit of lower labour costs by less labour standards. But whether the use of child labour, or any other labour standards violations, could produce these market effects which could be subjected to economic metrics or quantifiable remains doubtful. Therefore, there does not appear any cause for acrimony between developed and developing countries once Article XX is taken as an umbrella for discussing the core labour standards in international trade under the WTO jurisprudence.

There is a likelihood of Dispute Settlement Process of WTO to intervene in matters where core labour standards are violated. The DSB narrowly avoided such a controversy over a Massachusetts law that placed restrictions on companies doing business with Burma (now Myanmar) due to Burma's egregious violations of labour standards, in particular its use of forced labour. In 1998, the EU and Japan filed a complaint at the WTO challenging the sanctions imposed by the

[18]Report of the Appellate Body, WT/DS 58/AB/R (12 October 1998).

[19]See Robert Howse, 'The World Trade Organisation and the Protection of Workers' Rights', 3 J. Small and Emerging Bus. L. 131–42 (1999).

Massachusetts law[20] which resulted in the formation of a panel on the matter in October.[21] Only after federal challenges to the law were successful did the EU and Japan agree to withdraw their complaint.

4 Conclusion

After scanning the labour–trade link throughout the evolution of ITO down to the establishment of WTO,[22] it may be concluded that member states in the GATT or WTO did not see anything intrinsically improper about discussing labour standards in the context of trade negotiations and as such confirms the conventional wisdom of supporting a labour–trade link. But it cannot be extended to support the modern human rights concept of 'fair labour standards'. Article XX of the GATT was not crafted to address labour standards concerns or human rights generally but only in the context of multilateral trade-offs between the countries in the WTO. Article XX may in a limited way address to the labour standards to protect the domestic industry by restricting imports of products not produced under normal competitive conditions. History demonstrates that the GATT/WTO system was designed to use the wage as the metric for determining labour standards violations, and thus it seems any labour discussion within the GATT/WTO must begin with a clear understanding of the empirical evidence underlying the labour–trade relationship.

The collapse of the Third WTO Ministerial Conference in Seattle in November 1999 brought open the wide differences between the developed and the developing countries as to how the issues of trade and core labour standards should be handled. The developed countries especially the American Trade Unions were asking for 'enforceable workers rights' in US trade policy, i.e. allowing the USA to impose sanction on countries that did not uphold the core labour standards, whereas the developing countries opposed the goal of higher labour standards on the ground that higher labour standards would be an excuse for the developed countries not to allow imports from developing countries as these exports from developing countries would be cheaper. At the Fourth Ministerial Conference at Doha, the link between 'core labour standards' and international trade was reaffirmed and in any future negotiations at the WTO, it is necessary to arrive at a mutually advantageous understanding of the problem between developed and the less developing countries. As poverty appears to be the major factor for less developing countries not to adhere to core labour standards, the elimination of poverty in the less developing countries is a *sine-qua-non* both for complying with ILO Convention and adopting core labour standards of the WTO as and when developed.

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[20]Act Regulating State contracts with Companies Doing business with or in Burma, Chap. 130, 1996 Mass. Acts 239, codified at Mass. Gen. Laws, Chap. 7 22-4-22 M 40F1/2 (Wes Supp.) 1998.

[21]Office of the U.S. Trade Representative, 1999 Trade Policy Agenda 78 (2000).

[22]Elissa Alben, GATT and the Fair Wage: A Historical Perspective on the Labour-Trade Link, V. 101, Col. L. Rev 1410–1447 (2001).

Chapter 35
WTO, International Trade and Human Rights

1 Introduction

It is often being said that WTO and its jurisprudence should take into account the trade policies of member states reflecting on the human rights. Human rights both at the national and international levels have a jurisprudence unique to itself and has a history spanning for the last more than 60 years. WTO and GATT as international trade organisations have a parallel history wedded to trade liberalisation at national and international levels. The various Agreements within the WTO fold and the six ministerial conferences in pursuance of WTO, namely Singapore—1996, Seattle—1999, Doha—2001, Cancun—2003 and Hong Kong—2005, precipitated the international concerns of, 'why not human rights as a trade policy issues should be included in the WTO jurisprudence'? From Doha—2001, to Hong Kong—2005, a continuous quest is being made for introducing human rights as one of the determining factors for trade promotion between the developed and developing countries and inter se the member nations. Even the Committee on Economic, Social and Cultural Rights (UNCESCR) adopted a statement which called on the WTO to consider the human rights impact of trade and investment policies.[1]

Various arguments have been put forward for the inclusion of human rights as policy standards as one of the governing principals in the WTO dispute settlement mechanism. The other arguments suggested for the inclusion of human rights as a policy prescription are the lack of external transparency of WTO including the access of NGO to DSB. TRIPs and public health debate are suggestive of implications of human rights.[2] The bilateral agreements and custom unions and the participation of less developing and least developed countries in such bilateral and

[1]Globalisation and Economic, Social and Cultural Rights.

[2]At the WTO Fourth Ministerial Conference, in Nov. 2001, Members adopted Declaration on the TRIPS Agreement and Public Health which, inter alia, acknowledges that the TRIPS Agreement does not and should not prevent Members from taking to protect public health and to promote access to medicines for all.

A. K. Koul, *Guide to the WTO and GATT*,
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customs unions underpin that these agreements and unions allow less than fair share of less developing countries in international trade and the trade policies pursued by member nations in WTO impinge on human rights in general and possibly limiting the Government's efforts to provide shelter, food and clothing at the national level in particular.

The USA in pursuit of legalising trade sanctions in compliance with TRIPs standards have led to public outcry in many countries such as Argentina, South Africa and Brazil. In the garb of strengthening the IPRs, the USA and other developed countries have made use of IP standards in free-trade areas of the America and US-Central American free-trade Agreements, so restrictive that the spirit of Doha in making the generic drugs available to developing countries remains a far cry. TRIPs Agreement is sloth and in reality not only hampers but violates the human rights of people of the third world. Cambodia and Nepal are the examples which were compelled to raise their IPRs standard before joining WTO.[3]

Human rights as a trade policy have great implications in the WTO trade in service sectors also. The liberalisation of trade in services and its scope through WTO is vast, complex and has serious implications for access for basic services and impacts human rights in areas such as education, health care, job security and access to water. It is quite obvious that liberalisation, privatisation and globalisation, per se, affect the role of governments in providing basic necessities of human beings especially marginalised ones.

To ensure human rights in any given country, the government has to have a free hand to regulate the economy for purposes of ensuring human rights, whereas the mandate of the WTO is that all the measures which the government undertakes in regulating their economies for ensuring human rights should be compatible to WTO and trade law. Protection of public interest especially human rights is not of concern. There are human rights advocates who have argued that the human rights as international law measures require a constant examination of trade policy as developed by WTO in effectuating the enjoyment of human rights nationally and internationally.

2 Trade-Related Human Rights

The substantive law of WTO although does not reflect a linkage between human rights and WTO both in the preamble (comparative cost advantage and free market raising the standard of living) and general most-favoured-nations (m.f.n.) treatment in GATT and non-discriminations, yet the WTO DSB has to a large extent raised the argument that whether trade-related measures can be used as instruments in improving the human rights in the targeted countries. In simpler words, if a country

[3]Oxfam International (2003) Cambodia's Accession to the WTO—How the law of the jungle is applied to one of the world's poorest countries?

is employing children below their employable age in a sector of trade which may be essential in improving the economic scale of the country, should such employment of children in that trade sector be justified or is it a human rights violation and the exports of such trade should be prohibited? In other words, is trade more important than the violation of the human rights of the children?

Are trade-related measures feasible instruments to improve the human rights keeping in view the ILOs mandate of maintaining minimum labour standards across the globe? The general jurisprudence of international human rights as reflected in the United Nations Security Council specially under Chapter-VII of the UN Charter and some of the examples where economic sanctions were imposed on account of gross violation of human rights such as Iraq, Somalia, Rwanda and Congo could not be justified under WTO law as these economic sanctions are ultra vires, Articles-I and Article-XI of GATT. There have been one or other cases such as Massachusetts, USA versus Burma 1966 where business transactions between Massachusetts and USA were prohibited by Massachusetts law by raising 10% surcharges on the bids from companies doing business in Burma was an example of violation of the GATT law.[4]

Keeping in view the promotion, protection and implementation of international human rights and international trade law, the two are running on different streams and the possibility of meeting between them are few and far between. However, one cannot forget that with increasing globalisation and interdependence, the concerns for human rights have all the more accelerated.[5] At the same time, for enforcing human rights which have a trade relationship has to comply with WTO standards in the face of the fact that neither WTO nor GATT mentions human rights as a policy prescription.

3 The WTO Legal Framework for Trade-Related Human Rights Measures

WTO jurisprudence of most-favoured-nation treatment, national treatment and no disguised trade restrictions[6] besides the standards set in the WTO Technical Barriers to Trade (TBT) and WTO Sanitary and Phytosanitary Measures (SPS) Agreements cannot be interpreted to include the notion of human rights as trade strategy, whereas the central core principle of these agreements is a principle

[4]Massachusetts Act of 25 June 1996, chapter 130, Sec-1, 1996 Mass. Acts 210. P.L. Fit 2 Gerald Massachusetts, Burma and the WTO. A commentary on Blacklisting Federation and Internet Advocacy in the Global Trading Area, 34 Cornell International Law Journal (2001) 1–53.

[5]For an overview over the trade and human rights linkages. See; H. Lim, Trade and Human Rights. What is at Issue? 35 JWT (2001) 275–300.

[6]These principles are enshrined in all WTO Agreements for details cf. J.H. Jackson, the World Trading System: Law and Policy in International Economic Relations, Cambridge 213 (1997).

of non-discrimination applying to 'like products' and makes the WTO and GATT, isolated from the human rights debate.

The jurisprudence as evolved over the years has reinforced the principle that under WTO non-discrimination and m.f.n. is a rule not an exception and members of WTO cannot impose protectionist measures for non-economic concerns including human rights. Article-XX is often being cited as precursor of trade-related human rights especially in para(a)—Public Morals; para(b)—Protection of human, animal or plant life or health; para(e)—Measures relating to prison labour; and para(g)—Conservation of exhaustible natural recourses. However, the "Chapeau" of Article-XX imposes the obligation of the principle "to comply with non-discrimination" and "must not constitute disguised restrictions to International trade".[7] Article-XX as and when was subjected to interpretation by the DBS, the DBS interpreted Article-XX very restrictively not respecting the cause of human rights, environment or social standards as these standards are non-trade standards.

However, the cases brought before the DSB amply demonstrate that the possibility of reading human rights in deciding the exception in Articles-XX is possible. The arguments center on how to interpret Article-XX read with Chapeau. There have been occasions where DBS has invoked para(b) and para(g) to justified trade restrictions on environment and public health measures.[8] Reading the exceptions under Articles-XX as correlative to the protection of some human rights standards either as public health, plant life and protection of human, animal life or prison labour, the possibilities of trade-related human rights may happen. One could read Right to public health, Right to food, Right to shelter, Workers right, Mistreatment of women and children in Articles-XX exceptions and member nations can impose trade restrictions for implementing human rights. However, the requirement of the Chapeau i.e., the measures must not be applied in a manner which constitutes an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or which forms a disguised restriction to international trade makes the implementation of human right as trade policy quite difficult as the purpose of the requirements in the Chapeau is to avoid the abuse of the exceptions of Articles-XX.[9]

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[7]cf. USA—Standards for Reformulated and Conventional Gasoline (WT/DS2 and WT DS4), Appellate Body Report adopted on 20 May 1996, p. 22.

[8]cf. Thailand—Restrictions on Importation of an Internal Taxes on Cigarettes (DS10/R-37S/200), GATT Panel Report, adopted on 7 November 1990; USA—Restrictions on Imports of Tuna (DS21/R-39S/155), GATT Panel Report, circulated on 3 September 1991 (not adopted); USA—Restrictions on Imports of Tuna (DS29/R), GATT Panel Report, circulated on 16 June 1994 (not adopted); USA—Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58), Appellate Body Report, adopted on 6 November 1998; European Communities—Measures Affecting Meat and Meat Products (Hormones) (WT/DS26 and WT/DS48), Appellate Body Report, adopted on 13 February 1998; for details see S. Dillon, International Trade and Economic Law and the European Union, Oxford, Portland (2002), p. 122; N. Notaro, Judicial Approaches to Trade and Environment. The EC and the WTO (2003), p. 141.

[9]S. Bal, International Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT, 10 Minnesota Job Global Grade 62–108 (2001).

Demonstrating that the requirements of the Chapeau have been fulfilled is generally a difficult task. The existing case law regarding enforcement of environmental matters and public health concerns shows that the DBS has so far been quite restrictive in its jurisprudence. General sanctions against a country for its human rights violations will most likely be qualified as an arbitrary and unjustifiable discrimination. For example, the sanctions against Burma would be justified for other countries where a similar human rights situation exists, and, therefore, are arbitrary and discriminatory. Moreover, sanctions against products produced in disregards of basic social standards will very likely be qualified as disguised trade restrictions, as the purpose is very often to protect the national industries.

4 Article-XX and the DSB

Human rights are violated in the member nations by products and processing of goods and services. Any abuse of a worker producing the good may have implications for human rights. However, in case the law applies extraterritorially the debate of human rights becomes complex.

The DSB in Tuna Dolphin-II[10] case where differences between Tuna which was caught with dolphin excluding devices and Tuna which was caught without protecting dolphins, was prohibited as there were no differences in 'quality of the product'. Similarly, if child labour is employed or workers' rights are not protected, any member of WTO cannot prohibit the importation of the products produced by child labour or in violation of worker rights as it may violate Article-III (National Treatment) or XI (general elimination of quantitative restrictions) of GATT. The possibility of invoking human rights for products manufactured by prison labour is possible. In US Tuna Case-I,[11] the measures which presumably were to protect the violation of human rights in other countries are prohibited as it would amount to determining the life and health policies of other members of WTO.

In Tuna Dolphin-II, although the Panel recognised the application of national standards extraterritorially in principle, the measure was considered restrictive and thus declared ultra vires Articles-XX(b) and (g) on the ground that it forced other countries to adopt the US policies without recognising the other methods of protecting the dolphins. Similarly, in Tuna Dolphin-II, although the extraterritoriality of national standard was accepted in principle, the measures were considered too restrictive and ultra vires, Articles-XX(b) and (g). The DBS in Turtle-Shrimp case held that the conservation measures for saving the sea turtle was accepted as turtles are migratory but as it did not fulfill the criteria contained in Chapeau of Articles-XX, the conservation measures were restrictive and *ultra-vires* Article-XX of the GATT.[12]

[10]GATT, Panel Report, DS 29/R, 1994.

[11]GATT, Panel Report, DS 21/R, 1991.

[12]WT/DS 58/AB/RW, 2001.

The jurisprudence as evolved in these cases sufficiently demonstrates that human rights concerns for effective health, social or labour standards are secondary to WTO trade rules. One possible impact of the cases discussed above is that international standards for enforcing human rights are secondary to the rights and duties of member nations under WTO.

It is difficult to conceive a situation where national law can be applied extraterritorially by pursuit of defending or enforcing human rights. However, in the EC-Asbestos Case,[13] where the goal of import ban for asbestos-containing chrysolite substances was the protection of public health of workers in France, was allowed by DSB to protect public health.

The right to determine the level of protection to health is the sole prerogative of a Member of WTO. Approving the Panel findings in Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, the Appellate Body held that a measure under Article-XX(b) was necessary if, 'The import restrictions imposed by Thailand could be considered 'necessary' in terms of Article-XX(b) only if there was no alternative measure consistent with the GATT, or less consistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives'.[14]

In US—Gasoline, the Panel held that the US measures at issue could not be justified in the light of Articles-XX(g) as a measure relating to the conservation of exhaustible natural resources. More specifically, the Panel held that it saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving the air quality in the USA and that the favourable baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources. The Appellate Body reversed the Panel's findings and held that the measure was justified under Article-XX(g), although it ultimately found that the measure was inconsistent with the "Chapeau" of Articles-XX.[15]

5 International Human Rights and Its Linkages with WTO

International human rights standards and debates about them are subject to wide and varied scope and interpretation and also are often developed—developing—countries centric. The regime of human rights in the Universal Declaration of Human Rights, 1948, and the two Covenants 1996 form the International Bill of Rights—coupled with the rights of women and children, make a distinction between the civil and political rights on the one hand and economic, social and

[13]WT/DS 135/AB/R, 2001.

[14]DS/10/R-37S/200, 1990.

[15]WT/DS/AB/R, DSR, 1996.

culture rights on the other and are enjoyable and enforceable within the balancing metaphor of individuals rights versus public good. The member states to the International Bill of Rights have over the years obliged themselves to refrain from interfering with civil and political rights, whereas members are under the positive obligation to grant economic, social and cultural rights in a progressive manner. The International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of child and many other efforts broadening the scope of international human rights have unfortunately yet not set 'core human rights standards' which could be recognised as to be implementable through WTO standards. This deficiency makes it all the more difficult for recognising human rights standards by the WTO.

It is doubtful whether WTO should be more responsive to trade-related human rights measures since this could mean that members would unilaterally determine the standards of human rights to be applied which would be difficult in the context of developed and developing countries' economic strengths. The working of the WTO in general and some of its Agreements in particular have been interpreted by DSB in terms of customary rules of international law as well as Vienna conventions of the law of treaty. However, the Appellate and Panel decisions rendered by the DSB have shown bias in applying other source of international law including international human rights.

In the WTO Agreements on SPS and TBT, international standards of Codex Alimentarius—a non-binding international instrument has been applied and cases have been decided but with least references to international human rights regimes. In US—shrimp case, the convention on international trade in endangered species of wild fauna and flora was used but only as a reference point for concluding whether sea turtle is exhaustible natural resources.

6 Conclusion

From the above discussion, it is clear that WTO legal framework and its various Agreements including GATT have a very little role in applying trade-related measures to enforce international human rights standards. The jurisprudence of WTO in terms of most-favoured-nation principle and like-product philosophy and non-discrimination does not allow to treat the exports of other countries both in terms of product and process to be discriminated on account of human rights violations. The jurisprudence evolved for implementing Article-XX avoids the abuse of allegedly non-economic concerns.

The possibility of enforcing of some human rights under exceptions to Articles-XX (public morals, protection of human, animal and plant life or health, prison labour or measures relating to conservation of natural resources) is possible, yet introducing the human rights jurisprudence through WTO regimes is impossible and it is disputable whether the partial protection of only some human rights is

desirable in the face of the fact that human rights are indivisible and equal and as such the enforcement of only some rights shall not be proper.

Finally, to subscribe to the proposition that human rights should be made enforceable through trade measures of WTO is neither feasible nor implementable. The reasons are as follows: (a) the human rights obligations are unclear; (b) human rights standards are difficult to determine; (c) the human rights in the municipal context do not have fixed boundaries; and (d) international human rights are constantly evolving. And therefore, it cannot be the task of WTO to implement either the international human rights regimes or national human rights obligations and to determine the meaning and scope of human rights obligations.

It is equally problematic from a political point of view to allow a state to unilaterally determine, which states violate human rights and which states enforce human rights through trade sanctions. To use the WTO legal system for such a politicised action would endanger not only its credibility, but also the international human rights concept.

Chapter 36
Trade and Environmental Issues in the WTO

1 Origins of Trade and Environmental Conflict

International concern for the environment, except in particular areas such as marine pollution and aircraft noise, is of relatively recent origin. Protection of the environment was not a major issue when GATT 1947 was drawn up. Not a word was said about the environment in GATT 1947. The same is the case in the Charter of the UN and the Treaty of Rome establishing the European Economic Community. It was only in the beginning of 1950s that a number of widely read books and films, notably by Rachel Carson and Jacques Cousteau, stimulated a worldwide movement dedicated to preservation of the environment.[1]

Indeed, GATT does not explicitly refer to the term 'environment'. Until recently, trade policy-makers and environmental officials pursued their work on separate tracks, rarely perceiving their realms are interconnected. Today, environmental protection has become a central issue on the public agenda and trade and environmental policies regularly intersect and increasingly collide. This reflects the fact that norms and institutions of international trade remain rooted in the pre-environmental era and that there exists no international environmental regime to protect ecological values, to reconcile competing goals and priorities, or to coordinate policies with institutions such as the GATT and the WTO.[2]

From a trade perspective, environmentalism looms large on the horizon of new issues and it is viewed with some trepidation.[3] This reflects, in part, evolution in the focus of trade liberalisation efforts. More than 150 countries subscribe to the WTO

[1]Rachel Carson, The Sea Around US, (1951): Silent Shores, (1962); Jacques Cousteau, The Silent Word (1963): The Sea in Danger (1974).
[2]See generally, Daniel C. Esty, Greening the GATT, Trade, Environment and the Future, Institute for International Economics (Washington, DC, 1994).
[3]Ibid.

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_36

and GATT regulating international trade, and the GATT has made great progress in its original goal of reducing tariffs. As a result, attention has shifted to non-tariff barriers to the free flow of international commerce. In fact, the international trading system has become a market access regime that goes well beyond concerns about border controls, to cover international and domestic economic issues that require at least partial harmonisation of variety of national policies.

The Tokyo Round of GATT 1970 consolidated the assault on non-tariff barriers and produced a series of GATT Codes to combat some of the obstacles. The Uruguay Round negotiations advanced the process further by adding new non-tariff concerns such as intellectual property, service and investment to the GATT agenda which are by way of cutting down non-tariff barriers.

Environmental protection is, in fact, just one of many social policies affecting trade; two other examples are competition policy and labour standards discussed earlier. As a subset of the competitiveness policy debate, trade experts see special dangers in protectionism masquerading as environmentalism. It is particularly difficult to challenge policies cloaked in environmental garb because of their popular appeal and the skittishness of politicians and government officials at the prospect of being cast as anti-environmentalist. Moreover, environmentalists often add potency to their arguments by distilling complicated issues for the public into black and white choices or more precisely, 'brown' and 'green' positions. The hostility of some sectors of the environmental community to economic growth as a goal and, therefore, to trade as a tool for achieving growth, gives added intensity to the fears of those who see misguided and narrowly focused environmental initiatives as derailing trade liberalisation.[4]

In the wake of the Tuna-Dolphin decision of 1992,[5] the international trade regime came under severe attacks from proponents of the environmental protection lobby around the world. GATT was proclaimed as 'GATT-zilla' a kind of free-trade world government … all bottom line, a global corporate utopia in which local citizens are toothless, workers' unions are tame or broken, environmentalists and consumer advocates outflanked … regulations of all kinds are lax, factories are dangerous and their waste is toxic.

The uninformed nature of attacks of this sort and the level of misinformation led some observers to conclude that origins of the trade and environment conflict could be traced to a clash of cultures between free traders and environmentalists reflecting differences in goals, assumptions, procedures and traditions. No doubt progress towards mutually supportive trade and environmental policies has been slowed by the fact that trade and environmental communities approach similar problems in different ways. Even the language of the two communities can be a source of

[4]See generally, Daniel C. Esty, supra note 2.

[5]GATT, BISD39S/155, 03 September 1991. See also, John H. Jackson, 'Dolphins and Hormones: GATT and the Legal Environment for International Trade after the Uruguay Round', 14 University of Arkansas at Little Rock Law Journal, 429–454 (1992).

confusion. For example, the word 'protection' warms the hearts of environmentalists but sends chills down the spines of free traders.

Trade negotiators are generally outcome oriented, utilitarian and willing to compromise. Their goal is to lower trade barriers and increase economic welfare. In contrast, environmentalists, although interested in results, tend to be process oriented as well. They come from a tradition of openness and put great stress in public participation in decision-making as a way of ensuring that business interests do not dominate decision-making.

The trade and environment debate can also be seen as a clash of paradigms: the environmentalist's law-based world view versus the trade community's economic perspective. The trade world's economic paradigm puts great emphasis to the proposition that free trade stimulates the opportunity and creates additional resources for environmental protection. Free traders believe that excessive deference to environmental regulations or standards will result in creating barriers to trade, not justified by real environmental results. They also believe that indiscriminate use of trade as leverage will result not in broad conformity to high environmental standards but in international chaos and lost economic opportunities. Economists fundamentally see the trade and environmental issue as a matter of weighing the relative costs and benefits of trade and environmental policies to maximise social welfare.

Economists and free traders also believe that trade policy goals and environmental policy needs can be made largely compatible by ensuring that environmental resources are properly priced. Many environmentalists recognise the value of cost internalisation and increasingly understand the potential of the 'polluter pays principle' for making trade and environmental policies mutually reinforcing. In fact, as environmental regulations become more incentive-based, the scope for clashes with free trade goals is sharply reduced.

Despite the incipient prospect of collaboration based on adherence to the 'polluter pays principle', each paradigm finds fundamental faults with the other. Free traders believe that environmentalists systematically undervalue the real-world economic consequences of their inflexible command and control policies and the growth stunning impact of environmental trade issues. They also see environmentalists, as preoccupied with the use of coercion, rather than positive incentives and as being inattentive to whether this 'negative reinforcement' approach to difficult issues actually ushers in environmental quality improvements.

Free traders see the application of environmental trade measures as a threat to the trading system and to international harmony, generally. They argue, consistent with traditional public policy theory, that trade measures are never the best environmental policy tools.

Environmentalists believe the economic paradigm to be equally flawed. They see free traders living in a world of economic theory that distracts them from environmental realities. They argue that the trade community is too focused on a welfare maximising calculus that encompasses only impacts that can be easily reduced to a monetary value. Specifically, environmentalists believe the trade and environment

clash is inherently over 'values' and that such disputes are not amenable to solutions based on economic algorithms.

The nature of environmental problems exacerbates the valuation problems and thus the tension between environmentalists and free traders. In particular, ecological problems are characterised by threshold effects, time lags between emissions and detection and biological, chemical and physical interactions that are not well understood.

Sometimes it is also due to substantial scientific uncertainties over the source, scope and magnitude of public health or habitat damage. These uncertainties can lead economists to dismiss environmental values and to ignore environmental variables in their analysis. There is an additional problem of determining how much weight is to be put on these environmental issues.

Environmentalists building on a strong base of political reality fear that society is not setting aside resources to pay for future cleanups. In other words, we are leaving unfunded environmental liabilities to our progeny. On this basis, they reject the discount rate analysis. From an economic perspective, China argues that, in analysing long-term environmental problems, one should use a lower than traditional discount rate. China comes to this conclusion not only because of concerns about intergenerational equity but also the fact that being richer may not adequately compensate future citizens for being endowed with a degraded environment, because the price line or trade-off, between environmental amenities and all other goods may shift one day.

In addition to the economic debates, the conflict between environmentalists and free traders is, in part, a dispute over the relative scientific seriousness of the environmental issues the world faces. In analysing how the world responds to global environmental issues, there are four elements of policy-making: definition, fact finding, bargaining and regime strengthening. Scientific investigations have an integral role in each of these areas. The combination of scientific and economic uncertainty makes policy consensus hard to achieve in the environmental realm. If one accepts that the global problems like ozone layer depletion, climate change, deforestation, loss of biological diversity are large and pressing problems and potentially irreversible, then minor intrusions on the trade system are fair prices, in order to facilitate an effective worldwide response.

2 The Environmental Challenge

While the vituperative nature of some of the assaults on the international trade regime has been excessive, the charge that trade and trade liberalisation can be environmentally counterproductive is accepted even by the most ardent free traders. The environmentalist's challenge to free trade boils down to four central propositions:

(a) Without environmental safeguards, trade may cause environmental harm by promoting economic growth that results in the unsustainable consumption of natural resources and waste production.
(b) Trade rules and trade liberalisation often entail market access agreements that can be used to override environmental regulations, unless appropriate environmental protections are built into the structure of the trade system.
(c) Trade restrictions should be available as leverage to promote worldwide environmental protection, particularly to address global or transboundary environmental problems and to reinforce international environmental agreements.
(d) Even if the pollution caused does not spill over into other nations, countries with lax environmental standards have a competitive advantage in the global marketplace and put pressure on countries with high environmental standards to reduce the rigour of their environmental requirements.[6]

However, international trade and protection of the environment are both essential for the welfare of mankind. In a majority of the matters, these two values do not come into conflict with each other. Rather they supplement each other. Section 2.19 of Agenda 21, adopted at the UN Conference on Environment and Development, 1992 states that 'Environment and trade policies should be mutually supportive. An open multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to the lessening of demands on the environment. It thus provides additional resources needed for economic growth and improved environmental protection. A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpins the continuing expansion of trade'.

Secondly, it is beyond the scope of authority allotted to the WTO, to take active steps for the protection of environment. Its function is rather confined to the successful implementation of the provisions of various agreements covered under WTO. It is clear at the outset, from the provisions of the WTO, that the organisation has been established only for the promotion of international trade and not for the protection of the environment. The WTO agreements apply to measures protecting the environment only where and in so far as they have an impact on international trade. Relatively only very few environmental measures fall into this category.

Thirdly, nothing in the WTO agreements requires that free trade be accorded priority over environmental protection. Rather, the Preamble to the WTO Agreement acknowledges that expansion of production and trade must allow for the optimal use of world's resources in accordance with the objective of sustainable development. It, therefore, seeks both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with each of the member country's respective needs and their concerns at different levels of economic development.

[6]Supra note 2.

3 Trade and Environment and Other GATT Provisions

A. Article XX: A GATT Environmental Charter

GATT, whose basic objective is to promote free trade on a non-discriminatory basis, allows for trade restrictions on a non-discriminatory basis by allowing for trade restrictions on environmental grounds, under Article XX. The relevant part of Article XX of GATT 1994 provides for the following:

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

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

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The word 'environment' is not mentioned explicitly in either of these two paragraphs. Commentators are divided whether these provisions were intended by the drafters to apply to the environment in the broadest sense, including moral and aesthetic concerns or, alternatively, to a much narrower range of policy concerns. Shrybman, for instance, argues in favour of the latter point of view.[7] It is possible to understand Article XX(b), for example, as intended to cover measures designed either to protect public health against diseases, e.g. from contaminated meat or to protect animal or health life for commercial reasons.

With regard to Article XX(g), the purpose might be to allow a country to protect 'exhaustible natural resources' such as minerals or petroleum that are considered as essential to its economic well-being. In a detailed analysis of the negotiations that produced the GATT, Charnovitz has shown that drafters did have some conservation minimum, economic, public health and safety in mind. He argues that the drafters were aware of existing international conventions on conservation and probably did not include a more explicit environmental exemption, precisely because they thought that Articles XX (b) and (g) would suffice for this purpose.[8]

In the US—Gasoline case,[9] while discussing the preambular language of Article XX, the Appellate Body stated that, 'nothing in this agreement shall be

[7]S. Shrybman, 'International Trade and the Environment: An Environmental Assessment of GATT', 33 Ecologist 23 (1990).

[8]S. Charnovitz, 'Exploring the Environmental Exceptions in the GATT, 3 Journal of World Traded 25 (1991).

[9]United States Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS2/R Adopted 20 May, 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996: I.

construed to prevent the adoption or enforcement by any contracting party of measures necessary for protecting environment'. The exceptions listed in Article XX thus relate to all of the obligations under the GATT, the national treatment obligation and the most-favoured nation obligation and other obligations.

The Appellate Body in Gasoline case emphasised that there is specific acknowledgement to be found of the importance of coordinating policies on trade and environment. WTO members have a large measure of autonomy to determine their own policies on the environment, their environmental objectives and the environmental legislation they implement. So far as it concerns the WTO that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered Agreements.

The Panel on US—Gasoline, in a finding not reviewed by the Appellate Body, laid a three-tier test, with respect to Article XX (b). As the party invoking an exception, i.e. the USA bores the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that USA, therefore, had to establish the following elements:

(a) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
(b) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and
(c) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.

In order to justify the application of Article XX (b), all the above elements had to be satisfied.

In US—Gasoline, the Panel addressed the question whether the scrutiny should be justified as 'necessary' within the meaning of paragraph (b) of Article XX. The panel held that 'it was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that imported gasoline was effectively being prevented from benefiting from favourable sales conditions as were afforded by the individual baseline tied to the producer of a product'. The Appellate Body did not address the Panel's findings on paragraph (b) of Article XX, but was critical of the fact that the panel asked itself whether the less favourable treatment of imported gasoline was primarily aimed at the conservation of clean air. The Appellate Body found that 'the panel was in error in referring to its legal conclusion on Article III.4, instead of the measure in issue'.

In EU—Asbestos case,[10] the Panel found that the measure at issue, a French ban on manufacture, importation and exportation and domestic sale and transfer of

[10]European Communities—Measures, Affecting Asbestos and Asbestos-Containing Products, Panel Report, WT/DS135/135/R and Add. 1, Adopted, as modified by the Appellate Body Report, WT/DS 135/AB/R.

certain asbestos products including products containing chrysotile fibres, was inconsistent with GATT Article III: 4, but justified under Article XX(b) in the light of the underlying policy of prohibiting chrysotile asbestos in order to protect human life and health. The Appellate Body rejected Canada's argument under Article XX (b) and held that the Panel erred in law by deducing that chrysotile-cement products pose a risk to human life or health.

In US—Shrimp case,[11] the Appellate Body addressed the meaning of the term 'exhaustible' natural resource contained in Article XX(g). The Appellate Body emphasised the need for a dynamic rather than a static interpretation of the term 'exhaustible', noting the need to interpret this term in the light of contemporary concerns of the community of nations for the protection and conservation of the environment.

B. **The Tuna/Dolphin I Case**[12]

Commercial tuna fishing is carried on through the use of *purse seine* nets, which are large nets that are manoeuvred around a *shoals of fish* and then drawn tight, so that the tuna remain trapped inside the nets and can be easily harvested. The problem was that tuna fishes are frequently found together with dolphins. Indeed, the tuna boats often look for dolphins, which come up for air and often leap out of the water, in order to locate tuna swimming beneath the surface. Unless special protective measures are used, the dolphins become trapped in the *purse seine nets* along with the tuna, and many are fatally wounded or drowned.

The USA in 1972 passed the Marine Mammal Protection Act prohibiting 'setting on dolphins *purse seine* nets' and permitting incidental killing of dolphins by tuna boats only within certain strict limits. The Act was amended in 1984 to provide that tuna caught in foreign vessels could be imported, only upon a finding by the US Secretary of Commerce that the government of any nation from which yellow fin tuna were to be imported into the US provided that country has in place a regulatory programme comparable to USA and has an average marine mammal taking rate comparable to that of the US fleet. Meanwhile the US government imposed an embargo on imports of tuna from Mexico and several other countries, on the grounds that they had not met the comparability requirements of the US law.

Mexico at first requested consultations in GATT and initiated dispute settlement proceedings under Article XXIII of the GATT. Mexico's contention was that the US restriction on imports violated Article XI of the GATT. The more general issue which caught the attention of the public was the defence of the USA under Article XX of GATT.

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[11]United States—Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R and Corr. 1, Adopted 06 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998 VII.

[12]US—Restrictions on Imports of Tuna, (Mexico) Panel Report, 03 September 1991, Unadopted, BISD 395/155.

The Tuna/Dolphin case caught the world's attention by bringing into focus the perceived tension between the concerns of the environment and the law of international trade. Indeed, the case became a centre stage of contention for a variety of different interest groups including environmentalists that were or had become hostile to the GATT and the rules of international trade generally.

The Panel in Tuna/Dolphin construed Article XX narrowly. The Panel in this case followed the so-called Section 337 case[13] which had to decide the differential treatment by the US government of domestic and imported products alleged to infringe US patents, which was met with a defence under Article XX(d), addressed to measures, 'necessary to secure compliance with laws or regulations relating to protections of patents, trademarks and copyrights'. It was held in the Section 337 case that a panel hearing a charge of violation of the GATT could meet with a defence under Article XX, provided in the first instance, an affirmative obligation of the General Agreement had been breached, with the burden on the complainant. If the answer was in the affirmative, the Panel should then consider whether one of the exceptions stated in Article XX was applicable, with the burden on the responding party. Based on this approach the Panel found that the US embargo on imports of tuna from Mexico could not pass muster, since as the panel found, other measures, such as negotiation of international agreement, might have been undertaken in place of the unilateral measure imposed by the USA.

Accordingly, the Panel concluded that the prohibition of imports by the USA of certain yellow fin tuna and products thereof pursuant to the US Marine Mammal Protection Act was contrary to Article XI(1) of the GATT and unjustified by Article XX(b) or (g).

The environmentalist community rejected and still continues to reject the pro-trade bias reflected in the panel's interpretation of Article XX. In part, the criticism is a textual one. It has been suggested that if the 'least degree of inconsistency' requirement, that the Tuna/Dolphin Panel took from the Section 337 case, had been intended to be part of Article XX, it would have been easy to conclude such a phrase in the appropriate exceptions in Article XX.[14]

C. **Tuna/Dolphin II Case**[15]

Apparently because no request was submitted for adoption of the Panel Report in the Tuna/Dolphin case, a second complaint was brought by the EC and Netherlands, challenging the same regulation as in Tuna/Dolphin I. This time the complaining party focused on the 'intermediary nation embargo', i.e. on the

[13]European Community vs. US, GATT DOC. L/6439, Report adopted 07 November 1989, BISD, 36th Supp. 345 (1999).

[14]Thomas J. Shoenbaum, 'International Trade and Protection of the Environment', The Continuing Search for Reconciliation, 91 Am. J. Int'l L. 268 (1997).

[15]US—Restrictions on Imports of Tuna, Panel Report, 16 June 1994, Unadopted, DS 29/R.

provision in the US statute, prohibiting imports of yellow fin tuna or products thereof from any nation that could not certify that it had not in the preceding six months imported such products from a state, subject to the direct embargo in the preceding six months. The secondary boycott or tuna laundering provoked once again the long-standing resentment against the US action.

The second GATT Panel was convened, and it came out with a ruling substantially like the first Panel, except that it did not suggest that the human, animal or plant life or health to be protected by a challenged measure had to be located in the regulating state, as had been stated by the Panel in Tuna/Dolphin I. The second Panel focused more on Article XX(g), addressed to the conservation of exhaustible natural resources. The outcome, however, was much the same.

As in Tuna/Dolphin I, the majority of GATT members supported the decision, but it was not formally adopted by the GATT Council. For the environmental community, the Tuna/Dolphin II was confirmation of the notion that the first case was not aberration, but that the trade community, and the laws that govern international trade, had a persistent bias against the values of conservation and environmental controls.

D. **Gasoline Case**[16]

The petitioners in the Gasoline case asserted that the EPA rule of the USA, which set discriminatory standards for imported gasoline that were more stringent than the requirement of domestic refiners, was *prima facie* violation of the GATT national treatment norm in Article III: 4, but the USA claimed that the EPA rule was in fact consistent with Article III: 4 and, in the alternative, raised defences based on the human health and conversation of natural resources exceptions of Article XX.

The WTO Panel decided in favour of the petitioners. The Panel found that domestic and imported gasoline were 'like' products and that he EPA rule in fact discriminated against imported gasoline in violation of Article III: 4. In evaluating the EPA's treatment of 'like' products, the panel reasoned that imported gasoline which was chemically identical to domestic gasoline was subjected to more demanding quality standards than domestic gasoline; therefore, imported gasoline was effectively precluded from favourable sales conditions afforded to like domestic products.

With respect to the Article XX defence, the Panel concluded that (a) the EPA rule could not be justified under Article XX(b) as 'necessary to protect human… health' because the EPA had at its disposal other means less inconsistent with GATT, to accomplish the same health and environmental standards, and (b) the EPA rule could not be justified under Article XX(g) 'relating to' the conservation of 'exhaustible natural resources' since affording treatment to imports in accordance

[16]United States—Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS2/R, 29 January 1996.

with Article III: 4 would not necessarily prevent the attainment of the desired level of conservation of air quality under the rule.

The USA filed an appeal with the WTO Appellate Body on 21 February 1996, in order to challenge only the Panel's findings on Article XX(g). The limited context of the appeal is telling. Effectively, the USA was admitting that the EPA rule's violation of the GATT's national treatment norm was incontestable and that the provisions of the rule were not the 'least GATT inconsistent'. Given the fact that the USA had actually considered the May 1994 proposal which was 'least GATT inconsistent' than the original RFG rule—the USA could not argue on appeal that the approach the EPA maintained was 'necessary' and therefore it could not effectively appeal the Article XX(b) determination. Rather, the critical goal for the USA was to uphold its environmental regulatory prerogatives under Article XX, which would effectively provide the USA with an exception from national treatment obligations for purposes of upholding legitimate measures to protect the environment. The issue was whether the measures adopted by the EPA were in fact legitimate, in pursuance to the terms of Article XX(g).

The Appellate Body reversed the Panel and held that the EPA rules did in fact fall under the terms of Article XX(g). However, the Appellate Body decided against the USA by holding that the EPA rules were 'unjustifiable discrimination' and a 'disguised restriction on international trade' pursuant to the chapeau of Article XX. In making the 'unjustifiable discrimination' determination the Appellate Body underscored the fact that the USA had 'more than one alternative course of actions available in promulgating regulations implementing the environmental policies that were less inconsistent with GATT. Had it chosen such alternative courses, the USA could have avoided subjecting imported gasoline to the discriminatory treatment that resulted from the imposition of more exacting statutory baselines.

E. **The Shrimp/Turtle Case**[17]

Similar to the Tuna/Dolphin, another complaint was brought against the USA only after three years. Once again an imported product—this time shrimp—was the issue. In 1987, the USA acting pursuant to the US Endangered Species Act, 1973 issued a regulation requiring all US flag shrimp trawlers in the Gulf of Mexico and in the Atlantic Ocean off the south-eastern coast of the USA to use turtle excluder devices approved in accordance with standards set by US government agencies.

In 1989, the US Congress adopted an amendment calling on the Secretary of State to negotiate agreements with other nations for the protection and conservation of sea turtles. The amendment provided for the prohibition of shrimp harvested with technology that did not meet US standards. Nine states adopted regulatory measures meeting US standards and were granted certificates permitting them rights for

[17]United States—Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R and Corr. 1, Adopted 6 November 1998, as Modified by the Appellate Body Report, WT/DS 58/AB/R, DSR 1998: VII.

export. Imports of shrimp from vessels registered in other states were subject to embargo.

Four states—India, Pakistan, Malaysia and Thailand—which did not comply with US regulations brought a complaint under the WTO Understanding on Dispute Settlement, alleging violation by the USA of Article XI of the GATT, the same provision that had been invoked in the Tuna/Dolphin cases. The USA defended its restrictions on the basis that it was carrying out the intent of CITES, that its legislation and regulations were consistent with both the MFN and national treatment requirements of GATT, and they were in any event within the exceptions of Article XX(b) and (g). The complaining parties replied that CITES prohibited trade in sea turtles but did not authorise, let alone require, restrains on imports of shrimp, which were not an endangered species but were significant sources of revenue for the complaining states.

The Panel concluded that the US import ban on shrimp and shrimp products was not consistent with Article XI of the GATT, and not justified by any of the provisions of Article XX. The USA made an appeal on the ground of Article XX(g) relating to the conservation of exhaustible natural resources. Though the US programme discriminated between states, that had and that had not met the US standards, it argued that it was not unjustifiable discrimination within the meaning of the chapeau of Article XX. Moreover, the USA also argued that 'it is legal error to jump from the observation that GATT 1994 is a trade agreement, to the conclusion that trade concerns must prevail over all other concerns in all structures arising under GATT rules'.

The response of the Appellate Body was that the USA had abused Article XX by unilaterally developing a trade policy instead of proceeding down the multilateral path.

The Appellate Body concluded that 'if every member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns' the multilateral trading system would cease to exist.

The Appellate Body upheld the finding that the US import ban was incompatible with GATT, but significantly altered the rationale. The Panel had held that the *Chapeau* of Article XX only allows members to deviate from GATT provisions so long as, in doing so, they do not undermine the GATT/WTO trading system. The Appellate Body held that the *Chapeau* of Article XX addressed not the challenged measure itself, but rather the manner in which it was applied. The proper way to look at environmental or comparable measures, the Appellate Body held, is to look first at the specific provisions of Article XX(a) to (j), if a challenged measure is found to fit under one of the exceptions, for instance because it relates to the conservation of exhaustible natural resources, it must then be tested under the *Chapeau,* i.e. whether the measure is applied in a manner that would constitute unjustifiable discrimination or a disguised restriction on international trade. The Appellate Body concluded that it was our duty and our responsibility to complete the legal analysis, and make a finding under Article XX(g) on the basis of presentations made by the parties to the panel.

The complaining parties argued that exhaustible national resources referred to finite resources such as minerals, and not to living creatures. The Appellate Body rejected that view, holding that modern biological science had shown that living species, though in principle capable of reproduction are in certain circumstances susceptible to depletion, exhaustion and even extinction, frequently because of human activities. Living resources are just as finite as petroleum, iron ore and other non-living resources. The wordings of Article XX which was drafted some 50 years ago and had not been altered even by the Uruguay Round must be read in the light of contemporary concern of the nations. The US measure was related to the objective of preserving the endangered species; this was in principle enforced in an even handed way as between domestic and foreign shrimp. For the Appellate Body, 'comparable' in practice means 'essentially the same'. The USA should have been prepared to consider other measures to protect the sea turtles and should have been more forthcoming in undertaking negotiation with other countries, including the complaining parties.

In contrast to the Tuna/Dolphin panels, the Appellate Body in the Shrimp/Turtle case was careful to quote from the Rio Declaration on Environment and Development, from Agenda 21, from the Convention on Biological Diversity, as well as from the report of the Committee on Trade and Environment of the WTO. The Appellate Body, in short, was anxious to dispel, to the extent possible, the perception that the GATT/WTO system was indifferent to the concerns of the environment. This decision laid stress on multilateral solutions, international consensus and similar expressions as opposed to the exercise of unilateral restrains. Here the USA had negotiated with some, but not with other member states, including the complaining parties. The effect was plainly discriminatory and in view of the Appellate Body, unjustifiable within the meaning of the *Chapeau* of Article XX. The USA lost the case.

In the Shrimp/Turtle case, the Appellate Body had sought to tone down the conflict between trade and environment. The Appellate Body concluded that it has not decided that protection and preservation of the environment has no significance to the members of WTO. Members are free to adopt measures for the protection of endangered species. However, the Appellate Body did not provide any guidelines as to how protection of species should be tackled by member countries of WTO. It simply declined to decide what are the measures which should be taken individually or bilaterally or multilaterally.

4 Environment and WTO Preamble

Prior to the founding of the WTO in 1995, dispute settlement panels were disinclined to give much weight to environmental and other social policy considerations in determining how trade and domestic policies should be crafted for members to comply with GATT non-discrimination obligations. However, reflecting the trend in international agreements, the preamble makes specific reference to the need to

balance the trade and economic objectives of the GATT, GATS, TRIPS and other WTO agreements on the one hand and environmental policy considerations on the other. The opening paragraphs of the Preamble to the Agreement Establishing the World Trade Organisation states.

The Parties to this Agreement, recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

By virtue of the reference to sustainable development and environmental goals in the Preamble, the Appellate Body in the 1998 Shrimp Turtle decision determined that the negotiators of WTO agreement were fully aware of the importance and legitimacy of environmental protection as a goal for national and international policy. They concluded that GATT and all other WTO agreements must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.

The Appellate Body in US—Gasoline case emphasised the importance of the Preamble in the context of environmental issues. The Appellate body affirmed 'indeed in the Preamble to the WTO Agreement and in the Decision on Trade and Environment, there is a specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. In so far as it concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and other covered Agreements'.

A. **SPS Agreement and Environmental Protection**

SPS Agreement has four sets of consequences for environmental protection.[18] First, it imposes substantial requirements that member government base sanitary and phytosanitary measures on scientific principles and evidence, undertake risk assessment, apply consistent levels of risk protection across comparable regulatory situations, adhere to norms of transparency, accept the equivalency of equally effective foreign measures and adopt measures that are not more trade-restrictive than necessary to accomplish their objectives. Together, these place the WTO in the

[18]Peter Morici, Reconciling Trade and Environment in the World Trade Organisation, 52–53 (Rockefeller Foundation, 2002).

position of determining whether sanitary and phytosanitary measures, when not those prescribed by international standard-setting bodies, impose unnecessary burdens on trade.

Secondly, by presuming that the standards, guidelines and recommendations established by the Codex Alimentary Commission, the Office International des Epizooties and the International Plant Protection Convention meet the above-mentioned requirements, the SPS assigns considerable status to the norms established by these organisations and imposes costs on governments that seek to exceed or differ from these norms. This may not be as alarming as it sounds. Most WTO members participate in these organisations and adopt these standards which are essentially science oriented and not trade oriented.

Thirdly, the agreement appears to restrict the use of precautionary measures by requiring members, when faced with insufficient scientific evidence, to rely on provisional measures and to seek additional information for a more objective assessment of risk within a reasonable period.

Lastly, the coverage of the Agreement may not extend to certain issues. As defined in its Annex A, the Agreement applies to pests, diseases, disease-carrying organisms and disease-causing organisms, contaminants, toxins or disease-causing organisms in human and animal food.

B. Agreement on Technical Barriers to Trade and Environmental Protection

The TBT Agreement has three sets of consequences for environmental protection.[19] Firstly, the Agreement requires member governments to base regulations on risk assessment and available scientific evidence, adhere to certain rules of transparency, give positive considerations to accept the equivalency of foreign regulations and adopt regulations that are not more trade-restrictive than required. Together, these place the WTO in the position of determining whether measures, when not those prescribed by international standard-setting bodies, impose unnecessary burdens on trade.

Secondly, by presuming that the standards, guidelines and recommendations of international bodies meet the above-mentioned requirements, the Agreement assigns considerable status to the norms established by these organisations and creates new reporting costs for governments seeking to exceed or differ from them.

Thirdly, TBT Agreement may open the door to the challenging of labelling regimes (both mandatory and voluntary) that address how products are made rather than their specific performance and physical characteristics.

[19]Peter Morici, Reconciling Trade and the Environment in the World Trade Organisation, 55 (Rockefeller Foundation, 2002).

5 Environment and Other WTO Agreements

Besides the above-mentioned provisions in the GATT/WTO and various Agreements the concern of the protection of the environment has also been found mention in the following agreements;

(a) Agreement on Agriculture

The Preamble of the Agreement on Agriculture provides for the commitment from the developed countries to the reform programmes carried out in the developing countries. These reform programmes include a greater improvement of opportunities and access to agricultural products. The implementation of these reform programmes should be made in a purely equitable manner having regard to non-trade concerns including food security and the need to protect the environment.

The Agreement on Agriculture exempts direct payments under environmental programmes from members' commitment to reduce agriculture support programmes. To be eligible, payments must be part of 'a clearly defined environmental or conservation programme and be dependent on the fulfilment of specific condition under the government programme, including conditions related to production methods or inputs', and payments shall be limited to the extra cost or loss of income involved in complying with the government plan.[20]

(b) Agreement on Subsidies and Countervailing Measures (SCM)

Three categories of subsidies were non-actionable during the first five years of WTO:

(i) research and development subsidies;
(ii) subsidies to disadvantageous regions; and
(iii) environmental subsidies.[21]

The provisions relating to these non-actionable subsidies expired at the end of 1999. Nevertheless, the environmental subsidies are described below for a proper understanding.

Non-actionability of environmental subsidies reflects the awareness at the international plane that environmental harm cannot be avoided through private behaviour only. WTO members can provide subsidies to firms wishing to protect the environment by upgrading their facilities provided that:

(i) The scheme is directed to existing facilities, that is, facilities that have been operational for at least two years;

[20]Agreement on Agriculture, Annex. 2.12.

[21]Art 8.2, Agreement on Subsidies Code.

(ii) It is one-time measure; WTO members are disallowed from resubsidising the same firm;
(iii) The assistance is limited to 20% of the cost of adaptation of existing facilities;
(iv) Costs related to replacing and operating the assisted investment must be fully borne by the subsidised firm;
(v) It does not cover manufacturing cost savings; and
(vi) It is available to any firm that can adopt the new equipment or production process.

All the above conditions must be respected. A comparison of the criteria laid down for the three categories of non-actionable subsidies leads to the conclusion that the drafters of the SCM Agreement exhausted their rigour in the context of environmental subsidies.

(c) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Article 27.2 of TRIPS Agreement allows WTO members to exclude from patentability inventions that endanger human, animal or plant life or health or the environment, but the exclusion must be 'necessary', not merely because the exploitation is prohibited by the law. Art. 27.3(b) of the TRIPS further provides that plants, animals and essential biological processes may also be excluded from patentability, but micro-organisms, micro-biological processes and non-biological processes are patentable. It stipulates that new plant varieties need not be protected by patent but members who choose to exclude them from the patent protection are required to provide for an effective *sui generis* system, i.e. an effective special form of protection. The system gives members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure.

(d) General Agreement on Trade in Services (GATS)

Article XIV of GATS contains general exceptions comparable to Article XX of GATT. The two articles' *Chapeaus* are identical. Article XIV(b) of GATS allows members to take measures necessary to protect human, animal, plant life and health.

On 1 March 1995, the Council for Trade in Services, pursuant to the Ministerial Decision on Trade in Services and the Environment, adopted the Decision on Trade in Services and the Environment. The decision has requested the Committee on Trade and Environment to examine and report, with recommendations, if any, on the relationship between services, trade and environment including the issues of sustainable development. The Committee has also been empowered to examine the relevant intergovernmental agreements on the environment and their relationship to the Agreement on Services.

(e) **Committee on Trade and Environment**

WTO has established a Committee on Trade and Environment (CTE) in 1995. Although the committee was established at Marrakesh in April 1994, it came into operation at the beginning of January 1995. It took over from a GATT Subcommittee on Trade and Environment. The CTE has been charged with making appropriate recommendations on the need for rules to enhance the positive interaction between trade and environment measures for the promotion of sustainable development.

The CTE has been empowered to study the link between trade and the environment and to investigate and report on such issues as:

- The relationship between the provisions of multilateral environmental agreements and those of the WTO;
- Environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- Provisions of the multilateral trading system and,
  - (i) Charges and taxes for environmental purposes,
  - (ii) Requirements for environmental purposes relating to products, including standards and technology regulations, packaging, labelling and recycling;
- Transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
- Dispute settlement mechanisms in the multilateral trading system and those found in the multilateral environmental agreements;
- The effect of environmental measures on market access, especially in relation to developing countries, in particularity the least developed among them and environmental benefits of remaining trade restrictions and distortions;
- The issue of exports of domestically prohibited goods; and
- The relevant provisions of TRIPS Agreement.

However, no significant decision has been taken by the CTE, which is open to participation by all members. Consequently, the Final Declaration of the Doha Ministerial Conference in November 2001 adopted a Trade and Environment Work Programme, which includes the following:

(a) The relationship between WTO rules and trade restrictions in multilateral environmental agreements;
(b) Criteria for granting observer status and information exchange;
(c) Reduction and elimination of trade barriers for environmental goods and services; and
(d) Fishing subsidies.

In addition, the CTE has been entrusted to give particular attention to;

(i) The effect of environmental measures on market access, especially for developing countries;

(ii) Labelling requirements for environmental purposes;
(iii) Environment as part of TRIPS Agreement.

Thus, the accommodation of protection of the environment and trade is still incomplete. However, it is an ongoing process.

6 Trade and Environmental Issues

(a) The WTO–MEA Relationship

The relationship between WTO and Multilateral Environmental Agreements (MEA) was a hotly debated topic during the last decade of twentieth century. There are at least nearly 250 MEAs in existence, of which the WTO secretariat has identified 22 with potential trade policy implications. Many of these agreements protect specific group and classes of flora and fauna while others facilitate the joint management of resources taken in the 'global commons' and still others focus on broader environmental problems.

There are long-standing expectations that the WTO can and should deliver in this area. The first concerns WTO disciplines and the extent to which they accommodate environmental concerns. In the CTE, some members have proposed that a legal framework be developed to clarify the relationship between the WTO and MEAs, with specific reference to the exception provision in Article XX. Other WTO members would like to see other areas of WTO disciplines clarified with respect to the environment, such as the TBT, SPS, TRIPS and Agriculture Agreements as well as GATS. Some other members would like to have environment related results in some or all of these agreements, while others feel confident that environmental concerns are already sufficiently dealt with in these agreements. At this stage, individual proposals continue to be submitted to the CTE and its various committees that oversee each Agreement.

The spectrum of proposals submitted to the CTE can be classified into four broad categories, firstly the *status quo* approach, which is based on the premise that the WTO already has sufficient scope to accommodate the use of trade-related measures pursuant to MEAS and there has not been any dispute concerning trade measures applied pursuant to an MEA.

The second approach is that of a waiver, under which WTO members would take a decision to authorise members to deviate from their obligations for a limited period of time. Given the range of provisions in the WTO, some members consider that WTO rules do not require any amendments. A waiver is subject to adoption by consensus, although it is possible for a member to call for a vote, which would be subject to approval by three quarters of WTO members. A waiver is time-limited and can be renewed.

The third type of approach is to provide for clarification of WTO rules. Many members have proposed for the adoption of an understanding or guidelines. In order

to allow for predictability for guidelines, procedural and substantive criteria have been suggested.

Several members have advocated the fourth approach to clarify the relationship between WTO-MEA along the lines of co-operation. Such a clarification would increase predictability and legal certainly and avoid unnecessary conflicts.[22]

Trade measures may include regulations on exports and/or imports. These may include outright prohibition or bans on trade, quotas and various licensing and registration schemes. Trade measures may have many motivations. International trade may expand or create markets that encourage over-exploitation of resources. Limiting or eliminating trade may assist national efforts to enforce limits on harvesting or to eliminate poaching.

In contrast, encouraging certain type of trade may ease the economic burden of achieving conservation and environmental protection goals. Sometimes trade measures that support environmental goals often conflict with the requirements of GATT and other WTO Agreements and may not qualify for one of the general exceptions provided by these Agreements. The major problems lie in resolving conflicts emerging from actions taken by WTO members participating in an MEA that adversely affect the commercial interests of other WTO members who are not the participants in the MEA.

(b) **Environmental Subsidy**

There has been increasing emphasis by many countries on 'win-win-win' outcomes from future WTO negotiations, which would benefit trade, environment and sustainable development. Several WTO members advocate for the removal of tariff escalation and tariff peaks for forest and leather produces and subsidies in agriculture and fisheries in order to contribute to both environmental protection and trade liberalisation.

While initial discussions concentrated on the benefits of eliminating agricultural subsidies, recent proposals have highlighted the potential contribution of the WTO in addressing the major trade distortion affecting the fisheries sector, by subsidies. Following the failure at Seattle, the USA and some other countries are now striving to address those subsidies that contribute to the unsustainable use of global fisheries recourses. The fisheries' issues are a complex and highly politicised matter and is part of the larger issue of sustainable fisheries management. The complexities can be seen in the light of the recent wave of potential fishery-related disputes. The depleted state of global fish stocks has become a major economic and environmental concern—now central to the trade and environment debate in the WTO. The potential contribution of the WTO, which has a trade mandate, would be to examine the trade restrictions and distortions that impact upon this sector.

[22]See, Sabrina Shaw and Risa Suchwartz, 'Trade and Environment in the WTO-State of Play', Journal of World Trade, 36(I), 129–154 (2002).

(c) TRIPS and Biodiversity

Another long-standing debate covering the relationship of trade and environment is the compatibility of the TRIPS and the Convention on Biological Diversity, 1992 (CBD). The issue has got a new lease of life in the recent discussions in the CTE, TRIPS Council and the CBD. The developing countries are advocating for the implementation of TRIPS and CBD in a mutually satisfactory way. India has expressed the view that TRIPS Agreement is in conflict with the CBD, because the provisions of TRIPS regarding private rights are having the potential to overrule the sovereign rights recognised by the CBD. Currently, under TRIPS agreement nothing prevents a person from patenting a genetic material, a plant, for instance-originally from another country without having to fulfil some of the basic principles of the CBD, such as benefits sharing, prior informed consent and protection of the traditional knowledge associated with the genetic resource.

(d) Precautionary Principle

Although precaution is a fixture in both the preambles and working articles of many multilateral environmental agreements, recently the principle has been the focus of intense debate in the area of food safety and Genetically Modified Organisms (GMOs). The precautionary principle was first introduced in Germany in the 1984 International Conference on the North Sea. Although the principle was not crystallised as such, the conference contained the idea of limiting pollutants due to lack of knowledge and in advance of proof of their harmful effects.

The precautionary principle has been defined as taking precautionary measures when there is insufficient scientific proof, yet when inaction could lead to irreversible damage or risks to human health or the environment. The controversial issue that surrounds the principle is the determination when the threshold shifts the burden of proof towards protection of the environment, or health or safety. This threshold can be high, when it involves serious or irreversible harm to the environment, or lower, when it may cause harm to the environment.

The flexibility of the precautionary principle is its strength as well as its weakness. It has been applied to many different environmental issues and is subject to varying interpretations and has many definitions, in international agreements. Several WTO members have complained that there is no internationally agreed definition of the precautionary principle. They claim that although the principle has been recognised in international agreements but it has not been explicitly mentioned in the WTO, although several key provisions explicitly allow for precautionary action. The concept of precaution principal is mentioned in SPS Agreement but only as an alternative to insufficient evidence provided by a risk assessment, and not as a policy tool that allows action when the risk to the environment is considered to be unacceptable.

(e) **GMOs and Bio-safety**

The insecure status of the precautionary principle in the WTO, the SPS Agreement and in Hormones disputes[23] raises interesting issues for the CTE in the new trade-related area of genetically modified organisms and food safety. The framework regulations governing GM foods are still in the process of evolution. There is a greater concern among the developing countries for the protection of native species. Many environmentalists have been looking at the Bio-safety Protocol and WTO Agreements, such as SPS and TBT Agreements to ascertain whether this new upcoming framework is compatible with WTO rules. The issue is not solely about compatibility, but also about how signatories implement the provisions of the agreement.

7 Conclusion

Trade liberalisation and environmental protection share a common aim to enhance social welfare by improving the quality of life. In pursuing this cherished common goal, considerable amount of conflict arose over the adoption of approaches. The issues concerning environment have grown in prominence for both domestic and international policy agendas. The environmental issues affecting or effecting trade draw the attention of the policy-makers. The problem of environment has revealed the ecological interdependence. No country has complete environmental independence. For the redressal of the problem, the international co-operation is required.

Just as environmental issues are increasingly shaping trade policy, the economic interdependence of the world is influencing the dynamics of environmental policy. There exists a linkage between trade liberalisation and environmental protection. For this, WTO has now laid the foundation for reconciling the both actual and potential conflicts between international trade and the protection of the environment. Now it is up to the CTE and Ministerial Conference to evolve the additional aspects of the trade and environment agenda. The new trade and environmental conflicting issues especially in the area of food safety, subsidies, intellectual property and services urgently require attention keeping in view the interests of the developing countries. There is an immediate need to evolve a thorough and transparent decision-making process to be evolved within the institutional framework of the WTO when the conflict between trade and environment has to be reconciled.

There is also a need for the WTO to give specific recognition to environmental values. Article XX(b) and (g) of the GATT 1994 might be amended to provide a

[23]EC Measures concerning Meat and Meat Products (Hormones)—Complaint by the USA, Appellate Body Report, WT/DS 26/AB/R, WT/DS 48/R, DSR 1998: I.

general exception for trade measures that are reasonably necessary for the protection of the domestic environment. In addition, Article XX may also be amended to provide a safe harbour for multilateral environmental agreements that employ trade measures, which are reasonably necessary and reasonably related to the subject matter of any agreement. Further, there is a need for adopting a clear policy on the international use of environmental taxes, especially energy taxes and food safety.

Chapter 37
Developing Countries in the GATT/WTO

1 Introduction

The basic premise of the present international economic order and law in the context of globalisation and liberalisation of markets is how to orient the developing countries in such a setting. Historically, developing countries after the Bretton Woods Conference and with the establishment of GATT 1947, IBRD and IMF were apprehensive of fuller participation in the international trade law and institutions. However, after 1980s, the developing countries started showing respect and integrating trade law and policies as devised by GATT with increments.

With the establishment of WTO in January, 1995, international trade law has witnessed an unprecedented growth and profound changes in overall institutional and legal settings as well as in the conduct and obligations of the member states of the WTO and the orientation of countries in general, developed as well as less and least developed countries. However, the WTO/GATT, 1994, and their Multilateral Agreements have demonstrated a complex mix of globalisation on the one hand and how best to adjust the developmental needs of the less developing and least developed countries on the other hand.

This chapter, therefore, is devoted to unravel the positioning of less developing and least developed countries in the overall setting from the beginning of GATT 1947 up to the end of WTO Multilateral Agreements of 1995 and also the developments which have taken place subsequently in this area till date.

Accordingly, the chapter after introduction is devoted to the positioning of developing countries in the GATT 1947 up to the negotiations of Uruguay Round, 1986. It reveals two things: one that the earlier scepticism of developing countries to the GATT 1947 had to some extent disappeared by 1986, and second that GATT 1947 was considered important in liberalising the international trade and setting up the international trade law standards.

Secondly, the positioning of obligations of developing countries in the Uruguay Round and GATT/WTO Multilateral Agreements has been assessed. A brief

A. K. Koul, *Guide to the WTO and GATT*,
https://doi.org/10.1007/978-981-13-2089-7_37

description of Multilateral Agreements has been attempted followed by the obligations which these Agreements place on the developing countries. The assessment of obligations and law of developing countries *vis-à-vis* the WTO/GATT and Multilateral Agreements is complex and evolving and as such broad contours of obligations and the laws which developing countries have to follow have been depicted.

Further, the chapter is devoted to WTO and other issues such as trade and environment, trade and labour standards, trade and competition policies which are being pursued by the WTO to be formally legislated in future. The developing countries have resisted the inclusion of these new issues on the WTO negotiating forum. However, there is a consensus to negotiate these issues.

Although, it is too early to assess the overall impact of the WTO/GATT legal regime on the developmental needs of the developing countries, yet the discernible trend from the working of WTO/GATT, 1994, shows that WTO/GATT is growing from strength to strength and developing countries cannot remain outside the domain of WTO/GATT and their Multilateral Agreements.

2 Developing Countries and the GATT, 1947

The developing countries since the ITO Charter negotiations have been clamouring for some special exceptions to the international trade law regime. Although in the GATT 1947 there was no formal recognition of developing countries in the original Contracting Parties of the GATT, over time the developing countries have been recognised as a separate group for the implementation of international trade law regime. The reasons are not hard to find. The principles of tariff reductions, non-discrimination and reciprocity in the GATT 1947 were conceived on the presumption that the world is essentially homogenous and composed of countries of equal strength and comparable economic development, yet the real world of international trade comprised of countries with varying and diverse levels of economic development and vast differences in economic and social systems.[1]

The developing countries as a group in GATT 1947 witnessed economic underdevelopment which was manifested either in their low per capita income or in the terms of international trade which were hardly beneficial to the developing countries as the prices of primary products which were the chief exports of developing countries declined relative to industrial products of the developed world and on balance developing countries often accused that GATT would be behaving as a rich-man's club and is slanted against them.[2]

[1]When GATT was established in 1947, 11 of the original 23 Contracting Parties would have been considered developing countries.

[2]Raul Prebisch, Towards a New Trade Policy for Development, U.N. Doc E/Conf.46/141. Vol. II at 9–12 (1964).

The negotiating history of the defunct International Trade Organization (ITO) and the establishment of the GATT 1947 reveals that developing countries were interested in securing freedom from the ITO/GATT obligations so that they could protect their infant industries, receive tariff preferences to their exports in developed countries markets, benefit from developed country tariff concessions without being asked to offer equivalent tariff concessions as well as have complete freedom to control foreign investment and institute international commodity agreements in commodities of their special interest, and to get remunerative prices for commodities, which were of export interests to them. The developing countries further demanded systematic tariff preferences by the developed countries within the ITO legal regime.[3] The developing countries, main argument was that liberal trade policies would not promote their industrialisation and development as the terms of trade in international business were adverse to the developing country export trade for the reason that their exports mainly comprise raw materials and primary commodities which were characterised by low price, low income, elasticity of demand and considerable price volatility. The developing countries depend on imports of manufactures, especially the capital goods and intermediate inputs needed for investment and industrialisation. Besides exposing their infant industries to unfair competition, the development process was directly associated with their balance-of-payments difficulties. Therefore, the developing countries believed that they require protections both tariff and non-tariff for promoting their industrialisation through import substitution; the use of export subsidy as a means to promote exports so as to offset the advantages enjoyed by the developed country producers; and use of trade controls in response to actual or potential balance-of-payments problems.

3 First Seven Years of GATT

In the first seven years of GATT (1947–1954) operations, the policy towards developing countries adhered fairly closely to the policy defined in the GATT/ITO negotiation and as the balance of payments were a major presence during this period, reducing the need for, and significance of other forms of protection.

As unamended Article XVIII of the GATT (Governmental Assistance to Economic Development) contained special provisions relating to less developing countries, resort to the infant-industry exceptions under Article XVIII was limited. However, the developing countries acceding to GATT were expected to negotiate meaningful tariff concessions as a payment for the legal right to benefit from the tariff concessions of other GATT members.

It was in the year 1954–55 GATT Review Sessions that for the first time, the needs of developing countries as a group within the GATT with some legal freedom were recognised and adopted.

[3]Robert E. Hudec, Developing Countries in the GATT Legal System 11 (1987), John H. Jackson, World Trade And the Law of GATT, (1969) Ch. 25.

The Review Sessions incorporated three main provisions, two of which related to the GATT. Article XVIII and Article XVIII(B) were revised to include a specific provision to allow countries 'at an early stage of development' to adopt quantitative restrictions on imports whenever their monetary reserves were deemed inadequate in terms of their long-term development strategy.[4] Since developing countries have an almost infinite-need for additional development resources, the new text made it possible to justify almost any restrictions.[5] Article XVIII(C) was revised to allow for the imposition of trade restrictions (both tariffs and quantitative restrictions) to support infant industries with a view to improving living standards. In other words, the developed countries were not supposed to insist on full reciprocity for the concessions they were making. The need to obtain prior approval for applying restrictions both tariff and quantitative was retained. But a provision granting an absolute veto to certain affected countries was removed, and the standards for using quantitative import restrictions on infant industry ground were made easier to satisfy, which was in furtherance of the revised and expanded positive tone of Article XVIII incorporating that trade barriers authorised by Article XVIII were not derogations from GATT policy, instead were legitimate measures in complete harmony with GATT policy. Developing countries have made little use of the reconstructed Article XVIII, however—perhaps because the compensation requirement, to be administered by nations with more bargaining power, was too threatening. In any event, the revision did little to dispel the reservations of developing countries towards GATT.[6]

4 From Herberler Report to the Adoption of Trade and Development Chapter in the GATT, 1965

Between 1954 amendments and the second major amendment in 1965 of the GATT's legal framework, various administrative projects were undertaken in an attempt to meet the problems of developing countries. Commodity issues were first addressed in GATT as early as 1956 and the Contracting Parties adopted a joint resolution on the particular difficulties faced by the developing countries connected with trade in primary commodities. The resolution also called for an annual review of trends and developments in commodity trade, and convening of an intergovernmental meeting if it was felt that international joint action would usefully contribute to the solution of the problem.[7]

The Herberler Report, 1958 as an outcome of GATT 1957 ministerial meeting established Herberler Committee which concluded that 'there is some substance in

[4]The Report of the Review Working Party on Quantitative Restrictions (GATT, 1955).

[5]Hudec, supra note 3, p. 27.

[6]Autar Krishen Koul, The Legal Framework of UNCTAD in World Trade 28 (1977).

[7]Ibid., p. 2

the disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them'.[8] The Report recommended (1) stabilisation programmes to address commodity price fluctuations through buffer stocks and (2) reductions in developed countries' internal taxes on primary products such as coffee, tea and tobacco as these taxes served to constrain consumption and import demand and (3) the effect of regional trading blocs on the less developing countries need to be implored.[9]

The Herberler Report became the basis of GATT Contracting Parties to initiate an Action Programme to look into the possibilities of further negotiations for the reduction of tariffs; problems connected with the widespread use of non-tariff measures for the production of agriculture and other obstacles to the expansion of trade, with particular reference to the importance of maintaining and expanding the export earnings of the developing countries.[10] In 1961, GATT adopted a declaration on the promotion of trade of less developing countries which, *interalia*, called for preferential market access for developing countries not covered by preferential tariff systems (such as commonwealth preferences or preferences in customs union or free trade areas) which were subsequently established. A germ plasm for the subsequent generalised system of preferences (GSP) was laid thereof.[11]

Again in the Ministerial Meeting of GATT (May 1963) the need for adequate legal institutional framework to expand the trade of less developing countries was further reinforced[12], and by March 1964, the Committee on the Legal and Institutional Framework of GATT in relation to less developing countries had drafted a 'Chapter on Trade and Development' for inclusion in the General Agreement.

In 1965, GATT when faced an institutional challenge from the initial meeting of United Nations Conference on Trade and Development (UNCTAD) , intensified its efforts on behalf of the developing countries as a result a new chapter on Trade and Development comprising three articles (Articles, XXXVI to XXXVIII) was added to the GATT in 1965.

Article XXXVI, entitled 'Principles and Objectives', stated the need for stable prices, noting that reciprocity in tariff reductions could not be expected from these countries and that co-operation between the GATT and other development organisations should be encouraged. Article XXXVII called for the highest priority to be given to the elimination of restrictions that served to 'differentiate unreasonably' between primary and processed products, and required Contracting Parties to take full account of the impact that trade policy instruments permitted by GATT would have on developing country members. Article XXXVIII called for 'Joint Action' by

[8]GATT, Trends in International Trade, 11–12 (Herberler Report, 1958), (Sales No. GATT/1958-3).

[9]Ibid., p. 12.

[10]GATT, 7th Suppl. BISD 28 (1959).

[11]GATT, 8th Suppl. BISD 29 (1961).

[12]GATT, 10th Suppl. BISD 33 (1962) and 12 Supp. BISD 45 (1964).

the Contracting Parties through international arrangements to improve market access for products of export interest to developing countries. The Committee on Trade and Development (CTD) was established and mandated to review the application of Part IV provisions and consider any extensions, and modifications to Part IV suggested by Contracting Parties with a view to furthering the objectives of trade and development.[13]

The GATT International Trade Centre, located in Geneva, was also instituted in 1964 to provide market information and liaison system to facilitate trade communications among the governments.

Although less developing countries tried to argue out that Part IV was legally binding on developed countries, most of the developed countries refused to accept it, which led developing countries to put too much of faith in UNCTAD and its work programme. However, the legal standards and commitments evolved over the years have taken recognition of the fact that: (a) developing countries have freedom to use their tariff flexibility in terms of their development needs; (b) developing countries who made tariff concessions at the time of their accession to GATT could withdraw the same as Article XVIII validates the withdrawal as legitimate for industrial development reasons; and (c) Article XVIII was needed only where the tariff was bound and that where the tariff was unbound—which was the case over by far the major part of the tariffs of most developing country members, and they are free to set their tariffs at any level.[14] GATT allowed the granting of waivers for balance-of-payments surcharges provided the prohibited trade measures were found appropriate to the circumstances. What was interesting was besides the absence of legal obligations, there was a link between GATT's legal policy towards the less developing countries and its strong desire to attract and hold developing country members.[15]

On the other hand, the scepticism of the developing countries with GATT led to their lobbying for the establishment of UNCTAD which came into existence in 1964. The developing countries pursued their international trade agenda through UNCTAD, which resulted in the introduction of Generalised System of Preferences (GSP) for developing country manufactured exports in developed country markets and stabilisation of commodity trade. The GSP was established under the auspices of UNCTAD in 1968 and GATT granted a waiver in 1971, along with another waiver allowing developing countries to grant preferences among themselves.[16]

[13]GATT Text; Articles XXXVI to XXXVIII can be found in any book on GATT.

[14]The Role of GATT in Relation to Trade and Development 7–17 (Geneva): GATT Secretariat, (1964).

[15]Robert E. Hudec, supra note 3, pp. 59–60.

[16]Autar Krishen Koul, supra note 6, pp. 119–151.

5 Tokyo Round and the Enabling Clause

Kennedy Round which lasted up to 1969 and the Tokyo Round of tariff negotiations which ended in 1979 resulted in tariff cuts on industrial goods. However, the average reduction in tariffs following each round was less favourable to developing countries—the deepest cuts in Kennedy Round occurred in manufactures requiring high concentration of capital and technology and on balance the discrepancy between tariffs on the export goods of developed and developing countries increased.[17] However, from the point of legal disciplines in international trade relations, 1960s and 1970s saw least respect for GATT rules and non-compliance to GATT rules became a rule and not an exception.[18]

The Tokyo Round in the backdrop of the then international economic scenario in which US economy had developed chinks relative to Japan and Western Europe which were experiencing rapid economic growth, the international community including less developing countries whose number in GATT had increased to 65 introduced the so-called 'Enabling Clause' which established the principle of differential and more favourable treatment for less developing countries, reciprocity and fuller participation by developing countries. It also provided for (a) preferential market access of developing countries to developed country markets on a non-reciprocal, non-discriminatory basis; (b) more favourable treatment for developing countries in respect of other GATT rules on non-tariff barriers; (c) the introduction of preferential trade regimes between developing countries; and (d) special treatment for least developed countries in the context of specific measures for developing countries.[19]

The use of surcharges by developing countries for balance of payments was to some extent legalised, and the Tokyo Round relaxed some of the other requirements for reviews of developing country balance-of-payments restrictions.[20] The framework text broadened the exceptions for 'infant-industry' protection in Article XVIII, removing the requirement of advance approval (a major concession) and broadening the right to protect existing non-infant industry.[21]

[17]Ibid., p. 30.

[18]Robert E. Hudec, supra note 3, p. 60.

[19]BISD, 26th Supp. 203–04, paragraph 1–4, (1980); A.K. Koul, The Legal Framework of UNCTAD in World Trade (1977).

[20]Ibid., pp. 205–09.

[21]Ibid., pp. 209–10.

6 S&D Treatment and Graduation

The developing countries did not participate in a number of Agreements (Codes) negotiated during the Tokyo Round especially the Export Subsidies, Countervailing Duties, Technical Barriers to Trade and Government Procurement, although these Agreements (Codes) did contain specific special measures for developing countries. On the other hand, developed countries did manage to introduce separate provisions to most of the Tokyo Round Codes usually entitled 'Special and Differential Treatment for Developing Countries'—S&D provisions.[22] However, an ingenious system of 'graduation' was also introduced which meant that the developing countries had to abide by the legal disciplines of the GATT and the obligations of multilateral trading system once their economic conditions and trade improved. This was also a mechanism which provided the developed countries a legal basis to phase out non-reciprocal preferential market access measures to contracting parties that over time, were deemed to have attained a sufficient level of progress.[23]

7 New International Economic Order (Nieo) and the Less Developing Countries

With the establishment of UNCTAD in 1964 as the chief spokesperson of less developing countries in matters of trade and other economic policy matters, the less developing countries clamour for more favourable and preferential treatment got a boost in 1974 when the United Nations adopted two major resolutions, one calling for the Establishment of a New International Economic order,[24] and the Programme of Action on the Establishment of New International Economic Order and the other declaring a Charter of Economic Rights and Duties of States.[25] The developmental perspectives gave thrust not only to international trade but also to international law. The New International Economic Order (NIEO) conceived of varieties of strategies to be introduced in international trade and economic relations which have been discussed and deliberated by scholars and policy-makers in full measure and are still being referred to in academic and policy formulations across the globe. However, for the purpose of this chapter, only two major issues would be referred: one, dealing with the right of countries for expropriation of foreign property, and two, the principle of preferential and non-reciprocal treatment in trade affairs. Both these principles are yet to be crystallised as customary principles of international

[22]The only exception was the Import Licensing Code, where developing country exemptions appeared in the text of the relevant rule or in footnote thereto. BISD Supp. 154 (1980).

[23]Ibid., p. 205.

[24]General Assembly Resolution 3201 (S-VI) of May, 1974; A.K. Koul, The North South Dialogue and The NIEO, IJIL 385–404 (1986).

[25]Ibid., Genera Assembly Resolution 3281 (XXIX) of 1976.

law, although it has been fairly recognised that equality principle (or non-discrimination principle) means that equal cases should be treated equally and unequal cases unequally.[26] The principle of economic equality of states demanded a new approach, correcting it to include preferential treatment for developing countries. The most-favoured-nations clause could not be applied in the relations between the industrially developed and developing countries,[27] since the international economic order as conceived in GATT was developed country centric and unfavourable to less developing countries' economies.

UNCTAD used the paradigm of New International Economic Order and was instrumental in making the policy-makers in GATT to realise the emergent needs of developing countries in the overall future GATT negotiations. Accordingly, UNCTAD was instrumental in establishing Common Fund for Commodities in 1980 which came into operation in 1989 besides the establishment of Generalised Scheme of Preferences on a permanent basis.

8 International Economic Scenario and the Less Developing Countries Prior to Uruguay Round

By the end of 1970s and the beginning of 1980s, less developing countries' trade concerns were fairly recognised in terms of (a) protections for infant industry or balance-of-payments purposes; (b) developing countries had not to reciprocate to the tariff concessions; (c) developing countries could take recourse to subsidies subject to the risk of countervailing duties; (d) Generalised Scheme of Preferences would provide access to the developed country markets of their exports; and (e) Commodity Fund would take care of stabilising their export earnings.

However, all the above-said measures of making the less developing countries as equal partners in the GATT proved cosmetic and the less developing countries exports did not increase commensurate to the international commitments as envisaged above. The reasons were; that for the purposes of market access, although tariffs on manufactured imports had been reduced considerably, yet non-tariff barriers had proliferated especially on the products of interest to developing countries. Textiles and clothing sector in which less developing countries had some comparative advantage were subjected to quotas under the Multifibre Agreements (MFA's) and voluntary export restrains were imposed by the developed country on the goods such as shoes, iron, steel and non-ferrous metals for the newly industrialised developing countries. Agricultural sector remained exempted from the GATT jurisdiction, which allowed the developed countries to use subsidies randomly which restrained the less developing countries exports in the sector. GSP

[26]Robert E. Hudec, supra note 3, p. 106.

[27]Milan Bulajic, 'Legal Aspects of New International Order, in Kamal Hossain (ed.), Legal Aspects of New International Economic Order and International Organisation, 46–61 (1980).

did not help the exports of less developing countries as it was riddled with as many contradictions as possible and the GSP margin of preference was eroded in successive multilateral tariff negotiations.[28]

9 Newly Industrialised Countries and the GATT

The early 1970s saw a clamour for preferential treatment for the less developing countries at the GATT. This was to some extent questioned by some of the advanced less developing countries, as it was believed that protectionism of every type does not help industrialise the economy. Rather protections either for infant industry or for foreign exchange or import substitution purposes make the less countries worse off with least export competitiveness.[29] By the end of 1980s, some of the less developing countries had shifted from protectionism to free trade, conducive to their economic development. However, all such liberalisation programmes were taken outside the GATT umbrella supported either by IBRD or IMF stabilisation and adjustment programmes which essentially involved conversion of quantitative restrictions into tariffs and tariff reductions, phasing out of selective export subsidies and the liberalisation of exchange markets.

The Enabling Clause of the GATT introduced by the Tokyo Round was found to have a bias in favour of protection and against exports in the commercial policy formulations in GATT as the clause created scope within the multilateral trading system for the implementation, and in some cases entrenchment, of development strategies with deleterious consequences.

The general consensus from the perspective of the developing countries was that;

The GATT and its rules are to be strengthened so that international trade law has fixed dimensions. In any such system, the developing countries have high stakes in order to secure market access in areas of export interests for which they need to reciprocate with commitments and concessions. After accepting the legal commitments under GATT, developing countries will exercise stronger impact on the decision-making process of GATT which developed countries cannot avoid. The principles of 'Graduation' have to be complied with, as the advanced developing countries cannot afford not to offer reciprocity, as it may be deleterious to the economic interests of other less developing countries. The efforts of UNCTAD in conceiving buffer stocks and commodity agreements and Common Fund had failed,

[28]The trade weighted preferential margin on imports (agriculture and industrial) into EFC, USA and Japan fell by 27.3% after the Tokyo Round; Assessment of the Results of the Multilateral Trade Negotiations, UNCTAD: Geneva, 1980.

[29]See generally, J. Bhagwati, Anatomy and Consequences of Exchange Control Regimes (New York: National Bureau of Economic Research, 1978); A.O. Krueger, Liberalisation Attempts and Consequences (New York: National Bureau of Economic Research, 1978).

and liberalisation of international trade is an a priori within the GATT structure and future negotiations and less developing countries have no less if not similar stakes to pursue a liberal, non-protectionism and multilateral trade agenda under the aegis of GATT.[30]

10 Developing Countries and the Uruguay Round

The place of less developing countries in the post-Uruguay Round, especially after the establishment of WTO in January 1995 and various multilateral agreements under it, is not only highly defused but complex. Yet from the perspectives of less developing countries, the various agreements concluded under the WTO offered significant opportunities of market access in the areas where they have comparative cost advantage such as Agriculture, Textiles and Clothing. As the voluntary export restraints are fairly eliminated in the WTO Agreement on Safeguards, the less developing countries have potential beneficial impact on primary products which are their main exports. As the tariffs have been reduced across the members of the WTO, the developing countries are equally benefited. The Dispute Settlement Mechanism as evolved in the WTO has tremendous impact on the sensitivities of less developing countries trade interests of not being brow beaten by the economic might of the developed countries as the dispute settlement is inherently evolved on fair play and justice in the international trading relations.[31]

The developing countries, however, were and continue to be fearful of some of the trade policy measures established under the WTO, viz. Agreements on Services, Trade-Related Intellectual Property Rights and the future of Special and Differential Treatment (S&D) of less developing countries and least developed countries. In addition, there is also the problem of how the obligations of the various agreements concluded under the WTO are to be implemented by the less developing countries keeping in view the earlier GATT 1947 obligations. As explained, Article XVIII read with part IV of GATT (Commitments) have allowed the less developing countries some flexibility in using trade measures for protection of their infant industries and for balance-of-payments difficulties, and part IV of the GATT obligates developed countries to improve the access of developing countries exports into their markets without reciprocity, the recognition of some flexibility for less developing countries was *quid pro quo* of their fuller participation in WTO and its allied multilateral agreements.[32]

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[30]Supra note 28 at p. 24.

[31]A.K. Koul, WTO Dispute Settlement Mechanisms: A Fresh Look, XXV 66–102, Delhi Law Review (2003).

[32]The Enabling Clause (Decisions on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 Nov. 1979; L/4903.

Although the Uruguay Round establishing the Marrakesh Treaty obligates WTO members to comply fully with the obligations conceived in the WTO and its various multilateral agreements, yet some amount of flexibility in recognising the developmental needs of less developing countries have been recognised in these agreements. The least developed countries (LDCs) have been accorded special treatment in these agreements in addition to the express acknowledgement of their needs in the Ministerial Decision on Measures in favour of least developed countries (LDCs) and the LDCs are obligated to respect only those commitments which are consistent with their development needs and individual capabilities. In addition, it sets out a framework for other countries to follow when formulating and implementing their national trade policies so that they are helpful to the LDCs.[33]

The WTO and its multilateral agreements are replete with differential and more favourable treatment for developing countries and LDCs, but the majority of these exceptions are either in the nature of exhortations or are general and others are very specific and relate to particular aspects of developed—or developing country policy. The clamour of less developing countries for recognising their special needs is often addressed in the preamble of the WTO and Multilateral Agreements expressed as, 'the need for positive efforts designed to ensure that developing countries and especially the LDCs secure a share in the growth of international trade commensurate with their economic development needs'.[34]

Committee on Trade and Development of the WTO has been entrusted to review periodically the special provisions in favour of less developing country member's and in particular to LDCs to submit the report to General Council for appropriate action.[35] Even to become original members, LDCs are only required to undertake commitments and concessions to an extent consistent with their industrial development, financial and trade needs or their administrative and institutional capabilities.[36] As a general rule in GATT Article XXXVI, the disequilibrium and economic disparity between developed and developing countries has been amply recognised and therefore keeping in view heterogeneity of the international economic relations, the international trade should be used as a means of achieving economic and social advancement of less developing countries; the less developing countries should be allowed to use special measures for promoting their trade and development.[37] Further, Article XXXVI recognises the principles that; (a) there is a

[33]LDCs are classified according to United Nations classification system. This is unlike the term less developing which has thus far been a subject of self-classification as far as international trade rules are concerned. In WTO, the abbreviation LDCs is used for a 'least developed country' and not for developing countries as a whole.

[34]Preamble of the WTO; TBT Agreement-Rights & Obligations of the Developing Country Members; Special Regard… to the special situation of developing country members while applying Anti-Dumping Measures, etc.

[35]Article IV: 7 of WTO.

[36]Article XI: 2 of WTO.

[37]Article XXXVI of GATT of 1994.

need for rapid and sustained expansion of the export earning of less developing countries; (b) positive efforts should be designed to secure for less developing countries a share in the growth in international trade; (c) as the less developing countries continue to depend on export of their primary products, their exports should be made accessible to world markets; and (d) measures should be devised to stabilise and improve the conditions of world markets for these exports assuring stable, equitable and remunerative prices for economic upliftment of less- developing countries. Their excessive dependence on primary commodity exports should be reduced which can be accomplished provided the less developing countries are supported with economic policies and measures so that they can export processed and manufactured products. Further, the chronic deficiency of foreign exchange earnings in the less developing countries has to be improved for which the international lending agencies (IBRD, IDA, IFC and IMF) should contribute effectively for alleviating their foreign exchange burdens.

11 Developing Countries and the Multilateral Agreements of the GATT/WTO

The special and differential treatment of less developing members in the WTO has not remained confined to the exceptions carved out for them in the Multilateral Agreements but has been subjected to further negotiations after the establishment of the WTO in 1995. Since the year 1995, six WTO Ministerial Conferences such as Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001), Cancun (2003) and Hong Kong (2005) have reinforced the special needs of the less developing and least developed countries with a profound impact on the future trade policy issues especially concerning less- developing countries. Those declarations either tried to incorporate new issues such a labour standards, competition policy, government procurement, environment, investment, or to accomplish and fine-tune the already negotiated agreements such as Agriculture, Services, and Intellectual Property Rights, etc.

The Singapore Conference set the agenda by establishing three working group, on trade and investment, trade and competition policy and transparency in government procurement in addition to conduct a study on trade facilitation. The Singapore Conference reiterated the importance of integration of less developing countries in the multilateral trading system and the differential and more favourable treatment conferred on them under the WTO dispensation and the complexities both legislative and procedural involved in complying with the commitments of the less developing countries for which the less developing countries require technical support. For least developed countries, a specific agenda by way of a Plan of Action was agreed which included *interalia*, duty-free access on an autonomous basis for their exports, enhancing investment opportunities and providing predictable and

favourable market access for LDCs products and to foster an integrated approach in association with UNCTAD and International Trade Centre.[38]

The Geneva Conference and its declaration (Adopted on 20 May 1996) carried forward the Singapore issues. However, no new initiative or policy statement for less developing or LDC was entertained. The Seattle Ministerial Conference of 1999 collapsed on account of stiff opposition by non-governmental organisations and other representatives of civil society representing labour, environment and other interests to the very foundation of WTO and its agenda which led the conference to keep the agenda open-ended. In respect of special and differential treatment for less developing countries, the Seattle Conference reiterated the importance of generalised, non-reciprocal and non-discriminatory preferences in favour of less developing countries as encompassed in the Enabling Clause. Further, it asserted that the significant role played by the existing preferential trading arrangements and agreements between developed and developing countries needs to be strengthened and waivers granted wherever feasible were also agreed upon.

The Doha Ministerial Conference and Declaration (November 2001)[39] turned out to be important in two respects. One, Doha Development Agenda scheduled to last up to 1 January 2005, included, *inter alia*, negotiations on; (a) agricultural subsidies with emphasis on reductions of and phasing out all form of export subsidies for farm products and substantial reduction in trade-distorting domestic support schemes; (b) industrial products so as to eliminate or reduce tariff and non-tariff barriers including tariff peaks (spikes) on sensitive products like textiles; (c) services negotiations on (i) market access for financial, telecommunication, and transport services and (ii) easing of immigration rules for workers employed on temporary contracts; (d) trade remedies which included negotiations as clarifying and improving disciplines on anti-dumping and countervailing duty as set forth in Article VI of the WTO Agreement on Implementation of Article VI of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM) Agreement 1994; (e) regional trade agreements so that the disciplines and procedures on customs unions and free trade areas are clarified and improved; (f) trade-related intellectual property (TRIPS) should be interpreted in a way that Members should not be prevented from taking measures to protect public health and should be understood and enforced in a way 'supportive of WTO' members right to protect public health and, in particular, to promote access to medicines for all; (g) geographic indications which includes negotiations on certain foods (namely cheese, ham and rice) and on the establishment of registering and notifying geographical indications on wines and spirits, with the possibility of extending the system to cover other items (such as cheese, ham and yogurt); (h) extended deadline for

[38]For the text of the Singapore Ministerial Conference and Ministerial Text, see, the WTO, ministerial, Singapore 1996, ministerial text.

[39]WTO, Ministerial Conference, Fourth Session (Doha), 9–14 Nov. 2001, Ministerial Declaration, WT/MIN (01)/Dec. W/1.

phasing out export and import substitution subsidies under Article 27.4 of the SCM Agreement; (i) the four Singapore issues such as investment, competition policy, trade facilitation and transparency in government procurement to be further negotiated if there is explicit consensus; (j) environment, the negotiation of which includes, *inter alia*, (k) relationship between WTO obligations and multilateral environment agreements (MEAS) (e.g., between TRIPs and U.N. Convention on Biodiversity, or between various WTO obligations and the Cartagena Biosafety Protocol for Genetically-Modified Organisms). (ii) information exchange between the WTO and MEA Secretariats, and (iii) reduction on trade barriers to environmentally—friendly goods and services. Second, the special and differential treatment for the less developing countries was recognised in all the items of the Doha Development Agenda. More specifically, in the item on intellectual property rights the concerns of the less developing countries for compulsory licensing and parallel imports were recognised in addition to allowing members to protect public health and other concerns.

The Cancun Ministerial Conference (September 2003) and the Hong Kong Conference (2005) carried forward the Doha Development Agenda and one significant achievement was the allowance of access of essential medicines for the countries which do not have capacity to manufacture drugs crucial for addressing public health crises and also the use of compulsory licensing provisions of the TRIPs Agreement and parallel imports. For the LDCs the time for implementing the TRIPs Agreement was extended up to the year 2016.[40]

12 Less Developing, Least Developed Countries and the Individual WTO Multilateral Agreements: An Assessment

Before making any assessment of how developing and LDCs trade interests have been covered in the Multilateral Agreements, it is important to note that no economic assessment of the benefits that have flowed or would flow to developing and least developed countries has been made although the presumption is that in the context of globalisation, free trade and market access being the dominant philosophy, there is little scope for protectionism or exception in favour of any member of the WTO be if the developed or the developing. Multilateralism as conceived in WTO and Multilateral Agreements propound the theory of multilaterally agreed and applied trade laws enforced by the WTO settlement systems with the commitment that WTO members should not be allowed to take unilateral decisions. However, trade as an instrument of development, to raise the standards of living, expand production, the special needs of the less and the least developed countries cannot be sidetracked.

[40]WTO, Annual Report (2004), pp. 3–5.

(i) WTO Agreement on Agriculture (AoA)

WTO Agreement on Agriculture (AoA) from the perspectives of less developing and least developed countries contains various measures that exempt less developing and LDCs members from disciplines and measures that apply generally and it extends longer timetables or more modest reductions in government support and subsidies that are required from other members. AoA which was to be implemented over a period of six years beginning 1995 was extended to a period of 10 years for developing countries. Developing countries were expected to cut tariffs by an average of 24% over 10 years whereas the developed countries had to make tariff cuts of 36% in equal proportion over a period of six years.[41]

In the AoA, five broad areas, which have specific importance for the developing countries, are; market access; food security (with specific reference to net food importing countries); domestic support commitments; export subsidy commitments; and notification requirements and technical assistance. The phasing out of all forms of export subsidies in farm sector and the reduction of trade-distorting domestic support schemes and market access are on the agenda of WTO and by the end of Cancun Ministerial Conference (24th August 2003) some progress has been made in these directions.[42]

However, the challenges that lie ahead for the international economic order in dealing with agriculture go beyond the commitments of AoA. For example, the scientific research in agriculture in the areas of genetically modified seeds and bio-technology in the sector and consequent patent protection may pose far greater challenges for less- developing countries in addition to food security in a sector which presumably may benefit the less developing countries.[43]

(ii) WTO Agreement on Technical Barriers to Trade (TBT Agreement)

The developing countries special difficulties in the formulation and application of technical regulations, standards and conformity assessment procedures were duly recognised and except in cases of safety, health, environmental protection or national security emergencies developing country members are allowed sufficient time to adopt the new technical regulation.[44] Further, it is obligatory on Members to take care not to create unnecessary obstacles to exports from developing members when preparing and applying their technical regulations, standards and conformity procedures.[45] Developed country members will have to take into account the special, developmental, financial and trade needs besides periodically examining the special and differential treatment being accorded to developing country

[41]Trading into the Future: The World Trade Organization (WTO, 2nd Ed., Feb., 1998), pp. 17–18.

[42]WTO, Draft Cancun Ministerial Text, the WTO, ministerial—Cancun 2003.

[43]Communication to the WTO from India, WTO Doc.WT/GC/W/114 dated 18th Nov. 1998, see also WTO DSB WT/DS26/AB/R and WT/DS 48/AB/R, (16th Jan., 1998).

[44]Article 2.12 of the Legal Text of the Agreement on Technical Barriers to Trade, (TBT Agreement), 1994.

[45]Articles 12.2 and 12.3 of the TBT Agreement.

members on national and international levels.[46] The developing country members are not expected to use international standards as the basis for their own technical regulations, standards or testing methods. If the international methods are not appropriate to the country's individual development situation and upon request the Committee on Technical Barriers to Trade may grant developing country members specific, time limited exceptions from obligations under this Agreement.[47]

The WTO Secretariat has been entrusted with providing (a) notification relating to products of particular interest, (b) advice or technical assistance both for preparing technical regulation or national standardising bodies, conformity assessment systems and other technical support for less developing members.[48]

The developing countries have been facing serious problems in applying the requirements of TBT Agreement and the same have been voiced in the Doha Declaration, c.f.; conformity of less developing countries to the standards of TBT Agreement, transferring of knowledge and technology for preparing and adopting of technical standards or conformity assessment procedures, which are being looked into by the Technical Committee of the TBT Agreement and some follow up action has been taken.[49]

(iii) WTO Agreement on Trade-Related Investment Measures (TRIMs)

The Agreement on TRIMS requires WTO members to eliminate trade-related investment measures (TRIMS) that are inconsistent with Article III or Article XI of GATT, 1994. However, recognition was given to the developing country members to temporarily apply otherwise prohibited TRIMS in accordance with the GATT rules on the protection of infant industries (Article XVIII: C) and balance-of-payments safeguards (Article XVIII: B, the 1979 Declaration on Trade Measures Taken for Balance of Payments purposes)[50] and the Understanding on Balance of Payments Provisions of the GATT, 1994.[51]

LDC members have a seven year transitional period and less developing country members have five years and developed country members have just two years to eliminate all GATT inconsistent TRIMS in addition that Council for Trade in Goods may extend the transition period under special circumstances.[52] One of the 'Singapore issues' TRIMS are on the agenda of the WTO for further negotiations.[53]

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[46]Articles 12.2 and 12.3 of the TBT Agreement.

[47]Article 12.8 of the TBT Agreement.

[48]WTO, Annual Report (2004), pp. 46–47.

[49]WTO, Annual Report (2004), pp. 46–47.

[50]BISD 26D/205-209.

[51]Art. 4 of the Legal Text on Understanding on Balance of Payments Provisions of the GATT, 1994.

[52]Art. 5 of the TBT Agreement.

[53]Trading into the Future, supra note 40, pp. 47–48.

(iv) WTO Agreement on Implementation of Art. VI of the GATT (Anti-dumping) and Agreement on Subsidies and Countervailing Measures

Article VI of GATT 1994 allows members to apply anti-dumping measures on imports of a product when the export price is below its 'normal value' (usually, the comparable price of the product in the domestic market of the exporting country), if such imports cause or threaten to cause material injury to a domestic industry. The Agreement on Implementation of Article VI of GATT 1994 sets forth detailed rules concerning, the 'determination of dumping', 'injury', and 'causal' link, and the procedures to be followed in initiating and conducting anti-dumping investigations. Further WTO members are under a continuing obligation to notify their anti-dumping legislation or regulations (or lack thereof) to the WTO Secretariat.[54]

The interests of less developing countries in the Anti-Dumping Agreement have been recognised fleetingly either in 'special regard to the situation of developing country members' or 'constructive remedies must be explored before anti-dumping measures are applied affecting the essential interests of developing countries'.[55] In the Doha Declaration, the developing countries members insistence that the anti-dumping and countervailing duty rules required more clarification was put on the future negotiation of the WTO.[56]

The Agreement on Subsidies and Countervailing Measures (the SCM Code) regulates the provision of subsidies and the imposition of countervailing measures by Members, and the Agreement applies to subsidies that are specific to an enterprise or industry or group of enterprises or industries within the territory of a Member. Specific subsidies are divided into two categories, prohibited subsidies under Part II of the Agreement and actionable subsidies under Part III of the Agreement. Part V of the Agreement governs the conduct of countervailing duty investigations and the application of countervailing measures by Members. Parts VIII and IX of the Agreement provide special and differential treatment, respectively for developing country members and for members in transformation to market economy.

The developing country members are subject to the eight-year transition period in Article 27.2(b) of the SCM Agreement subject to further extension on request. After the Doha Declaration, the Ministers agreed that Annex, VII (b) of the Agreement included the Members that were listed therein until GNP per capita reached US $1000 in constant 1990 Dollars set forth in January 2003, the methodology for calculating constant 1990 Dollars as set forth in G/SCM/38, Appendix 2 applies.

The developing countries members have been accorded special and differential treatment in the cases of total ad-valorem subsidisation of a product which exceeds 5% subsidies to cover losses sustained by an industry or with certain exceptions by

[54]A.K. Koul, Uruguay Round of Tariff Negotiations And the WTO, The Emergent Issues, V. I, KLJ 100–26 (1995).

[55]Article 15 of the Anti-Dumping Agreement.

[56]WTO Annual Report (2004), pp. 43–46.

an enterprise and direct forgiveness of debt and grants to cover debt repayment. The burden of proof of serious prejudice in such cases falls on the complainant. On the other hand, actionable subsidies maintained by less developing members are actionable multilaterally provided they cause serious injury or impair other member's benefits under GATT, 1994, by displacing or impeding that members import of like products into the developing country markets.[57]

A countervailing investigation on an export from a developing country member must be terminated if the volume of subsidised imports from that member is negligible, i.e., less than 4% of the total imports of like products into the importer's market, unless collectively, the total share of all developing country members having less than a 4% import accounts for more than 9% of the complainant's imports of that product.[58]

This agreement also requires the termination of countervailing investigations against developing country members if the level of subsidisation is no more than 2% of the per unit value of the product, as opposed to the 1% allowed for developed country members. For Annex VII countries (i.e., LDCs and listed developing countries), the *de minimis* level is set at 3%. It is also 3% for those developing countries that eliminate their export subsidies before the end of the eight-year transition period.[59]

The Committee on Subsidies upon request by a developing country member may review the consistency of another member's countervailing measure with special and differential treatment provisions.[60]

The direct forgiveness of debt and certain other subsidies are not actionable under multilateral rules when such subsidies are granted within, and directly linked to, a privatisation programme of a developing country member. Any programme of this kind (and the subsidies involved) must, however, be notified to the Committee on Subsidies and Countervailing Measures, must be in place only for a limited period of time and must result in the eventual privatisation of the enterprise concerned.[61]

Developing countries Members not included in Annex VII of this Agreement are allowed to phase out their export subsidies over a period of eight years, as long as these are consistent with their development needs. During this period such Members must not increase the level of their export subsidies. Annex VII countries are exempt from the prohibition on export subsidies.[62]

Upon request from an interested member, the Committee on Subsidies and Countervailing Measures will determine whether or not a specific export subsidy

[57]Articles 27.8 and 27.9 of the SCM Agreement see generally, A.K. Koul, The Legal Regime of Subsidies and Countervailing Measures in WTO, V. XXI, 38-69, Delhi Law Review (1999).

[58]Article 27.10 of the SCM Agreement.

[59]Articles 27.10 and 27.11 of the SCM Agreement.

[60]Articles 27.10 and 27.11 and 27.15 of the SCM Agreement.

[61]Article 27.13 of the SCM Agreement.

[62]Article 27.2 (a) of the SCM Agreement.

practice of a developing country conforms with its development needs.[63] The phasing- out period for developing country export subsidies may be extended year by year if necessary and agreed to by the Committee. If an extension is not granted, however, then export subsidies must be phased out within two years. In practice, this means that any developing country applying for an extension before the original eight years are up will automatically gain two more years exemption, even if the application is turned down.[64]

The prohibition on local content subsidies does not apply to developing country members for a period of five years after entry into force of the Marrakesh Agreement, nor to LDC members for a period of eight years.[65]

Developing country members other than Annex VII countries that attain 'export competitiveness' for particular products have two years to phase out export subsidies on these items. Competitiveness exists if a developing country's exports of a product reach 3.25% of world trade in the product, for two consecutive years. Annex VII country members (i.e., LDCs and listed developing countries have a period of eight years in which to phase out export subsidies on products for which they have attained export competitiveness.[66]

(v) WTO Agreement on Safeguards

Under the Agreement, WTO members may take 'safeguard' actions with respect to a product if increased imports of that product are causing or threatening to cause, serious injury to the domestic industry that produces like or directly competitive products. Prior to the Uruguay Round, safeguard measures could be applied on the basis of Article XIX of GATT 1947. The WTO Agreement on Safeguards establishes additional substantive and procedural requirements for applying new safeguard measures. It also stipulates that Members shall not seek, take or maintain any voluntary restraints, orderly marketing arrangements or any similar measures, which afford protection.

Imports originating in a developing country Member are exempt from safeguard measures if: (a) those imports' share of the importing member's imports of the product concerned does not exceed 3%, and (b) total imports from those developing country members having less than a 3% individual import share do not account collectively for more than 9% of the total imports of the product.[67]

Developing country members, like all members, may apply safeguard measures for a maximum initial period of four years. Developing country members may then extend these measures for a maximum additional period of six years, rather than the four-year extension period allowed for developed country members.[68]

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[63]Article 27.14 of the SCM Agreement.

[64]Articles 27.2 (b) and 27.4 of the SCM Agreement.

[65]Article 27.3 of the SCM Agreement.

[66]Articles 27.5 and 27.6 of the SCM Agreement.

[67]Article 9.1 of the Agreement on Safeguards.

[68]Article 9.2 of the Agreement on Safeguards.

Generally, safeguard measures imposed since the entry into force of the WTO and lasting more than 180 days cannot be re-imposed until after a period of time equal to the original duration of the safeguard—with a minimum allowable non-application period of two years. For developing country members, however, re-imposition is allowed after the lapse of a period equal to half the time that the original measure was in place, although the two-year minimum still applies. (For example, a measure in place for five years in a developing country may be re-imposed after two and a half years.[69])

(vi) WTO Agreement on Implementation of Article VII of GATT, 1994 (Customs Valuation Agreement)

The Agreement on Customs Valuation recognises the importance of the provisions of Article VII of GATT 1994 keeping in view the weaknesses in the earlier attempts of the Tokyo Round to develop uniform standards for customs valuation and provides certain methods and mechanisms of customs valuation by the customs authorities of the WTO members in a uniform and consistent manner.

The developing countries-general interest for securing additional trade benefits has been recognised, in the sense that less developing countries have been granted the right to refuse a request from an importer to reverse the order of the fourth and fifth methods of valuation listed in the Agreement.[70] Further, the developing countries' members may also reserve the right to value imported goods on the unit price at which the imported goods have been resold in the country of import, after undergoing further processing. This method of valuation may be applied whether or not the importer requests it whereas developed country members can do this only upon request of the importer.[71] Although a system of minimum customs valuation is prohibited under the Agreement, developing countries may retain a system of officially established minimum value, on a limited and transitional basis, and according to terms and conditions agreed by the Committee on Customs Valuation of the Agreement.

Finally, developing country members can request for technical assistance from a developed country member for making the customs valuation agreement workable.

(vii) WTO Agreements on Pre-shipment Inspection and Import Licensing Procedures

Both the Agreements recognise the general interests of less developing members for technical assistance to be provided bilaterally or multilaterally to make the Agreements functional. In case of the Agreement on Import Licensing, the import licensing should conform to GATT provisions and does not have trade-distorting effects; members are under an obligation to take into account trade, development

[69]Ibid.

[70]The Deductive and Computed Value Methods as put in Annex. III: 3 of the Customs Valuation Agreement.

[71]Annex. III: 4 of the Customs Poster Valuation Agreement.

and financial needs of less developing countries. So far as non-automatic import licensing regimes are concerned, developing countries are on the same footing as developed countries and must provide, upon request, all relevant information concerning the administration, the distribution of import licenses among supplier countries, the import licenses granted over a recent period and where practicable the import statistics of the products concerned. However, less developing members are not required to take additional administrative or financial burdens to provide this requirement.[72]

(viii) WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

The SPS Agreement sets out the rights and obligations of members when taking measures to ensure food safety, to protect human health, plant or animal-spread diseases, or to protect animal or plant health from pests and diseases. Governments are under an obligation to ensure that their food safety and animal or plant health measures are necessary for health protection, are based on scientific principles, are transparent, and are not applied in a manner which would constitute a disguised restriction on international trade. The measures must be justified through an assessment of the health risks involved. The use of internationally developed standards is encouraged. Advance notice must be given of imposed new regulations or modifications to requirements whenever these differ from relevant international standards.

While the SPS Agreement recognises the general interests of less developing members both in terms of their inability to comply with SPS measures as well as their compliance with internationally developed SPS standards no specific S&D treatment is provided for less developing countries, rather the SPS Agreement applies to LDCs also since January 2000. The less developing Members have vociferously opposed the onerous liability of SPS measures and have asked for special facilities to implement the SPS measures effectively.[73]

(ix) WTO Agreement on Textiles and Clothing (ATC)

ATC entered into force on 1 January 1995. It was a ten-year transitional agreement with a programme to gradually integrate the textile and clothing sector fully into GATT, 1994 rules and disciplines by the end of 2004. Under the ATC, when products are integrated, they are removed from the Agreement and normal GATT rules apply to this trade. Further, if the integrated products are subject to bilateral quotas carried over from the former multifibre Arrangement these quotas must be removed. The integration was to be achieved through three stages: in the first stage (1995–1997), the products accounting for at least 16% of the total volume of each

[72]Article 3.5(a) of the Import Licensing Procedures Agreement.

[73]Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Doc. G/SPS/12; 11 March, 1999, para. 4 and WTO Doc G/SPS/12, 11 March, 1999, para. 13.

country's imports in 1990s; a further 17% in the second stage (1998–2002); in the third stage, on 1 January 2003 all remaining restrictions were to be removed. Total product integration is now, at least 51% of the member's total imports in 1990. It has been estimated that the main- importing members had liberalised about 20% of imports under specific quota restrictions at the beginning of the third stage. The process was completed by 31 December 2004 with the integration of all remaining products and the full removal of the quota regime.[74]

The ATC Agreement recognises the special treatment for less developing countries generally either by way of consultation for cotton producing exporting members or by S&D treatment in the application of quotas to small supplies, wool producing developing countries and countries having significant proportion of their trade in outward processing. At the same time, the transitional safeguards cannot be taken against exports of handloom fabrics, handmade cottage industry products or folklore handicrafts and historically traded products such as bags, sacks, etc., from jute and some other fibres and pure silk products.[75]

This Agreement was terminated on 1 January 1995, together with all the restrictions maintained under its jurisdiction.

The Doha Declaration on Implementation-Related Issues and concerns contains several proposals relating to textiles and clothing, of which two relate to market access improvements in the context of ATC, through changes in the methodology for the application of quota growth rates.[76]

(x) WTO General Agreement on Trade in Services and Related Decisions and Annexes (GATS)

The four elements of GATS are its main text, containing general principles and obligations, annexes dealing with rules for specific sectors, individual countries specific commitments to provide access to their markets and lists showing where countries are temporarily not applying most-favoured-nation principle of non-discrimination. The methods of providing an international service defined by the GATS are 'cross-border supply' (services supplied by one country to another); 'consumption abroad' (consumers or firms making use of services in another country); 'commercial presence' (a foreign company setting up subsidiaries or branches to provide services in another country) and 'presence of natural persons' (individuals travelling from their own country to supply services in another country).

The GATS covers all internationally traded services. These include: business services (professional services, computer and related services, research and development services, real estate services, rental/leasing services without operators, advertising and other miscellaneous services); communication services (courier services, postal services, telecommunications services, audio-visual services);

[74]World Trade Organization, Annual Report (2004), pp. 39–40.

[75]Annex. I of the ATC Agreement.

[76]See generally, the Doha Declaration, WTO, WT/MTN(OI)/(DEC. 1, 20 Nov., 2001).

construction and related engineering services; distribution services; educational services; environmental services; financial services (insurance services, banking and other financial services); health and related social services; tourism and travel-related services; recreational; cultural and sporting services (entertainment services, news agency services, libraries, archives, museums and other cultural activities, sporting and other recreational services); and transport services (maritime transport services, internal waterways services, air transport services, space transport, rail transport services, road transport services, pipeline transport services and services auxiliary to all modes of transport).[77]

The S&D treatment for less developing countries is more pronounced in GATS as it provides market access only according to 'specific commitments' made by the country concerned as well as process of liberalisation to take place with due regard to national policy objective and the level of development of individual members both overall and individual sectors. It also accords developing countries a right to 'appropriate flexibility for opening up fewer sectors, liberalising fewer types of transaction, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching such conditions aimed at achieving the objectives such as strengthening their domestic capacity through access to technology, access to distribution channels and information networks, and liberalising in sectors and modes of supply of export interest to them'. The progressive liberalisation as conceived in GATS created significant opportunities for developing countries and provided incentive to many developing countries to accept the GATS.[78] The gains by acceding to the GATS are; (a) the availability of transferable capital as capital moves across the national boundaries freely through the MNCs; (b) new and faster methods of creating trade especially in the areas of financial services, telecommunication and information technology; (c) the strong movement for labour created in a rapidly changing international economy and its factors of production; and avoidance of distortions in the service market with least governmental intervention providing faster growth for the services sectors.

However, there are some major concerns such as accessibility of latest technology in services which is not readily transferred, Movement of Natural Persons including natural and professional people required in the developed countries which are denied entry in the developed countries either by fixing quotas or on other pretexts and conditional commitments especially in maritime service sector. Finally, the loophole of what amounts to emergency safeguard in Art. X of the GATS is equally a cause of concern for less developing countries.[79]

[77]GATT Doc. MTN.GNS/W/120 (10 July, 1991).

[78]Case in point is that of India which committed itself of opening up of some service sectors, banking, insurance and telecommunication with 49% foreign equity and in investment in these sectors, see WTO Doc./S/GBT/W1/Add. 24. Rev. I, (14 Feb., 1997).

[79]See generally Asoka Mukherji, Developing Countries, and the WTO, 34 JWT 33–74 (2000).

The service sector as a whole is pending further negotiations and the above problems are being subjected to future negotiations.[80]

(xi) WTO and Trade-Related Intellectual Property Rights (TRIPS)

Protection of intellectual property rights in international trade law are essentially the concern of World Intellectual Property Organisation (WIPO) and various international conventions and agreements and as such did not find place in GATT 1947. However, the Uruguay Round negotiations resulted in WTO TRIPs Agreement which came into effect on 1 January, 1995, with the purpose to 'contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare'.[81] The TRIPS Agreement covers intellectual property, *interalia*; in copyright and related rights (i.e., the rights of performers, producers of sound recordings, and broadcasting organisations); trademarks, including service marks; geographical indications including appellation of origin; industrial designs; patents including the protection of new varieties of plants and micro-organisms; layout-designs of integrated circuits; and undisclosed information including trade secrets.

The acrimony in the early negotiations of TRIPs in the Uruguay Round reflected a clear north-south developmental dimensions wherein the developed countries were insisting on increased IPRs protection for research and development, to promote foreign direct investment and encourage the transfer and dissemination of technology which was strongly opposed by less developing countries on the premise that the stronger IPRs protection does not suit their economic interests, is inappropriate for their social and economic and technological needs, and would make them worst off in the aggregate benefits of stronger IPRs protections which ultimately would benefit the developed countries.[82] However, given the fact that intellectual capital as reflected in IPRs essentially are private rights, the owner of the right cannot be denied rewards for his labour from the market, therefore, IPRs may serve both as an incentive for the creation, use and exploitation of inventions, works, marks and designs and as a stimulus to competition in a well-functioning, free market economy.[83]

The breadth of the IPRs disciplines covered in the WTO Agreement on IPRs is unprecedented at the international level. It supplements the basic WIPO convention on IPRs with substantive obligations and disciplines within the WTO, *inter alia*, most- favoured nations obligation, a novelty in international IPRs, whereby any advantage a member grants to the nationals of any other country must be extended

[80]WTO, WT/MIN (01)/DEC/1(20 Nov. 2001).

[81]Article 7 of the TRIPS Agreement.

[82]A.V. Deardorff, Could Patent Protection be Extended to all Developing Countries, 13, the World Economy 497–508, (1990).

[83]UNCTAD/ITE/1, The TRIPs Agreement and Developing Countries (United Nations, New York and Geneva, 1996), p. 53.

to nationals of all other WTO members and is subject to the dispute settlement system of WTO.[84]

TRIPs Agreement has a commitment that members may adopt measures to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development and also to prevent the abuse of IPRs by right holders or to resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.[85]

From the point of view of less developing countries, although transitional provisions[86] were provided for complying with the TRIPS Agreement, yet the working of the TRIPs Agreement for the last decade amply demonstrated the eagerness of the developed industrialised world to impose their laws of IPRs protection with a focus of preserving the monopoly rights of their corporations as the vehicles of technology, investment and trade in international economy.[87] The developing countries it is presumed, will have to bear increased costs in the patent sector of the IPRs protection and protection of geographical indications and trademarks is equally detrimental to the economic interests of the less developing countries as their protection would increase rents that accrue to their holders/producers which are mostly located in the developed countries. Further geographical indications are important in food, wine and spirit industries as these products from a particular location are claimed to possess superior qualities due to unique, vegetative, climatic and/or soil conditions and such product differentiation is of significance primarily to the developed countries.

Under TRIPs, the treatment of wines and spirits is not identical to that of other products: whereas the former have explicit additional protection for geographical indications,[88] the general protection provided to other goods is less rigorous.[89] Some developing countries including India have become aware of the possible benefits to be had by extending the additional protection to wines and spirits to products of interest to them, for example food, handicrafts and folklore.

The most debatable issues in the TRIPs Agreement from the standpoint of developed versus developing countries centres round the interpretation of Articles 27.3 and 29 of the TRIPs Agreement. Article 27.3 of the TRIPs Agreement obliges countries to provide product patents for micro-organisms and for non-biological and micro-biological processes and also protection of plant varieties by either

[84]Ibid., at p. 7; Trading into the Future: The World Trade Organization (WTO. 2nd ed. Feb., 1998), pp. 25–28.

[85]Article 8 of the TRIPs Agreement.

[86]Articles 65 and 66 of the TRIPS Agreement.

[87]India for instance was subjected to bullying pressures and various tactics by the USA under super and special section 301 of Trade Act, 1978 and a dispute was raised against India's patent protection regime for Pharmaceuticals and Agricultural Chemicals Products. The absence of a 'mail box' provision in India's Patent Act, 1970 was found to be inconsistent with India's obligation under TRIPS Agreement, WTO, DSB Report, WT/DS50/AB/R (19 Dec., 1997).

[88]Art. 23 of the TRIPS Agreement.

[89]Article 22 of the TRIPS Agreement.

patents or an effective *sui generis* system, or combination thereof, whereas the Convention on Biodiversity (1992) (CBD) gives nations the sovereign rights over their natural resources and the authority to determine access to genetic resources in keeping with national legislation. The CBD Convention further stipulates that any access granted, shall be on mutually agreed terms and shall be subject to prior informed consent of the resource provider. Thus Article 27.3 is in direct derogation of the CBD Convention.[90] Further, there are growing instances of 'bio-piracy' where the MNCs of the developed world have patented natural resources based on traditional/folklore knowledge in developing countries such as neem, turmeric, and other traditional resource. Hence, there is an urgent need to reconcile TRIPS Agreement with CBD Convention.

The developing countries have put forward proposals of amending Article 29 of the TRIPs Agreement so that a clear categorisation of all known information, pertaining to knowledge and practice of the biological source materials by indigenous communities of the country of origin is made available. Other proposals included the establishment of a Material Transfer Agreement with country of origin where the inventor made use of indigenous or traditional knowledge and local, contemporary innovations of traditional folk.[91]

Less developing countries have voiced some other fears especially in respect of access to technology on realistic terms, dual-use technologies which restrict access of technology to less developing countries and the issue of compulsory licensing under Article 31 of the TRIPs Agreement for purposes of safeguarding public health and prevention of disease and parallel imports.[92]

The Doha Declaration and Development Agenda[93] have accepted that TRIPs should not prevent Members from taking measures to protect public health and access to medicines for all. It includes a number of important clarifications of some of the form of flexibility available in the TRIPs Agreement, in particular, parallel imports and compulsory licensing. In addition, it provides for an extension until 2016 of the transition period for LDCs in regard to the protection and enforcement of patents and undisclosed information with respect to pharmaceutical products.[94]

Council on TRIPs in pursuance of the Doha Declaration is seized of (a) implementation of TRIPs and public health; (b) review of the provisions of Article 27.3 (b), the relation between the TRIPs Agreement and the Convention on Biological Diversity, and the protection of traditional knowledge and folklore; (c) initiations of

[90]Asoke Mukherji, supra note 78, p. 57.

[91]Report of the Committee on Trade and Environment 1996, WTO Doc. Wt/CTE/W/40 (7th Nov., 1996), p. 34.

[92]For a discussion on these issues, see Communication from India to the WTO. WTO Doc. WT/GC/W/352 (11 Oct., 1999).

[93]WTO, Ministerial Declaration on the TRIPs Agreement and Public Health, WT/MIN(01)/DEC/1 pp. 3–4. See also, James Thu Gathii, the Legal Status of Doha Declaration and Public Health, Harvard Law Journal & Technology, 296–98 (2002)

[94]Ibid.

geographical indications in areas other than wines and spirits and other issues pertaining to TRIPS and less developing countries.[95]

(xii) WTO Dispute Settlement Mechanisms

The 'Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), created an integrated system for dispute settlements by bringing all the WTO Multilateral Agreements under the jurisdiction of DSU and established automaticity in decision making and time frames for completion of dispute settlement procedure.[96] The DSU and Dispute Settlement Body (DSB); (General Council of WTO when adopting a ruling gets converted into Dispute Settlement Body) has been conceived to create security, predictability and efficacy in the WTO multilateral trading system reducing the potential of unilateral action by any member including the developed ones which in turn would ensure the governments, policy-makers, trades and producers and consumers repose faith in the multilateral rule-based international trade.

Since the establishment of WTO in 1995 and by the end of the year 2008, more than four hundred disputes were initiated under the dispute settlement system involving both the developed and the developing members. The four hundred mark surpasses the number of disputes brought to its predecessor GATT 1947 during its entire existence of almost fifty years. The above figures of disputes brought before the DSB show that member governments have reposed confidence in the WTO settlement system and the WTO Multilateral Agreements.

The developing countries have equally contested their claims in the dispute settlement systems which have provided them both the challenges and opportunities of adjusting to the international economic order. The DSU contains 27 Articles totalling 143 paragraphs plus four appendices and is perhaps the most significant achievement of the Uruguay Round negotiations, being referred as jewel in the crown of WTO. This dispute settlement system is unique in international trade law for the fact that DSU confers compulsory jurisdiction on the DSB for settlement of disputes as well as the interpretative role of the WTO dispute settlement system is made explicit in Article 3(2) of the DSU which provides that the system serves to clarify the provisions of the WTO agreements in accordance with the customary principle of international law.

The central provision pervading the settlement of disputes under the WTO is GATT Articles XX and XXIII 1947 incorporated *mutatis mutandis* in GATT 1994. Article I of the DSU sets out the coverage and applicability pursuant to its consultation and dispute settlement provisions concerning the 'Covered Agreements'

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[95]World Trade Organization, Annual Report (2004), p. 22.4. See also, James Thu Gathii, the Legal Status of Doha Declaration and Public Health, Harvard Law Journal & Technology, 296–98 (2002).

[96]A.K. Koul, WTO Settlement of Disputes Mechanism, A Fresh Look V. XXV Delhi Law Review, 66–102 (2003)—Settlement of Disputes in International Trade, 1, N.C.L.J., 46–48 (1996); WTO Dispute Settlement Mechanisms: A Fresh Look, XXV 7–102, Delhi Law Review (2003).

which are listed in Appendix I; The Agreement Establishing the World Trade Organization; the 13 individual multilateral agreements on Trade in Goods; GATS; TRIPs and the four Plurilateral Agreements. It encompasses measures affecting the operation of any covered agreement taken within its territory of a member, including measures taken by regional or local governments.[97] The rules of DSU with special modification have been made applicable to other Agreements as listed in Appendix 2 to DSU.

The DSU created three institutions to administer WTO dispute settlement mechanism. The DSB established under Article 2 of the DSU for the purpose of administering rules and procedures and DSB has the power to establish panels, adopt panel reports and Appellate Body reports, supervise the implementation of recommendations and rulings, and authorise sanctions for failure to comply with dispute settlement decisions. The General Council of the WTO serves as DSB but the DSB has its own chairman and follows separate procedures for those of the General Council.

DSB has the power to establish Appellate Body to review panel rulings.[98] The Appellate Body is a standing institution composed of seven persons appointed by the DSB for four-year terms.[99] The members of the Appellate Body must be persons with demonstrated expertise in law and international trade who are not affiliated with any government.[100] The Appellate Body hears cases in divisions of three, but each member is required to stay abreast of the dispute settlement activities of the WTO. The WTO system continues the panel system of GATT. Panels are composed of three (exceptionally five) persons, well qualified governmental or non-governmental individuals, selected from a roaster of persons suggested by the WTO members. Panel members serve in their individual capacity and not as representative of WTO members.[101]

As already said that the DSU of the WTO is considered as a jewel in the crown of the WTO trading system and the support for the DSU has been acknowledged universally transcending the developed and the developing countries with euphoria and exuberance. However, from the very beginning there have been proposals submitted to WTO for reform of its dispute settlement system.

From the perspectives of developing countries, the reform proposals can be catalogued as; (a) transparency, participation and prompt settlement of disputes; (b) integrated mechanisms for the application of panel and appellate body decisions; (c) Art. 21.2 of the DSU be reformed to address the sequencing problems; (d) non-allowance of *Amicus Curiae* briefs from Non-Governmental Organisations (NGOS); need for transparency and public understanding of WTO from the standpoint of less developing countries economic interests especially after the Doha

[97]GATT focus No. 407, May 1994 at p. 12.

[98]WTO Agreement, Article IV: 3.

[99]DSU, Article 17.

[100]Ibid.

[101]Article 8 of the DSU.

Declaration. Numerous proposals have been submitted in these directions and public report on the status of implementation of decisions and rulings have been made sufficiently. All such proposals have been consolidated as texts for the reform of the dispute settlement understanding and are actively being pursued for future negotiations.[102]

13 WTO and Other Issues

(I) Trade and Environment

The link between trade and environment was recognised in the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil in 1992 which was reiterated in a 'Ministerial Decision on Trade and Environment issues adopted at Marrakesh in 1994, to coordinate policies in the field of trade and environment… without exceeding the competence of the multilateral trading system, limited to trade policies and those trade related aspects of environment policies resulting in significant trade effects for members of WTO'.[103] At the same time, the Decision formulated a work programme for the establishment of a Committee on Trade and Environment (CTE) in the WTO.

The CTE has been empowered to study the link between trade and environment and to investigate and report on such issues as: (a) the relationship between the provisions of multilateral environmental agreements and those of the WTO; (b) the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system; (c) the relationship between the provisions of the multilateral trading system and (i) charges and taxes for environmental purposes, and (ii) requirements for environmental purposes relating to products, including standards and technology regulations, packaging, labelling and recycling; (d) the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects; (e) the relationship between the dispute settlement mechanism in the multilateral trading system and those found in the multilateral environmental agreements; (f) the effect of environmental measures of market access, especially in relation to developing countries and LDCs; (g) the issue of exports of domestically prohibited goods; and the relevant provisions of TRIPs having bearing on environment.

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[102]See Annex. to TN/DS/9 Chairman's Text, (28th May 2003). For a detailed analysis of DSU Reform, see, John Ragosta, et al.; WTO Dispute Settlement, the System is Flawed and must be Fixed, 137 International Lawyer, 697–752, (2003).

[103]The legal texts of the Marrakesh Treaty", Ministerial Decisions on Trade and Environment", pp. 469–471.

Thus, the mandate of the CTE is two-fold: 'to identify the relationship between trade measures and environmental measures in order to promote a sustainable development and to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system'. Since the Doha Declaration, (November 2001) the work has been split into two separate tracks: (i) the negotiating track (paragraph 31)[104] conducted in the CTE special session (CTESS) and, (ii) the regular work of CTE (paragraphs 32 and 33) conducted under the CTE Regular Sessions.[105]

Following the Doha Declaration, the CTE in addition to the issues already listed, has to give particular attention to the following issues:

- the effects of environmental measures on market access, especially in relation to developing countries, in particular the LDCs, and those situations where the elimination of trade restrictions and distortions would benefit trade, the environment and development;
- the relevant provisions of TRIPS; and
- labeling requirements for environmental purposes.[106]

(ii) Trade and Labour Standards

One of the most controversial issues that has taken the centre-stage of WTO negotiations is how to accommodate the growing consensus of the WTO Members especially of the developed countries on the labour standards within the WTO framework. Although, the debate surrounding the issue is highly contentious, yet in recent times, it has been pushed to the top of international trade agenda by non-governmental institutions and labour unions which was reaffirmed at the Fourth Ministerial Conference in Doha of the WTO.[107]

The Doha Declaration categorised the labour standards as internationally recognised core labour standards and the debate centres round 'enforceable workers right' as proposed by the USA, allowing impositions of sanctions on members of WTO who did not uphold the core labour standards. Whereas the developing members are opposed to the imposition of higher labour standards on the ground that the developed countries would use it as a ploy not to allow imports from developing countries who have low labour standards which are giving them comparative cost advantage of their exports especially in the primary goods sector.

So far as GATT/WTO Agreements are concerned, Article XX of the GATT 1994 is being referred as the proper article of tackling the problem of international labour standards for the reason that the language of the Article permits the incorporation of enforcement of lax labour standards in contracting parties which are

[104]Paragraph numbers refer to Doha Ministerial Declaration of Nov. 2001. WT/MTN (01) DEC/1.

[105]The full list of documents circulated in both CTE Regular and the CTESS since Jan. 1995 is contained in Doc. WT/CTE/INF/5/Rev. 2 (2003).

[106]WTO, Annual Report (2004) pp. 26–29.

[107]WTO, WT/MTN(01) DEC1(20 Nov. 2001) paragraph 8.

necessary to protect public health, public morals, or to banish imported products made with forced labour, or to secure compliance with other GATT/WTO laws.[108]

Scanning the labour-trade link throughout the evolution of ITO down to the establishment of WTO, it can fairly be said that the debate of GATT/WTO of incorporating the labour standards as a trade policy issue may be proper but should not be extended to the modern 'human rights' concept of fair labour standards. Article XX of the GATT cannot be stretched to address labour standards concerns or human rights generally but can be discussed in the context of multilateral tradeoffs between the members of WTO.[109] However, it is ironical that International Labour Organisation (ILO) being the competent body to set and deal with labour standards, the 'core labour standards' have been simultaneously shifted to the GATT/WTO Agenda.

(iii) Trade and Competition Policy

The Doha Declaration was significant in recognising the case for multilateral framework for enhancing the contribution of competition policy to international trade and development. And it was also agreed that negotiation in this area would commence after the Fifth Session of the Ministerial Conference which took place in 2005 at Hong Kong. The above Declaration further recognised the needs of developing and least developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operations for their development policies and objectives. To this end, a working group was established which would co-operate with intergovernmental organisations, including UNCTAD and other bilateral and regional channels for responding to the needs of developing countries and LDCs. The Group will further focus on the clarification of core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary co-operations; and support for progressive reinforcement of competition institutions in less developing countries and LDCs.[110]

For any future negotiation of competition policy, it is important to take stock of how unfair competition in international trade distorts the equal opportunity of access to the members of WTO in world trade and business. Generally a number of unfair practice instances are cited as anti-competitive practices which have restrictive or discriminatory effects which, *interalia*, include, collective boycott of foreign goods, exclusionary actions by professional bodies and associations, abuses of dominant positions of enterprises intended to prevent the entry of new competitors, price fixing, export-import cartels and market sharing arrangements. There are various harmonisation experiments carried at the regional and multilateral levels

[108]Charlovitz, The Moral Exception in Trade Policy, 38 Va. J. Int' I 4, 689–724, (1998).

[109]Elissa Alben, GATT and the Fair Wage: A Historical Perspective on the Labour-Trade Link, V.101, Col. L. Rav, 1401–1447, (2001).

[110]Doha Declaration, WTO, WT/MTN(01)/DEC/1(20 Nov. 2001) paragraphs 23–25.

such as the European Union, the Australian New Zealand closer Economic Relations Agreement, North American Free Trade Agreement, which have directly or indirectly dealt with the issue of harmonising competition laws and practices. Also relevant in this context are UNCTAD non-binding code of multilaterally agreed principles and rules for the control of restrictive business practices (1980)[111] and various references in the ITO charter[112] coupled with Articles VIII and IX of GATS 1994. All such experiments can be the starting ground for the WTO to develop internationally agreed competition law and policy in course of its ongoing negotiations.

14 Developing Countries and the Ninth Ministerial Conference and Bali Package 2013–2014

Trade Facilitation Agreement 2013 (TFA) is believed to reduce the cost of trading, smooth customs procedures, reducing red tape and enhance efficiency and transparency. The Agreement makes it obligatory on the developed countries to assist the developing and the least developed countries to update their infrastructure and train customs officials for any cost associated with implementing the Agreement. The Agreement is in furtherance of the mandate imposed by the three articles of GATT 1994 such as Article V involving freedom of transit; Article VIII dealing with border fees and formalities and Article X dealing with publication and administration of regulations.

There are various estimates of economic gains flowing from trade facilitation; some believe that the agreement could increase global GDP by one trillion USD; others believe that the reforms in this area of international trade would reduce costs by 14.5% for low-income countries and 15.5% for lower middle-income countries and 13.2% for upper middle countries. However, the agreement is conceived to simplify custom procedures and lower transaction costs. There have been various concerns expressed by developing countries as to how to implement the trade facilitation measures conceived in TFA in the face of technological, scientific and economic constraints, therefore, the final text of the agreement is divided into two parts: the first describes specific commitments countries will have to make to improve their custom procedures (Section I): the second involving special and differential treatment for developing countries (Section II). Achieving a balance between foreign commitments in Section I and technical assistance and capacity building in Section II was the measure stumbling block.

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[111]For a brief analysis of these experiments, see Eleanor M. Fox in Lowenfelded; International Economic Law (2002) Ch. 12 ed., pp. 340–383.

[112]Article 46 of the ITO charter detailed various anti-competitive practice such as price fixing, dividing territorial markets between same enterprise, discriminating against particular enterprise, refusing the development and application of technology by patent specifications, etc. See generally, Clair Wilcox, A charter for world Trade, (1949, Repr. 1972).

In order to reconcile the above objectives, the final agreement contains provisions allowing for flexibility in the scheduling and sequencing of implementation, and linking commitments to acquired capacity resulting from technical assistance. There is a marked departure from the usual WTO practices that developing countries and least developing countries are allowed to self-define their implementation period within three categories of implementation modalities: Category A includes those provisions that are implemented immediately upon the agreement entering into force: Category B includes those commitments that will be implemented after a 'self-selected' transition period: Category C involves those commitments that will require both self-selected transition period and technical assistance. In the last category, the mechanism ensures that assistance arrangements be notified by donor countries before least developed countries would be obligated to notify their definitive implementation date, thereby linking implementation obligations to the provision of technical assistance and capacitive building. All these provisions in a great measure change the current approach to special and differential treatment for developing countries creating a new and innovative template for future solutions.

So far as agriculture negotiations are concerned Bali package concentrated on reform of farm trade of developed countries: export subsidies and tariff rate quotas. During the negotiations, concern was expressed by India that public food stock holding by India should not be considered as an infringement to the obligations of either under the WTO Agreement on Agriculture or any other WTO commitments as food security programs are essential for sustaining the poor and vulnerable sections of society. The WTO members gave two-year concessions to India and all other countries having similar programmes and the General Council of WTO was asked to find a solution to India's and similar such food security programs.

The other issues such as development and least developed countries' concerns were the weakest component of the Bali package. However, it was agreed in principle that least developed countries would be extended the duty-free, quota-free market access. The Bali package has established a monitoring mechanism on special and differential treatment which will serve as a focal point within the WTO for analysing and reviving all aspects of the implementation of *S&D* treatment provisions. In case the review faces problems, the monitoring mechanism may put forward recommendations and possible negotiations would ensue in the relevant WTO body.

One of the elements of the Bali package deals with Rules of Origin which has been conferred to the products traded internationally. In the context of trade preferences granted to least developed countries, i.e., duty free, quota free, the rules of origin would define how much processing must take place locally before goods are considered to be of a least developed origin and may therefore get the benefit of preferential treatment; further, the rules of origin should be transparent, simple and objective. It also mandates that every country has freedom to choose the methods to make rules of origin transparent and objective.

So far as least developed countries trade in services is concerned, the Bali ministerial agreed that WTO Council for Trade in Services shall initiate a process aimed at promoting the expeditious and effective operationalisation of the least developed countries services waiver.

In the area of duty-free, quota-free market access for least developed countries, the Bali package decided that duty free quota free is an obligation on the developed countries members and the developed countries members should provide much more coverage for duty-free, quota-free access to the products of the least developed countries. There has not been any substantial change so far as Cotton is considered as a symbol of the development dimension, as discussion on Cotton remained inconclusive as Bali recognised that WTO has yet to deliver on the Cotton initiative and as such members requested to continue the negotiation in this sector.

15 Conclusion

Scanning through the historicity of events, it is fair to say that international trade and law is not constituted among the homogenous countries of equal strength and comparable economic development. The developing countries and least developed countries are sucked in international trade and institutions which do not have equal level playing field for the reason that they have individually and as a group all the disadvantages, yet GATT 1947 proved its mettle in retaining and increasing the number of less developing countries (two/thirds of the total membership of WTO comprises of less developing and least developed countries) and fostered a model for complementarities making the international trade and law to grow and sustain.

The developing countries tried hard to confront GATT 1947 through UNCTAD and NIEO but GATT managed to survive by developing ingenious doctrines such as ‘special and differential treatment’ (S&D) and ‘Enabling clause’. After 1980s the newly industrialised developing countries participated in GATT with full vigour with the result that other developing countries also followed suit by showing respect to GATT and international trade law.

After the Uruguay Round and with the establishment of WTO/GATT 1994 and Various Multilateral Agreements, the developing countries obligations and law in WTO/GATT is a curious mix of little ‘special and differential treatment’ and full obligations.

The insertion of new issues or social clauses in the WTO has made the position of developing countries tenuous. However, at the Ministerial Conference at Cancun, the concern of fuller participation of developing and least developed countries at the WTO/GATT counter was accepted as a proposition to be looked into.

In conclusion, it is hoped that developing and least developed countries obligations in the GATT/WTO Law should not be onerous to the extent that the developing and least developed countries may be accused of winding up the GATT/WTO in the future. The developing and least developed countries feel strongly that much still needs to be done to implement the WTO/GATT Multilateral Agreements and the functioning of the rule-based international trade should not ignore the handicaps which these countries are facing to participate fully and integrally in international trade relations and law.

List of Cases

Argentina-Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, Panel Report, WT/DS189/R, Adopted 05 November 2001.

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