

**FACULTY OF LAW**  
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PAPER LB 5036

# **INTERNATIONAL TRADE LAW**

Materials Selected

by

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# INTERNATIONAL TRADE LAW

## LL.B. V<sup>th</sup> TERM

2016-17

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### PART I

#### **Prescribed Books:**

1. Raj Bhala, *International Trade Law: An Interdisciplinary Non-Western Textbook* (Vols 1 & 2) Lexis Nexis (2015)
2. Schnitzer Simone, *Understanding International Trade Law* (2<sup>nd</sup> ed.) Universal (2010)
3. Carole Murray, David Holloway, *The Law and Practice of International Trade*, (12th edn.) Sweet & Maxwell (2015)
4. Autar Krishen Kaul, *A Guide to the W.T.O. and GATT: Economics, Law, and Politics*, Kluwer Law International (2006)
5. Dr. S.R. Myneni, *International Trade Law (International Business Law)* (3rd edn.) Allahabad Law Agency (2014)

#### **Topic 1: Origin and Evolution of GATT & WTO.**

- 1.1 Global Economics and International Trade Law
- 1.2 Protectionism vs Free Trade
- 1.3 Birth of GATT, 1947
- 1.4 GATT Rounds of Negotiation Including Doha Round and After
- 1.5 The WTO: Its Genesis (Uruguay Round 1986 to 1994)
- 1.6 The WTO Charter and GATT 1994, WTO Agreements, Understandings, Annexes
- 1.7 Objective, Function and Structure of WTO (Key Organs or Bodies), Membership, Decision Making Process, Voting, Amendment, Waiver etc.

#### **Topic 2: The Principles on Non-Discrimination in GATT & WTO**

- 2.1. Most-favoured-Nation Treatment (MFN) Article 1 of GATT 1947: its background and history, meaning, scope, significance & advantages,; meaning and scope of 'like product'.
- 2.2. Exceptions to MFN (Annexes A to F of Article 1, Customs Unions and Free Trade Areas (Art. XXXIV), Generalized System of Preferences (Art XXV), Art. XXXV, Art XXV, Art. XX, Art XXI, XII-XVIII, Art. VI, Subsidies Code and Government Procurement Code, Art XXIII, XIX (Escape Clause); Also Discuss Regional Associations like NAFTA, BRICS, SAFTA, TTIP etc.
- 2.3. National treatment principle (NT) Article III, GATT: its Origin & Scope, Meaning, Methodology.
- 2.4. Exceptions to National Treatment Principle.

Cases:-

1. *Application of Article 1:1 to Rebates on Internal Taxes [India Tax Rebates on Exports]* (1948); II GATT B.I.S.D. 12
2. *Japan-Taxes on Alcoholic Beverages* case, Complaints by the European Communities, Canada, and the United States against Japan, (WT/DS8, DS10, DS11), Appellate Body and Panel Reports adopted on 1 November, 1996.
3. *US Taxes on Automobiles* case, Complaints by the European Community against US, WT/DS 31/R, 11 Oct., 1994
4. *European Communities — Regime for the Importation, Sale and Distribution of Bananas* case, Complaint by Ecuador, Guatemala, Honduras, Mexico, United States against European Community, WT/DS 27, 5 Feb., 1996
5. *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef* case (Korea-Beef case), Complaint by US & Australia against South Korea, WT/DS 161, 11 Dec., 2000
6. *India – Measures Affecting the Automotive Sector* case, Complaint by US & EU against India, WT/DS146/R, 5 April, 2002
7. *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (adopted 18 June 2014)

### **Topic 3: Dispute Settlement Procedures under GATT and WTO**

- 3.1 Dispute settlement under GATT: Article XXII, Article XXIII, its merit & de-merit
- 3.2 Difference between the GATT and WTO dispute settlement procedures
- 3.2.1 Dispute Settlement Procedure under the WTO charter (refer Agreement on Dispute Settlement Understanding), Consultation, Dispute Panel Body, Appellate Body, Implementation of findings/decisions of WTO Dispute Settlement Body (Refer Article XXV GATT)

### **Topic 4: Agreement on Subsidies and Countervailing Measures**

- 4.1 Identification of Subsidies that are subject to the SCM Agreement.
- 4.2 Definition of ‘Subsidy’, ‘Specificity’.
- 4.3 Regulation of Specific Subsidies
  - i. Prohibited Subsidies
  - ii. Actionable Subsidies
  - iii. Non- actionable Subsidies
- 4.4 Dispute Settlement and Remedies

Cases:-

1. *U.S. –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India*, WT/DS 436/AB/R (19 December 2014)
2. *Canada- Certain Measures Relating to the Renewable Energy Sector*, WT/DS412/AB/R (24 May 2013)
3. *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (adopted 18 May 2011)

## **Topic 5: Agreement on Dumping and Anti-Dumping Duties**

- 5.1 Anti-dumping: A Basic Overview
- 5.2 Anti-dumping Investigations
  - i) Initiation
  - ii) Evidence used in the Investigation
  - iii) Key substantive issues: Dumping, injury and causation
- 5.3 Anti- dumping Measures
  - i) Provisional measures
  - ii) Price undertakings
  - iii) Duration & review of duties
  - iv) The use of Anti-dumping Measures other than Tariff Duties
- 5.4 Challenging AD measures in WTO Dispute Settlement
  - v) Standard of Review
  - vi) The measures to be challenged
  - vii) Good faith, Even-handedness, Impartiality

### *Cases*

1. *United States-Anti-Dumping and Countervailing Measures on Steel Plate from India* case, Complaint by India against US, WT/DS 206, 19 Feb., 2003
2. *United States-Continued Dumping and Subsidy Offset Act of 2000* case, Complaint by Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Korea, Thailand against US, WT/DS 217, 21 Dec., 2000 (Authorization to retaliate granted on 26 November 2004)
3. *United States- Countervailing and Anti-dumping Measures on Certain Products from China* case, Complaint by China against US, WT/DS 449, 7 July, 2014.
4. *China-Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* case, Complaint by US against China, WT/DS 440, 18 June, 2014

## **Topic 6: General Agreement on Trade and Services (GATS)**

- 6.1 The scope of GATS
- 6.2 General obligations and disciplines
  - i. MFN Principle (GATS Article II & Annex)
  - ii. Domestic regulations (GATS Article VI)
  - iii. Exceptions (GATS Article XIV)
- 6.3. Specific commitments (GATS Parts III-IV)
  - i) Market access
  - ii) National treatment
  - iii) Additional commitments

### *Cases:-*

1. *US- Measures Affecting The Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted on 20 April 2005)

## **Topic 7: Agreement on Trade-Related Investment Measures (TRIMs)**

- 7.1. Objective and Coverage of TRIMs
- 7.2. National Treatment and Quantitative Restrictions, Inconsistent TRIMs
- 7.3. Notification & Transitional Agreements, Transparency
- 7.4. Provision for Developing Country Members

Case:

- 1. *India-Certain Measures Relating to Solar Cells and Solar Modules* case, Complaint by US against India, WT/DS 456, 6 Feb. 2013 (Panel Report has been appealed by India on 20 April, 2016)

## **PART- II**

- 1. Indira Carr, *International Trade Law*, (5<sup>th</sup> edn.) Routledge (2014)
- 2. Jason Chuah, *Law of International Trade*, (5<sup>th</sup> edn.) Sweet & Maxwell (2013)
- 3. Dr. S.R. Myneni, *International Trade Law (International Business Law)* (3<sup>rd</sup> edn.) Allahabad Law Agency (2014)

### **Topic 7: Export Trade transactions and International Commercial Contracts**

- 7.1 Types of International Contracts
- 7.2 Standard Trade Terms (CIF, FOB, FAS)
- 7.3 Formation and Enforcement of International contracts
- 7.4 Rights Liabilities of Parties to Contracts

### **Topic 8: Payments in International Trade**

- 8.1 Bills of Exchange
- 8.2 Law Relating to Bills of Exchange
- 8.3 Commercial Credit in International Trade
- 8.4 Letter of Credit: Types and the Law Relating to Commercial Credit

### **Topic 9: Carriage of Goods in Export Trade**

- 9.1 Carriage of Goods by Sea
- 9.2 Bills of lading and Charter Parties
- 9.3 Rights and Liabilities of the Parties to Contract of Carriage

## **INDEX**

1. WTO: Objective, Functions & Organizational Structure
2. Agreement Establishing the WTO, 1994 (Text)
3. General Agreement on Tariffs and Trade, 1994 (Text)
4. Principle of Most Favoured Nation
5. Principle of National Treatment
6. Understanding on Rules & Procedures Governing the Settlement of Disputes (Text)
7. Dispute Settlement System in the WTO (Reading)
8. Dumping & Anti-Dumping in the GATT/WTO
9. General Agreement on Trade in Services (Text)
10. GATS (Reading)
11. Agreement on Trade Related Investment Measures (Text)
12. TRIMS (Reading)
13. European Communities — Regime for the Importation, Sale & Distribution of Bananas, WT/DS 27, 5 Feb., 1996
14. India – Measures Affecting the Automotive Sector  
WT/DS146/R, 5 April, 2002
15. U.S. –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS 436/AB/R (19 December 2014)
16. India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS 456, 6 Feb. 2013

**LL.B. V Term Examination, 2016**

**Paper L.B. 5036 - International Trade Law**

**Time: 3 hours**

**Maximum Marks: 100**

**Note:** *Attempt at least one question from each part and five questions in all.*

**PART I**

**Q. No. 1. (a)** What is the scope and function of WTO? Discuss in brief the organizational structure of the WTO.

**(b)** “The Uruguay Round of Negotiations finally led to the creation of WTO”. In the light of this statement briefly discuss the salient achievements of Uruguay Round.

**Q. No. 2. (a)** Explain the rules and exceptions governing Principle of National Treatment in WTO? Refer to relevant decisions of WTO.

**(b)** Country X takes a measure whereby meat imported from country Y is required to be sold from an exclusive separate outlet in the domestic market of X. Country Y alleges discrimination. Examine the validity of the measure taken by X and claims made by Y in the light of relevant finding made by WTO in the *Korea-Beef case*, WT/DS 161 (2000)

**Q. No. 3.** What are the objectives of Dispute Settlement Body of the WTO? Discuss in detail the different stages of the WTO Dispute Settlement Process.

**Q. No. 4.** What are the elements for identification of ‘subsidy’ under the GATT/WTO? Explain the various types of subsidy. What are the requirements before the countervailing measure can be applied under the framework of WTO?

**Q. No. 5.** Write short note on any two of the following:

- (a)** India-Solar Panel Dispute
- (b)** Anti-Dumping and Countervailing Duties
- (c)** ‘Services’ under WTO.

**PART II**

**Q. No. 6.** Explain the standard trade terms CIF, FOB and FAS, commonly used in the international contracts of sale. What are the obligations of seller and buyer under these contracts?

**Q. No. 7.** What is a Letter of Credit (LOC) used in international commerce? Discuss the advantages and disadvantages of using the Letter of Credit?

**Q. No. 8.** Explain the purpose and functions of a Bill of Lading in International Commerce? Enumerate the liabilities of a carrier under the Bill of Lading.

**LL.B. V Term Examination, 2015**

**Paper L.B. 5036 - International Trade Law**

**Time: 3 hours**

**Maximum Marks: 100**

**Note:** Attempt at least one question from each part and five questions in all.

**PART I**

**Q. No. 1. (a)** Discuss the objectives and functions of WTO.

**(b)** Describe the important differences between GATT and the WTO? How the current decision-making process under WTO is different from the GATT, 1947.

**Q. No. 2.** Discuss the rule governing “Most Favoured Nation Treatment” (MFN) under the GATT, 1994. What are its exceptions? Support your answer with the help of WTO decisions.

**Q. No. 3.** What is dumping of goods? Discuss the scope and application of Article VI of GATT, 1994. Explain the process governing anti-dumping measures under the WTO.

**Q. No. 4.** The WTO dispute settlement system is considered the most important part of the WTO. Explain in detail the process of dispute settlement at WTO. What are the consequences of non-adherence to WTO findings?

**Q. No. 5.** Write short note on any two of the following:

**(a)** Subsidies and Countervailing Measures

**(b)** Principle of National Treatment.

**(c)** WTO Doha Round

**PART II**

**Q. No. 6.** What is a Bill of Lading? Explain its various types. Describe its different functions and purposes under the international carriage of goods.

**Q. No. 7.** What do you mean by International Commercial Terms used in international sale contracts? Discuss the obligations of the parties under CIF, FOB and FAS contracts.

**Q. No. 8. (a)** What is Letter of Credit in International Sales? Discuss its various types.

**(b)** Discuss the benefits of arbitration in the settlement of international commercial disputes.



**LL.B. V Term Examination, 2014**

**Paper L.B. 5036 - International Trade Law**

**Time: 3 hours**

**Maximum Marks: 100**

**PART I**

1. Discuss briefly the developments leading to the establishment of WTO, 1995. Discuss also the differences between WTO, 1995 and GATT, 1947.

2. “General Most Favoured Nation Treatment is the cornerstone of the free trade, yet maintaining state freedom in regulating international trade”.

In the light of the above statement, discuss the salient features of MFN treatment. Discuss also exceptions, if any, to MFN treatment.

3. Discuss briefly any two of the following;

- (a) National Treatment
- (b) General Agreement on Trade in Services
- (c) Accession to WTO

4. “The Understanding on Rules and Procedures governing the Settlement of Trade Disputes between nations has proved to be a boon to freedom of International Trade.”

In the light of the above, discuss briefly the salient features of settlement of disputes under WTO, 1995. What will be the legal position if there is a conflict between the Dispute Settlement Agreement of WTO and Dispute Settlement Provisions of individual agreements, which are part of WTO, 1995.

5. Discuss briefly any two of the following:

- (a) Dumping and Anti-Dumping Duties
- (b) Structure of WTO, 1995
- (c) Schedule of Concessions

**PART II**

6. Discuss the main elements of a C.I.F. and F.O.B. contract. Discuss also the responsibilities of parties to a C.I.F. contract.

7. Discuss the salient features of a Letter of Credit. Discuss the Rules governing the operation of a Letter of Credit.

8. Discuss briefly any two of the following:

- (a) Commercial Arbitration
- (b) Rejection of Documents and Rejection of Goods
- (c) Bill of Lading

# WTO: OBJECTIVES, FUNCTIONS & ORGANIZATION STRUCTURE

## I.A. WHAT IS "WTO"?

WTO is the acronym for **World Trade Organization**. The WTO came into being in 1995 and was created after the culmination of long intense negotiations which took place under the auspices of the General Agreement on Tariffs and Trade (GATT).

### AN ORGANIZATION FOR TRADE LIBERALIZATION

The WTO is an organization for liberalizing trade. Trade liberalization is the **main approach that the WTO has adopted to help Member countries achieve economic growth and raise living standards**. However, the WTO recognizes Members' right to maintain trade barriers, subject to the conditions provided in the WTO Agreements. Such trade barriers are considered to serve legitimate objectives, such as the protection of human, animal or plant life or health or the protection of consumers. In so doing, a balance is struck between trade liberalization and the flexibility Members need to meet their policy objectives.

### A FORUM FOR TRADE NEGOTIATIONS

The WTO provides a multilateral forum for Member governments to **negotiate rules of international trade**. Thus, the WTO was born out of negotiations and everything the WTO does is the result of negotiations. The WTO is currently host to new negotiations under the **Doha Development Agenda (DDA)** launched in 2001.

### A SET OF INTERNATIONAL TRADE RULES

These rules are contained in the WTO Agreements which were signed by the bulk of the world's trading nations and have binding effects on them. Thus, the **WTO Agreements lay down the legal ground rules for international commerce between WTO Members**. They cover trade in goods, trade in services and trade-related aspects of intellectual property rights (TRIPS). However, it is important to note that the WTO Agreements constitute an international agreement, as such, bind only states and separate customs territories.

### A PLACE FOR SETTLING TRADE DISPUTES

The WTO is also a place for settling trade disputes between Member countries. The WTO's procedure for resolving trade disputes is vital for enforcing the rules and for ensuring that trade flows smoothly.

Who can be members of the WTO?
International organizations are normally made up of sovereign states, that is also the case for the WTO. The vast majority of WTO Members are states; however, also separate customs territories that meet certain requirements can become Members of the WTO (see section on Accession).

## I.B. PRINCIPLES OF THE WTO

### MOST-FAVOURLED-NATION (MFN) PRINCIPLE: TREATING FOREIGNERS EQUALLY

Under the WTO Agreements, **a country should not discriminate between its trading parties**. According to the MFN principle, any advantage, favour, privilege or immunity granted by a Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product of all Members.

The MFN principle is **one of the cornerstones of the WTO**. It is embodied in Article I of the GATT 1994 which will be studied in Module 2, Article II of the General Agreement on Trade in Services (GATS) and Article 4 of the TRIPS Agreement, which will be studied in Modules 6 and 7, respectively. However, as we will see, in each Agreement the principle is applied slightly different.

### NATIONAL TREATMENT PRINCIPLE: TREATING FOREIGNERS AND LOCALS EQUALLY

Within national territory, **WTO Members cannot favour domestic products over imported products**

(Article III of the GATT 1994). The principle of national treatment also applies, with some differences, to trade in services (Article XVII of the GATS) and intellectual property protection (Article 3 of the TRIPS Agreement). The national treatment principle will be explained in Modules 2 (Goods), 6 (GATS) and 7 (TRIPS).

### GENERAL PROHIBITION OF QUANTITATIVE RESTRICTIONS (QRS)

**WTO Members cannot prohibit, restrict or limit the quantity of products authorized for importation** or exportation (Article XI of the GATT 1994), subject to limited exceptions. This principle does not apply in this way in the context of the GATS and the TRIPS.

### OBSERVANCE OF BINDING LEVELS OF TARIFF CONCESSIONS (GOODS) AND OF SPECIFIC COMMITMENTS (SERVICES)

**Minimum market access conditions** are guaranteed by commitments undertaken by Members regarding customs duties (tariff concessions for goods - Article II of the GATT 1994) and market access for the supply of services (specific commitments - Article XVI of the GATS). They will be explained in detailed in Modules 3 (Goods) and 6 (GATS).

### TRANSPARENCY

It is **fundamentally important that regulations and policies are transparent**. For example, as you will study in different Modules, WTO Members are required to inform the WTO and fellow-Members of specific measures, policies or laws through regular "notifications". In addition, the WTO conducts periodic reviews of individual Members' trade policies through the Trade Policy Review Mechanism (TPRM), which will be introduced in Module 10.

## Why Free Trade?

The economic case for an open trading system based on multilaterally agreed rules not only rests on commercial common sense, but it is also supported by evidence: the experience of world trade and economic growth since the Second World War. During the first 25 years after the war, **world economic growth averaged about five per cent per year, a high rate that was partly the result of lower trade barriers.** World trade grew even faster, averaging about 8 per cent during this period.

The data show a **statistical link between freer trade and economic growth.** Economic theory points to strong reasons for the link. All countries, including the poorest, have assets — human, industrial, natural, financial — which they can employ to produce goods and services for their domestic markets or to compete overseas. Economics tells us that we can benefit when these goods and services are traded. Simply put, the **principle of "comparative advantage"** says that **countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.** In other words, **liberal trade policies — policies that allow the unrestricted flow of goods and services — sharpen competition, motivate innovation and breed success.**

The principle of comparative advantage, which dates back to classical economist David Ricardo, is the most powerful and widely accepted economic theory underlying the case for open trade. To illustrate this, let's first look at a simple case - a case of absolute advantage. Suppose country A is better than country B at making wines, and country B is better than country A at making bicycles. Thus, it would be an obvious case that each country will specialize in the products that it can produce most efficiently and then trade their products. In this scenario, country A will concentrate on the production of wines and import bicycles from country B while country B will concentrate on the production of bicycles and import wines from country A.

But what if a country is bad at making everything? Can countries still benefit from trade? According to Ricardo's Principle of "Comparative Advantage", the answer is yes.

Let's change the scenario a bit and assume that country A is better than country B in making both products

– wines and bicycles. Let's further assume that country A is much more superior at making wines and only slightly superior at making bicycles. Then country A should still invest resources in what it does best — producing wines — and export the product to B. B should still invest in what it does best — making bicycles

— and export that product to A, even if it is not as efficient as A. Both would still benefit from the trade. A country does not have to be best at anything to gain from trade.

## **HISTORICAL BACKGROUND OF THE WTO: FROM THE GATT TO THE WTO**

While legally distinct from the GATT, you will see that the WTO and the GATT are inter-related.

### II.A. WHAT IS THE GATT?

#### **IN BRIEF**

The GATT is **an international trade agreement concluded in 1947**. It contains rules and obligations that governed trade in goods for almost fifty years between its "CONTRACTING PARTIES". **From 1948 to**

**1994, before the WTO was created, the GATT provided the legal framework for the bulk of world trade.**

The negotiation of the GATT dates back to the 1940's. It was part of the post-war project to reconstruct a multilateral system of world trade through the elimination of discrimination, the reduction of tariffs and the dismantlement of other trade barriers. **The initial objective was to create an International Trade Organization (the ITO)** to handle the trade side of international economic cooperation, which was meant to join the two "Bretton Woods" institutions, the World Bank and the International Monetary Fund (IMF).

The project went on two tracks: (1) drafting a Charter for an International Trade Organization (the ITO); and,

(2) launching tariff negotiations on a multilateral basis.

The GATT was never intended to be an international organization but only to be a subsidiary agreement under the ITO Charter. Nevertheless, the ITO did not materialize and the GATT came into force by means of a Provisional Protocol, signed on 30 October 1947 and effective since 1 January 1948. The signatory countries to the Protocol agreed to apply the provisions contained in the GATT until the ITO could take over its administration. Hence, **for 47 years, the GATT served as a *de facto* international organization, taking up some of the functions originally intended for the ITO.**

**The GATT developed rules for a multilateral trading system (MTS) through a series of trade negotiations or rounds.** From 1947 to 1994, the GATT CONTRACTING PARTIES organized eight rounds of negotiations. The early rounds dealt mainly with tariff reductions on goods, but later rounds included other areas, such as, anti-dumping and non-tariff barriers.

The last round lasted from 1986 to 1994 and is generally known as the "**Uruguay Round**", which led to the creation of the WTO in 1994. The Uruguay Round brought about the biggest reform to the world trading system since the GATT was established. **Since 1995, the WTO has performed the role of an international organization for trade rules.** The table below lists the rounds, the subjects covered and the number of contracting parties that participated in each one, respectively.

**ROUNDS OF TRADE NEGOTIATIONS UNDER THE AUSPICES OF THE GATT**

<b>Year</b>	<b>Place/Name</b>	<b>Subjects Covered</b>	<b>Parties</b>
<b>1947</b>	Geneva	Tariffs	23
<b>1949</b>	Annecy	Tariffs	13
<b>1951</b>	Torquay	Tariffs	38
<b>1956</b>	Geneva	Tariffs	26
<b>1960-1961</b>	Geneva, Dillon Round	Tariffs	26
<b>1964-1967</b>	Geneva, Kennedy Round	Tariffs and anti-dumping measures	62
<b>1973-1979</b>	Geneva, Tokyo Round	<p>Tariffs, non-tariff measures, "framework"</p> <p>agreements:</p> <ul style="list-style-type: none"> <li>▫ first negotiations on non-tariff barriers;</li> <li>▫ creation of plurilateral codes; and</li> <li>▫ creation of the Enabling Clause – i.e. the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries"</li> </ul>	102

		<p>It supplemented the Generalized System of Preferences (GSP) which was adopted before the Tokyo Round in 1971 and further extended r and differential treatment and more favourable treatment in favour of developing countries.</p>	
<b>1986-1994</b>	Geneva, Uruguay Round	<p>Tariffs, non-tariff s, measure rules, services, dispute settlement textiles TRIPS, e , , agriculture, creation of WTO, etc.</p>	123

**Table 1:** Rounds of trade negotiations under the auspices of the GATT

Participants in the **Uruguay Round** concluded the Round by adopting the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" ("the Final Act"). After the Final Act follows the "Marrakesh Agreement Establishing the World Trade Organization" ("the Agreement Establishing the WTO") and its four Annexes, which will be introduced below (See Section V.H. "Overview of the WTO Agreements"). The **GATT still exists as the WTO's treaty for trade in goods. The Agreement Establishing the WTO and its Annexes will be referred to as "the WTO Agreements" in this course.**

### III. OBJECTIVES OF THE WTO

#### IN BRIEF

In the Preamble to the Agreement Establishing the WTO, the parties to the Agreement recognize the objectives they wish to attain through the MTS (Multilateral Trade System):

- raise living standards;
- ensure full employment;
- ensure a large and steadily growing volume of real income and effective demand; and,
- expand 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.

The Agreement also recognizes the need for "**positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade** commensurate with ... their economic development".

**The Preamble to the Agreement Establishing the WTO encapsulates its objectives.** It declares:

### **Preamble to the Agreement Establishing the WTO**

The *Parties* to this Agreement

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living ensuring full employment and a large and steadily growing volume of real income and effective demand and expanding the production of and trade in goods and services while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development

*Recognizing* further that there is need for positive efforts designed to ensure that developing countries and especially the least developed among them secure a share in the growth in international trade commensurate with the needs of their economic development. Being desirous of contributing to these objectives by entering into 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 relations..

The objectives of the WTO are not fundamentally different from those contained in the Preamble to the GATT 1947. In this way, it recognizes the importance of continuity with the previous GATT system. It is noteworthy that although the objectives of the WTO do not mention **trade liberalization as the means to establish free-trade between Members**, the drafters considered "substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations" as important steps to achieving such objectives. **Trade expansion is thus not seen as an end in itself, but as an instrument to promote growth and development.**

**The WTO adds three new dimensions** to the objectives in the Preamble of the GATT 1947, including:

- the expansion of "**the production of and trade in goods and services**" to take into consideration the extension of the coverage of the WTO subject matters. While the GATT covered only trade in goods, under the WTO coverage was expanded to another subject area – trade in services (see the GATS Agreement);
- "**the objective of sustainable development** seeking both to protect and preserve the environment and to enhance the means for doing so"; and,



- **the "development dimension"** aiming at helping "developing countries and especially the least-developed among them secure a share in the growth in international trade commensurate with the needs of their economic development".
- The Preamble to the Agreement Establishing the WTO provides an important legal basis for the interpretation of the WTO Agreements.

#### **IV. FUNCTIONS OF THE WTO IN BRIEF**

The WTO fulfils its objective by:

- administering the trade agreements between its Members;
- serving as a forum for trade negotiations;
- settling international trade disputes among its Members;
- reviewing Members' trade policies;
- ensuring greater coherence in global economic policy-making, including cooperating with the IMF and the World Bank; and,
- provide technical assistance (TA) to developing country Members.

Article III of the Agreement Establishing the WTO explains the functions of the WTO. These include:

##### **A. ADMINISTRATION OF THE WTO AGREEMENTS**

The WTO Agreements lay down the legal ground rules for international commerce and codes of conduct for WTO Members. **Thus, the first function of the WTO is to facilitate the implementation, administration and operation, and further the objectives of these Agreements.**

##### **B. FORUM FOR NEGOTIATIONS**

The WTO provides a permanent **institutional forum for multilateral negotiation and cooperation on trade-related policies among its Members.** Although the WTO is specifically charged with providing the forum for negotiations on matters already covered by the WTO Agreements, negotiations under the auspices of the WTO may be extended to "new issues" to be disciplined by WTO Agreements.

##### **C. SETTLEMENT OF TRADE DISPUTES**

The WTO also acts as a **forum for the settlement of trade disputes between its Members in accordance with the disciplines and procedures elaborated in the Dispute Settlement Understanding (DSU)** (the DSU, found in Annex 2 to the Agreement Establishing the WTO).

A dispute arises when a Member country believes another Member is acting in a manner that is inconsistent with its WTO commitments and considers that any benefits accruing to it directly or indirectly under the WTO Agreements are being impaired by measures taken by such Member. When Members are unable to reach a mutually agreed solution to a dispute arising under one of the WTO covered Agreements, they may seek recourse to the WTO dispute settlement mechanism.

##### **D. SURVEILLANCE OF NATIONAL TRADE POLICIES**

This function underscores the role of the WTO in the transparency mechanism designed by Members during the Uruguay Round. All WTO Members are subject to review under the Trade Policy Review Mechanism (TPRM) and the frequency of each country's review varies according to its share of world trade. **The regular surveillance of national trade policies through the TPRM provides a means of encouraging transparency both domestically and at the multilateral level.**

The reviews take place in the Trade Policy Review Body which is actually the WTO General Council — comprising the WTO's full membership — operating under special rules and procedures. The reviews are therefore essentially peer-group assessments.

#### E. COORDINATION WITH RELEVANT INTERNATIONAL ORGANIZATIONS

This function identifies the "**coherence mandate**" as one of the objectives of the WTO. Cooperation with the IMF and the World Bank, as well as their affiliated agencies, is essential since it is an important factor that WTO Members need to consider when they enter into negotiations to design an international regulatory framework with regard to economic policy. Cooperation with other international organizations would allow the WTO to achieve "greater coherence in global economic policymaking".

Article V of the Agreement Establishing the WTO also lays down rules for the WTO to establish "effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO" and the possibility for the WTO to consult and cooperate "with non-governmental organizations concerned with matters related to those of the WTO".

#### F. TECHNICAL ASSISTANCE (TA)

In Doha Ministerial, in November 2001, Members confirmed that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system. They instructed the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction (Doha Ministerial Declaration, paragraph 38).

The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rule-based MTS.

### V. ORGANIZATIONAL STRUCTURE OF THE WTO

**The WTO is a member-driven organization. WTO Members established a working structure for the WTO to allow them to monitor the implementation and the development of the WTO.** All WTO Members may participate in all Councils, Committees, Bodies, except Appellate Body, Dispute Settlement panels, Textiles Monitoring Body, and plurilateral committees. The WTO Secretariat is made up of international officers and its main task is to supply technical support for the various councils and committees.

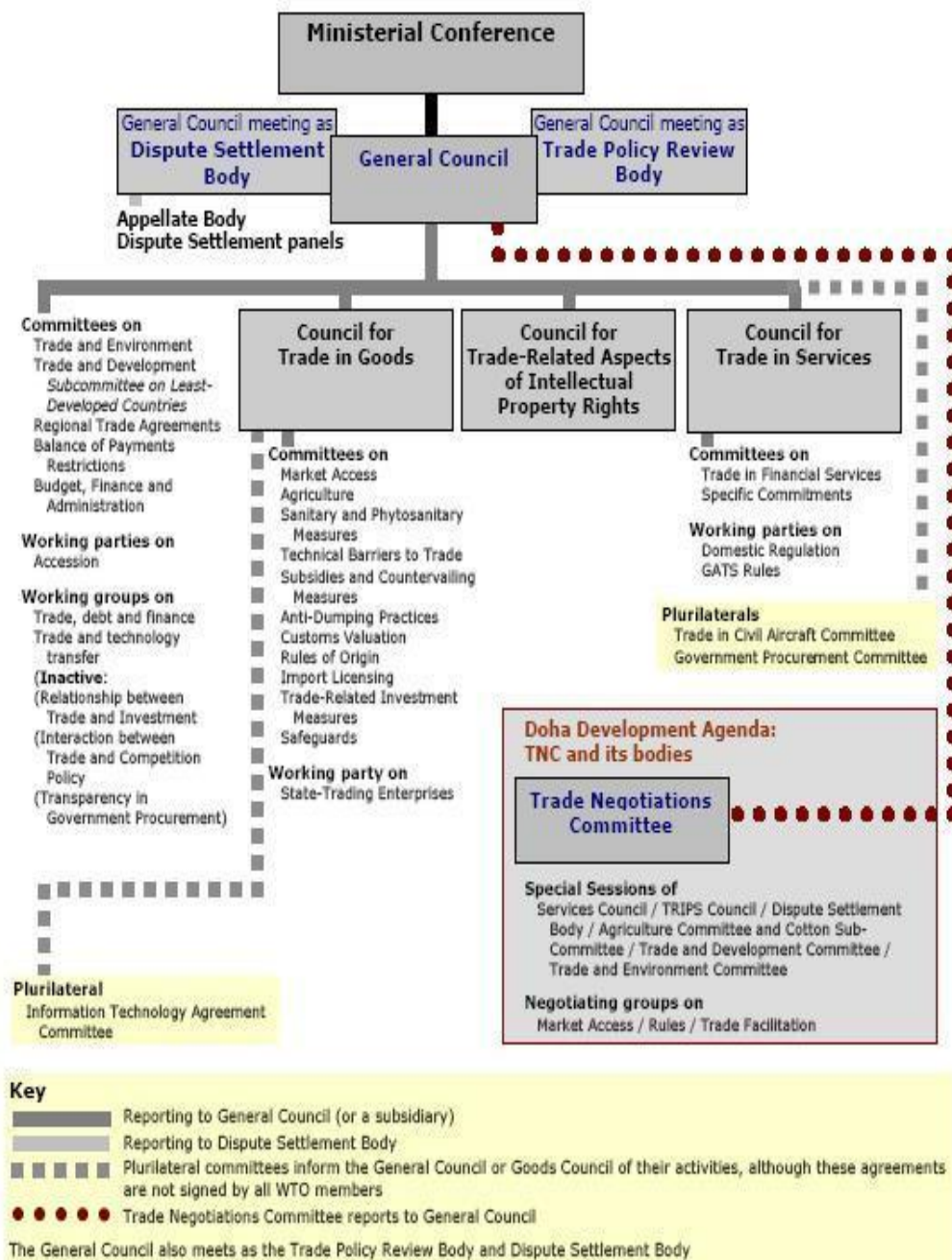
#### **In Brief:**

The **Ministerial Conference is the topmost decision making body in the WTO.** It is **composed by representatives of all WTO Members** and shall meet at least once every two years. The Ministerial Conference may take decisions on all matters under all multilateral WTO Agreements, in accordance with the decision-making procedures contained in the Agreement Establishing the WTO.

The **second tier in the decision-making structure** of the WTO is the **General Council**, which is also **formed by representatives of all Member countries**, usually Ambassadors or Permanent Representatives, based in Geneva. It **adopts decisions on behalf of the Ministerial Conference on all WTO affairs** when the Conference is not in session. It also **meets as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB).**

In the third level are **three subsidiary councils** – Council for Trade in Goods (**Goods Council**), Council for Trade in Service (**GATS Council**) and Council for Trade-Related Aspects of Intellectual Property Rights (**TRIPS Council**) -, which operate under the general guidance of the General Council and are responsible for the workings of the WTO Agreements dealing with their respective areas of trade. **They consist of all WTO Members and have subsidiary bodies.**

Finally, the **Secretariat of the WTO** headed by a Director-General appointed by the Ministerial Conference has **no decision making powers**. Its main duties include, among others, **to supply technical support for the various councils and committees, to provide TA to developing countries and to provide legal assistance in the dispute settlement process.** Contrary to the WTO Bodies explained above, the WTO Secretariat is integrated by international officers who cannot seek or accept instructions from any government or any other authority external to the WTO in the discharge of their duties.



## VI. DECISION-MAKING AT THE WTO

### IN BRIEF

The WTO continues GATT's tradition of making decisions not by voting but by **consensus. Where consensus is not possible the WTO Agreement allows for voting** – Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast and on the basis of "one country one vote".

The Agreement Establishing the WTO envisages four specific situations involving voting: interpretation of the multilateral trade agreements; decisions on waivers; decisions to amend most of the provisions of the multilateral agreements (depending on the nature of the provision concerned and binding only for those Members which accept them); and decisions to admit a new Member.

### CONSENSUS

The WTO is a Member-driven, consensus-based organization. Consensus is defined in footnote 1 to Article IX of the Agreement Establishing the WTO, which states "The Body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member present at the meeting when the decision is taken, formally objects to the proposed decision".

### VOTING IF CONSENSUS NOT REACHED

Where a decision cannot be reached by consensus, the Agreement Establishing the WTO permits voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting (Article IX of the Agreement Establishing the WTO). Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in the Agreement Establishing the WTO or in the relevant multilateral trade agreement (those WTO Agreements that apply to all WTO Members). As we will see in Section V.H, most of the WTO Agreements enter into this category.

Article IX of the Agreement Establishing the WTO envisages voting, whenever a decision cannot be reached by consensus, voting can be exercised in the following situations:

a. Interpretations

Three fourths majority of WTO Members in the Ministerial Conference or the General Council can adopt an interpretation of the Agreement Establishing the WTO and of the multilateral trade agreements

(Article IX:2 of the Agreement Establishing the WTO). In the case of an interpretation of a multilateral trade agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of the Agreement.

b. Waivers

In exceptional circumstances, the Ministerial Conference may decide, by three fourths, to waive an obligation imposed on a Member by the Agreement Establishing the WTO or any of the multilateral trade agreements (Article IX:3 of the Agreement Establishing the WTO).

c. Amendments

Any Member of the WTO may initiate a proposal to amend the provisions of the Agreement Establishing the WTO or the multilateral trade agreements in Annex 1 by submitting such proposal to the Ministerial Conference, which shall decide by consensus to submit the proposed amendment to the Members for acceptance. If consensus is not reached, the Ministerial Conference shall decide by a two-thirds majority according to the rules set forth in Article X of the Agreement Establishing the WTO.

The rules applicable to decisions on amendments vary depending on the provision subject to amendment. Amendment to certain provisions of the WTO Agreements (e.g. Article IX of the Agreement Establishing the WTO, Article I - MFN Principle - and Article II - Schedules of Concessions - of the GATT 1994) shall take effect only upon acceptance by all Members.

d. Accession

Article XII of the Agreement Establishing the WTO provides that decisions on **accession of new WTO Members** are taken by Ministerial Conference and by a two thirds majority of all WTO Members (in practice however, decisions on accession have been taken by consensus in accordance with WTO practice).

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**AGREEMENT ESTABLISHING THE  
WORLD TRADE ORGANIZATION**

**[WTO officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948]**

The *Parties* to this Agreement,

*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

*Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

*Being desirous* of contributing to these objectives by entering into 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 relations,

*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

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*Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system,

*Agree* as follows:

*Article I*

*Establishment of the Organization*

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

*Article II*

*Scope of the WTO*

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.
2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.
3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

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4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

### *Article III*

#### *Functions of the WTO*

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.



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4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

#### *Article IV*

##### *Structure of the WTO*

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

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4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional

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framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

### *Article V*

#### *Relations with Other Organizations*

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.
2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

### *Article VI*

#### *The Secretariat*

1. There shall be a Secretariat of the WTO (hereinafter referred to as “the Secretariat”) headed by a Director-General.
2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.
3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

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4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

### *Article VII*

#### *Budget and Contributions*

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

- (a) the scale of contributions apportioning the expenses of the WTO among its Members; and
- (b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

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4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

*Article VIII*

*Status of the WTO*

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

*Article IX*

*Decision-Making*

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1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.<sup>1</sup> Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States<sup>2</sup> which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.<sup>3</sup>

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths<sup>4</sup> of the Members unless otherwise provided for in this paragraph.

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<sup>1</sup> The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

<sup>2</sup> The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

<sup>3</sup> Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

<sup>4</sup> A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

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(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths<sup>5</sup> of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

## *Article X*

### *Amendments*

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<sup>5</sup> A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

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1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If 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 the Ministerial Conference within the established 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. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;

Articles I and II of GATT 1994;

Article II:1 of GATS;

Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for 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 under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each



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case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which 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 the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

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9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.
10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

### *Article XI*

#### *Original Membership*

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.
2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

### *Article XII*

#### *Accession*

1. 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 Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

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2. Decisions on accession 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.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

### *Article XIII*

#### *Non-Application of Multilateral Trade Agreements between Particular Members*

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as 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.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where 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 this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII 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.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

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5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

*Article XIV*

*Acceptance, Entry into Force and Deposit*

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.
2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.
3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each

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acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

### *Article XV*

#### *Withdrawal*

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both 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.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

### *Article XVI*

#### *Miscellaneous Provisions*

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices

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followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. 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.

3. In the event of a 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.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. 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.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

Explanatory Notes:

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The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

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**AGREEMENT**

**ON TARIFFS AND TRADE, 1994**

**(Revised and Amended GATT, 1947)**

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**Article I***General Most-Favoured-Nation Treatment*

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 5t of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

tThe authentic text erroneously reads "sub-paragraph 5 (a)".

## ARTICLE II

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 mostfavoured-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 subparagraph (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

### **Article II**

#### *Schedules of Concessions*

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.

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\*;
- (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.

## ARTICLE II

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 charges and 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.

## PART II

### Article III\*

#### *National Treatment on Internal Taxation and Regulation*

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 1.\*

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 April 10, 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 obligations 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 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 regulations in a manner contrary to the principles set forth in paragraph 1 \*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation 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 provisions 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 provisions 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 provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases 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 requirements

of

Article

IV.

## **Article IV**

### *Special Provisions relating to Cinematograph Films*

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:

- (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.

## **Article V**

### *Freedom of Transit*

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 the 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 the flag of vessels, the place of origin, departure, entry, exit or 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 the 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).

## Article VI

### *Anti-dumping and Countervailing Duties*

1. 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 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 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 antidumping 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 subsidization.

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 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.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (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 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 requirements of sub-paragraph (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 sub-paragraph (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 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 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.

## **Article VII**

### *Valuation for Customs Purposes*

1. The contracting parties recognize 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.\*

(c) When the actual value is not ascertainable in accordance with sub-paragraph (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 recognized 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 recognized 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 amounts 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.

### **Article VIII**

*Fees and Formalities connected with Importation and Exportation\**

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 a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).

(c) The contracting parties also recognize the need for minimizing 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 regulations 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.

## **Article IX**

### *Marks of Origin*

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 requests 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.

## **Article X**

### *Publication and Administration of Trade Regulations*

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 governmental 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 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 sub-paragraph (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 of 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 sub-paragraph.

## **Article XI\***

### *General Elimination of Quantitative Restrictions*

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

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 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 sub-paragraph (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.

#### **Article XII\***

##### *Restrictions to Safeguard the Balance of Payments*

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 a 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 sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

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 recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(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 interests 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, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize 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 sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (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 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 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 balance 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 organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

#### **Article XIII\***

##### *Non-discriminatory Administration of Quantitative Restrictions*

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 following 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 licences or permits without a quota;

- (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (d) of this paragraph, require that import licences 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 licences granted over a recent period and the distribution of such licences 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 subparagraph.

(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 this 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.

**Article XIV\***

*Exceptions to the Rule of Non-discrimination*

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 Section 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 to 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.

#### **Article XV**

##### *Exchange Arrangements*

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 the 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 obligations 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 in 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.

## **Article XVI\***

### *Subsidies*

#### 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 subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization 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 subsidization, 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 subsidization.

#### Section B \_ Additional Provisions on Export Subsidies\*

2. The contracting parties recognize 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.\*

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 subsidization 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 provisions 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 subsidization seriously prejudicial to the trade or interests of contracting parties.

### **Article XVII**

#### *State Trading Enterprises*

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 sub-paragraph (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 sub-paragraph (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.

3. The contracting parties recognize that 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 authorizing 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 mark-up\* 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 interest 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 authorizing 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 interests of particular enterprises.

#### **Article XVIII\***

##### *Governmental Assistance to Economic Development*

1. The contracting parties recognize 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 recognize 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 recognize 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.

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 of this Agreement, as provided in Sections A, B and C of this Article.

(b) 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 recognize 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.

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 recognize 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, trade mark, 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 sub-paragraph (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 sub-paragraph 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 sub-paragraph (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 so 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 sub-paragraph (c) (ii) or (d) of this paragraph, finds that the release of obligations authorized 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<sup>1</sup> 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.\*

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 party may, after informing the CONTRACTING PARTIES, 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 authorize 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 sub-paragraph 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.

### Article XIX

#### *Emergency Action on Imports of Particular Products*

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 sub-paragraph (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 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 sub-paragraph (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.

## **Article XX**

### *General Exceptions*

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, trade marks 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 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.

## **Article XXI**

### *Security Exceptions*

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

## **Article XXII**

### *Consultation*

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.

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 inter-governmental organization 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 authorize 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<sup>1</sup> 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.

## **PART III**

### **Article XXIV**

*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;
  - (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 recognize 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 recognize 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 if 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 sub-paragraphs (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 sub-paragraph 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 sub-paragraph (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 jeopardize 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 to 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 recognizing 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.

## **Article XXV**

### *Joint Action by the Contracting Parties*

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<sup>^</sup>

## **Article XXVI**

### *Acceptance, Entry into Force and Registration*

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<sup>1</sup> 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 Executive Secretary<sup>1</sup> to the CONTRACTING PARTIES at the time of its own acceptance.

(b) Any government, which has so notified the Executive Secretary<sup>1</sup> under the exceptions in sub-paragraph (a) of this paragraph, may at any time give notice to the Executive Secretary<sup>1</sup> 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 Executive Secretary!

(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 Executive Secretary<sup>1</sup> 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.

#### **Article XXVII**

##### *Withholding or Withdrawal of Concessions*

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.

#### **Article XXVIII\***

##### *Modification of Schedules*

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

iSee Preface.

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 agreement, 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.

(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 paragraph 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 paragraph 1 to 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.

#### **Article XXVIII bis**

##### *Tariff Negotiations*

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 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 fiscal,\* developmental, strategic and other needs of the contracting parties concerned.

#### **Article XXIX**

##### *The Relation of this Agreement to the Havana Charter*

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to 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 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.

#### **Article XXX**

##### *Amendments*

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.

#### **Article XXXI**

##### *Withdrawal*

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 Secretary-General of the United Nations.

#### **Article XXXII**

##### *Contracting Parties*

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.

#### **Article XXXIII**

##### *Accession*

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.

#### **Article XXXIV**

##### *Annexes*

The annexes to this Agreement are hereby made an integral part of this Agreement.

#### **Article XXXV**

*Non-application of the Agreement between Particular Contracting Parties*

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.

## PART IV

### TRADE

### AND

### DEVELOPMENT

#### 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) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;
  - (e) recognizing 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. 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.

3. 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 stabilize 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.

4. 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.

5. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships 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.

6. 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.

7. 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.\*

8. 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.

9. 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 to 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 stabilize 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 organizations, and in particular with organizations 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 harmonization 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.

# MFN IN THE GATT AND THE WTO

*Donald McRae* \*

## I. INTRODUCTION

The object of this paper is to provide an analysis of the way in which MFN has been interpreted and applied in the context of GATT and the WTO agreements. In the previous work of the International Law Commission, the role of MFN in GATT was considered in some depth.<sup>1</sup> This paper, therefore, focuses more on practice under the WTO agreements and in particular the interpretation of those agreements through WTO dispute settlement.

## II. THE INCLUSION OF MFN IN GATT

The MFN principle, first embodied in treaties of friendship, commerce and navigation, was regarded even in the inter-war years as “an essential condition of the free and healthy development of commerce between States”.<sup>2</sup> In the negotiations for the International Trade Organization (ITO) the United States argued that an MFN provision was “absolutely fundamental”, and the MFN provision included in the draft charter for the ITO became the first paragraph of GATT Article I, essentially unchanged from the initial draft proposal of the United States.<sup>3</sup>

Article I of the GATT provides:

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.

There are two important aspects to this MFN provision, which distinguish it from the MFN provisions of past bilateral treaties. First, the

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<sup>1</sup> See the treatment provided by the Special Rapporteur, Mr. Endre Ustor in his *Second Report on the Most-Favoured-Nation Clause*, 1970(2) Y. B. INT’L L. COMMISSION 199, 217-235.

<sup>2</sup> *The World Economic Conference: Final Report 34*, League of Nations Doc. C.356.M.129.1927.II (C.E.I.46) (1927).

<sup>3</sup> JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 252 (1969). A reference to government contracts for public works was excluded from both the ITO and the GATT.

inclusion of MFN in GATT made it a multilateral not a bilateral obligation as it had been under friendship, commerce and navigation treaties. Instead of having to conclude country-by-country treaties providing for MFN treatment, by becoming a party to the GATT a state could obtain MFN benefits from all other GATT Contracting Parties automatically. GATT applied MFN multilaterally. Second, GATT opted for unconditional MFN. According to the terms of GATT Article I:1, MFN treatment was to be provided “immediately and unconditionally”. GATT

represented a clear break from any notion of conditional MFN where MFN would be provided only in exchange for some reciprocal benefit.<sup>4</sup>

The MFN principle is generally regarded as a “cornerstone” of the GATT.<sup>5</sup> Although stated explicitly in Article I:1, it is also found directly and indirectly in a number of provisions of the GATT.<sup>6</sup> It reflects the fact that a multilateral trading regime depends on non-discrimination — in that each party has to be able to ensure that its traders have equality of competitive opportunities.<sup>7</sup> And that is what MFN provided. As the Appellate Body pointed out in *Canada-Autos*, the object and purpose of GATT Article I:1 “is to prohibit discrimination among like products originating in or destined for different countries.”<sup>8</sup> Somewhat circularly, the Appellate Body went on to say, that “[t]he prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.”<sup>9</sup> GATT Article I:1 provides more than an incentive; it contains an obligation to extend such benefits at all WTO Members.

The MFN obligation is repeated in GATT Article II, which relates specifically to tariff bindings. Each contracting party is required to “accord to the commerce of the other contracting parties treatment no less favourable than that provided for” in its schedule of tariff concessions. It is to be noted the form of the MFN provision in GATT Article II differed from that of GATT Article I. Under GATT Article I “advantages” had to be accorded “immediately and unconditionally”; under GATT Article II,

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<sup>4</sup> See International Law Commission [ILC], *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, at 33-9. While many major nations moved to an “unconditional MFN” policy prior to War World I, the United States changed to an unconditional policy in 1923.

<sup>5</sup> Appellate Body Report, *European Communities – Conditions for the Granting of Tariff*

*Preferences to Developing Countries*, ¶ 101, WT/DS246/AB/R (Apr. 20, 2004) [hereinafter *EC- Tariff Preferences* Appellate Body Report].

<sup>6</sup> General Agreement on Tariff and Trade [GATT] arts. II, III (7), IV, V (2), (5) & (6), IX (1), XIII (1), XVII (1), and XX (j).

<sup>7</sup> For a discussion of the economic and non-economic rationales for MFN within the multilateral

trading system, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF*

*INTERNATIONAL ECONOMIC RELATIONS* 158-60 (2nd ed., 1997).

<sup>8</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 84, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada-Autos* Appellate Body Report].

<sup>9</sup> *Id.*

“treatment” that was “no less favourable” had to be provided to other contracting parties.

MFN under GATT was a provision relating initially to tariffs. The wording of GATT Article I expresses this: “with respect to customs duties and charges of any kind”. It related to border measures, and equality of competitive opportunities at the border was necessary for the operation of comparative advantage that underpinned the notion of free trade. Under the traditional GATT negotiating process, contracting parties would negotiate tariff concessions on a bilateral basis.<sup>10</sup> State A would agree to lower tariffs on certain goods of interest to State B in exchange for State B agreeing to lower tariffs on goods of interest to State A. These tariff commitments would be included in the schedule of commitments of each contracting party and by virtue of the operation of the MFN provision all other contracting parties would be entitled to the benefit of those tariff concessions. Although the rationale of comparative advantage indicates that economic efficiency is promoted even where tariff concessions are granted to States that have not given anything in exchange for that benefit, States do not always view things that way. States that obtain such benefits without providing anything in exchange are often viewed as “free riders”.

However, even though MFN under GATT was pervasive in that most provisions, both tariff and non-tariff related, are covered by an MFN obligation, it was also circumscribed by numerous exceptions and these exceptions gained in importance as attention was directed to non-tariff barriers to trade. An important group of exceptions is found in GATT Article I itself, which “grandfathered” certain existing preferential arrangements.<sup>11</sup> Beyond this, the most prominent exception was that of Article XXIV, which permits GATT contracting parties to continue with existing or enter into new customs unions or free trade areas. Since such arrangements by definition grant preferences to some States that are not made available to others, they are in contravention of a general MFN provision. Article XXIV allows GATT contracting parties to lower tariffs in the context of a customs union or free trade area without having the obligation to lower those tariffs in respect of all other GATT contracting parties.

There were also other exceptions under the GATT. Article XX deals with general exceptions including regulations relating to public morals, health and safety regulation and environmental regulation. In all of these instances, if appropriate conditions are met, contracting parties may adopt measures that are discriminatory, and are relieved from their obligation to provide MFN treatment. Article XXI provides an exception in relation to

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<sup>10</sup> See D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*,

77 *Am. J. Int'l L.* 51, 66 (1983).

<sup>11</sup> GATT art. I:2-4.

regulations protecting a contracting party's security interests. Equally GATT Article XIX permits derogation from MFN obligations in respect of safeguard measures designed to deal with temporary import surges and Articles XII and XIV provided exceptions to deal with balance of payments problems.

An exception was also developed under GATT to respond to the particular needs of developing countries. Under the "generalized system of preferences", GATT contracting parties were permitted to grant preferential tariffs to products from developing countries without being in contravention of their MFN obligations. This subsequently became formalized as the "Enabling Clause"<sup>12</sup> whose relationship to MFN has given rise to some controversy under the WTO.<sup>13</sup>

A further specific exception from the obligations of GATT Article I:1 was granted by the Lomé Waiver, under which the GATT contracting parties granted the European Communities a waiver from its obligations under GATT Article I:1 in respect of its obligations under the Lomé Convention. That waiver was later extended by the General Council of the WTO.<sup>14</sup>

### III. RELATIONSHIP TO NATIONAL TREATMENT

The other arm of the non-discrimination principle under the GATT was the national treatment principle. While MFN prevented discrimination as between foreign products, the national treatment principle prevented discrimination as between domestic and imported products. While MFN would operate primarily at the border, the national treatment principle would prevent discrimination within the domestic market of a State.<sup>15</sup>

The national treatment principle is found specifically in two paragraphs of GATT Article III. Paragraph 2 requires that imported products 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". Paragraph 4 provides that imported products "shall be accorded treatment no less favourable than that accorded to like products of domestic

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<sup>12</sup> Officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", the Enabling Clause was adopted under GATT in 1979. See World Trade Organization [WTO], WTO Trade and Development Committee, *Work on special and differential provisions, available at [http://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm)* (last visited Feb. 20, 2012).

<sup>13</sup> *EC-Tariff Preferences* Appellate Body Report, *supra* note 5, ¶¶ 87-103.

<sup>14</sup> See Decision of the WTO General Council of 14 October 1996, WT/L/186 (Oct. 18, 1996).

<sup>15</sup> MFN would also operate within the domestic market if there was discrimination between foreign products even if there was no breach of the national treatment principle.

origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use". Each of these provisions uses a slightly different formula for prohibiting discrimination than that employed in GATT Article I:1, but they all use the common term "like product". As will be seen, judicial interpretation of the term "like product" has been far more frequent in the case of national treatment than it has been in the case of MFN.

#### IV. INTERPRETATIVE ISSUES UNDER GATT

GATT Article I:1 was not subject to frequent interpretation under GATT dispute settlement. Generally, panels took the view that any benefit accorded to a GATT contracting party not available to other contracting parties was an "advantage" and hence fell within GATT Article I:1. In

*EEC-Imports of Beef*<sup>16</sup> the fact that USDA — approved beef automatically

met the requirements of the EEC quota for beef imports but Canadian- approved beef that met precisely the same specifications did not, meant that there was a violation of GATT Article I:1. In *US-MFN Footwear*<sup>17</sup> a panel concluded that automatic backdating of the revocation of countervailing

duties was an advantage which if not accorded on an MFN basis was contrary to GATT Article I:1. The effect was to cover both discriminatory treatment that was clear on its face as well as discriminatory treatment that existed in fact, even though apparently neutral.

In respect of the interpretation of the term "like product" in GATT Article I:1, no definitive approach emerged under GATT panels. In *Spain- Unroasted Coffee*,<sup>18</sup> the panel took the view that unroasted, non- decaffeinated coffee was the same product regardless of where it was grown, how it was cultivated, or how the beans were processed. Essentially the panel relied on external characteristics and end use, noting that coffee "was universally regarded as a well-defined and single product intended for drinking."<sup>19</sup>

However, what was never resolved under GATT was the extent to which the term "like product" under Article I:1 should be given the same meaning as the term "like product" in GATT Article III dealing with national treatment, or as the term "like product" used in the provisions

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<sup>16</sup> Report of the Panel, *European Economic Community – Imports of Beef from Canada*, ¶ 4.3, L/5099 (Mar. 10, 1981), GATT B.I.S.D. (28th Supp.) at 92 (1982).

<sup>17</sup> Report of the Panel, *United States – Denial of Most-Favoured-Nation Treatment as to Non- Rubber Footwear from Brazil*, ¶ 6.17, DS18/R (June 19, 1992), GATT B.I.S.D. (39th Supp.) at 128 (1993).

<sup>18</sup> Report of the Panel, *Spain – Tariff Treatment of Unroasted Coffee*, ¶ 4.9, L/5135 (June 11, 1981), GATT B.I.S.D. (28th Supp.) at 102 (1982) [hereinafter *Spain-Unroasted Coffee* GATT Panel Report].

<sup>19</sup> *Id.* ¶ 4.7.

relating to antidumping or safeguards.<sup>20</sup> This remains an issue under the WTO, although more guidance is now available from decisions of the WTO Appellate Body.

## V. MFN UNDER THE WTO

The WTO continued GATT as it was, so there was no change to the wording of GATT Article I:1. However, the WTO included a compulsory form of judicial dispute settlement, including an Appellate Body, providing thereby an opportunity for the provisions of the GATT to be interpreted and clarified.<sup>21</sup> Moreover, trade in services and trade-related aspects of intellectual property rights were also brought within the framework of the WTO and in each of these areas obligations to provide MFN treatment are included.<sup>22</sup>

## VI. THE INTERPRETATION OF GATT ARTICLE I:1 UNDER THE WTO

### A. General Approach

From the outset, the WTO Appellate Body has been prepared to give a broad interpretation to the scope of GATT Article I:1. In *EC-Bananas*, the Appellate Body concluded that the fact that certain procedural and administrative requirements applicable to the banana imports of particular States went “significantly beyond” those applicable to banana imports from third States constituted an “advantage” within the meaning of GATT Article I.<sup>23</sup> In coming to its conclusion, the Appellate Body noted that GATT panels had given a broad definition to the term “advantage”.<sup>24</sup>

In *Canada-Autos*, the Appellate Body once again emphasized the breadth of the obligation in GATT Article I:1:<sup>25</sup>

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<sup>20</sup> GATT art. VI and art. XIX.

<sup>21</sup> Art. 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU] provides that one of the functions of the dispute settlement system is “to clarify the existing

provisions of those (WTO) agreements in accordance with customary rules of interpretation of public international law.”

<sup>22</sup> General Agreement on Trade and Service [GATS] art. II; Agreement on Trade-Related Aspects

of Intellectual Property Rights [TRIPS] art. 4. On the treatment of MFN under both GATT and GATS; see generally PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, TEXT, CASES AND MATERIALS*, chapter 4 (2005).

<sup>23</sup> See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 206, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC-Bananas III*

Appellate Body Report].

<sup>24</sup> *Id.*

<sup>25</sup> *Canada-Autos* Appellate Body Report, *supra* note 8, ¶ 79.

We note next that Article I:1 requires that “*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*.” (emphasis added) The words of Article I:1 refer not to *some* advantages granted “with respect to” the subjects that fall within the defined scope of the Article, 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.

The Appellate Body also made clear that it was following the earlier GATT jurisprudence, which applied GATT Article I:1 to *de facto* as well as to *de jure* discrimination. It said:<sup>26</sup>

[W]e observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an “advantage” to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words “*de jure*” nor “*de facto*” appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only “in law”, or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also “in fact”, or *de facto*, discrimination. Like the Panel, we cannot accept Canada’s argument that Article I:1 does not apply to measures which, on their face, are “origin- neutral”.

The Appellate Body ultimately found that the duty remission on imported vehicles provided by Canada under which only vehicles imported by certain manufacturers were eligible (essentially excluding exports from Japanese and German manufacturers) contravened GATT Article I:1.

In principle, then, GATT Article I:1 applies to all “advantages” granted by WTO Members unless they have been specifically excluded from the scope of MFN under provisions of the Agreement or by other of the WTO “covered” agreements. The application of MFN to specific areas of trade in goods under GATT (subsidies, antidumping, safeguards) is generally governed by the separate covered agreements applicable to those areas, which in some circumstances permit discriminatory action.<sup>27</sup>

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<sup>26</sup> *Id.* ¶ 78.

<sup>27</sup> *E.g.*, Agreements on Safeguards, art. 5(2)(b).



However, the extent to which GATT Article I:1 would apply to the provisions of agreements that are not part of the WTO “covered” agreements is less clear. The problem had already arisen under the GATT. During the Tokyo Round, a number of separate “Codes” were concluded, but not all GATT contracting parties had become parties to those Codes. The question therefore was whether GATT contracting parties that were not parties to a Code, could nevertheless get the benefit of the Code through the application of the MFN provision in GATT Article I:1. The United States specifically did not provide benefits of the Codes to which it was a party to GATT contracting parties that had not become a party to the Code. This was challenged by India, which considered that MFN should apply, although the matter was eventually settled by agreement.<sup>28</sup>

The contemporary question is whether WTO Members who are not parties to the WTO “Plurilateral Agreements”<sup>29</sup> can claim the benefits of those agreements on the basis of GATT Article I:1. Some argue that in principle they can,<sup>30</sup> although the matter has yet to come before a WTO Panel. If they can, then the distinction between the WTO covered agreements, to which all WTO Members must become parties and the Plurilateral Agreements which WTO members can choose to become party to or not, is diminished, if not extinguished.

### ***B. The Exceptions to MFN***

Some insight into the scope of GATT Article I:1 can also be found in the way in which the exceptions to MFN have been applied. In interpreting the Lomé Waiver in *EC-Bananas* the Appellate Body focused on the specific wording of the waiver, which had been granted “to the extent necessary” to permit the EC to provide the preferential treatment “required” by the Convention.<sup>31</sup> Thus, it was not prepared to allow derogations in respect of GATT Article I:1 in respect of measures that were not “required” by the Lomé Convention. Equally, the Appellate Body was not prepared to apply the Lomé Waiver to other MFN obligations under GATT, since the waiver stated expressly that it applied to GATT Article I:1.<sup>32</sup>

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<sup>28</sup> JACKSON, *supra* note 7, at 143-45.

<sup>29</sup> The WTO Plurilateral Agreements were originally negotiated in the Tokyo Round but are annexed to the WTO Agreements. However, not all WTO members became party to them. The

four initial agreements were trade in civil aircraft, government procurement, international dairy agreement and international bovine meat agreement, though the later two agreements were terminated in 1997. See WTO, Understanding the WTO: The Agreements, *Plurilaterals: of minority interest*, available at [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm10\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm) (last visited Feb. 20, 2012).

<sup>30</sup> VAN DEN BOSSCHE, *supra* note 22, at 314.

<sup>31</sup> See *EC-Bananas III* Appellate Body Report, *supra* note 23, ¶ 74.

<sup>32</sup> *Id.* ¶ 81.

In *EC-Tariff Preferences*,<sup>33</sup> the Appellate Body took the view that the relationship between GATT Article I:1 and the “Enabling Clause” was that of rule and exception. Thus, it first had to be established whether there had been a violation of GATT Article I:1, and if that was established, whether it

could be justified under the Enabling Clause.<sup>34</sup> The complaint by India involved the way in which the EC applied its tariff preferences for developing countries — some developing countries were entitled to receive certain preferences whereas others were not.

The “rule/exception” analysis of the Appellate Body in *EC-Tariff Preferences* reinforces the primacy attached to the MFN provision in GATT Article I:1. The Appellate Body had reiterated that MFN was the “cornerstone” of the GATT, thus reasserting its priority, even though any preference given to developing countries by virtue of the Enabling Clause had by definition been excluded from the application of GATT Article

I:1.<sup>35</sup> As will be seen, however, such assertions are to a certain extent symbolic. The potential scope of application of GATT Article I:1 is broad, but in practice the effect of the exceptions to it is to limit its ambit at the outset.

The breadth of the scope of MFN under GATT is also demonstrated by the way in which the Appellate Body has interpreted GATT Article XXIV, which provides an exception from MFN in respect of regional free trade

agreements and customs unions. In *Turkey-Textiles*<sup>36</sup> the Appellate Body had to determine whether quantitative restrictions imposed by Turkey on

the importation of certain textiles and clothing products from India was contrary to, *inter alia*, the MFN requirement of GATT Article XIII.<sup>37</sup> Turkey argued that it had imposed those measures in implementation of a

customs union it had entered into with the EC, and thus was justified in its actions under GATT Article XXIV.

However, the Appellate Body took a somewhat restrictive approach to the scope of GATT Article XXIV as a means of avoiding the MFN obligation of GATT Article I:1. Relying in part on the terms of the chapeau to GATT Article XXIV:5, that the provisions of the Agreement are not to “prevent” the formation of a customs union or free trade area, the Appellate Body concluded that deviation from MFN under a customs unions was

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<sup>33</sup> *EC-Tariff Preferences* Appellate Body Report, *supra* note 5, ¶ 40.

<sup>34</sup> *Id.* ¶ 40.

<sup>35</sup> *Id.*

<sup>36</sup> Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 1, WT/DS34/AB/R (Oct.22, 1999) [hereinafter *Turkey-Textiles* Appellate Body Report].

<sup>37</sup> GATT Article XIII addresses obligations in regards to non-discriminatory administration of

quantitative restrictions and provides in relevant part: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.

justified only if the formation of the customs union would have been prevented if the measure in question could not have been adopted.<sup>38</sup>

In short, not all action taken under a customs union or free trade area will escape the MFN obligation of GATT Article I:1. It would have to be action that if not taken would prevent the establishment of the customs union. The effect of the Appellate Body decision in *Turkey-Textiles* is to establish a relatively high threshold for claims that measures that are inconsistent with MFN are in fact justified under GATT Article XXIV. This in turn reinforces the priority given to the MFN obligation under GATT.

The interpretation of the General Exceptions under GATT Article XX indicates that the Appellate Body gives a restrictive interpretation to these exceptions as well, and thereby enhances the status of the substantive non-discrimination obligations. While the instances that have arisen have been in the context of the interpretation of the national treatment obligation under GATT Article III, there seems no reason why such a restrictive approach would not apply when Article XX defences are raised with respect to other MFN obligations in GATT, including that in GATT Article I:1.

In *US-Shrimp* the Appellate Body stated that the exceptions in GATT Article XX were “*limited and conditional* exception(s) from the substantive obligations contained in the other provisions of the GATT 1994”<sup>39</sup> and spoke of a balance that is required between the right of a State to invoke an exception and its duty to respect the treaty rights of other States.<sup>40</sup> The consequence is that a hierarchy has been established between the substantive obligations of GATT and the exceptions to those obligations, with the latter being interpreted restrictively and the former not necessarily so.<sup>41</sup> The result as far as GATT Article I:1 is concerned is that MFN can be given a broad meaning but the exceptions to it will be interpreted restrictively.

This restrictive approach to GATT exceptions is also evident in *Mexico-Soft Drinks*.<sup>42</sup> Mexico had imposed a tax on the importation and the

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<sup>38</sup> *Turkey-Textiles* Appellate Body Report, *supra* note 36, ¶ 16. It was also required that the customs union was one that met the requirements of GATT Article XXIV for the formation of a customs union.

<sup>39</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 157, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US-Shrimp* Appellate Body Report] (emphasis in the original).

<sup>40</sup> *Id.* ¶ 156.

<sup>41</sup> See Donald M. McRae, *GATT Article XX and the WTO Appellate Body*, in *NEW DIRECTIONS IN*

*INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 219, 232 (Marco

Bronckers & Rienhard Quick eds., 2000).

<sup>42</sup> See generally Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter *Mexico-Taxes on Soft Drinks* Appellate Body Report].

distribution of soft drinks containing artificial sweeteners and sought to justify the violation of the national treatment provision in GATT Article III (in that no tax was imposed on the like product soft drinks sweetened with sugar) on the ground that the measure was in conformity with GATT Article XX(d). That is to say, it was a measure “necessary to secure compliance [by the United States] with laws or regulations which are not inconsistent with this Agreement” as provided for in GATT Article XX(d). The “law or regulation” to which United States compliance was sought was allegedly the provisions of NAFTA. In short, Mexico wanted the Appellate Body to interpret “laws or regulations” to include international legal obligations. But the Appellate Body was not prepared to give GATT Article XX(d) such a broad interpretation, reading it as limited to the domestic legal obligations such as those set out in an illustrative list in paragraph GATT Article XX(d).<sup>43</sup>

Thus, whenever the Appellate Body has had to interpret the scope of exceptions to the MFN provision in GATT Article I:1, it has done so by interpreting those exceptions restrictively. It has asserted the primacy of MFN over the exceptions and thus given the impression at least that MFN under the WTO agreements has a broad scope.

### ***C. The Concept of “Like Product”***

The term “like product” in GATT Article I:1 has yet to be interpreted by WTO panels or the Appellate Body. However, the term “like products” appears in numerous places in GATT and has been the subject of significant discussion in the context of GATT Article III National Treatment. In *Japan-Alcohol* when interpreting GATT Article III, the Appellate Body made its often-quoted statement:<sup>44</sup>

The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

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<sup>43</sup> This included customs, monopolies, patent and trade mark enforcement and the prevention of deceptive practices.

<sup>44</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 21, WT/DS8/AB/R (Oct. 4, 1996) [hereinafter *Japan-Alcoholic Beverages II* Appellate Body Report].

The Appellate Body concluded that in the particular context of the first sentence of GATT Article III:2, the term “like products” should be interpreted narrowly. Since GATT Article I:1 does not have the complexity of GATT Article III, which relates not just to “like products” but also to “directly competitive or substitutable products”, it is not clear that the restrictive interpretation applicable in the context of GATT Article III would be applied to what constitutes “likeness” under MFN in GATT Article I:1.

Nevertheless, the objective factors that are taken into account in determining likeness under GATT Article III — external characteristics, end use, consumer tastes and preferences and the way they are dealt with in tariff regimes — would appear to be relevant to any determination of “like product” under GATT Article I:1. Indeed, the GATT case of *Spain- Unroasted Coffee*, which dealt with the issue of “like products” under GATT Article I:1, considered many of these factors.<sup>45</sup> More interesting is the question whether the statement of the Appellate Body in *EC-Asbestos*<sup>46</sup> that the health risks of a product are relevant to determining its likeness to other products would also apply in considering “likeness” under GATT Article I:1.<sup>47</sup>

#### ***D. “Immediate and unconditional” application***

In respect of the requirement that any advantage granted to a product be accorded to like products “immediately and unconditionally”, there has been some discussion in the jurisprudence on the meaning of “unconditionally”. In the GATT case *Belgium-Family Allowances*,<sup>48</sup> the fact that an exemption from levies on products was available only to countries that had a system of family allowances similar to Belgium was treated as a conditional grant of MFN. Countries could only get those exemptions if they adopted a particular system of family allowances. In *Indonesia-Autos* customs duties and tax benefits for imported vehicles were “conditional on achieving a certain level of local content value for the finished car.”<sup>49</sup> This, the Panel said, was inconsistent with the provisions of

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<sup>45</sup> *Spain-Unroasted Coffee* GATT Panel Report, *supra* note 18, ¶ 4.7.

<sup>46</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 113, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC-Asbestos* Appellate Body Report].

<sup>47</sup> In fact, the impact of this may not be great since under the SPS Agreement WTO Members can impose border restrictions on products that pose health risks provide they meet the requirements of that Agreement.

<sup>48</sup> Report of the Panel, *Belgian Family Allowances*, ¶ 3, G/32 (Nov. 6, 1952), GATT B.I.S.D. (1st Supp.) at 59(1953).

<sup>49</sup> Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.146, WT/DS54/R (July 2, 1998) [hereinafter *Indonesia-Autos* Panel Report].

GATT Article I:1, which required that advantages be accorded immediately and unconditionally.<sup>50</sup>

A similar approach was taken by the Appellate Body in *Canada-Autos*, which noted that “the import duty exemption to certain motor vehicles entering Canada from certain countries” was granted to “a limited number of designated manufacturers who are required to meet certain performance conditions”.<sup>51</sup> Thus, the Appellate Body said, “In practice, this measure does not accord the same import duty exemption immediately and unconditionally to like motor vehicles of *all* other Members, as required under Article I:1 of the GATT 1994.”<sup>52</sup>

In effect, then, a finding that an advantage has not been accorded immediately and unconditionally is consequential on a determination that it has been granted to a Member or to some Members, but not to others. Once it has been established that an advantage has been granted to certain Members products but not to other Members products, the conclusion that it has not been accorded immediately and unconditionally to the products of all Members seems to follow as a matter of course.

## VII. MFN IN GATS

Just as it is under GATT Article I, MFN is regarded as a core obligation under GATS. Each WTO Member must provide MFN treatment to all services and service suppliers of another WTO Member. GATS Article II paragraph 1 provides: “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than treatment it accords to like services or service suppliers of any other country.”

Yet this blanket provision for MFN is not as broad as it might appear. Paragraph 2 of Article II allowed Members to annex exceptions to which MFN would not apply and thus the extent of the obligation is significantly circumscribed.

The difference in wording between GATT Article I and GATS Article II is that whereas the former relates to any “advantage” granted to a contracting party, the latter relates to “measures affecting trade in services”. Moreover, the wording of GATS Article II uses the language of “treatment no less favourable” found in of GATT Article II and GATT Article III. However, this does not mean that GATT Article I and GATS Article II are to be interpreted differently. In the first case to consider GATS Article II, *EC-Bananas*, the panel had noted that the wording of GATS Article II

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<sup>50</sup> *Id.*

<sup>51</sup> *Canada-Autos* Appellate Body Report, *supra* note 8, ¶ 85.

<sup>52</sup> *Id.* emphasis in the original.

resembled that of GATS Article XVII dealing with national treatment.<sup>53</sup> Accordingly, the panel concluded, the language of the two articles should be interpreted in the same way. However, the Appellate Body pointed out that Article II was an MFN provision and the interpretation of a national treatment provision was not necessarily relevant to the interpretation of an MFN provision.<sup>54</sup>

Instead, the Appellate Body said, the MFN obligation in GATS Article II should be compared with the MFN obligations in GATT, and as a consequence interpreted it in line with that provision.<sup>55</sup> GATT Article I:1 applied to both *de jure* and *de facto* discrimination, and the Appellate Body

concluded that even though GATS Article II was worded differently from GATT Article I:1, this did not mean that it was limited only to *de jure* discrimination.<sup>56</sup> Thus, whether an MFN clause is worded as requiring that

“any advantage” accorded to one contracting party must be “immediately and unconditionally” accorded to all contracting parties, or as requiring that treatment accorded to a contracting party must be “no less favourable” than treatment accorded to other contracting parties, in the view of the Appellate Body the result is the same. Both *de jure* and *de facto* discrimination are covered.

The interpretive issues in relation to GATS Article II relate to what constitutes a “measure”, what constitutes “like services or service providers” and what constitutes “no less favourable treatment”.

The concept of a measure appears to be quite wide under GATS. “Measure” is defined in GATS Article XXVIII as meaning “any measure by a Member, whether in the form of a law, regulation, rule procedure, decision, administrative action, or any other form”. However, in *Canada- Autos*, the Appellate Body pointed out, the term used in GATS Article II:1 is “any measure covered by this Agreement” and by virtue of GATS Article

I:1, a measure must be one “affecting trade in services”.<sup>57</sup> Thus, the enquiry under GATS Article II:1 is twofold; was there a trade in services, and did the measure affect that trade?<sup>58</sup>

Trade in services is defined in GATS Article I:2 by the various ways in which cross-border services can take place.<sup>59</sup> In *EC-Bananas*, the Appellate

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<sup>53</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.301, WT/DS27/R/ECU, WT/DS27/R/MEX & WT/DS27/R/USA (May 22, 1997).

<sup>54</sup> *EC-Bananas III* Appellate Body Report, *supra*, note 23, ¶ 231.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* ¶¶ 233-34.

<sup>57</sup> *Canada-Autos* Appellate Body Report, *supra* note 8, ¶ 152.

<sup>58</sup> *Id.* ¶ 155.

<sup>59</sup> GATS art. I:2: For the purposes of this Agreement, trade in services is identified as the supply of a service:(a) from the territory of one Member into the territory of any other Member; (b) in the

territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service

Body indicated that the concept of “affecting a service” can be quite broad. It said.<sup>60</sup>

In our view, the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word “affecting” implies a measure that has “an effect on”, which indicates a broad scope of application. This interpretation is reinforced by the conclusions of previous panels that the term “affecting” in the context of Article III of the GATT is wider in scope than such terms as “regulating” or governing”.

A “service supplier” is defined, rather unhelpfully, in GATS Article XXVIII as “any person that supplies a service”. However, the Appellate Body has yet to clarify the meaning of “like services or service suppliers” in GATS Article II.1. In *Canada-Autos* the Panel simply noted that to the extent that services suppliers supply the same services, they should be considered “like”.<sup>61</sup>

With respect to the meaning of the term “treatment no less favourable”, as pointed out earlier, the Appellate Body concluded in *Canada-Autos* that GATS Article II.1 included *de facto* as well as *de jure* discrimination.<sup>62</sup>

However, given the reluctance of the Appellate Body to link GATS Article II with the national treatment provision of GATS, whether guidance can be drawn from the concept of “treatment no less favourable” in respect of national treatment in GATS Article XVII is an open question.

### VIII. MFN IN TRIPS

Article 4 of the TRIPS Agreement provides: “With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

The inclusion of an MFN provision in relation to intellectual property is quite new<sup>63</sup> and is designed to ensure that advantages granted bilaterally

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supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

<sup>60</sup> *EC-Bananas III* Appellate Body Report, *supra* note 23, ¶ 220.

<sup>61</sup> Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 10.247, WT/DS139/R, WT/DS142/R (Feb. 11, 2000).

<sup>62</sup> *Canada-Autos* Appellate Body Report, *supra* note 57 and accompanying text.

<sup>63</sup> DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 104 (2003).

However, national treatment is a common provision in intellectual property agreements, including the Paris, Berne and Rome Conventions.



will be accorded to all WTO Members. However, the range of application of the provision is significantly limited because it does not apply to agreements concluded before the WTO entered into force unless such agreements constitute a means of arbitrary or unjustifiable discrimination against WTO members.<sup>64</sup> There are also exceptions in respect of agreements relating to judicial assistance and law enforcement as well as advantages granted under the Berne and Rome Conventions.<sup>65</sup>

Nevertheless, the concept of “protection” for which MFN is to be granted, is quite broad. Footnote 3 to Article 3 (National Treatment) provides: ‘For the purposes of Articles 3 and 4, “protection” shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.’

In *US-Section 211*, the Appellate Body described MFN as “fundamental”<sup>66</sup> to the TRIPS Agreement, just as it is fundamental to GATT. The Appellate Body also demonstrated that it was continuing its broad approach to the scope of MFN. Any difference in treatment between Cuban national trademark holders and non-Cuban national foreign trademark holders constituted an MFN violation even though the possibility of it occurring was very limited.<sup>67</sup> Moreover, in that case claims were made in respect of both MFN and national treatment, and the Appellate Body found that what constituted a violation of one was equally a violation of the other.<sup>68</sup>

## IX. MFN IN THE WTO: AN ASSESSMENT

In all of the areas of the WTO agreements to which MFN applies — goods, services and intellectual property — MFN treatment has been treated as essential, fundamental, or as the cornerstone of the agreement. It has been interpreted in a way to give it maximum effect. Advantage in GATT Article II:1 has been emphasized as applying to “any advantage”. Similarly in respect of trade in services, and trade-related aspects of intellectual property, MFN has been treated as having a broad application. This broad application appears to draw no distinction between procedural and substantive benefits. As the Appellate Body said in *Canada-Autos*, “any advantage” means “any advantage” and procedural rights have been

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<sup>64</sup> TRIPS Agreement art. 4(d).

<sup>65</sup> *Id.* arts. 4(a) and (b) respectively.

<sup>66</sup> Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, ¶ 297, WT/DS176/AB/R (Jan. 2, 2002) [hereinafter *US-Section 211 Appropriations Act Appellate Body Report*].

<sup>67</sup> *Id.* ¶¶ 316-17.

<sup>68</sup> *Id.* ¶ 310.

included in within the scope at least of national treatment provisions.<sup>69</sup> There is nothing in the jurisprudence relating to MFN under GATT to suggest that procedural rights would be excluded from the application of MFN.<sup>70</sup>

The application of MFN under the WTO seems to be the same regardless of the different ways in which the principle has been formulated. The requirement to accord any advantage provided to one state immediately and unconditionally to other states has been interpreted to mean the same as the requirement to accord a state treatment no less favourable than that accorded to other states. In this respect, the interpretation of MFN clauses under the WTO has been influenced more by a perception of the object and purpose of the provision, rather than by its precise wording.

At the same time, the scope of MFN is significantly curtailed by exceptions, both in general terms, for example those relating to customs unions and free trade areas and, specifically as in the case of the carve-out in respect of trade in services that WTO Members were able to annex to GATS Article II. The breadth of these exceptions means that the range of application of MFN can be in fact quite limited. This is true, for example, in respect of tariffs, the original object of MFN treatment in trade agreements. As a result of the burgeoning of customs unions and free trade areas, the majority of tariffs today are not applied on an MFN basis. They are applied under regional and other preferential GATT-exempt arrangements.

It is true that the approach of the Appellate Body has been to interpret many of these exceptions narrowly. The approach taken to GATT Article XXIV in *Turkey-Textiles*, and to the chapeau to GATT Article XX, in *US- Shrimp*, are evidence of this. But even with such a restrictive interpretation of individual applications of the exceptions, the substantive scope of the exceptions is far ranging and thus MFN under the WTO has more limited substantive application than the statement of the principle and its characterization as “fundamental” would suggest.

Nevertheless, a note of caution should be sounded. There is as yet insufficient jurisprudence on the interpretation of the MFN provisions under the WTO to be too definitive. The cases so far have been concerned with the interpretation of MFN within the relatively confined framework of the WTO covered agreements. Questions about benefits arising under other agreements have dealt with under the framework of regional trade agreements and GATT Article XXIV. The difficult question is whether

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<sup>69</sup> Report of the Panel, *United States Section 337 of the Tariff Act of 1930*, ¶ 5.10, L/6439 (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1990).

<sup>70</sup> Arguably, in the case of TRIPS this might be seen to flow from the broad meaning given to the term “protection” under TRIPS arts. 3 & 4.

WTO Members who are not parties to the Plurilateral Agreements can claim the benefits under those Agreements by application of GATT Article I:1. If that issue were to arise, only then would the Appellate Body be faced by the kind of issue confronting the investment tribunals, epitomized in the *Maffezini* case.<sup>71</sup>

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<sup>71</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain* (Decision on Objections to Jurisdiction of 25 January 2000) ICSID Case No ARB/97/7 (2002) 5 ICSID Rep. p. 39.

## **NATIONAL TREATMENT PRINCIPLE IN INTERNATIONAL TRADE LAW**

**Michael J. Trebilcock and Shiva K. Giri**

The National Treatment principle, along with the Most-Favored-Nation (MFN) principle, constitute the two pillars of the non discrimination principle that is widely seen as the foundation of the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) multilateral trading regime.

The National Treatment principle has an ancient genesis in international trade law, arguably dating back to ancient Hebrew Law<sup>1</sup> and then appearing in agreements between Italian city states in the eleventh century,<sup>2</sup> in commercial treaties concluded during the twelfth century between England and continental powers and cities,<sup>3</sup> and in agreements among German city states constituting the Hanseatic League from the twelfth century onwards.<sup>4</sup> The principle was also adopted in various shipping treaties entered into between European powers in the seventeenth and eighteenth centuries,<sup>5</sup> and became commonplace in the trade treaties drawn up in large numbers in the latter part of the nineteenth century,<sup>6</sup> as well as appearing in the Paris and Berne Conventions governing intellectual property rights entered into late in the nineteenth century.<sup>7</sup>

While the principle was heavily undermined in the protectionist policies that characterized international trading relations between the two world wars,<sup>8</sup> bilateral trade agreements negotiated by the United States with various trading partners pursuant to the Reciprocal Trade Agreements Act of 1934 typically included some form of the National Treatment principle,<sup>9</sup> and the United States insisted on its incorporation in the GATT as one of its fundamental principles.<sup>10</sup> The principal initial rationale for the principle was to protect concessions reflected in tariff bindings from being undermined by internal taxes or other regulatory measures that replicated the protectionist effect of the previous tariffs.<sup>11</sup> However, on the insistence of the United States, the principle of National Treatment was applied not only to cases of imports that were subject to tariff bindings but extended to internal taxes and other regulatory measures that had a protectionist or discriminatory impact on imports,<sup>12</sup> even in the absence of such bindings, apparently on the assumption that protectionist policies should be channelled into border measures, especially tariffs, that could then be subject to subsequent negotiated reductions and bindings.

During the early years of the GATT, the principal impediment to imports was high tariffs, and the preoccupation of the GATT members was negotiating reductions in these tariffs on an MFN basis,<sup>13</sup> leaving a relatively minor role for the National Treatment principle in disciplining protectionism or discrimination in international trade. However, with the success of the GATT in reducing tariffs to very low levels by the 1980s,<sup>14</sup> the National Treatment principle began to emerge as an important source of discipline on residual forms of protectionism or discrimination that lay beyond or within each member country's borders.

The principle of National Treatment as embodied in Article III of GATT prohibits discrimination between domestic and foreign goods in the application of internal taxation and government regulations after the foreign goods satisfy customs measures at the border. Article 111:1 prohibits the application of internal taxes and other internal charges as well as the 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, to imported or domestic products so as to afford

protection to domestic production. Article III:2, first sentence, prohibits the direct or indirect application of internal taxes or other internal charges of any kind to imported products in excess of those applied, directly or indirectly, to like domestic products. Article III:2, second sentence, prohibits the application of internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in Article III:1. The explanatory note added to Article III:2 states that a tax conforming to the requirements of Article III:2, first sentence, 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 products and, on the other hand, directly competitive or substitutable products that were not similarly taxed. Article III:4 prohibits the accord of less favorable treatment to imported products than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

According to Professor John H. Jackson, "one of the more difficult conceptual problems of GATT rules is the application of the National Treatment obligation in the context of a national regulation or tax which on its face appears to be nondiscriminatory, but because of various circumstances of the market place or otherwise has the effect of tilting the scales against imported products."<sup>15</sup> He claims that because of the language found in GATT Article III paragraph 1 prohibiting taxes or other regulations arranged "so as to afford protection," it could be strongly argued under the GATT that even though a tax (or regulation) appears on its face to be nondiscriminatory, if it has the effect of affording protection, and this effect is not essential to a valid regulatory purpose (as suggested in Article XX), then such tax or regulation is inconsistent with GATT obligations.<sup>16</sup> However, in a situation where the discrimination is made not on the basis of origin of products but on the basis of some other characteristics, it is not easy to distinguish between necessary and legitimate discrimination and illegitimate and trade-restrictive discrimination. Aaditya Mattoo and Arvind Subramanian argue that a difficulty lies in distinguishing between two types of situations - one, a nonprotectionist government cannot prevent certain domestic policies from incidentally discriminating against foreign competitors; and two, a protectionist government uses a legitimate objective as an excuse to design domestic policies which inhibit foreign competition.<sup>17</sup> They claim that the challenge is to devise international rules that are sensitive to the difference between these two situations, exonerating the former while preventing the latter.<sup>18</sup>

Under the GATT and WTO dispute settlement systems, the issues of both explicit discrimination, where internal tax and regulatory measures provide explicitly different standards for foreign products as opposed to the standards applicable to domestic products, and implicit or origin neutral discrimination, where an internal tax or regulatory measure makes no distinction as to the origin of products but such a measure has a disparate or disproportionate impact on imported products, have been challenged before GATT panels as well as WTO panels and the Appellate Body.<sup>19</sup> According to Hudec, the GATT was more preoccupied with explicit or *de jure* discriminatory measures than implicit or *de facto* discrimination.<sup>20</sup> He claims that of the first 207 legal complaints filed with the GATT between 1948 and 1990, only a small number of complaints involved claims of *de facto* discrimination by internal regulatory measures.<sup>21</sup> According to him, the first affirmative ruling sustaining a claim of *de facto* discrimination with regard to an internal regulatory measure was the 1987 panel decision in *Japan - Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages* (hereinafter *1987 Japan Alcohol*).<sup>22</sup> However, as Maruyama argues,<sup>23</sup> this trend has changed since 1990 and the WTO dispute settlement system has been more concerned with facially neutral rather than explicitly discriminatory internal tax or regulatory measures.

This chapter first reviews the GATT panel case law on facially non discriminatory internal tax and regulatory measures in Section 2 and then provides a similar review of more recent WTO panel and Appellate Body case law in Section 3. Section 4 provides a critique of this case law, arguing that it has inconsistently adopted literalist, regulatory purpose, and economic approaches to the interpretation of Article III that have been insufficiently informed by a purposive interpretation of the provisions of Article III, reflecting the anti protectionist purpose identified in Article III:1. The chapter argues for an economically oriented test of “like products” in Article III:2 and III:4 that turns on an existing or potential competitive relationship between imported and domestic products. Similarly, it argues for an economically oriented test of less favorable treatment of imported products in Article III:2 and III:4 that focuses on whether challenged measures disturb the competitive equilibrium between imported and domestic products by imposing competitive burdens on the former that are not borne by the latter. Finally, it acknowledges that there may be a need to accommodate incidentally adverse impacts on imported products produced by domestic measures primarily aimed at nonprotectionist policy objectives and not at restricting imports but which incidentally and unavoidably have this effect. The chapter does not explore, other than incidentally, the relationship between Article III and Article XX (the Exceptions provision), Article III and Article XI (the prohibition on quantitative restrictions), or Article III and the provisions of the WTO TBT, SPS, or GATS Agreements.

## 2 Facially Neutral Tax or Regulatory Measures and the Principle of National Treatment under the GATT Dispute Settlement System

As noted above, the question of the legitimacy of a regulatory measure that does not explicitly distinguish between foreign and domestic products but distinguishes on the basis of some characteristics or set of characteristics of the products arises when such a measure imposes burdens or has a disparate impact on foreign products. The central issue with regard to such a question is the criteria according to which the burdens or disparate impact on foreign products are determined to be illegitimate or contrary to the principle of National Treatment.<sup>24</sup> According to Hudec, the central finding required in this regard is the conclusion that imports are being treated less favorably than domestic products, and the primary sources of differential impact in facially neutral regulatory measures are the distinctions these measures make between one class of products and another.<sup>25</sup> He claims that the finding of discrimination ultimately rests on a finding that the product distinction is illegitimate.<sup>26</sup>

Mattoo and Subramanian also accept that “a determination under Article III hinges on determining whether or not the imported product and its domestic comparator are ‘like’ each other.”<sup>27</sup> They argue that GATT panels lurches between two different doctrinal approaches, which they describe as the “textual” and “contextual” approaches, to interpreting “like products.”<sup>28</sup> They cite the example of the Panel Report in 1987 *Japan Alcohol* case as exemplifying the “textual approach” in its sharpest form, the example of the Panel Report in *United States - Measures Affecting Alcoholic and Malt Beverages* (hereinafter *US-Malt Beverages*) as having introduced, and the unadopted Panel Report in *United States - Taxes on Automobiles* as having fully expressed the “contextual approach.”<sup>29</sup> According to them, these approaches have the following features:<sup>30</sup>

The textual approach has the following features: first, it defines likeness *a priori* in terms of one or a combination of product characteristics, its end-use and its tariff classification; second it makes a distinction between “like” products and “directly competitive or substitutable” products in a manner faithful to the two sentences in Article III:2, and applies different standards of discrimination to the

two cases; third, it preserves a distinct role for Article XX and other exceptions provisions in that they could come into play once (and only after) a measure is deemed to transgress Articles III.

The contextual approach has the following features: first, it does not attempt to define likeness *a priori*; rather it allows *any* distinction to be made between products on regulatory grounds; and second, the standard for determining whether an infraction of Article III has occurred is to ensure that no protectionist intent underlies the distinction nor that any protectionist effect follows from it. In effect, this gives governments the freedom to define likeness, thereby permitting a larger set of measures to be deemed origin-neutral, and *prima facie*, consistent with Article III.

1987 *Japan Alcohol* case<sup>31</sup> was the first significant case brought before the GATT that involved the issue of facially neutral measures and that led to an affirmative ruling sustaining a claim that such measures were contrary to the principle of National Treatment set out in Article III of GATT. The issue in this case was an internal tax measure that classified alcoholic beverages into different categories, subcategories, and grades, based on alcohol content and other qualities, and set different tax rates on each category of alcoholic beverages. The European Communities complained that the Japanese liquor tax system violated the first sentence of Article III:2, by taxing imports at higher rates than “like” domestic products, and the second sentence of Article III:2 by affording protection to “directly competitive or substitutable” domestic products. Japan responded by arguing that each contracting party to the GATT was free to classify products for tax purposes as it chose and that the “likeness” or “directly competitive or substitutable” relationship of imported and domestic products were legally irrelevant to the interpretation of Article III if both of these products were taxed in a non-discriminatory manner, regardless of their origin.

The panel concluded that the ordinary meaning of Article III:2 in the light of its object and purpose<sup>32</sup> supported the practice of examining the conformity of internal taxes with Article III:2 by determining, firstly, whether the taxed imported and domestic products were “like” or “directly competitive or substitutable,” and, secondly, whether the taxation was discriminatory (first sentence) or protective (second sentence). The panel began its examination of the “likeness” of products by noting that GATT contracting parties had never developed a general definition of the term “like products.” However, it found the prior GATT decisions on this question were made on a case-by-case basis after examining a number of relevant factors. It cited the Working Party Report on “Border Tax Adjustments” adopted in 1970 (BISD18S/102) which concluded that problems arising from the interpretation of the terms “like” or “similar” products should be examined on a case-by-case basis using the following criteria: (i) the product’s end-uses in a given market; (ii) consumers’ tastes and habits which change from country to country; and (iii) the product’s properties, nature, and quality. It applied the above criteria and other criteria recognized in previous GATT practice, such as Customs Co-operation Council nomenclature for the classification of goods in customs tariffs, to determine whether the alcoholic beverages classified by Japanese law into different categories, subcategories, and grades were “like” products. The panel concluded, in view of their similar properties, end-uses, and usually uniform classification in tariff nomenclatures, that imported and Japanese-made gin, vodka, whisky, grape brandy, other fruit brandy, certain classic liquors, unsweetened still wine, and sparkling wines should be considered as “like” products in terms of Article III:2, first sentence, because such “likeness” of these alcoholic beverages was recognized not only by governments for the purposes of tariff and statistical nomenclature, but also by consumers to constitute “each in its end-use a well defined and single product intended for drinking” and that minor differences in taste, color, and other properties did not prevent products from qualifying as “like products.” The panel did not rule out the possibility of considering other alcoholic beverages as “like products” and it was of the view that the “likeness” of the products must be examined taking

into account not only objective criteria, such as manufacturing and composition processes of products, but also subjective consumer viewpoints, such as consumption and use by consumers. However, the panel cautioned that consumer habits were variable in time and space and differential taxes could be used to crystallize consumer preferences for traditional domestic products. It argued that “like” products do not become “unlike” merely because of differences in local consumer traditions within a country or differences in their prices, which were often influenced by government measures (e.g., customs duties) and market conditions (e.g., supply and demand, sales margins).

The panel further concluded that even if imported alcoholic beverages, for example, vodka, were not considered to be “like” Japanese alcoholic beverages, for example, shochu, flexibility in the use of alcoholic drinks and their common characteristics often offered an alternative choice for consumers leading to a competitive relationship. In the view of the panel, under Article III:2 second sentence, there was direct competition or substitutability<sup>33</sup> between imported and Japan-made distilled liquors including all grades of whiskies/brandies, vodka, and shochu, among each other; imported and Japan-made liquors among each other; imported and Japan-made sweetened and unsweetened wines among each other; and imported and Japan-made sparkling wines among each other.

After having compared the imported and domestic alcoholic beverages to determine their “likeness” or “directly competitive or substitutable relationship,” the panel next proceeded to a comparison of the fiscal burdens on the products at issue in the dispute. The panel noted that Article III:2 first sentence prohibited the direct or indirect imposition of “internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.” Thus, a prohibition of tax discrimination was strict. Even very small tax differentials were prohibited, and a *de minimis* argument based on allegedly minimal trade effects was not relevant. In assessing whether there was tax discrimination, account was to be taken not only of the rate of the applicable internal tax but also of 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 tax collection (e.g., basis of assessment). After having noted that Japanese specific tax rates on imported and Japanese special grade whiskies/brandies were considerably higher than the tax rates on first and second grade whiskies/brandies, the panel found that these tax differentials did not correspond to objective differences between the various distilled liquors, for instance, nondiscriminatory taxation of their respective alcohol contents. In the opinion of the panel, as a result of this differential taxation of “like products,” almost all whiskies/brandies imported from the EEC were subject to the higher rates of taxes whereas more than half of whiskies/brandies produced in Japan benefited from considerably lower rates of taxes, and thus, the whiskies/ brandies imported from the EEC were subject to internal Japanese taxes in excess of those applied to like domestic products in the sense of Article III:2, first sentence.

With regard to the mixed system of specific and *ad valorem* taxes adopted by Japan, the panel was of the view that such a mixed system was not as such inconsistent with Article III:2 because it prohibited only discriminatory or protective taxation of imported products but not the use of differentiated taxation methods, provided the differentiated taxation methods did not result in discriminatory or protective taxation. Since the *ad valorem* taxes were not applied to all liquor categories such as the traditional Japanese products shochu, mirin, and sake, the panel found that the differences as to the applicability and non taxable thresholds of the *ad valorem* taxes were not based on corresponding objective product differences, such as alcohol content, nor formed part of a general system of internal taxation equally applied in a trade-neutral manner to all “like” or “directly competitive” liquors. For this reason and for the reason that liquors above the non taxable



thresholds were subjected to *ad valorem* taxes in excess of the specific taxes on “like” liquors below the threshold, the panel concluded that the imposition of *ad valorem* taxes on wines, spirits, and liquors imported from EEC was inconsistent with Article III:2, first sentence. Regarding the different methods of calculating *ad valorem* taxes on imported and domestic liquors, the panel agreed that Article III:2 did not prescribe the use of any specific method or system of taxation. There could be objective reasons proper to the tax in question, which could justify or necessitate differences in the system of taxation for imported and for domestic products. It could also be compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. What mattered was whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products.

Under the first sentence of Article III:2, the tax on the imported product and the tax on the like domestic product had to be equal in effect, but Article III:2, second sentence, prohibited only the application of internal taxes to imported or domestic products in a manner “so as to afford protection to domestic production.” Small tax differentials could influence the competitive relationship between directly competing products, but the existence of protective taxation could be established “only in light of the particular circumstances of each case” and “there could be a *de minimis* level below which a tax difference ceases to have the protective effect” prohibited by Article III:2, second sentence.

The panel found that the Japanese tax system was applied “so as to afford protection to domestic production” because of considerably lower specific tax rates on domestic products, and the imposition of high *ad valorem* taxes on most imported products but the absence of *ad valorem* taxes on most domestic products. Similarly, the product taxed at lower rates was almost exclusively produced in Japan, and the mutual substitutability of domestic products with imported products was illustrated by increasing imports of like products and consumer use. According to the panel, Article III:2 protects expectations on the competitive relationship between imported and domestic products rather than expectations on trade volumes. Therefore, it was not necessary to examine the quantitative trade effects of these tax differentials for its conclusion that the application of considerably lower internal taxes by Japan on exclusively domestic products than on directly competitive or substitutable imported products had trade-distorting effects affording protection to domestic production contrary to Article III:2, second sentence.

The 1987 *Japan Alcohol* case was related to internal tax measures and to the issues required to be examined in determining the consistency or inconsistency of such a measure with Article III:2. Since the language of Article III:4 which is related to non tax regulatory measures is different from that of Article III:2, particularly in regard to the treatment required to be provided to the imported products compared to the domestic products, it is necessary to examine separately how the GATT panels interpreted Article III:4 in the context of determining the consistency of a facially neutral regulatory measure with the National Treatment principle.<sup>34</sup>

Although the regulatory measures in dispute were based on the country of origin of products, *United States - Section 337 of the Tariff Act of 1930* (hereinafter *US - Section 337*)<sup>35</sup> was an important GATT case with regard to the issues required to be examined in determining the consistency of a non tax regulatory measure with Article III:4. In this case, the panel had to determine whether US patent enforcement procedures, which were formally different for imported and for domestic products, violated Article III:4.

Since there was no dispute on the “likeness” of domestic and imported products affected by the measure, the panel mainly examined the meaning of the terms “laws, regulations, and

requirements” and “no less favorable treatment” as provided in Article III:4, and how an assessment should be made as to whether the regulatory measure in dispute does or does not accord imported products less favorable treatment than that accorded to “like” domestic products. With regard to the meaning of the terms “laws, regulations, and requirements,” the panel concluded that not only substantive laws, regulations, and requirements but also procedural laws, regulations, and requirements are covered by Article III:4. According to the panel, Article III:4 is intended to cover not only the laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.

With regard to the “no less favorable treatment” standard of Article III:4, the panel stated that the “no less favorable treatment” requirement set out in Article III:4 is unqualified as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given to the domestic products. According to the panel, the words “treatment no less favorable” call for effective equality of opportunities for imported products, as a minimum permissible standard, in respect of the application of laws, regulations, and requirements affecting the internal sale, purchase, transportation, distribution, or use of products. The panel said:

On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favorable treatment. On the

other hand, it also has to be recognized that there may be cases where the application of formally identical legal provisions would in practice accord less favorable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favorable.

Therefore, according to the panel, the mere fact that imported products are subject to legal provisions that are different from those applying to domestic products is in itself not conclusive in establishing inconsistency with Article III:4. With regard to the issue of how an assessment should be made as to whether the regulatory measure in dispute accords imported products less favorable treatment than that accorded to “like” domestic products, the panel rejected the respondent’s claim that this determination could only be made on the basis of an examination of the actual effects of the regulatory measure. Relying on the previous panel decision in *United States - Taxes on Petroleum and Certain Imported Substances* (GATT, BISD 34S/136,138, Report of the Panel adopted on June 17, 1987) *Japan Alcohol Beverages* that the purpose of Article III is to protect expectations on the competitive relationship between imported and domestic products, the panel concluded that in order to establish whether the “no less favorable” treatment standard of Article III:4 is met, it had to assess whether or not the contested regulatory measure in itself may lead to the application to imported products of treatment less favorable than that accorded to domestic products. Any decision in this regard should be based on the distinctions made by the contested measure itself and on its potential impact rather than on the actual consequences for specific imported products or actual trade effects.

*United States - Restrictions on Imports of Tuna*<sup>36</sup> was a significant, but controversial, GATT case involving the issue of “like products” within the meaning of Article III:4. Although the main contested issue in this case was whether the measures prohibiting certain yellowfin tuna and tuna products from Mexico on the ground that the tunas were caught by a dolphin-unfriendly process were internal quantitative restrictions on imports under Article XI or internal regulations under Article III:4, the panel concluding that the measures did not constitute internal regulations covered by Article III:4, the panel made an alternate ruling on the issue of the US measures’ consistency with

Article III:4 and concluded that even if the contested measures were regarded as internal regulations under Article III:4, they would still not meet the requirement of Article III. Giving the reasons for such a conclusion, the panel said:

Article III:4 calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favorable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.

The panel in this case implied that that the difference in fishing methods do not make the two tuna products unlike products within the meaning of Article III:4, but the product-process distinction drawn in this case has been the subject of intense subsequent controversy<sup>37</sup>, as we discuss further below.

*US Malt Beverages* case<sup>38</sup> was another significant GATT case involving facially neutral measures. The test applied to determine the consistency or inconsistency of such measures with Article III was significantly different from that applied in the earlier cases. In this case, Canada had complained, among other things, that a lower tax rate applied by the state of Mississippi to wines made from a certain variety of grape discriminated against “like” Canadian products and was therefore inconsistent with Article III:1 and Article III:2, and that restrictions on points of sale, distribution and labeling based on the alcohol content of beer above 3.2 percent by weight maintained by some US states were inconsistent with Article III:4 since all beers, whether containing an alcohol content of above or below the said level, were “like” products and an alcohol level of 3.2 percent was entirely arbitrary. The panel in this case considered that Canada’s claim depended upon whether wine imported from Canada was “like” the domestic wine in Mississippi made from the specified variety of grape that qualified for special tax treatment,

and noted that past decisions on the question of “likeness” had been made on a case-by-case basis after examining a number of relevant criteria, such as the product’s end-uses in a given market, consumers’ tastes and habits, and the product’s properties, nature, and quality. However, it considered that the “like” product determination under Article III:2 should have regard to the purpose of the Article, which was not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. The panel concluded that the purpose of Article III was not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production. Consequently, in determining whether two products subject to different treatment were like products, it was necessary to consider whether such product differentiation was being made “so as to afford protection to domestic production.” Unlike 1987 *Japan Alcohol* case, the panel began its examination by looking into the rationality of the product differentiation made by the Mississippi wine tax law. The panel found that the special treatment accorded to wine produced from a particular type of grape grown only in the South-eastern United States and Mediterranean region was a rather exceptional basis for a tax distinction, and that this particular tax treatment implied a geographical distinction which afforded protection to local production of wine to the disadvantage of wine produced where the type of grape could not be grown. Since tariff nomenclatures and tax

laws, including those at the US federal and state level, did not generally make such a distinction between still wines on the basis of the variety of grape used in their production, and the United States also did not claim any public policy purpose for the tax provision other than to subsidize small local producers, the panel concluded that unsweetened still wines were “like” products and that the particular distinction in the Mississippi law in favor of still wine of a local variety must be presumed to afford protection to Mississippi vintners. Therefore, according to the panel, the lower rate of excise tax applied by Mississippi to wine produced from the specified variety of grape was inconsistent with Article III:2, first sentence.<sup>39</sup>

On the issue of whether the restrictions on points of sale, distribution, and labeling based on the alcohol content of beer were inconsistent with Article III:4, the panel again examined, first, the rationality of the regulatory measure in making a distinction between low alcohol beer and high alcohol beer and then, the competitive effects of such regulations. It stated that the purpose of Article III was not to harmonize the internal taxes and regulations of contracting parties. In the view of the panel, it was imperative that the “like” product determination in the context of Article III be made in such a way that it does not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties. Therefore, even if low alcohol beer and high alcohol beer were similar on the basis of their physical characteristics, they need not be considered as “like” products in terms of Article III:4 if the differentiation in the treatment of low alcohol beer and high alcohol beer was not such “as to afford protection to domestic production.”

In determining the validity of the regulatory distinction based on the alcohol content of beer, the panel examined the issue of whether the aims and effects of such a regulatory measure showed that it was applied so as to favor domestic producers over foreign producers. From the legislative history of relevant laws, the panel found that the policy background of the laws distinguishing alcohol content of beer was the protection of human health and public morals or the promotion of a new source of government revenue, and the alcohol content of beer had not been singled out as a means of favoring domestic producers over foreign producers. With respect to the effects of the regulatory measure, the panel found that Canadian and US beer manufacturers produced both high and low alcohol content beer, and that the regulatory measure did not differentiate between imported and domestic beer as such, so that where a state law limited the points of sale of high alcohol content beer or maintained different labelling requirements for such beer, that law applied to all high alcohol content beer regardless of its origin. Similarly, the burdens resulting from the measures did not fall more heavily on Canadian than US producers and despite the physical similarities and overlapping in the market for the two types of beer, there was a certain degree of market differentiation or specialization.<sup>40</sup> Therefore, according to the panel, the regulatory measures were consistent with Article III.4.

The “aims-and-effects” approach to determining “likeness” that was applied for the first time in *US Malt Beverages* was also applied and elaborated on in the unadopted GATT panel decision in *United States - Taxes on Automobiles*.<sup>41</sup> In this case, the EEC had complained against US regulations that imposed a luxury excise tax and gas-guzzler tax on domestic and imported automobiles on the basis of their value and gasoline consumption per mile. The threshold value of automobiles for the luxury excise tax was \$30,000 and the threshold gasoline consumption for the gas-guzzler tax was 22.5 mpg. Automobiles that were above the stated thresholds were subject to higher levels of tax. Most of the automobiles imported to the United States from the EEC were more expensive and subject to a higher rate of taxes.<sup>42</sup>

The panel proceeded to determine the “likeness” of the automobiles in question by examining the protective aim and effect of these tax measures. Although there was evidence that the protective

effects of these measures had not been ignored during the formulation of regulations providing for one of the taxes, the panel found that these tax measures served a bona fide regulatory purpose and the competitive effects of these measures were neither clear nor inherent enough to be considered as protective. Applying the inherence criterion, the panel attempted to evaluate whether the regulations inherently divided products into those of domestic or foreign origin. Using this criterion, the panel found that the threshold set for the gas-guzzler tax did not discriminate between automobiles of domestic and foreign origin because the technology to manufacture high fuel-economy automobiles - above the 22.5 mpg threshold - was not "inherent" to the United States, nor were low fuel-economy automobiles inherently of foreign origin. Such an advantage would not, therefore, alter the conditions of competition in favor of domestic automobiles, and thereby have the effect of affording protection to domestic production. The panel applied the same "inherence" test to conclude that the threshold set for the luxury excise tax also did not discriminate between automobiles of domestic and foreign origin because no evidence had been advanced that foreign automobile manufacturers did not in general have the design, production, and marketing capabilities to sell automobiles below the stipulated threshold, or that they did not in general produce such models for other markets.

### 3 Facially Neutral Tax or Regulatory Measures and the Principle of National Treatment under the WTO Dispute Settlement System

After the establishment of the WTO, the panels and Appellate Body under the WTO, as under the GATT dispute settlement system, have also addressed various internal tax and regulatory measures which were facially neutral but were claimed to violate the principle of National Treatment as set out in Paragraphs 1, 2, and 4 of Article III of GATT. Although the GATT panels had taken two different approaches; that is, a textual or "like" product approach as applied in the 1987 *Japan Alcohol* case and a contextual or "aim-and-effect" approach as applied in *US - Malt Beverages* and *US - Taxes on Automobiles*, in examining the validity of a facially neutral regulatory measure, the WTO panels and Appellate Body have rejected the "aims-and-effects" approach to test the validity of any measures which are claimed to violate the provisions of Article III and have accepted that the "like product" approach taken in the 1987 *Japan Alcohol* case is the proper approach.<sup>43</sup>

As there are differences in the National Treatment obligations set forth in Article III:2 with respect to internal tax measures and the National Treatment obligations set forth in Article III:4 with respect to other regulatory measures, it is appropriate to examine separately the interpretations adopted by WTO panels and the Appellate Body of Article III:2 and Article III:4.

#### 3.1 Internal Tax Measures and National Treatment<sup>44</sup>

The first WTO case under Article III involving a facially neutral internal tax measure is the second *Japan - Taxes on Alcoholic Beverages* case. The requirements set out in this case in order to prove that such a tax measure violates Article III of GATT have been consistently followed by other WTO panels and the Appellate Body in other cases involving internal tax measures, such as *Canada - Certain Measures Concerning Periodicals*, *Korea - Taxes on Alcoholic Beverages*, *Chile - Taxes on Alcoholic Beverages*, and *Indonesia - Certain Measures Affecting the Automobile Industry*. According to the Appellate Body's decision in *Japan - Taxes on Alcoholic Beverages*,<sup>45</sup> when an issue is raised that an internal tax measure violates the National Treatment obligation set out in Article III:2, first sentence, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are "like" and, second, whether the taxes applied to the imported products are "in excess of" those applied to the like domestic products. If the imported and domestic products are "like products," and if the taxes applied to the imported products are "in excess of" those applied to the like

domestic products, then the measure is inconsistent with Article III:2, first sentence. The Appellate Body claimed that this approach to an examination of Article III:2, first sentence, was consistent with the object and purpose of Article III:2 and with past practice under the GATT 1947.

According to the Appellate Body, if the imported and domestic products are not “like” products for the purposes of Article III:2, first sentence, then they are not subject to the strictures of Article III:2, first sentence, and there is no inconsistency with the requirements of that sentence. However, depending on their nature, and on the competitive conditions in the relevant market, those products may well be among the broader category of “directly competitive or substitutable products” that fall within the domain of Article III:2, second sentence. In such a case, a separate examination is required to determine the consistency of an internal tax measure with Article III:2, second sentence. In the view of the Appellate Body, three issues<sup>46</sup> must be established separately in this examination in order to find that a tax measure imposed is inconsistent with Article III:2, second sentence. These three issues are: (i) whether the imported products and domestic products “are directly competitive or substitutable products”;

(ii) whether the directly competitive or substitutable imported and domestic products are “not similarly taxed”; and (iii) whether the dissimilar taxation of the directly competitive or substitutable imported and domestic products is “applied so as to afford protection to domestic production.”

According to the Appellate Body, Article III of GATT obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. The Appellate Body said that it is irrelevant that “the trade effects” of tax differentials between imported and domestic products, as reflected in the volumes of imports, are insignificant or even nonexistent, as Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.

With regard to the difference in the tests for “like” products and “directly competitive or substitutable,” the Appellate Body claimed that this is due to the difference in wording of the first and second sentences of Article III:2. Article III:2, first sentence, does not refer specifically to the general principle of National Treatment articulated in Article III:1 which requires that internal tax and other regulatory measures should not be applied so as to afford protection to domestic production, whereas the language of Article III:2, second sentence, which contains a general prohibition against internal taxes or other internal charges applied to imported or domestic products in a manner contrary to the principles set forth in Article III:1, specifically invokes Article III:1. The Appellate Body argued that the omission of any reference to Article III:1 in Article III:2, first sentence, and the specific invocation of Article III:1 in Article III:2, second sentence, must have some meaning, and the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. In the view of the Appellate Body, this does not mean that the general principle of Article III:1 does not apply to the first sentence. The first sentence of Article III:2 is, in effect, an application of the general principle set forth in Article III:1.

By establishing the above-mentioned standards for examination of the conformity of an internal tax measure with Article III:2, the Appellate Body seems to have accepted the panel’s rejection of an “aims-and-effects” test to determine the validity of an internal tax measure. Although they reached opposite results by applying essentially the same test, both the complainant, the United States, and the respondent, Japan, had argued at the panel level,<sup>47</sup> as well as before the Appellate Body,<sup>48</sup> that the contested internal tax measure including the product distinction made for tax purposes should be examined in the light of its aims-and-effects in order to determine whether or not it is consistent

with Article III:2, and where the aim and effect of the contested tax measure do not operate so as to afford protection to domestic production, no inconsistency with Article III:2 can be established. Such arguments by Japan and United States were based upon rulings and findings by the GATT panels in *US Malt Beverages* and *US - Taxes on Automobiles* cases. The panel simply rejected the “aims-and-effects” test applied in these GATT cases, stating that the panel was not in a position to detect how the 1992 *US Malt Beverages* panel weighed the different criteria that it took into account in order to determine whether the products in dispute were like, that the panel report in *US - Taxes on Automobiles* remained unadopted, and that even if a panel could find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant, unadopted panel reports have no legal status in the GATT or WTO system since they have not been endorsed by the Contracting Parties to the GATT or WTO Members.<sup>49</sup>

The panel gave the following reasons for rejecting the “aims-and-effects” test: first, such a test is not consistent with the wording of Article III:2, first sentence, as the basis of this test is the words “so as to afford protection” contained in Article III:1, and Article III:2, first sentence, contains no reference to these words; second, the adoption of such a test would have important implications for the burden of proof imposed on the complainant because according to this test, the complainant would have the burden of showing not only the effect of a particular measure, which is, in principle, discernible, but also its aim, which sometimes can be indiscernible; third, very often there is a multiplicity of aims that are sought through enactment of legislation and it would be a difficult exercise to determine which aim or aims should be determinative for the “aims-and-effects” test; fourth, access to the complete legislative history, which is argued by proponents of this test to be relevant to detect the protective aims, could be difficult or even impossible for a complainant to obtain, and even if the complete legislative history is available, it would be difficult to assess which kinds of legislative history (statements in legislation, in official legislative reports, by individual legislators, or in hearings involving interested parties) should be primarily determinative of the aims of the legislation; and fifth, the list of exceptions contained in Article XX of GATT could become redundant or useless because the aims-and-effects test does not contain a definitive list of grounds justifying departure from the National Treatment obligations incorporated in Article III.<sup>50</sup>

With regard to the definition of “like products” in Article III:2, first sentence, the Appellate Body agreed with the panel’s conclusion that this term should be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn, because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not “like products” as contemplated by the first sentence. According to the Appellate Body, how narrowly is a matter that should be determined separately for each tax measure in each case. The Appellate Body agreed with the practice under the GATT 1947 of determining whether imported and domestic products are “like” on a case-by-case basis in accordance with the criteria, including the product’s properties, nature, and quality, the product’s end-uses in a given market, and consumer tastes and habits, which change from country to country, set out in the 1970 adopted Report of the GATT Working Party on Border Tax Adjustments. However, the Appellate Body cautioned that in applying the criteria cited in the Border Tax Adjustments Report to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases (such as tariff classifications), panels can only apply their best judgment in determining whether in fact products are “like.” Although the Appellate Body did not agree with the panel’s observation that distinguishing between “like products” and “directly competitive or substitutable products” under Article III:2 is an arbitrary exercise, it acknowledged that this would always involve an unavoidable element of individual, discretionary judgment, which

must be made in considering the various characteristics of products in individual cases. The Appellate Body said:

No one approach to exercising judgment will be appropriate for all cases. The criteria in Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is “like.” The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of “likeness” is meant to be narrowly squeezed.

Regarding the relevance of a uniform tariff classification of products in determining “like products,” the Appellate Body said that a sufficiently detailed tariff classification could be a helpful sign of product similarity. However, the Appellate Body cautioned that tariff bindings that include a wide range of products may not be a reliable criterion for confirming or determining product “likeness” under Article III:2, and, therefore, the determinations on which tariff bindings provide significant guidance as to the identification of “like products” need to be made on a case-by-case basis.<sup>51</sup> In all other respects, the Appellate Body affirmed the findings and the legal conclusions of the panel with respect to “like products.”

According to the panel, the appropriate test to define whether two products are like or directly competitive or substitutable is the marketplace. In the panel’s view, although the decisive criterion in determining whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by the elasticity of substitution in a market where competition exists, commonality of end-uses is a necessary but not sufficient criterion to define “likeness.” According to the panel, the term “like products” suggests that for two products to fall under this category they must share, apart from commonality of end-uses, essentially the same physical characteristics. By applying the above-mentioned criteria for examination of the products at issue, the panel concluded that vodka and shochu were like products because both vodka and shochu shared most physical characteristics and except for the media used for filtration there was virtual identity in the definition of the two products.<sup>52</sup> The panel, however, did not conclude that shochu and other alcoholic beverages in dispute were “like products” because substantial noticeable differences in physical characteristics existed between the remaining alcoholic beverages in dispute and shochu that would disqualify them from being regarded as like products.<sup>53</sup>

According to the Appellate Body, after the determination of the “likeness” of the products at issue, the only remaining step to determine the conformity of an internal tax measure with Article III:2, first sentence, is the examination of whether the taxes on imported products are “in excess of” those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. In the view of the Appellate Body, even the smallest amount of “excess” is too much because 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. Accordingly, the Appellate Body agreed with the panel’s legal reasoning and with its conclusions<sup>54</sup> on this aspect of the interpretation and application of Article III:2, first sentence.

As noted earlier, even if the imported and domestic products are not “like products,” they may still be “directly competitive or substitutable products.” In such a case a three-step test is required to determine the validity of an internal tax measure under the principle of National Treatment. The first



step is the determination of “directly competitive or substitutable products.” In the Appellate Body’s view, as with “like products,” the determination of the appropriate range of “directly competitive or substitutable products” under Article III:2, second sentence, must be made on a case-by-case basis, taking into account all the relevant facts. The Appellate Body agreed with the panel’s approach in this regard. The panel had emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the “market place” because the important issues in this regard were factors like market strategies and the responsiveness of consumers to the various products offered in the market. In the view of the Appellate Body, it was not inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as “directly competitive or substitutable.” The Appellate Body also agreed with the panel’s view that the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution in the relevant markets.<sup>55</sup> It thus found the panel’s legal analysis of whether the products are “directly competitive or substitutable products” to be correct.

According to the Appellate Body, after the determination of directly competitive or substitutable products, the next step in the test is whether these products are similarly taxed. In its view, the phrase “not similarly taxed” does not mean the same thing as the phrase “in excess of” in Article III:2, first sentence, because if “in excess of” and “not similarly taxed” were construed to mean one and the same thing, then “like products” and “directly competitive or substitutable products” would also mean one and the same thing.<sup>56</sup> According to the Appellate Body, 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 may not be enough to justify a conclusion that such products are “not similarly taxed” for the purposes of Article III:2, second sentence. It agreed with the panel that the amount of differential taxation must be more than *de minimis* to be deemed “not similarly taxed”; and whether any particular differential amount of taxation is *de minimis* or not must be determined on a case-by-case basis. Thus, to be “not similarly taxed,” the tax burden on imported products must be heavier than on “directly competitive or substitutable” domestic products, and that burden must be more than *de minimis* in any given case. The Appellate Body also agreed with the legal reasoning applied by the panel in determining whether “directly competitive or substitutable” imported and domestic products were “not similarly taxed.” However, the Appellate Body also found that the panel erred in blurring the distinction between that issue and the issue of whether the tax measure in question was applied “so as to afford protection,” which, in the Appellate Body’s view, were entirely different issues that must be addressed separately. The panel had concluded that the following indicators, *inter alia*, were relevant in determining whether the products in dispute were similarly taxed in Japan: tax per liter of product, tax per degree of alcohol, *ad valorem* taxation, and the tax/price ratio.<sup>57</sup>

According to the Appellate Body, if “directly competitive or substitutable products” are “similarly taxed,” then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied “so as to afford protection.” However, if such products are “not similarly taxed,” a further inquiry must necessarily be made. In its view, this third inquiry must determine whether “directly competitive or substitutable products” are “not similarly taxed” in a way that affords protection. The Appellate Body argued that this was not an issue of intent and that it was not necessary for a panel to sort through the reasons given by legislators and regulators in imposing the measure in dispute. In its view, if the measure is applied to imported or domestic products so as to afford protection to domestic production, then it is irrelevant that protectionism was not an intended purpose. What is relevant is how the particular tax measure in

question is applied. In this respect, the Appellate Body found the approach followed in the 1987 *Japan Alcohol* case in the examination of the issue of “so as to afford protection” persuasive and concluded that an examination of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. In its view, it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products. The Appellate Body argued that even if the aim of a measure may not be easily ascertained, its protective application can most often be discerned from “the design, the architecture, and the revealing structure of a measure,” and the very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application. However, there may be other factors to be considered as well. Therefore, full consideration should be given to all the relevant facts and circumstances in any given case, and in every case, a careful, objective analysis, must be undertaken of each and all such facts and circumstances in order to determine “the existence of protective taxation.”

Despite arguing for a separate inquiry on the issue of “so as to afford protection to domestic production” and the rejection of the panel’s conclusion of equating the determination of dissimilar taxation with the separate requirement of demonstrating that the tax measure affords protection to domestic production, the Appellate Body, however, agreed with the panel’s conclusion that the very fact that the substantially dissimilar taxation was applied to directly competitive or substitutable imported and domestic products was enough in this case to conclude that the tax measure in dispute was applied “so as to afford protection.”<sup>58</sup>

The tests outlined by the Appellate Body in *Japan - Taxes on Alcoholic Beverages* have been followed by the panels and the Appellate Body in other cases involving internal taxes as well as other regulatory measures. The practical difficulties in applying these tests<sup>59</sup> were evident in *Canada - Certain Measures Concerning Periodicals*<sup>60</sup> case, where the panel found that imported split-run periodicals and domestic nonsplit-run periodicals were “like” products under Article III:2, first sentence, whereas the Appellate Body found that such periodicals were not “like” products, but were “directly competitive or substitutable” products under Article III:2, second sentence. In this case, one of the issues in dispute was Part V.1 of the Canadian Excise Tax Act which imposed an 80 percent excise tax on advertising in each split-run edition of a periodical.<sup>61</sup> The United States claimed that these provisions of the Excise Tax Act were in violation of the National Treatment obligation enshrined in Article III:2 of GATT because they discriminated between two “like” products, domestic non-split-run periodicals and imported split-run periodicals. The panel concluded that Part V.1 of the Canadian Excise Tax Act was inconsistent with Article III:2, first sentence, of GATT 1994. Canada and the United States both appealed.<sup>62</sup> Although the Appellate Body agreed with the application by the panel of the two-step “like” products test established by the Appellate Body in *Japan - Taxes on Alcoholic Beverages* case in examining the consistency of a tax measure with Article III:2, first sentence, it did not agree with the panel’s conclusion that imported split-run periodicals and domestic nonsplit-run periodicals were “like” products.<sup>63</sup> According to the Appellate Body, the panel did not base its findings on the exhibits and evidence before it<sup>64</sup> and that the panel’s conclusions lacked proper legal reasoning based on adequate factual analysis. However, the Appellate Body did not determine whether the imported split-run periodicals and domestic non-split-run periodicals were “like” products.<sup>65</sup> Instead, it proceeded to examine the consistency of the tax measure with Article III:2, second sentence.<sup>66</sup> It said that if the answer to the question of whether imported and domestic products are “like” products is negative, there is then a need to examine the consistency of the measure with the second sentence of Article III:2.

Applying the three-step test established by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, the Appellate Body found that the imported split-run periodicals and Canadian non-split-run periodicals were “directly competitive or substitutable” products in so far as they were part of the same segment of the Canadian market for periodicals. This conclusion was based on a study carried out by a Canadian economist, a Task Force Report submitted by Canada, and statements made by the Minister of Canadian Heritage and Canadian officials, all of which had acknowledged the substitutability of, and considerable competition between, imported split-run periodicals and domestic non-split-run periodicals in the Canadian market.<sup>67</sup> Similarly, the Appellate Body concluded that “directly competitive or substitutable” imported split-run periodicals and domestic non-split-run periodicals were “not similarly taxed” by the Canadian Excise Tax Act because it taxed split-run editions of periodicals in an amount equivalent to 80 percent of the value of all advertisements, whereas domestic non-split-run periodicals were not subject to the tax, and the amount of the taxation was far above the *de minimis* threshold specified by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*. Finally, it concluded that the design and structure of Canadian excise tax was clearly “to afford protection to the production of Canadian periodicals.” This conclusion was based on the magnitude of dissimilar taxation,<sup>68</sup> the evidence of protective purpose from several statements of the Government of Canada’s explicit policy objectives in introducing the measure, and the demonstrated actual protective effect of the measure.<sup>69</sup> Thus, the Appellate Body concluded that Part V.1 of the Canadian Excise Tax Act was inconsistent with Canada’s obligations under Article III:2, second sentence, of the

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The *Canada - Certain Measures Concerning Periodicals* case suggests<sup>70</sup> that it is difficult to prove the “likeness” of products under Article III:2, first sentence, unless there is a substantial identity in the physical characteristics and perfect substitutability of the products in question. However, this difficulty has not affected the outcome of the examination of whether a tax measure is inconsistent with the principle of National Treatment because of the availability of a further examination under Article III:2, second sentence, which covers “directly competitive or substitutable” products, and there is not a single decided case under the WTO where a tax measure has been determined to be consistent with Article III:2, second sentence, once the products in question have been found to be “directly competitive or substitutable.” This is evident from the Appellate Body decisions in *Korea - Taxes on Alcoholic Beverages* and *Chile - Taxes on Alcoholic Beverages*. In both of these cases, the Appellate Body affirmed the findings of the respective panels which had found both the Korean and Chilean alcohol taxation systems to be inconsistent with the National Treatment principle set forth in Article III:2.

In *Korea-Taxes on Alcoholic Beverages*,<sup>11</sup> the Appellate Body upheld the findings of the panel that soju (diluted and distilled), whiskies, brandies, cognac, rum, gin, tequila, liquors, and admixtures were directly competitive or substitutable products. It also upheld the panel’s conclusion that Korea had taxed the imported products in a dissimilar manner and that the dissimilar taxation was applied so as to afford protection to domestic production. Both the panel and Appellate Body applied the three-step test established by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*. In the panel’s view, an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste, and the

determination of whether domestic and imported products are directly competitive or substitutable requires evidence of a direct competitive relationship between the products, including comparisons of their physical characteristics, end-uses, channels of distribution, and prices. According to the panel the focus should not be exclusively on the quantitative extent of the competitive overlap. Quantitative analyses and studies of cross-price elasticity of demand are helpful and relevant, but should not be considered necessary and are not exclusive or even decisive in nature because protectionist government policies can distort the competitive relationship between products, causing the quantitative extent of the competitive relationship to be understated. According to the panel, the assessment of competition has a temporal dimension. Therefore, panels should examine evidence of trends and changes in consumption patterns and make an assessment as to whether such trends and patterns lead to the conclusion that the products in question are either directly competitive now or can reasonably be expected to become directly competitive in the near future.<sup>72</sup> According to the Appellate Body, the context of the competitive relationship between imported and domestic products is necessarily the marketplace since this is the forum where consumers choose between different products. In its view, the word “substitutable” indicates that the requisite relationship may exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, capable of being substituted for one another. Products are competitive or substitutable when they are interchangeable or if they offer alternative ways of satisfying a particular need or taste.

With regard to the issue of whether or not the Korean liquor taxes were applied so as to afford protection to domestic products, the panel found that the Korean tax law had very large differences in levels of taxation,<sup>73</sup> and that the very magnitude of dissimilar taxation itself was sufficient to conclude that the taxes at issue were applied so as to accord protection to Korean domestic liquors. In addition to the very large levels of tax differentials, the panel also found the structure of the Liquor Tax Law itself to be discriminatory.<sup>74</sup> The Appellate Body upheld the panel’s conclusions and rejected the arguments of Korea that there were no such protective effects in the market because of the large pre tax price difference between diluted soju and imported alcoholic beverages. According to the Appellate Body, this argument did not change the pattern of application of the contested measures because Article III is not concerned with trade volumes and therefore it was not incumbent on the complainant to prove that tax measures were capable of producing any particular trade effect.

The panel and Appellate Body in *Chile - Taxes on Alcoholic Beverages*<sup>15</sup> followed the same approach as followed in *Japan - Taxes on Alcoholic Beverages* and in *Korea - Taxes on Alcoholic Beverages* in determining the issues of whether or not pisco, whisky, and other spirits are directly competitive or substitutable, whether or not the domestic alcoholic beverages and directly competitive or substitutable imported alcoholic beverages were similarly taxed and, if there were dissimilar taxes above the *de minimis* level, whether or not dissimilar taxes were applied so as to afford protection to domestic products. With regard to the first issue, the panel looked at evidence of the relationship between the products, including comparisons of their end-uses, physical characteristics, channels of distribution, and prices, and found that pisco and other spirits were directly competitive or substitutable products.<sup>76</sup> According to the panel, products do not have to be substitutable for all purposes at all times to be considered competitive and it is sufficient that they may be substituted for some purposes at some times by some consumers.

In evaluating substitutability in end-uses, the panel also found it useful to consider consumer theory, which, according to the panel, holds that “goods are, in the eyes of consumers, never really perceived as commodities that are in themselves direct objects of utility; rather, it is the properties

or characteristics of the goods from which utility is derived that are the relevant considerations. It is these characteristics or attributes that yield satisfaction and not the goods as such. Goods may share a common characteristic but may have other characteristics that are qualitatively different, or they may have the same characteristics but in quantitatively different combinations. Substitution possibilities arise because of these shared characteristics.” According to the panel, one hypothetical example in this regard is that of butter, milk, and margarine. “Butter and milk are both dairy products and they share important characteristics that margarine does not have. However, butter and margarine each have combinations of characteristics that make them good substitutes as complements for bread, which is not the case with milk. The characteristics of butter and margarine can be expressed as physical properties such as spreadability, taste, color, and consistency. These physical characteristics combine to render both products good substitutes as bread complements. The latter represents the end-use of the commodities as determined by their combination of characteristics derived from certain physical characteristics.” In the panel’s view, the same type of reasoning can be applied to the substitutability of pisco and other spirits such as whisky, brandy, cognac, etc.<sup>77</sup>

Similarly, the panel also found that its conclusion on competition or substitutability between pisco and other spirits was consistent with the production and marketing decisions of the pisco producers who desired to convey an image of pisco as a drink that competes with the best imported distilled spirits. According to the panel, when a product is being marketed in ways that suggest that it is in competition with up market imported distilled spirits, this is evidence of at least potential competition with those imports. Likewise, the panel also found that the Chilean Central Preventive Commission, in deciding on a merger between two major pisco producers, had stated that pisco faced major competition from other alcoholic beverages, such as wine, beer, and whisky, and that these were alternative products which consumers of alcoholic beverages could choose to drink in the market for alcoholic beverages. Thus, the panel concluded that the totality of the evidence presented supported a finding that the imported distilled spirits and pisco were directly competitive or substitutable.

With respect to the issue of whether or not the imported distilled spirits and directly competitive or substitutable pisco were similarly taxed, the panel found that both the Transitional and New Systems applied dissimilar taxes to these alcoholic beverages. According to the panel, the level of difference in taxation between whisky and pisco under the Old System was greater than *de minimis* because whisky was taxed at more than twice the rate of pisco and even if the Transitional System would make the difference in taxation somewhat narrower in the following years, the tax difference would still remain more than *de minimis*, and even with respect to other spirits, the tax difference of five percentage points *ad valorem* was greater than *de minimis*. The New System, which assessed taxes on an *ad valorem* basis that varied according to alcohol content, also applied dissimilar taxes greater than *de minimis* to directly competitive or substitutable imported and domestic products because the difference in taxation between the top (47 percent) and bottom (27 percent) levels of *ad valorem* rates of taxation of distilled alcoholic beverages was clearly more than *de minimis* and was so by a very large margin. Similarly, the difference of four percentage points between the various levels of alcohol content also constituted a greater than *de minimis* level of dissimilar taxation. According to the panel, the question of dissimilar taxation does not involve judgments about the objectives of the laws or regulations involved, nor does it involve an assessment of who benefits from the tax system. It is sufficient for this step of the analysis to find that some of the imports are being taxed dissimilarly from some of the domestic production and the difference is more than *de minimis*. In the view of the panel, a tax system based on taxing value is generally considered not to be applying dissimilar taxation if done on a purely *ad valorem* basis (i.e., a single *ad valorem* rate

applied uniformly to all products). However, the New Chilean System was not strictly an *ad valorem* system because it applied *ad valorem* rates that varied not just by value but also by alcohol content.

On the issue of whether or not the Chilean alcohol taxes were applied so as to afford protection to domestic products, the panel concluded that both the Transitional and New Systems applied dissimilar taxes to domestic products and directly competitive or substitutable imported products so as to afford protection to Chilean domestic products. According to the panel, the central issue in this regard is the design, architecture, and revealing structure of the tax measure and an important question in the determination of protective application is who receives the benefit of the dissimilar taxation. Since the Transitional System assessed tax rates by type of spirits and the lowest tax rate was on pisco, which under Chilean law was exclusively a domestic product, it was clear that the beneficiary of the tax structure was the domestic industry. Similarly, the largest category of imports was whisky, which was taxed at a rate of 53 percent (at its least discriminatory level) compared to pisco's 25 percent, and pisco accounted for almost 75 percent of domestic production of distilled spirits. The panel rejected the argument of Chile that the Transitional System did not have any protective application as it actually reduced the tax rate on whisky. The panel held that the fact that the Transitional System lessened the protective effect did not vitiate the conclusion that, even at its least discriminatory, it was a system that did and would afford protection to domestic production.

The New System also afforded protection to domestic production because the structure of the New System applied its lowest rate at the level of alcohol content of the large majority of domestic production and its highest rate at the level of the overwhelming majority of imports;<sup>78</sup> the large magnitude of the differentials were applied over a short range of physical difference (27 percent for 35 degrees versus 47 percent for 39 degrees of alcohol content); the interaction of the New System with the Chilean regulation which required most of the imports to remain at the highest tax level without losing their generic name and changing their physical characteristics;<sup>79</sup> and the lack of any connection between the stated objectives and the results of the measures.<sup>80</sup> The panel rejected the arguments made by Chile to support the non protective application of the tax measure that any producer, whether foreign or domestic, could produce spirits at lower levels and benefit from the tax structure; that there was a great deal of spirits produced in the EEC at 35 degrees of alcohol or less which could easily be exported to Chile and enjoy a lower level of taxation; that there was more absolute production of domestic spirits in Chile at the higher levels of taxation than there were imports; that there was not even *de facto* discrimination because the imported product could easily be diluted to take advantage of the lower available tax rates; and that if protection was the goal, Chile could have raised tariffs which were currently at 11 percent, but bound at 25 percent. The panel found these factors either irrelevant or as demonstrating that there would not be equal competitive conditions unless the foreign producers make certain important changes in their products, changes not justified by any exception or rule of the WTO Agreements. The Appellate Body upheld the findings of the panel in *Chile - Taxes on Alcoholic Beverages*.<sup>81</sup>

In *Indonesia - Certain Measures Affecting the Automobile Industry*<sup>8</sup> Japan, the United States, and the European Communities complained that the sales tax benefits provided under the February 1996, 1993, and June 1996 Indonesian car programs violated Article III:2 of GATT. Indonesia argued that the sales tax and luxury tax benefits provided to its national car companies were subsidies and were consistent with the Agreement on Subsidies and Countervailing Measures (SCM Agreement) even if such tax benefits were inconsistent with Article III:2. It argued that there was a conflict between Article III:2 and the SCM Agreement in that the obligations contained in Article III:2 and the SCM Agreement were mutually exclusive because the SCM Agreement "explicitly authorized" Members to provide subsidies that were prohibited by Article III:2. However, the panel rejected the arguments

made by Indonesia and concluded that whether or not the SCM Agreement was considered generally to authorize Members to provide actionable subsidies so long as they did not cause adverse effects to the interests of another Member, the SCM Agreement clearly did not authorize Members to impose discriminatory product taxes. The SCM Agreement and Article III:2 were not mutually exclusive because it was possible for Indonesia to respect its obligations under the SCM Agreement without violating Article III:2 since Article III:2 was concerned with discriminatory product taxation, rather than the provision of subsidies as such.

Once the panel concluded that Article III:2 applied in regard to the Indonesian tax benefit scheme for national car producers, it followed the approach adopted by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, to test the validity of the Indonesian tax benefit scheme under Article III:2 of GATT. The panel concluded:

Under the Indonesian car programmes the distinction between the products for tax purposes is based on such factors as the nationality of the producer or the origin of the parts and components contained in the product. An imported vehicle alike in all aspects relevant to a likeness determination would be taxed at a higher rate simply because of its origin or lack of sufficient local content. Such an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2 without the need to demonstrate the existence of actually traded like products.

### **Regulatory Measures and National Treatment**

Article III:4 of GATT, along with the general principle in Article III:1, sets out the National Treatment obligations with regard to various internal regulations other than internal tax measures. The significant difference between the National Treatment obligations set forth in Article III:4 and Article III:2 is that Article III:4 in its wording only applies to “like” products and not to “directly competitive or substitutable” products. Similarly, the required treatment of imported products is “no less favorable than that accorded to ‘like’ domestic products” and there is no reference to Article III:1 in Article III:4. This means, according to the interpretation of Article III adopted by the Appellate Body in *Japan - Taxes on Alcoholic Beverages* and followed by panels and the Appellate Body in other cases, such as *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (hereinafter *Korea - Measures on Beef*), and *European Communities - Regime for the Importation, Sale, and Distribution of Bananas* (hereinafter *EEC - Bananas*), that no separate inquiry as to whether a regulatory measure has been applied “so as to afford protection to domestic production” is required to determine the consistency of a regulatory measure with National Treatment obligations set out in Article III:4. A determination that the imported and domestic products in question are “like” and that the regulatory measure in dispute provides less favorable treatment to imported products than that accorded to like domestic products, is sufficient to establish a violation of Article III of the GATT.

The first case under the WTO dispute settlement system where an issue of the violation of Article III:4 was raised is *United States - Standards for Reformulated and Conventional Gasoline* (hereinafter *US-Gasoline*).<sup>83</sup> The regulatory measure in question in this case was explicitly discriminatory<sup>84</sup> and not facially neutral because the gasoline product standard at issue in the case set a different and potentially more onerous standard for foreign suppliers, and the United States’ main defense of the gasoline standard was the exceptions to general GATT obligations set out in Article XX. However, the panel<sup>85</sup> in this case made rulings with regard to the steps in the inquiry required to determine whether a non tax regulatory measure is consistent with the National Treatment obligations set out in Article III:4. According to the panel, complainants under Article III:4 are required to show the

existence of: (a) a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of an imported product; and (b) treatment accorded in respect of the law, regulation, or requirement that is less favorable to the imported product than to the “like” product of national origin. The panel concluded that the establishment of these two issues was sufficient to determine the inconsistency of a regulatory measure with Article III:4, and there is no need to establish the issue of “so as to afford protection to domestic production” as set forth in Article III:1 because the provision of Article III:1 is a general one and the provision of Article III:4 is more specific.

The panel began its examination in this regard by the determination of ‘like’ products. To determine the likeness of products, the panel followed the criteria suggested by the 1970 GATT Working Party Report on Border Tax Adjustments and considered that the criteria applied in the 1987 *Japan Alcohol* case in the examination under Article III:2, first sentence of internal tax measures were also applicable to the examination of like products under Article III:4. The panel found that the domestic and imported gasoline were “like” products because the chemically identical imported and domestic gasoline by definition had exactly the same physical characteristics, end-uses, tariff classification, and were perfectly substitutable.

In order to determine whether the treatment provided to the imported products was less favorable than that accorded to like domestic products, the panel followed the conclusions of the GATT panel in *US - Section 337*, which had said that the words “treatment no less favorable” in Article III:4 call for effective equality of opportunities for imported products in respect of laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products. The panel concluded that the US gasoline regulations treated the imported gasoline less favorably than the domestic gasoline because, under the baseline establishment methods provided in the regulations, the imported gasoline was effectively prevented from benefiting from as favorable sales conditions as were afforded to domestic gasoline. Relying on the conclusions in *US-Section 337*, the panel also concluded that, under Article III:4, less favorable treatment of particular imported products in some instances could not be balanced by more favorable treatment of other imported products in other instances.

The approach taken by the panel in *US - Gasoline* in determining the inconsistency of a non tax regulatory measure with Article III:4 was not fully followed by the panel in *EEC - Bananas*.<sup>8</sup> In this case, the panel, citing the Appellate Body’s decision in *Japan - Taxes on Alcoholic Beverages* and relying on the GATT panel decision in *US - Section 337*, also examined the issue of whether the regulatory measure in question was applied so as to afford protection to domestic production, in addition to the two issues examined by the panel in *US - Gasoline* case. However, the Appellate Body in *EEC-Bananas* rejected this part of the panel’s approach, stating that the panel misinterpreted its conclusion in *Japan - Taxes on Alcoholic Beverages* and that “a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure ‘affords protection to domestic production.’”

The first WTO case on the National Treatment principle involving the issue of facially neutral non tax regulatory measures was the *Japan - Measures Affecting Consumer Photographic Film and Paper*<sup>87</sup> (hereinafter *Japan - Film*). The panel in this case followed the same approach as that established by the panel in *US - Gasoline* to determine whether the various Japanese distribution measures violated the National Treatment principle contained in Article III:4. In this case, the United States complained that eight different decisions, reports, guidelines, etc., of various Japanese authorities accorded less favorable treatment to imported film and paper than to like domestic film and paper in the Japanese market. In response, Japan argued that the United States failed to show how the alleged measures



applied less favorable treatment to imported film and paper. The panel concluded that none of the alleged Japanese distribution measures violated Article III:4. Relying on the Appellate Body's decision in *Japan - Taxes on Alcoholic Beverages*, the panel held that the standard of effective equality of competitive conditions on the internal market for imported products in relation to domestic products is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the no less favorable treatment standard in Article III:4. According to the panel, the United States failed to show that any of the measures cited by the United States discriminated against imported products either in terms of *de jure* discrimination or in terms of *de facto* discrimination. The United States had argued that the measures in question were directed at promoting vertical integration in the photographic materials distribution system with a view to impeding market access for foreign products. However, the panel rejected the US arguments, stating that the Japanese measures were formally neutral as to the origin of products and their application did not have a disparate impact on imported film or paper. The basis of the US claim was the existence of a single brand wholesale distribution system in the Japanese market for film and photographic papers, which according to the United States, impeded market access for foreign products. The panel found that the United States could not establish a causal link or a meaningful nexus between the challenged measures and the market structure because the contested market structure existed even prior to the introduction of the measures in question. It also found that a single brand wholesale distribution system was the common market structure - indeed the norm - in most major national film markets, including the US market. The panel argued that it was unclear why the same economic forces acting to promote single brand wholesale distribution in the United States would not also exist in Japan.

Thus, the panel in *Japan - Film* established that a causal link or meaningful nexus between the challenged measures and the competitive conditions in the market must be shown by the complainant in order to prove a violation of Article III:4. However, what constitutes a regulatory measure (i.e., a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of an imported product) subject to the purview of Article III:4 may itself be a contentious issue. In *Japan - Film*, the panel's interpretation of the terms "laws, regulations or requirements" in Article III:4 was not entirely clear. Although it argued that a literal reading of the words "all laws, regulations or requirements" in Article III:4 could suggest that they may have a narrower scope than the word "measure" in Article XXIII:1(b) in the context of nullification and impairment, the panel assumed for the purposes of this case that the terms "laws, regulations or requirements" in Article III:4 should be interpreted as having a meaning similar to the term "measures" in Article XXIII:1(b), and found that only three measures met the definition of "laws, regulations or requirements" within the meaning of Article III:4. However, the panel also assumed that the remaining five contested measures were also "laws, regulations or requirements" for the sake of completeness of its analysis in examining whether less favorable treatment was accorded to imported products.

The issue as to the meaning of "laws, regulations or requirements" in Article III:4 also arose in *Canada - Certain Measures Affecting the Automotive Industry* (hereinafter *Canada - Automotive*).<sup>88</sup> The issues in dispute relating to Article III:4 in this case were Canadian measures, which accorded to certain motor vehicle manufacturers established in Canada, the right to import motor vehicles with an exemption from the generally applicable customs duty. In order to qualify for the exemption, an eligible manufacturer's local production of motor vehicles (including in certain cases the production of parts) must have achieved a minimum amount of Canadian value added (CVA) and its local production must have maintained a minimum production-to-sales ratio with respect to its sales of motor vehicles in Canada. Japan and the European Communities claimed that the CVA and

production-to-sales ratio contained in various government Orders as well as the commitment with regard to the CVA expressed by certain manufacturers in Letters of Undertaking to the government were “requirements” affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of an imported product within the meaning of Article III:4 and these requirements accorded less favorable treatment to imported parts, materials, and non permanent equipment for use in the production of motor vehicles. Canada argued that these measures did not affect the “internal sale,..., or use” of imported products because they did not in law or in fact require the use of domestic products and therefore played no role in the parts sourcing decisions of manufacturers.

The panel concluded that Article III:4 applies not only to mandatory measures, but also to conditions that an enterprise accepts to receive an advantage, including cases where the advantage is in the form of a benefit with respect to the conditions of importation of a product. The fact that compliance with the CVA requirements is not mandatory but a condition that must be met in order to obtain an advantage consisting of the right to import certain products duty-free does not preclude application of Article III:4. Similarly, the panel found that the word “affecting” in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any law or regulation that might adversely modify the conditions of competition between domestic and imported products. The panel concluded that the CVA requirements in government Orders must be regarded as measures which “affect” the “internal sale, ., or use” of imported products because a measure which provides that an advantage can be obtained by using domestic products, but not by using imported products, has an impact on the conditions of competition between domestic and imported products and thus affects the “internal sale, ., or use” of imported products, even if the measure allows for other means to obtain the advantage, such as the use of domestic services rather than products. Similarly, the panel claimed that neither legal enforceability nor the existence of a link between a private action and an advantage conferred by a government was a necessary condition in order for an action by a private party to constitute a “requirement.” According to the panel, a determination of whether a private action amounts to a “requirement” under Article III:4 must necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. The panel concluded that the commitments expressed in the Letters of Undertakings were “requirements” within the meaning of Article III:4.<sup>89</sup>

On the issue of whether the CVA requirements accorded less favorable treatment to imported products, the panel rejected the argument of Canada that these requirements did not in practice accord less favorable treatment to imported products as the CVA levels were so low that they could easily be met on the basis of labor alone. The panel found that the CVA requirements accorded less favorable treatment within the meaning of Article III:4 to imported parts, materials, and non permanent equipment than to like domestic products because, by conferring an advantage on the use of domestic products, they adversely affected the equality of competitive opportunities of imported products in relation to like domestic products. For the same reasons, the panel concluded that the commitments contained in the Letters of Undertaking also accorded less favorable treatment to imported products.

Despite distinctions noted in some cases between *de jure* discrimination caused by explicitly discriminatory regulatory measures and *de facto* discrimination caused by facially neutral regulatory measures, the WTO jurisprudence has not developed separate tests to determine the validity of such measures under Article III of the GATT. Although in the context of Article III:2, first sentence, WTO panels and Appellate Body have declared any internal tax measure that imposes even slightly

different tax rates on imported products compared to like domestic products to be inconsistent with the National Treatment principle on the very basis of such origin-specific differentiation, origin-specific regulatory measures are not *per se* inconsistent with the National Treatment principle. The Appellate Body in *Korea - Measures on Beef* rejected the panel's conclusion that "any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports, confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III."<sup>90</sup> The Appellate Body stated that a formal difference in treatment between imported and like domestic products is neither necessary nor sufficient to show a violation of Article III:4. In its view, whether or not imported products are treated "less favorably" than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.

In this case,<sup>91</sup> both the panel and Appellate Body concluded that Article III:4 is violated if the complainant demonstrates: (a) that imported and domestic products are "like;" (b) that the measure at issue is either a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (c) that the measure provides to imported products treatment less favorable than that accorded to domestic products. As there was no dispute at both the panel and Appellate Body levels on the "likeness" of domestic and imported beef and the measure at issue being a law or regulation within the meaning of Article III:4, both the panel and Appellate Body only examined whether or not the dual retail system for beef in the Korean market provided less favorable treatment to imported beef. Although both the panel and Appellate Body reached the same conclusion that the retail system for beef in the Korean market provided less favorable treatment to imported beef, they based their conclusion on different reasons.

Korea had appealed against the finding of the panel, which concluded that the dual retail system applied by Korea to imported and domestic beef accorded less favorable treatment to imported beef and thus was inconsistent with Article III:4. In addition to the above-mentioned reason based on origin of products that was rejected by the Appellate Body, the finding of the panel was also based on its assessment of how the dual retail system modified the conditions of competition between imported and like domestic beef in the Korean market. The panel gave several reasons for why it believed that the dual retail system altered the conditions of competition in the Korean market in favor of domestic beef: first, the dual retail system would "limit the possibility for consumers to compare imported and domestic products," and thereby "reduce opportunities for imported products to compete directly with domestic products"; second, under the dual retail system, "the only way an imported product can get on the shelves is if the retailer agrees to substitute it, not only for one but for all existing like domestic products," and this disadvantage would be more serious when the market share of imports (as is the case with imported beef) is small; third, the dual retail system, by excluding imported beef from "the vast majority of sales outlets" limited the potential market opportunities for imported beef, and this would apply particularly to products "consumed on a daily basis," like beef, where consumers may not be willing to "shop around"; fourth, the dual retail system imposed more costs on the imported product, since the domestic product would tend to continue to be sold from existing retail stores, whereas imported beef would require new stores to be established; fifth, the dual retail system "encourages the perception that imported and domestic beef are different, when they are in fact like products belonging to the same market," which gave a competitive advantage to domestic beef "based on criteria not related to the products themselves"; and sixth, the dual retail system "facilitates the maintenance of a price differential" to the advantage of domestic beef. On appeal, Korea argued that dual retail system does not on its face

violate Article III:4, since there was “perfect regulatory symmetry” in the separation of imported and domestic beef at the retail level, and there was “no regulatory barrier” which prevented traders from converting from one type of retail store to another. Korea also argued that the dual retail system did not deny consumers the possibility to make comparisons, and it neither added to the costs of, nor sheltered high prices for, domestic beef.

Relying on the GATT panel decision in *US - Section 337* and its decision in *Japan - Taxes on Alcoholic Beverages*, the Appellate Body stated that “treatment no less favorable” means according conditions of competition no less favorable to the imported product than to the like domestic product and it implies that a measure according formally different treatment to imported products does not *per se* violate Article III:4. The Appellate Body did not agree with the panel that the limitation on the ability of consumers to compare visually two products at the point of sale necessarily reduced the opportunity for the imported product to compete “directly” or on “an equal footing” with the domestic product, nor did it agree that the alleged encouragement provided by the dual retail system to the perception of consumers that imported and domestic beef were “different” necessarily implied a competitive advantage for domestic beef. In its view, although the Korean dual retail system formally separated the selling of imported beef and domestic beef by the requirement of two distinct retail distribution systems, such formal separation, in and of itself, did not necessarily compel the conclusion that the treatment thus accorded to imported beef was less favorable than that accorded to domestic beef. According to the Appellate Body, to determine whether the treatment accorded to imported beef was less favorable than that accorded to domestic beef, it was necessary to inquire into whether or not the Korean dual retail system for beef modified the conditions of competition in the Korean beef market to the disadvantage of the imported product. After examining the beef market structure in Korea, the Appellate Body concluded that the introduction of the dual retail system resulted in the imposition of a drastic reduction of commercial opportunities for imported beef to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef.<sup>92</sup> Although it agreed that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product, it found that the legal necessity of making a choice was imposed by the government measure itself and the reduction of access to normal retail channels was, in legal contemplation, the effect of that measure. The Appellate Body concluded, therefore, that the Korean Government’s measure was responsible for the resulting establishment of competitive conditions less favorable for the imported product than for the domestic product, and the fact that the WTO-consistent quota for beef was fully utilized did not detract from the lack of equality of competitive conditions entailed by the dual retail system.<sup>93</sup>

The next significant case involving a facially neutral regulatory measure that was claimed to violate the National Treatment principle in Article III:4 was the *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* (hereinafter *EEC - Asbestos*).<sup>94</sup> In this case, the issue was the general ban imposed by a Decree of the French Government on the manufacture, processing, sale, import, placing on the domestic market, and transfer under any title whatsoever of all varieties of asbestos fibers. However, on an exceptional and temporary basis, the ban was not to apply to certain existing materials, products, or devices containing chrysotile fiber when, to perform an equivalent function, no substitute for that fiber was available which posed a lesser health risk. Canada complained, *inter alia*, that the French Decree violated the National Treatment principle of Article III:4 of the GATT by banning the marketing of chrysotile fibers and chrysotile-cement products because chrysotile fibers and chrysotile-cement products were “like” polyvinyl alcohol (PVA), cellulose, and glass fibers within the meaning of Article III:4 and by prohibiting chrysotile

fibers and chrysotile-cement products, the EEC was favoring its national industry of PVA, cellulose, and glass fibers (hereinafter “PCG fibers”) and fibro-cement products containing these fibers.

The panel, following the steps established by WTO panels and the Appellate Body in past cases, began its inquiry by examining whether or not the chrysotile fibers were “like” PCG fibers, and whether or not cement-based products containing chrysotile asbestos fibers were “like” cement-based products containing one of the PCG fibers. To define the “likeness” of products, the panel followed the same approach as that taken by the panel in *US - Gasoline* which had applied the criteria suggested by the Appellate Body in *Japan - Taxes on Alcoholic Beverages* for the purposes of determining “like” products in the context of Article III:2, first sentence. The panel specifically noted the observations made by the Appellate Body in *Japan - Taxes on Alcoholic Beverages* that the term “like” products should be examined on a case-by-case basis, which would inevitably involve a degree of judgment. Despite the acknowledgment that the structure of chrysotile fibers is unique by nature and that none of the substitute fibers has the same structure, either in terms of its form, diameter, length, or potential to release particles that possess certain characteristics, and that they do not have the same chemical composition or in purely physical terms the same nature or quality, the panel still found that chrysotile fibers were “like” PCG fibers. The basis of the panel’s finding was that, for many industrial uses, PCG fibers have the same applications as chrysotiles. The panel rejected the narrow definition of “like product” as applied in other WTO cases, arguing that consideration of only the physical structure, chemical composition, and properties of products in the examination of “likeness” of products would exclude many products from being “like” even if they had a similar use. The panel also claimed that the context for the application of Article III:4 is not a scientific classification exercise but is to provide market access for products, and in the context of market access, it is not necessary for domestic products to possess all the physical similarities and properties of the imported products in order to be “like” products. In the view of the panel, the fact that chrysotile fibers and PCG fibers have certain identical or at least similar end-uses in cement products was sufficient to consider them as “like” products even if in other circumstances their end-uses may be different.

The panel also rejected as irrelevant the argument of the EEC that chrysotile fibers are a widely recognized carcinogen and pose serious threats to human health. The panel claimed that the risk of a product to human or animal health has never been used as a factor of comparison by panels entrusted with applying the concept of “likeness” within the meaning of Article III, and introducing a criterion as to the health risks of a product into the analysis of “likeness” within the meaning of Article III would largely nullify the effect of Article XX(b) which specifically covers the protection of human health and life (under which the panel went on to uphold the measures in question). The panel also did not consider the criterion of consumers’ tastes and habits, stating that the products concerned were not everyday consumer goods. Similarly, the panel disregarded the difference in tariff classification of the products in dispute in the Harmonized System stating that the difference in tariff classification was not a decisive criterion in this case.

On the issue of whether or not the EEC measure provided less favorable treatment to imported products than that accorded to like domestic products, the panel concluded that the terms of the EEC measure themselves established less favorable treatment for asbestos and products containing asbestos as compared to PCG fibers and products containing PCG fibers because the measure imposed a ban on asbestos fibers, and did not place an identical ban on PCG fibers and fibro-cement products containing PCG fibers.<sup>95</sup> Thus, the panel found that the EEC measure in regard to asbestos products was inconsistent with Article III:4.

It is evident from the panel's decision in *EEC-Asbestos* that the determination of the issue of whether or not a regulatory measure is inconsistent with the principle of National Treatment depends very much on whether or not the imported product and its domestic comparator are "like" each other. As stated by the Appellate Body in *EEC-Asbestos*, the determination of the "likeness" of two products in the context of Article III:4 rests on how a panel decides three issues: first, which characteristics or qualities are important in assessing the "likeness" of products since most products have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product; second, the degree or extent to which products must share qualities or characteristics in order to be "like" products since products may share only very few characteristics or qualities or they may share many; and third, from whose perspectives "likeness" should be judged because ultimate consumers may have a view about the likeness of two products which may be very different from that of the inventors, producers, or regulators of those products.<sup>96</sup> The Appellate Body attempted to resolve these issues.

The Appellate Body first noted that the appeal from the panel's decision provided it with its first occasion to examine the meaning of the term "like products" in Article III:4. Although it observed that the term "like product" appears in the first sentence of Article III:2 and in Article III:4 in the context of National Treatment principle, and both of these provisions constitute specific expressions of the overarching general principle of National Treatment set forth in Article III:1, it concluded that the term "like products" in Article III:4 should not be construed as narrowly as in the context of

Article III:2. The reason for a different approach to interpreting the same words in the context of the National Treatment principle is, according to the Appellate Body, that Article III:2 contains two separate obligations in two sentences covering "like" products and "directly competitive or substitutable" products respectively and there is a need to interpret these two sentences in a harmonious manner in order to give meaning to both sentences of Article III:2, whereas Article III:4 contains a single obligation that applies solely to "like" products and the harmony required to be attributed to the two sentences of Article III:2 need not and cannot be replicated in interpreting Article III:4. In the view of the Appellate Body, a determination of "likeness" under Article III:4 is fundamentally a determination about the nature and extent of a competitive relationship between and among products, even if there is a spectrum of degrees of competitiveness or substitutability of products in the market place and it is difficult, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 falls. The Appellate Body concluded that the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2.<sup>97</sup> After having so defined the scope of "like" products in Article III:4, the Appellate Body proceeded to outline a framework for analyzing the "likeness" of particular products in a particular case. It found that past GATT panels as well as WTO panels and the Appellate Body have developed and followed an approach consisting of four general criteria in order to determine the "likeness" of products. These four criteria are: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and (iv) the tariff classification of the products. However, the Appellate Body claimed that these criteria are neither a treaty-mandated nor a closed list of criteria that should determine the legal characterization of products, but are simply tools to assist in the task of sorting and examining the relevant evidence in a particular case. According to the Appellate Body, all the pertinent evidence needs to be examined in each case and the kind of evidence to be examined in assessing the "likeness" of products depends upon the particular products and the legal provision at issue.

The Appellate Body rejected the approach taken by the panel in *EEC - Asbestos* to determine the “likeness” of chrysotile fibers with PCG fibers, and reversed the determination that chrysotile fibers were “like” PCG fibers and cement-based products containing chrysotile asbestos fibers and cement-based products containing PCG fibers were “like products.” It concluded that the panel should have examined the evidence relating to each of the four criteria and then weighed all of this evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as “like,” and that it was inappropriate for the panel to express a conclusion after examining only one of the four criteria (end-uses). According to the Appellate Body, physical properties of products deserve a separate examination which should not be confused with the examination of end-uses, and although not decisive, the extent to which products share common physical properties may be a useful indicator of “likeness” because the physical properties of a product may influence how the product can be used, consumer attitudes about the product, and tariff classification. The evidence relating to the health risks associated with a product may be pertinent to an examination of “likeness” under Article III:4, but need not be examined under a separate criterion and can be evaluated under the criteria of physical properties and of consumers’ tastes and habits.

After reversing the panel’s conclusion in regard to the “likeness” of chrysotile fibers with PCG fibers and cement-based products containing chrysotile asbestos fibers with cement-based products containing PCG fibers, the Appellate Body proceeded to its own examination of “likeness” of the products at issue on the basis of the evidence available in the panel’s report. It first examined the physical properties of chrysotile fibers and PCG fibers and noted the panel’s conclusion that these fibers are physically very different. Then, it emphasized the fact, which was treated as irrelevant although acknowledged by the panel in examining “likeness” - that chrysotile fibers have been recognized internationally as a known carcinogen because of the particular combination of their molecular structure, chemical composition, and fibrillation capacity. The Appellate Body also noted the evidence that PCG fibers are not classified by the World Health Organization at the same level of risk as chrysotile and the experts consulted by the panel also confirmed that current scientific evidence indicates that PCG fibers do not present the same risk to health as chrysotile fibers. It then concluded that when the evidence relating to properties indicates that the products in question are physically different, then “in order to overcome the indication that products are not like, a high burden is imposed on a complainant to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that, all the evidence, taken together, demonstrates that the products are ‘like’ under Article III:4.” The Appellate Body found that the complainant had not satisfied its burden because the end-uses of chrysotile fibers and PCG fibers were the same for only a small number of applications, no evidence was submitted on consumers’ tastes and habits<sup>98</sup> and chrysotile fibers and PCG fibers have different tariff classifications.

Applying the same criteria as in the examination of the “likeness” of chrysotile fibers with PCG fibers, the Appellate Body also examined whether cement-based products containing chrysotile asbestos fibers are “like” cement-based products containing PCG fibers and found that these products were not “like” products. It specifically rejected the contention of Canada that evidence on consumers’ tastes and habits concerning cement-based products was irrelevant. According to the Appellate Body, it was of particular importance under Article III to examine evidence relating to competitive relationships in the market place, and it was likely that the presence of a known carcinogen in one of the products would have an influence on both intermediate and final consumers’ tastes and habits regarding that product. In the view of the Appellate Body, it might be that, although cement-based products containing chrysotile fibers were capable of performing the same functions as other cement-based products, consumers were, to a greater or lesser extent, unwilling to use products

containing chrysotile fibers because of the health risks associated with them. However, the Appellate Body considered it as only speculation and did not make any determination on this issue because of lack of evidence. In its view, a determination on the “likeness” of the cement-based products could not be made, under Article III:4, in the absence of an examination of evidence on consumers’ tastes and habits.

On the basis of these findings, the Appellate Body concluded that, as Canada had not demonstrated that chrysotile asbestos fibers were “like” PCG fibers or that cement-based products containing chrysotile asbestos fibers were “like” cement-based products containing PCG fibers, it did not succeed in establishing that the EEC measure at issue was inconsistent with Article III:4 of the GATT. The Appellate Body, however, also observed that there is a second element that must be established before a regulatory measure can be held to be inconsistent with Article III:4. Even if two products are “like,” the complainant must still establish that the measure accords to the group of “like” imported products “less favorable treatment” than it accords to the group of “like” domestic products. In the view of the Appellate Body, the term “less favorable treatment” expresses the general principle set out in Article III:1, that internal regulations should not be applied “so as to afford protection to domestic production.” It said that if there is “less favorable treatment” of the group of “like” imported products, there is, conversely, “protection” of the group of “like” domestic products. Nevertheless, the Appellate Body also said that distinctions may be drawn between products which have been found to be “like,” without, for this reason alone, according to the group of “like” imported products “less favorable treatment” than that accorded to the group of “like” domestic products.<sup>99</sup>

It is notable that one Member of the Appellate Body in *EEC - Asbestos* expressed a separate opinion about the approach to be taken in order to determine the “likeness” of two products. He took the view that, considering the nature and quantum of the scientific evidence showing the carcinogenicity of chrysotile asbestos fibers, there was ample basis for a definitive characterization of such fibers as not “like” PCG fibers, and that definitive characterization might and should be made even in the absence of evidence concerning the other two criteria of end-uses and consumers’ tastes and habits.<sup>100</sup> He also cautioned that the necessity or appropriateness of adopting a “fundamentally economic” interpretation of the “likeness” of products under Article III:4 was not free from substantial doubt, and in future contexts, the line between a “fundamentally” and “exclusively” economic view of “like products” under Article III:4 might well prove very difficult, as a practical matter, to identify. However, he did not offer any suggestion as to the appropriate approach to the interpretation of the “likeness” of products under Article III:4, but rather he reserved his opinion on this matter.

After the *EEC - Asbestos* case, two other cases, which involve issues pertaining to Article III:4 of the GATT, have been decided by the Dispute Settlement Body (DSB) of the WTO. However, the tests applied by the panel and Appellate Body to examine the consistency or inconsistency of the measure in question with Article III:4 in *United States - Tax Treatment for “Foreign Sales Corporations” - Recourse to Article 21.5 of the DSU by the European Communities*<sup>101</sup> [hereinafter *US - FSC (Article 21.5)*] and the panel in *India - Measures Affecting the Automotive Sector*<sup>102</sup> (hereinafter *India - Automotive*) are similar to those followed by the panel and the Appellate Body in *Canada - Automotive*, *Korea - Beef*, and *EEC- Asbestos*.

In the *US - FSC (Article 21.5)*,<sup>103</sup> the panel cited the rulings of the panel and Appellate Body in *Canada - Automotive* and *EEC-Asbestos* in respect of the meaning of “like products” and “less favorable treatment,” and viewed the principal purpose of the “like product” inquiry under Article III:4 as ascertaining whether any formal differentiation in treatment between an imported and a domestic



product could be based upon the fact that the products are different (not like) rather than on the origin of the products involved. According to the panel, when a regulatory measure of general application makes a distinction between imported and domestic products solely and explicitly on the basis of origin of such products, and applies horizontally to all possible products that can be used for the production of goods that might eventually be a recipient of the benefit accorded by the said regulatory measure, then there is no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4. On the issue of when a regulatory measure at issue is considered as one “affecting” the internal sale or use of the products concerned, the panel said, relying on the rulings in *EEC - Bananas* and *Canada - Automotive*, that the ordinary meaning of the term “affecting” implies a measure that has “an effect on,” thereby indicating a broad scope of application. The panel also noted that the term “affecting” in Article III:4 has been interpreted to cover not only laws and regulations that directly govern the conditions of sale or purchase but also any law or regulation that might adversely modify the conditions of competition between domestic and imported products. The panel then considered that a measure pursuant to which the use of domestic, but not imported, products contributes to obtaining an advantage has an impact on the conditions of competition between domestic and imported products and thus “affects” the internal “use” of imported products, even if the measure allows for other means to obtain the advantage, such as the use of domestic inputs other than products.

On the issue of “less favorable treatment,” the panel recalled the previous rulings in *Canada - Automotive* and *Korea - Beef* that Article III:4 of the GATT is an obligation addressed to governments requiring that they ensure equality of competitive opportunities to domestic and like imported products, and it does not require a demonstration of trade effects, nor proof that the sourcing decisions of private firms have actually been impacted by the regulatory measure in question. The panel also stated that any distinction that is based exclusively on criteria relating to the nationality or origin of the product would not necessarily be incompatible with Article III. To be incompatible with the provisions of Article III:4, a measure must accord treatment to imported products that is “less favorable than” that accorded to like domestic products. According to the panel, when an advantage is conferred upon the use of domestic products that is not conferred upon the use of imported products, it constitutes a formal differentiation of treatment between imported and like domestic products, which, in the view of the panel, affords less favorable treatment to imported products than to like domestic products because by conferring an advantage upon the use of domestic products but not upon the use of imported products, it adversely affects the equality of competitive opportunities of imported products in relation to like domestic products. The Appellate Body upheld the rulings of the panel in this case.<sup>104</sup>

In *India - Automotive* case,<sup>105</sup> the issues were similar to those in *Canada - Automotive* and *US - FSC (Article 21.5)*. Therefore, the panel followed the same approach and gave similar reasons in determining the inconsistency of the measure in question with Article III:4. On the issue of the meaning of the term “requirement” under Article III:4, the panel concluded that a binding enforceable condition falls squarely within the ordinary meaning of the word “requirement,” in particular as “a condition which must be complied with.” According to the panel, the enforceability of the measure in itself, independently of the means actually used or not to enforce it, is a sufficient basis for a measure to constitute a requirement under Article III:4. Similarly, with respect to the meaning of the term “affecting,” the panel said that this term goes beyond laws and regulations which directly govern the conditions of sale or purchase to cover also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products. On the issue of “less favorable treatment” to imported products, the panel said that in determining whether imported products are treated less favorably than domestic products, it (the panel) is

obliged to examine whether the contested regulatory measure modifies the conditions of competition in the relevant market to the detriment of imported products. According to the panel, any requirement that provides an incentive to purchase and use domestic or local products and hence creates a disincentive to use like imported products modifies the conditions of competition between the domestic and imported products in the relevant market within the meaning of Article III:4 because such a requirement creates a situation where imported products cannot compete on an equal footing with domestic products.

## Notes

- 1 See William Smith Culbertson, *International Economic Policies: A Survey of the Economics of Diplomacy* (D. Appleton Company, 1925), p. 24.
- 2 See Michael M. Hart, *The Mercantilist's Lament: National Treatment and Modern Trade Negotiations*, 21(6) *Journal of World Trade Law* 38 (1987).
- 3 See Georg Schwarzenberger, *The Most-Favored-Nation Treatment in British State Practice*, XXII *The British Yearbook of International Law* 97 (1945).
- 4 See G. Erler, *Grundprobleme des Internationalen Wirtschaftsrechts* (Gottingen, 1956), p. 47, cited by Pieter VerLoren van Themaat in *The Changing Structure of International Economic Law* (Hague: Martinus Nijhoff, 1981), p. 19.
- 5 See Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, in *RECUEIL DES COURS*, vol. I, 1966, Academie De Droit International, Hague, p. 80; W. McClure, *German-American Commercial Relations*, 19 *American Journal of International Law* 692 (1925), and William Smith Culbertson, *supra* note 1.
- 6 *Ibid.*; see also Gerard Curzon, *Multilateral Commercial Diplomacy* (London: Michael Joseph, 1965), p. 15, and Pieter VerLoren van Themaat, *supra* note 4.
- 7 See Article 2 of the Paris Convention for the Protection of Industrial Property of March 20, 1883; and Article 5 of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886.
- 8 Clair Wilcox, *A Charter for World Trade* (Macmillan Company, 1949), p. 3; see also Gerard Curzon, *supra* note 6; and Michael M. Hart, *supra* note 2, p. 42.
- 9 Henry Joseph Tasca, *The Reciprocal Trade Policy of the United States: A Study in Trade Philosophy* (University of Pennsylvania Press, 1938), p. 18; see also John H. Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company, 1969), p. 37.
- 10 See John H. Jackson; *supra* note 9, pp. 276-8.
- 11 *Ibid.*; see also Kenneth D. Dam, *The GATT Law and International Economic Organization* (University of Chicago Press, 1970), pp. 6-12.
- 12 *Ibid.*
- 13 See Michael M. Hart, *supra* note 2, pp. 44-6, and Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (New York: Routledge, 1999), 2nd edn., chapter 5, pp. 112-34.
- 14 *Ibid.*
- 15 John H. Jackson, *National Treatment Obligations and Non-tariff Barriers*, 10(1) *Michigan Journal of International Law*, 212 (1989).
- 16 *Ibid.*
- 17 See Aaditya Mattoo and Arvind Subramanian, *Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution*, 1(2) *Journal of International Economic Law* 303.
- 18 *Ibid.*
- 19 See Robert Hudec, *GATT/WTO Constrains on National Regulation: Requiem for an 'Aim and Effects' Test* in Robert E. Hudec, *Essays on the Nature of International Trade Law* (Cameron May, 1999), p. 360.
- 20 *Ibid.*, p. 363.
- 21 *Ibid.*
- 22 *Ibid.*
- 23 He claims that starting in the mid-1980s, the GATT, and subsequently the WTO, expanded the National Treatment obligation of the GATT to effectively address *de facto* discrimination, see Warren H. Maruyama, *A New Pillar of the WTO: Sound Science*, 32 *International Lawyer* 651 (1998).
- 24 See Hudec, *supra* note 19, p. 364.
- 25 *Ibid.*
- 26 *Ibid.*
- 27 See Aaditya Mattoo and Arvind Subramanian, *supra* note 17, pp. 303-4.

- 28 Ibid.
- 29 Ibid., p. 305.
- 30 Ibid.
- 31 Panel Report adopted on November 10, 1987, see GATT, B.I.S.D. 34S/83; see also Pierre Pescatore, William J. Davey, and Andreas F. Lowenfeld (hereinafter Pescatore, Davey, and Lowenfeld), *Handbook of WTO/GATT Dispute Settlement* (Transnational Publishers, 2000), Volume 2. For a brief commentary on this case see Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, 1993), pp. 212-14.
- 32 The panel stated the following in regard to the context, purpose, and object of Article III:2: Just as Article I:1 was generally construed, in order to protect the competitive benefits accruing from 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 concessions would not be nullified or impaired by internal tax discrimination against like products.
- 33 According to the panel, the increasing imports of “Western-style” alcoholic beverages into Japan bore witness to this competitive relationship and to the potential product substitution through trade among various alcoholic beverages.
- 34 We are mindful of the fact that GATT and WTO panels and Appellate Body have not made any distinction as such between the explicit discrimination by regulatory measures based on nationality or country of origin of the products and implicit discrimination by facially neutral regulatory measures in the course of determining the consistency or inconsistency of a regulatory measure with Article III of GATT.
- 35 Report of the Panel adopted on November 7, 1989, see GATT, B.I.S.D. 36S/345; see also Pescatore, Davey, and Lowenfeld, *supra* note 31.
- 36 *United States - Restrictions on Imports of Tuna* (1991) 30 I.L.M. 1594. The Panel ruling in this case was not formally adopted by the GATT Council.
- 37 See, e.g., Robert E. Hudec, “The Product-Process Doctrine in GATT/WTO Jurisprudence,” in Marco Bronckers and Reinhard Quick (eds.), *New Directions in International Economic Law: Essays in Honour of John. H. Jackson* (Kluwer Law International, 2000); Robert Howse and Donald Regan, “The Product-Process Distinction: An Illusory Basis for Disciplining Unilateralism in Trade Policy,” 11 *European Journal of International Law* 249 (2000); and Henry L. Thaggert, “A Closer Look at the Tuna-Dolphin Case: ‘Like Products’ and ‘Extrajurisdictionality’ in the Trade and Environment Context” in James Cameron, Paul Demaret and Damien Geradin (eds.), *Trade and the Environment: The Search for Balance* (Wm Gaunt & Sons, 1994), vol. I, p. 69.
- 38 Report of the panel adopted on June 19, 1992, GATT, B.I.S.D. 39S/206; see also Pescatore, Davey, and Lowenfeld, *supra* note 31, at DD88/1.
- 39 In the panel’s view, even if the wine produced from the specified variety of grape were to be considered unlike other wine, the two kinds of wine would still have to be regarded as “directly competitive” products in terms of Article III:2, second sentence, and the imposition of a higher tax on directly competing imported wine so as to afford protection to domestic production would have been inconsistent with that provision.
- 40 In the panel’s view, consumers who purchased low alcohol beer might be unlikely to purchase beer with high alcohol and *vice versa*, and the advertising and marketing by manufacturers showed such different market segments.
- 41 See GATT Doc. DS31/R, September 29, 1994. For an analysis and critique of this case, see Mattoo and Subramanian, *supra* note 17; and James H. Snellson, “Can GATT Article III Recover From Its Head-On Collision with *United States — Taxes on Automobiles?*,” 5 *Minnesota Journal of Global Trade* 467 (1996).
- 42 The EEC claimed that all automobiles were “like” products and the distinction made on the basis of their value and gasoline consumption resulted in the imposition of internal taxes on imported products in excess of those applied to “like” domestic products. The United States claimed that the tax measures were applied equally to domestic and imported automobiles and the United States and EEC producers manufactured automobiles with both the low and high values as well as with high and low gasoline consumption.
- 43 See Robert E. Hudec, *supra* note 19.
- 44 For a recent review of the case-law under Article III pertaining to internal tax discrimination, see Elsa Horn and Petros Mavroidis, “Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination,” December 3, 2002 (a copy of the manuscript is on file with the authors).

45 *Japan - Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS8/R, WT/DS10/R and WT/DS11/R (July 11, 1996) (96-2651); and *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (October 4, 1996) (96-3951), AB-1996-2.

46 In the panel report, the panel stated that such an examination requires two determinations: (i) whether the products concerned are “directly competitive or substitutable,” and (ii) if so, whether the treatment afforded to foreign products is contrary to the principles set forth in Article III:1.

47 The issue in this case was the Japanese Liquor Tax Law that divided all liquors into different categories and subcategories, and applied different tax rates to each of these categories and subcategories. The tax rates were expressed as a specific amount in Japanese Yen per liter of beverage, and for each category or subcategory, the Liquor Tax Law laid down a reference alcohol content per liter of beverage and the corresponding reference tax rate. The European Communities complained, *inter alia*, that Japan had acted inconsistently with Article III:2 of GATT by applying a higher tax rate on the categories of spirits, whisky/brandy and liquors than on each of the two subcategories of shochu. Canada and United States complained that the higher rates of taxation on imported alcoholic beverages including whiskies, brandies, and other distilled alcoholic beverages and liquors than on Japanese shochu imposed under the Liquor Tax Law were inconsistent with Article III:1 and Article III:2 of GATT.

48 The issues raised before the Appellate Body were the conclusions reached by the panel that shochu and vodka are like products and Japan, by taxing the latter in excess of the former, was in violation of its obligation under Article III:2, first sentence, of GATT 1994, and that shochu, whisky, brandy, rum, gin, genever, and liquors are “directly competitive or substitutable products” and Japan, by not taxing them similarly, was in violation of its obligation under Article III:2, second sentence, of GATT 1994. Japan and United States appealed against the panel’s findings. c

49 According to the panel, even if the adopted panel reports have any legal status, it does not necessarily have to follow their reasoning or results. Although the Appellate Body endorsed the panel’s conclusion in regard to unadopted panel reports and did not agree with the conclusion on the legal status of adopted panel reports, it, however, agreed that adopted panel reports are not binding, except on the parties to the dispute, even if they create legitimate expectations among WTO Members and should be taken into account where they are relevant to any dispute.

50 According to the panel, if the “aim-and-effect” test was applied in regard to Article III, then in principle, a WTO Member could, for example, invoke protection of health in the context of invoking the “aim-and-effect” test, and if this were the case, then the standard of proof established in Article XX would effectively be circumvented and WTO Members would not have to prove that a health measure is necessary to achieve its health objective. For a response to the panel’s criticism of the “aims and effects” test, see Serena B. Wille, *Recapturing a Lost Opportunity: Article III: 2 GATT 1994 Japan-Taxes on Alcoholic Beverages*, Jean Monnet Working Paper 11-97 (NYU School of Law, 1997).

51 According to the Appellate Body, many least-developed countries and developing countries have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings.

52 The panel noted that a difference in the physical characteristic of alcoholic strength of two products did not preclude a finding of “likeness” especially since alcoholic beverages are often drunk in diluted form. The panel also noted the similar findings in the 1987 *Japan Alcohol* case and that vodka and shochu were classified in the same heading in the Japanese tariffs bindings.

53 According to the panel, the use of additives would disqualify liquors, gin, and genever; the use of ingredients would disqualify rum; and appearance (arising from manufacturing processes) would disqualify whisky and brandy.

54 The panel concluded that the tax imposed on vodka was in excess of the tax imposed on shochu because vodka was taxed at 377,230 Yen per kiloliter - for an alcoholic strength below 38 degrees - 9,927 Yen per degree of alcohol - whereas shochu A was taxed at 155,700 Yen per kiloliter - for an alcoholic strength between 25 and 26 degrees - 6,228 Yen per degree of alcohol.

55 Applying the criterion of elasticity of substitution between products, the panel concluded

that shochu, whisky, brandy, rum, gin, genever, and liquors were “directly competitive or

substitutable products.” To find the elasticity of substitution, the panel relied on the conclusions of the 1987 *Japan Alcohol* case that both white and brown spirits were directly

competitive or substitutable products to shochu, the studies put forward by the complainants

supporting such elasticity of substitutions, and the evidence submitted by the complainants concerning the 1989 Japanese tax reform which showed that the products

in question were essentially competing for the same market.

56 In the view of the Appellate Body, this would eviscerate the distinctive meaning that must be respected due to the distinctions in the wordings of the text of Article III:2, first sentence, and Article III:2, second sentence.

57 The panel concluded that the products at dispute were not similarly taxed because the differences in the amounts of taxes were not de minimis and Japan's Liquor Tax Law did not specifically provide that tax/price ratio was the basis of taxation, as there were significantly different tax/price ratios even within the same product categories.

58 To support its conclusion, the Appellate Body noted the findings of the panel that the combination of customs duties and internal taxation in Japan had the impact of making it difficult for foreign-produced shochu to penetrate the Japanese market as well as the impact of not guaranteeing equality of competitive conditions between shochu and the rest of "white" and "brown" spirits; and thus, through a combination of high import duties and differentiated internal taxes, Japan managed to "isolate" domestically produced shochu from foreign competition.

59 For various aspects of practical difficulties in applying the tests advocated by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*, see Mattoo and Subramanian, *supra* note 17 (arguing that this case follows a strict textual interpretation of Article III:2 which is difficult to apply to a range of known situations); Sarah Hogg and Mahmud Nawaz, "Economic Considerations and the DSU" in James Cameron and Karen Campbell (eds.), *Dispute Resolution in the World Trade Organisation* (Cameron May, 1998) (arguing that the interpretation was focused on *supply side* factors and the key *demand side* question - whether the products concerned competed in the same market - was not considered as important); and Ramon R. Gupta, *Appellate Body Interpretation of the WTO Agreement: A Critique in Light of Japan - Taxes on Alcoholic Beverages*, 6 *Pacific Rim Law and Policy Journal* 683 (July 1997) (criticising the vague approach in defining "like" and "directly competitive or substitutable" products in light of the importance of predictability and clarity in developing credible dispute settlement procedure).

60 *Canada - Certain Measures Concerning Periodicals*, Report of the Panel, WT/DS31/R (March 14, 1997) (97-0939); and *Canada - Certain Measures Concerning Periodicals*, Report of the Appellate Body, WT/DS31/AB/R (June 30, 1997) (97-2653), AB-1997-2.

61 A split-run edition was one that was distributed in Canada, had more than 20 percent of editorial material substantially the same as the editorial material that appeared in one or more excluded editions of one or more issues of one or more periodicals, and contained an advertisement that did not appear in identical form in all excluded editions.

62 Canada claimed, *inter alia*, that the panel erred in law in finding that imported United States' split-run periodicals and Canadian non-split-run periodicals were like products. The US appeal related to some other issues.

63 Based on a single hypothetical example constructed using a Canadian-owned magazine *Harrowsmith Country Life*, which was previously a split-run periodical but stopped its US edition as a result of the tax, the panel compared two editions, before and after the discontinuation of the US edition, of the same magazine, and concluded that imported split-run periodicals and domestic non-split-run periodicals were "like" products because the two editions of the said magazine would have common end uses, very similar physical properties, nature and qualities as well as they would have been designed for the same readership with the same tastes and habits.

64 The Appellate Body particularly noted the facts that the panel based its findings on a single, incorrect, hypothetical example that involved a comparison between two editions of the same magazine, both imported products, which could not have been in the Canadian market at the same time, but the panel did not examine the evidence of likeness of TIME, TIME Canada and Maclean's magazines, presented by Canada, and the magazines, Pulp & Paper and Pulp & Paper Canada, presented by the United States, or the Report of the Task Force on the Canadian Magazine Industry.

65 In its view, the determination of "likeness" was a delicate process by which legal rules had to be applied to facts, and due to the absence of adequate analysis of facts in the Panel Report in that respect, it was not possible for the Appellate Body to proceed to a determination of "like" products.

66 The Appellate Body rejected the argument of Canada that it did not have the jurisdiction to examine a claim under Article 111:2, second sentence, as no party had appealed the findings of the panel on that provision.

67 The Appellate Body rejected the argument of Canada that the Task Force Report's description of the relationship as one of "imperfect substitutability" characterized the absence of perfect substitutability that was required to prove the direct competitiveness or substitutability of products. In its view, a case of perfect substitutability makes products the "like" products. It also cautioned that the conclusion that imported split-run periodicals and domestic non-split-run periodicals were "directly competitive or substitutable" did not mean that all periodicals belong to the same relevant market, whatever their editorial content. In its view, a periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music, or cuisine, but news magazines, like TIME and Maclean's, are directly competitive or substitutable.

68 The Appellate Body claimed that the magnitude of the dissimilar taxation was prohibitive.

69 The effects cited were the moving of the production of a split-run magazine of United States for the Canadian market from Canada to the United States and the cessation of production of the US edition by a Canadian split-run periodical after the imposition of the tax.

70 For the analysis of different aspects of the Appellate Body decision in the *Canada Periodicals* case, see Stephen de Boer, "Trading Culture: The Canada-US Magazine Dispute," in James Cameron and Karen Campbell (eds.), *Dispute Resolution in the World Trade Organisation* (Cameron May, 1998); Richard L. Matheny III, "In the Wake of the Flood: 'Like Products' and Cultural Products after the World Trade Organization's Decision in Canada Certain Measures Concerning

Periodicals,” in 147 *University of Pennsylvania Law Review*, November 1998, p. 245; Sydney M. Cone III, “The Appellate Body and *Harrow-smith Country Life*” in 32(2) *Journal of World Trade* 117 (1998); Chi Carmody, “When “Cultural Identity Was Not At Issue”: Thinking About *Canada — Certain Measures Concerning Periodicals*” in 30 *Law and Policy in International Business* 231 (1999); and Trevor Knight, “The Dual Nature of Cultural Products: An Analysis of the World Trade Organization’s Decisions Regarding Canadian Periodicals”, 57(2) *University of Toronto Faculty of Law Review* 165 (1999).

71 *Korea - Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS75/R and WT/DS84/R (September 17, 1998) (98-3471); and *Korea - Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS75/AB/R and WT/DS84/AB/R (January 18, 1999) (99-0100), AB-1998-7. In this case, the United States and EEC complained against the Korean taxes under the Korean Liquor and Education Tax Laws, as being inconsistent with Article III:2 because they accorded preferential tax treatment to soju, a traditional Korean alcoholic beverage, as compared with certain imported alcoholic beverages.

72 According to the panel, trends are particularly important in the context of experience-based consumer items and it would be unrealistic and, indeed, analytically unhelpful to attempt to separate every piece of evidence and disregard that which discusses implications for market structure in the near future.

73 The panel found that the total tax on diluted soju was 38.5 percent; on distilled soju and liquors 55 percent; on vodka, gin, rum, tequila, and admixtures 104 percent; and on whisky, brandy, and cognac 130 percent.

74 According to the panel, it was based on a very broad generic definition which was defined as soju and then there were specific exceptions corresponding very closely to one or more characteristics of imported beverages that were used to identify products which received higher tax rates. There was virtually no imported soju so the beneficiaries of the tax structure were almost exclusively domestic producers, and the only domestic product which fell into a category with higher tax rates was distilled soju which represented less than one percent of Korean production.

75 *Chile - Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS87/R and WT/DS110/R (June 15, 1999) (99-2313); and *Chile - Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS87/AB/R and WT/DS110/AB/R (December 13, 1999) (99-5414), AB-1999-6.

76 In the panel’s view, studies or surveys that reveal the following all serve as evidence of substitutability in end-uses: (i) a tendency among consumers to regard products as substitutes in satisfying a particular need; (ii) that the nature and content of marketing strategies of producers indicate that they are competing for the expenditure of potential consumers in a particular market segment; and (iii) that distribution channels are shared with other goods.

77 According to the panel, although whisky and pisco were distilled from different substances, namely barley and grapes respectively, they share the characteristics of being potable liquids with high alcohol content, which was the product of distillation, as well as being receptive to mixing with non alcoholic beverages. In any event, even the differences in ingredients between whisky and pisco were not sufficient to render these two distilled alcoholic spirits, both of which have a high alcohol content and more or less satisfy a similar need, incapable of being substituted for each other. As for brandy, cognac and some other spirits, the differences in physical characteristics were only post-distillation differences such as color and smell which were not sufficiently significant to change the basic character of spirits essentially made from grapes or other fruits.

78 According to the panel, between 70 and 80 percent of Chilean production consisted of products with less than 35 degrees alcohol content and, therefore, enjoyed the lowest tax rate of 27 percent. Over 90 percent of pisco was in this category.

79 Under Chilean regulations, most of the imported beverages, such as whisky, had generic names that required them to contain at least 40 degrees of alcohol. Thus, almost 95 percent of imports would be taxed at the highest rate of 47 percent or would lose their ability to retain their generic name or would be required to change an important physical characteristic, namely their water/alcohol ratio.

80 Chile argued that its objectives of the tax measure were maintaining revenue collection; eliminating tax distinctions based on the types of alcoholic beverages; discouraging alcohol consumption; and minimizing the potentially regressive aspects of the reform of the tax system. Examining the relationship between the stated objective and the measure in question, the panel claimed that there was no rational reason why such a structure as devised by Chile was necessary for the purpose of maintaining revenue neutrality, as Chile had acknowledged that the same revenue result could be achieved with a single *ad valorem* rate at some point between 27 and 47 percent. Similarly, the panel claimed that the New System did not achieve the purpose of eliminating type distinctions because the favorable tax treatment accorded to products called “pisco” was removed, but the system was replaced with one providing unfavorable tax treatment for any products called “whisky,” “gin,” “vodka,” or “rum,” which happened to be primarily imports. Likewise, the panel claimed that there was no direct correlation between the objective of discouraging alcohol consumption and the measure because the tax differential between products with 35 degrees of alcohol and 39 degrees of alcohol was not the same as the differential between products with, for instance, 40 degrees and 44 degrees of alcohol as the tax rate almost doubled between 35 and 39 degrees but was the same between 40 and 44 degrees. Since the system was based not just on alcohol content, but on *ad valorem* rates qualified by the additional criterion of alcohol content, there appeared to be no correlation between value and alcohol consumption. Finally, minimizing the regressive aspects of the tax reform would be true only if the factual situation were to remain static. In many markets there were quite low priced whiskies sold at the same alcohol content as high priced whisky.

81 For a brief commentary on the Appellate Body decision in this case, see Raj Bhala and David Gantz, “WTO Case Review 2000” in *Arizona Journal of International and Comparative Law*, vol. 18, No. 1, pp. 1-101.

82 *Indonesia - Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R,

WT/DS59/R and WT/DS64/R (July 2, 1998) (98-2505).

83 *United States - Standards for Reformulated and Conventional Gasoline*, Report of the Panel, WT/DS2/R (January 29, 1996) (96-0326).

84 See Hudec, *supra* note 19, at 363. For comments on the panel and Appellate Body decisions in this case, see Jennifer Schultz, "The Demise of 'Green' Protectionism: The WTO Decision on the US Gasoline Rule" in 25 *Denver Journal of International Law and Policy* 1 (Fall 1996) (arguing that the case was correctly decided).

85 This case was appealed but Appellate Body did not make any ruling on National Treatment because the issue was not raised in the appeal, see *United States - Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (April 26, 1996) (96-1597), AB-1996-1.

86 *European Communities - Regimes for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT/DS27/R (May 22, 1997) (97-2069) (97-2070) (97-2077) (97-2078); and *European Communities - Regimes for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (September 9, 1997) (97-3593), AB-1997-3. The issues at dispute related to Article III:4 of GATT were the EEC procedures and requirements for the distribution of licenses for importing bananas among eligible operators within the EEC, which provided for the allocation of import licenses in regard to 30 percent tariff quota for third country/nontraditional ACP imports to the operators that had marketed EC and/or traditional ACP bananas, on the basis of the average quantities of such bananas marketed in the three most recent years for which data were available, and the issuance of hurricane licenses exclusively to EEC producers or operators including or directly representing a producer adversely affected by a tropical storm who was unable to supply the EEC market. These rules were explicitly discriminatory but the main question was whether or not the provisions of Article III:4 applied to these rules. Once it was concluded that Article III:4 did apply in respect of these rules, the discrimination based on the origin of products was evident. The said EEC licensing procedures and requirements were contested as being inconsistent with the National Treatment obligations of both GATT Article III and GATS (General Agreement on Trade in Services) Article XVII. Both the panel and Appellate Body found these licensing procedures as being inconsistent with both the GATT and GATS National Treatment obligations. For a brief commentary on this case, see Terence P. Stewart and Mara M. Burr, "The WTO's First Two and a Half Years of Dispute Resolution," in 23 *North Carolina Journal of International Law and Commercial Regulation* 481 (1997/1998).

87 *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WT/DS44/R (March 31, 1998) (98-0886).

88 *Canada - Certain Measures Affecting the Automotive Industry*, Report of the Panel, WT/DS139/R and WT/DS142/R (February 11, 2000) (00-0455); and *Canada - Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body, WT/DS139/AB/R and WT/DS142/AB/R (May 31, 2000) (00-2170), AB-2000-2. For a brief history and objectives behind the Canadian measures as well as the analysis and commentary on the Appellate Body decision in this case, see Raj Bhala and David Gantz, *supra* note 81.

89 This conclusion was based on the facts that, in making the commitments, the companies acted at the request of the Government of Canada ("the Government"); the anticipated Auto Pact between the United States and Canada was a key factor in the decision of the companies to submit these undertakings; the companies accepted responsibility *vis-a-vis* the Government with respect to the implementation of the undertakings contained in the letters, which they described as "obligations" and in respect of which they undertook to provide information to the Government and indicated their understanding that the Government would conduct yearly audits; and until recently the Government gathered information on an annual basis concerning the implementation of the conditions provided for in the letters. The panel rejected the Canadian argument that the commitments expressed in the letters of undertaking were not "requirements" within the meaning of Article III:4 because the Government of Canada did not negotiate for them, and compliance with the letters was neither legally enforceable nor a condition to obtain an advantage.

90 *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Panel, WT/DS161/R and WT/DS169/R (July 31, 2000) (00-3025); and *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R and WT/DS169/AB/R (December 11, 2000) (00-5347), AB-2000-8.

91 The measure in dispute was the Government of Korea's Management Guidelines for Imported Beef which specified that imported beef (except for pre packed imported beef) might only be sold in specialized imported-beef shops and that large-scale distributors (department stores, supermarkets, etc.) must provide a separate sales area for imported beef. Stores selling imported beef were also mandatorily required to display a "Specialized Imported Beef Store" sign to distinguish them from domestic meat sellers. Australia and the United States complained that Korea's requirement was inconsistent with Article III:4. Korea defended the dual retail system for beef on the grounds that it did not impose less favorable treatment on imported beef as domestic and imported beef both were sold in separate shops and there were no limitations on the number of imported-beef shops that could be opened.

92 The Appellate Body noted that the reduction of commercial opportunities was reflected in the much smaller number of specialized imported beef shops (around 5,000 shops) as compared with the number of retailers (around 45,000 shops) selling domestic beef.

93 The Appellate Body also stated that it was *not* holding that a dual distribution system that was *not* imposed directly or indirectly by governmental regulation, but was rather solely the result of private entrepreneurs acting on their own calculation of comparative costs and benefits of differentiated distribution systems, was unlawful under Article III:4.

94 *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R (September 18, 2000) (00-3353); and *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (March 12, 2001) (01-1157), AB-2001-11. For analysis

of various aspect of this case, see Laura Yavitz, "The World Trade Organization Appellate Body Report, European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, March 12, 2001, WT/DS135/AB/R" in 11 *Minnesota Journal of Global Trade*, Winter 2002, p. 43; and Robert Howse and Elisabeth Tuerk, "The WTO Impact on Internal Regulations - A Case Study of the Canada-EC Asbestos Dispute," in G. de Burca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001).

95 The panel simply ignored the arguments of the EEC that the measure itself was origin- neutral and did not seek to protect domestic products because France imports most substitute products from various third countries.

96 Appellate Body in *EEC - Asbestos*, see *supra* note 94.

97 Despite the existence of the same word and similar context, the Appellate Body's efforts to avoid for the purpose of Article III:4 the narrow definition of the word "like" given in the first sentence of Article III:2 seems to be influenced by the possible implication of such interpretation for the objective of the National Treatment principle. It stated that there is no sharp distinction between fiscal regulation covered by Article III:2 and nonfiscal regulation covered by Article III:4 because both forms of regulation can often be used to achieve the same ends. According to it, it would be incongruous if, due to a significant difference in the product scope of these two provisions, Members (of WTO) were prevented from using one form of regulation (for instance, fiscal) to protect domestic production of certain products, but were able to use another form of regulation (for instance, non fiscal) to achieve those results.

98 The Appellate Body also said that where the physical properties are very different, an examination of the evidence relating to consumers' tastes and habits is an *indispensable* - although not, on its own, sufficient - aspect of any determination that products are "like" under Article III:4.

99 However, the Appellate Body in this case did not examine further the interpretation of the term "treatment no less favorable" in the context of Article III:4.

100 He argued that it was difficult for him to imagine what evidence relating to competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibers, compared with PCG fibers, when inhaled by humans, and thereby compel a characterization of the "likeness" of chrysotile asbestos and PCG fibers. However, he also clarified that he was not suggesting that any kind or degree of health risk, associated with a particular product, would *a priori* negate a finding of the "likeness" of that product with another product, under Article III:4. His suggestion was limited only to the circumstances of *EEC-Asbestos* case, and confined to chrysotile asbestos fibers as compared with PCG fibers.

101 *United States - Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU by the European Communities*, Report of the Panel, WT/DS108/RW (August 20, 2001).

102 *India - Measures Affecting the Automotive Sector*, Report of the Panel, WT/DS146/R, WT/DS175/R (December 21, 2001) (01-6327).

103 In this case, the issue relating to Article III:4 was certain provisions of the 2000 *FSC Repeal and Extraterritorial Exclusion Act* of the United States which was enacted to comply with the DSB recommendations and rulings in *United States - Tax Treatment for "Foreign Sales Corporations."* The EEC claimed, *inter alia*, that the provisions of the said Act which excluded certain extraterritorial income derived from the sale or lease of "qualifying foreign trade property" from taxation were contrary to Article III:4 of the GATT. "Qualifying foreign trade property" was the property made within or outside the United States, and sold for ultimate use outside the United States, no more than 50 percent of the fair market value of which was attributable to "articles manufactured, produced, grown, or extracted outside the United States" and "direct costs for labor ... performed outside the United States," which meant that the exclusion from taxation provided by the Act was not available in respect of income derived from the sale or lease of property more than 50 percent of the fair market value of which was attributable to articles made, or costs of direct labor performed, outside the United States. The EEC argued that this foreign articles/labor limitation was inconsistent with Article III:4 as it was a requirement contained in a law which provided less favorable treatment to imported parts and materials than to like domestic goods with respect to their internal use in the production of goods within the United States.

104 See *United States - Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU by the European Communities*, Report of the Appellate Body, WT/DS108/AB/RW (January 14, 2002) (02-0152), AB-2001-8

105 The issue in this case relating to Article III:4 was the indigenization condition contained in Public Notice No. 60 issued by the Government of India under Foreign Trade (Regulation and Development) Act of 1992 and the MOUs required to be signed by manufacturers in order to gain the right to apply for an import license to import the restricted kits and components. The measure in question required the MOU signatories to commit to achieving a level of indigenization of components up to a minimum level of 50 percent in the third year or earlier and 70 percent in the fifth year or earlier, in order to obtain import licenses. The indigenization requirement was, thus, an obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles. The United States and the EEC argued, *inter alia*, that this requirement accorded less favorable treatment to imported parts and components and therefore was contrary to Article III:4.



## ANNEX 2

### UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

*Members hereby agree as follows:*

#### *Article 1*

##### *Coverage and Application*

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.
2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

#### *Article 2*

### *Administration*

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.
2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.
3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.
4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.<sup>6</sup>

### *Article 3*

#### *General Provisions*

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.
2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public

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<sup>6</sup> The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.<sup>7</sup>

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

#### *Article 4*

##### *Consultations*

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning

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<sup>7</sup> This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

measures affecting the operation of any covered agreement taken within the territory of the former.<sup>8</sup>

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

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<sup>8</sup> Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements<sup>9</sup>, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

#### *Article 5*

##### *Good Offices, Conciliation and Mediation*

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

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<sup>9</sup> The corresponding consultation provisions in the covered agreements are listed hereunder: 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 Preshipment 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.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

## *Article 6*

### *Establishment of Panels*

1. If the complaining party so requests, a panel shall 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, unless at that meeting the DSB decides by consensus not to establish a panel.<sup>10</sup>

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

## *Article 7*

### *Terms of Reference of Panels*

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"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

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<sup>10</sup> If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

of 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)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

## *Article 8*

### *Composition of Panels*

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments<sup>11</sup> are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international

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<sup>11</sup> In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.



trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

#### *Article 9*

#### *Procedures for Multiple Complainants*

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

#### *Article 10*

#### *Third Parties*

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

#### *Article 11*

### *Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

### *Article 12*

#### *Panel Procedures*

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.
2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.
3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.
4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.
5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.
6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

### *Article 13*

#### *Right to Seek Information*

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

#### *Article 14*

##### *Confidentiality*

1. Panel deliberations shall be confidential.
2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.
3. Opinions expressed in the panel report by individual panelists shall be anonymous.

#### *Article 15*

##### *Interim Review Stage*

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.
2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to

circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

## *Article 16*

### *Adoption of Panel Reports*

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting<sup>12</sup> unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

## *Article 17*

### *Appellate Review*

#### *Standing Appellate Body*

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<sup>12</sup> If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.
2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.
5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.
6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.
7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.
8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

### *Procedures for Appellate Review*

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.
10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.
11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.
12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.
13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

### *Adoption of Appellate Body Reports*

14. An 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 30 days following its circulation to the Members.<sup>13</sup> This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

## *Article 18*

### *Communications with the Panel or Appellate Body*

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.
2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a

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<sup>13</sup> If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.



party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

#### *Article 19*

##### *Panel and Appellate Body Recommendations*

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned<sup>14</sup> bring the measure into conformity with that agreement.<sup>15</sup> In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

#### *Article 20*

##### *Time-frame for DSB Decisions*

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

#### *Article 21*

##### *Surveillance of Implementation of Recommendations and Rulings*

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<sup>14</sup> The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

<sup>15</sup> With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.
2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.
3. At a DSB meeting held within 30 days<sup>16</sup> after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
  - (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
  - (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,
  - (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.<sup>17</sup> In such arbitration, a guideline for the arbitrator<sup>18</sup> should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.
4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.
5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the

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<sup>16</sup> If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

<sup>17</sup> If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

<sup>18</sup> The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

## *Article 22*

### *Compensation and the Suspension of Concessions*

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

- (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
- (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
- (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;
- (d) in applying the above principles, that party shall take into account:
  - (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
  - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;
- (e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;
- (f) for purposes of this paragraph, "sector" means:
  - (i) with respect to goods, all goods;

- (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;<sup>19</sup>
  - (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;
- (g) for purposes of this paragraph, "agreement" means:
- (i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;
  - (ii) with respect to services, the GATS;
  - (iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator<sup>20</sup> appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator<sup>21</sup> acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such

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<sup>19</sup> The list in document MTN.GNS/W/120 identifies eleven sectors.

<sup>20</sup> The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

<sup>21</sup> The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered 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. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.<sup>22</sup>

### *Article 23*

#### *Strengthening of the Multilateral System*

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

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<sup>22</sup> Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

2. In such cases, Members shall:
  - (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
  - (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
  - (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

#### *Article 24*

##### *Special Procedures Involving Least-Developed Country Members*

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.
2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

## Article 25

### Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

## Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the 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 relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

- (a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;



(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without 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) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

## 2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

- (a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;
- (b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

## *Article 27*

### *Responsibilities of the Secretariat*

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.
  
2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.
  
3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

# **DISPUTE SETTLEMENT SYSTEM IN THE WTO**

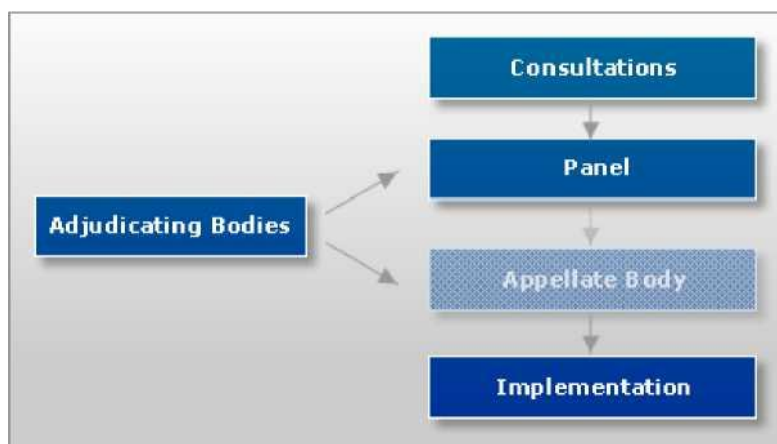
(WTO e-Learning)

## **I. INTRODUCTION**

The WTO provides a forum for the settlement of trade disputes between WTO Members. The WTO dispute settlement system consists one of the major outcomes of the Uruguay Round. After the entry into force of the WTO Agreements in 1995, the dispute settlement system soon gained practical importance as Members frequently resorted to using it. The mechanism is aimed at providing a fast, efficient and rule-oriented system to resolve trade disputes. By doing so, it provides security and predictability to the Members and more particularly private economic operators. Furthermore, it helps to mitigate the imbalances between developed countries and small economies by having disputes settled on the basis of rules rather than having economic power determining the outcome.

Only WTO Member governments have the right to participate in the dispute settlement system. They can act either as "complainant" or "respondent" (enjoy full rights) or "third parties" (enjoy some rights). The possibility of being third parties offers important advantages, especially to developing Members who can gain experience from such participation, without getting directly involved as a party. Other entities (e.g. non-governmental organizations or associations of producers) have no legal right to participate in WTO dispute settlement proceedings, although adjudicating bodies may deem appropriate to accept or consider their submissions in certain cases and after consulting to the parties.

The WTO dispute settlement system applies to all disputes brought under the covered Agreements, that is, the majority of the WTO Agreements (including the GATT 1994 and the other multilateral Agreements on trade in goods, the GATS and the TRIPS Agreement). Many matters brought before the DSB include alleged violations of more than one covered Agreement. One of the main features of the system is the institutional support provided by the Dispute Settlement Body (DSB) - the General Council in another guise - conformed by the whole Membership and in charge of overseeing the entire process of disputes. In addition, the WTO Secretariat provides assistance in the dispute settlement process. The Dispute Settlement Understanding (DSU) sets out the rules and procedure to be followed in resolving disputes. It also contains some provisions on special and differential treatment for developing country Members. The dispute settlement process includes the following main stages: consultations, adjudication (panel and, in case of appeal, Appellate Body) and implementation.



**Figure:** Main Stages of the WTO Dispute Settlement Process

The first stage of formal dispute settlement is consultations. The objective is to allow parties to obtain satisfactory adjustment of the matter before resorting to adjudication. This is a mandatory stage and any mutually agreed solution reached during this stage must be notified to the DSB.

If the consultations have failed to settle the dispute, the complaining party may request the establishment of a panel - like a first instance court - to resolve the dispute. Panels consist normally of three experts selected for each specific dispute, who examine the legal and factual aspects of the case and submit a report to the DSB. The panel's report includes its conclusions as to whether the challenge measure is consistent or not with the WTO covered Agreements. Either party may appeal the report of the panel but only with respect to issues of law. Unlike the panel, the Appellate Body - composed of seven members- is a permanent body. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. Approximately, the total time of a dispute is 12 months (up to the panel stage) and one year and three months if there is an appeal. The reports of the panels and Appellate Body are binding after being adopted by the DSB. They are adopted by the DSB quasi-automatically through negative consensus, that is, unless all WTO Members decide against their adoption.

The last stage concerns the implementation of the reports after their adoption by the DSB, which maintains surveillance of the implementation of the rulings until their compliance. If immediate compliance is not possible, the respondent has a reasonable period of time to comply. The DSU provides to the complainant remedies applicable in case of non-compliance with the reports: trade compensation (almost never used); and, suspension of concessions. The suspension of concessions is a remedy of last resort, which has been used only on a few occasions. These remedies are only temporary since the main objective of the system is to secure the withdrawal of the measure found inconsistent with the WTO covered Agreements.

## II. THE DISPUTE SETTLEMENT SYSTEM (DSS)

**The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly.**

Typically, a dispute arises when a WTO Member adopts a trade policy measure that one or more Members consider to be inconsistent with the obligations set out in the WTO Agreements. Any Member that feels aggrieved is entitled to have resort to the WTO dispute settlement system to challenge such a measure.

The WTO dispute settlement system constitutes one of the major outcomes of the Uruguay Round. The system underscores the rule of law and makes the trading system more secure and predictable. By doing so, it provides a mechanism through which WTO Members can ensure that their rights under the WTO Agreements can be enforced.

The dispute settlement procedure is based on clearly-defined rules, including a timeframe for completing a case. First rulings are made by a panel. Appeals based on points of law are possible. The rulings of panels and the Appellate Body have to be adopted by WTO Members through the Dispute Settlement Body (DSB). However, the point is not to pass judgement. The priority is to settle disputes through mutually agreed solutions if possible.

The rules and procedures of the WTO dispute settlement system are embodied in the DSU, which applies to all WTO Members.

### III.A. OBJECTIVES AND FUNCTIONS OF THE WTO DISPUTE SETTLEMENT SYSTEM

The main functions and objectives of the WTO dispute settlement system can be summarized as follows:

#### **Provide Security and Predictability to the Multilateral Trading System**

The WTO dispute settlement system is a central element in providing security and predictability to the MTS ([Article 3.2](#) of the DSU). Member states, and, more particularly private economic operators, need to have a stable and predictable framework of rules for their commercial activities. The WTO dispute settlement system aims to provide a fast, efficient, dependable, and rule-oriented system to resolve disputes about the application of the provisions of the WTO covered Agreements.

#### **Preserve the Rights and Obligations of WTO Members**

The dispute settlement system provides a mechanism through which WTO Members can ensure that their rights under the WTO covered Agreements can be enforced. The rulings of the bodies involved are intended to reflect and **correctly apply the rights and obligations as they are set out in the WTO Agreements**.

#### **Clarify Provisions of the WTO Agreements through Interpretation**

The precise scope of the rights and obligations contained in the WTO Agreement is not always evident from a mere reading of the legal texts. Legal provisions are often drafted in general terms so as to cover a multitude of individual cases. In addition, legal provisions in international agreements often lack clarity because they are compromise formulations resulting from multilateral negotiations. Thus, in most cases, the answer can be found only after interpreting the provision at issue. The dispute settlement system is intended to **clarify the provisions of the WTO covered Agreements in accordance with customary rules of interpretation of public international law**.

Members have the right to seek authoritative interpretation of provisions of a WTO Agreement through decision-making. [Article IX: 2](#) of the Agreement Establishing the WTO provides that the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement. While the interpretations of the Ministerial Conference and the General Council are applicable to all WTO Members, the interpretation of the adjudicating bodies under the DSU are legally binding only upon the parties in respect of the subject matter of a specific dispute.

#### **Favour Mutually Agreed Solutions**

Although the dispute settlement system is intended to uphold the rights of aggrieved Members and to clarify the scope of the rights and obligations, the primary objective of the system is not to make rulings. **A solution mutually acceptable to the parties to a dispute, and consistent with the WTO Agreements is clearly to be preferred**. Adjudication is to be used only when the parties cannot work out a mutually agreed solution. To promote mutually agreed solutions, the DSU requires formal consultations as the first stage of any dispute. Even when the case has progressed to the stage of adjudication, a bilateral settlement always remains possible ([Articles 3.7](#) and [11](#) of the DSU).

## Detailed Procedures and Prompt Settlement of Disputes

The DSU emphasizes that the prompt settlement of disputes is essential to the effective functioning of the WTO and for the maintenance of a proper balance between the Members' rights and obligations ([Article 3.3](#) of the DSU). Accordingly, **the DSU sets out in considerable detail the procedures and corresponding deadlines to be followed in resolving disputes**. As you will see, if a case is adjudicated, it should normally take no more than nine months for a panel ruling and no more than 12 months if the case is appealed ([Article 20](#) of the DSU). The DSU provides shorter timeframes in cases of urgency (e.g. perishable goods). Furthermore, some provisions allow a party to move forward with the case even in the absence of agreement of the other party (e.g. [Article 6.1](#) of the DSU).

## Secure Withdrawal of Inconsistent Measures

If it is not possible for Members to reach a mutually agreed solution, the first objective of the dispute settlement system is to **secure the withdrawal of measures which have been found to be inconsistent with a provision of the WTO covered Agreements** ([Article 3.7](#) of the DSU).

## III.B. MAIN FEATURES OF THE WTO DISPUTE SETTLEMENT MECHANISM

A procedure for settling disputes existed under Articles [XXII](#) and [XXIII](#) of the old General Agreement on Tariffs and Trade (GATT) 1947. Several of the principles and practices that evolved in this dispute settlement mechanism were, over the years, codified in decisions and understandings of the CONTRACTING PARTIES of GATT 1947.

The DSU, as the legal basis of the WTO dispute settlement system, adheres to the principles for the management of disputes developed under the GATT 1947 ([Article 3.1](#) of the DSU). However, **the DSU modifies and elaborates upon the old GATT rules and procedures on dispute settlement**. Compared to the old GATT dispute settlement procedure, the DSU introduced several innovative features and improvements which make the WTO dispute settlement system quasi-judicial in nature. First, there is **assured access to these procedures**. Second, there is near **automaticity in decision-making** in certain key issues related to settlement of individual disputes (for example, panel establishment and adoption of panel and Appellate Body reports by the DSB). Third, the DSU provides an integrated framework, that is, **a single general dispute mechanism** which applies to disputes arising under all covered Agreements with only minor variations. Fourth, the DSU provides a **detailed procedure** for each stage of the dispute, with specific timeframes and deadlines. Finally, there is provision for **appellate review**.

### III.B.1. WHO CAN PARTICIPATE IN A WTO DISPUTE ?

Only WTO Member governments have the right to participate in the dispute settlement system. **The** WTO Secretariat, WTO observer countries, other international organizations, and regional or local governments are **NOT** entitled to initiate dispute settlement proceedings in the WTO.

#### a. PARTIES (COMPLAINANT VS. RESPONDENT)

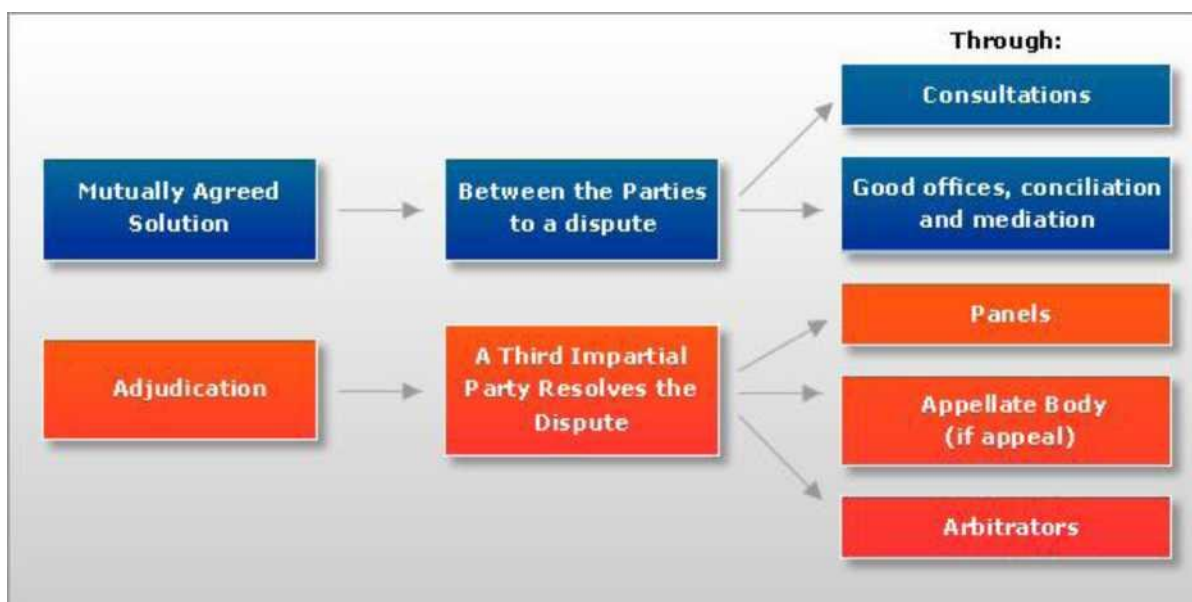
The DSU sometimes refers to the Member government bringing a dispute as the "complaining party" or the "complainant". The terms "responding party" or "respondent" are commonly used to refer to the Member government whose measure is challenged by the complainant in the dispute. A dispute may also involve more than one WTO Member as complainant ([Article 9](#) of the DSU).

**b. THIRD PARTIES**

A WTO Member that is neither the complainant nor the respondent may be interested in the matter of a dispute. Such Member may participate as a "third party". They **enjoy some rights**, such as to have the opportunity to be heard by the panel and to make written submissions, provided that they have a "substantial interest" in the matter before a panel and they have notified such interest to the DSB ([Article 10.2](#) of the DSU). If a third party considers that a measure, already the subject of a panel, nullifies or impairs benefits accruing to it under any covered Agreement, it may initiate a dispute settlement procedure on its own merit. The participation as "third party" offers important advantages, especially to developing country Members, who can gain valuable experience in the dispute settlement proceedings without getting directly involved as a party.

**III.B.2. WAYS OF SETTLING DISPUTES UNDER THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)**

The WTO dispute settlement mechanism provides for two main ways of resolving disputes: 1. **Mutually Agreed Solution**; or, 2. **Adjudication**.



**Figure:** Two Ways of Resolving Disputes under the DSU

With the exception of arbitration, **adjudication cannot be requested until consultations have taken place or unsuccessful attempts to consult have been made**. The DSU contains rules and procedures to be followed by WTO Members for both consultations and adjudications.

**a. MUTUALLY-AGREED SOLUTIONS**

As mentioned above, the DSU favours solutions mutually acceptable to the parties to the dispute, provided that they are consistent with the WTO Agreements ([Article 3.7](#) of the DSU). Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered Agreements must be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto ([Article 3.6](#) of the DSU).

**1. Consultations**

The objective of consultations is to **allow parties to obtain satisfactory adjustment of the matter before resorting to any further action** ([Article 4.5](#) of the DSU). Each Member undertakes to accord

sympathetic consideration to, and afford adequate opportunity for, consultation regarding any representation made by another Member concerning measures affecting the operation of any WTO Agreement ([Article XXII](#) of the GATT 1994; Article XXII of the General Agreement on Trade in Services (GATS); and [Article 4.2](#) of the DSU). Consultations allow parties to clarify the facts of the matter, thus dispelling misunderstandings as to the actual nature of the measure and claim at issue.

## 2. Good Offices, Conciliation And Mediation

Unlike consultations, good offices, conciliation and mediation are not a compulsory stage in the WTO dispute settlement process. [Article 5](#) of the DSU provides for good offices, conciliation and mediation **to be undertaken voluntarily if the parties to the dispute agree**. They are strictly confidential and do not diminish the position of either party in any subsequent dispute settlement procedure. Good offices, conciliation and mediation may begin at any time and be terminated at any time.

### b. ADJUDICATION

Adjudication under the DSU can be by a **panel** (Articles [6 to 16](#) of the DSU), the **Appellate Body** ([Article 17](#) of the DSU) in case of appeal of the panel report, or an **arbitrator** ([Article 25](#) of the DSU).

Panel and Appellate Body reports have, where applicable, to contain the recommendation that a measure which was found inconsistent with a WTO Agreement be brought into conformity with that Agreement. These reports may also suggest ways in which the Member concerned could implement the recommendations ([Article 19](#) of the DSU)

## III.B.3. BODIES AND ENTITIES INVOLVED IN THE WTO DISPUTE SETTLEMENT PROCESS

### a. DECISION MAKING - THE DSB

The General Council discharges its responsibilities under the DSU through the **DSB**, which consists of representatives of all WTO Members ([Article IV:3](#) of the Agreement Establishing the WTO). The DSB is responsible for administering the DSU, i.e. for **overseeing the entire dispute settlement process**.

#### 1. MAIN FUNCTIONS OF THE DSB

The DSB has the authority to establish panels of experts to consider a case, to adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and to authorize the suspension of concessions under the covered Agreements when a Member does not comply with a ruling ([Article 2.1](#) of the DSU).

#### 2. DECISION-MAKING IN THE DSB AND NEGATIVE CONSENSUS RULE

The general rule is for the DSB to take decisions by consensus, as is the case for all decision-making in the WTO. However, a radically different procedure is followed in decision-making at some key stages in the dispute settlement process: establishment of a panel; adoption of panel and Appellate Body reports; and authorization for suspension of concessions or other obligations. At these stages the decision to accept the request, or adopt the report is taken unless there is a consensus against it; so-called "negative consensus". It contrasts sharply with the "positive consensus" rule applied in the old GATT dispute settlement system, where a consensus was required for the adoption of a ruling. The negative consensus rule constitutes one of the major outcomes of the WTO dispute settlement system.



## Adjudicating Bodies (Panels, Appellate Body & Arbitrator)

### 1. PANELS

Where the Members concerned cannot find a mutually agreed solution through consultations, the DSB must, at the request of a party of the dispute, establish a panel. **The panel must review the factual and legal aspects of the case and submit a report to the DSB.**

Panels consist normally of three (and possibly up to five) experts who examine the legal and factual aspects of the case and submit a report to the DSB. The panel's report includes its conclusions as to whether the challenged measure is consistent or not with the WTO covered Agreements ([Article 11](#) of the DSU). There is no permanent panel at the WTO; instead, **a different panel is composed for each dispute.**

Who can be called to serve on a panel?

Panels are to be composed of **well-qualified governmental and/or non-governmental individuals.** The selection of panelists is made with a view to **ensuring the independence of the panel's members, a sufficiently diverse background and a wide spectrum of experience** ([Article 8.2](#) of the DSU). Citizens of WTO Members whose governments are parties of the dispute, or third parties, as defined in the DSU, may not serve on a panel concerned with that dispute, unless the parties of the dispute agree otherwise ([Article 8.3](#) of the DSU). The WTO Secretariat maintains an indicative list of names from which panelists may be chosen.

### 2. THE APPELLATE BODY

2.

Panel reports can be appealed by either party in a dispute. **The Appellate Body is entrusted with the task of reviewing the legal aspects of the reports issued by panels.** The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel ([Article 17.6](#) of the DSU). In doing so, it also provides consistency of decisions, which is in line with the objective of providing predictability to the system. The Appellate Body is the second and final stage in the adjudicatory part of the dispute settlement system.

The Appellate Body is composed of seven Members who are appointed by consensus by the DSB, to serve for a four-year term, with the possibility of being reappointed once ([Article 17.2](#) of the DSU). Thus, unlike the panels, **the Appellate Body is a permanent body.** It shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the WTO covered Agreements generally. The Appellate Body **membership must be broadly representative of the WTO membership** ([Article 17.3](#) of the DSU). The appellate review process will be also examined in Section II.C.

### 3. ARBITRATORS

Arbitration, as an alternative to dispute resolution through panel and Appellate Body procedures, may be resorted to by parties to a dispute, **through mutual agreement** ([Article 25](#) of the DSU). The DSU does not contain detailed procedures regarding resort to arbitration. Parties of the dispute are free to apply the rules and procedures they deem appropriate through mutual agreement. An agreement to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the relevant Council or Committee.

As we will see later on, arbitration may also be used during the stage of implementation of -- and alleged non-compliance with -- DSB recommendations (to establish the reasonable period of time for implementation and/or to determine the level of suspension of benefits in case of non-compliance).

### **EXPERTS**

Disputes often involve complex factual questions of a technical or scientific nature, for instance when the existence or degree of a health risk related to a certain product is the subject of contention between the parties. As mentioned earlier, according to [Article 13](#) of the DSU, **panels have the right to seek information and technical advice from any individuals or bodies which they deem appropriate.**

### **THE SECRETARIAT**

The WTO Secretariat, among others, provides **assistance in the dispute settlement process.**

### **Role of the Director-General**

#### **Good Offices, Conciliation and Mediation**

The Director-General of the WTO may, acting in an ex officio capacity, offer good offices, conciliation or mediation with a view to assisting Members in settling a dispute ([Article 5.6](#) of the DSU).

#### **Appointment of Panelists**

The Director-General may also be requested, in certain circumstances, to appoint panel members. Upon receiving a request from either party to the dispute, the Director-General must determine the composition of the panel in consultation with the Chairman of the DSB and the Chairmen of the relevant Councils or Committees, after consulting the parties to the dispute. The Director-General must appoint the panelists whom he or she considers most appropriate in accordance with the DSU and any other special or additional rules or procedures of the covered Agreement(s) concerned in the dispute.

#### **Appointment of Arbitrators**

The Director-General may appoint an arbitrator during the stage of implementation to establish a reasonable period of time for implementation and/or to determine the level of suspension of concessions (footnote to [Articles 21.3\(c\)](#) and [22.6](#) of the DSU).

## **III.B.4. SUBSTANTIVE SCOPE OF THE DISPUTE SETTLEMENT SYSTEM**

### **THE COVERED AGREEMENTS**

The WTO dispute settlement system applies to all disputes brought pursuant to the consultation and dispute settlement provisions of the WTO Agreements listed in [Appendix 1](#) of the DSU ([Article 1.1](#) of the DSU). These Agreements are referred to as the "**covered Agreements**" in the DSU and they include the Agreement Establishing the WTO, as well as basically all the Agreements annexed thereto (GATT, the other Multilateral Agreements on Trade in Goods, GATS, Trade-Related Intellectual Property Rights (TRIPS), the DSU and Plurilateral Trade Agreements) with the exception of the TPRM in [Annex 3](#). Many matters brought before the DSB include alleged violations of more than one covered Agreement.

However, there are **two exceptions** to the general application of the DSU. First, in cases where there are so-called "special and additional rules and procedures" on dispute settlement contained in the covered Agreements (e.g. in the Agreement on Subsidies and Countervailing Measures (SCM)), they prevail over the rules in the DSU to the extent that there is a conflict between the two ([Appendix 2](#) of the DSU). Second, the applicability of the DSU to the Plurilateral Trade Agreements -- in Annex 4 of the WTO Agreement Establishing the WTO -- is subject to the adoption of a decision by the parties to each of these Agreements setting out the terms for the application of the DSU to the individual Agreement, including any special and additional rules or procedures ([Appendix 1](#) of the DSU).

### III.B.5. EXCLUSIVE JURISDICTION OF WTO DISPUTE SETTLEMENT BODIES

[Article 23](#) of the DSU states that Members shall have recourse to, and abide by, the rules and procedures of the DSU when they seek redress of a violation of obligations under the covered Agreements.

The DSU promotes the use of a multilateral system of dispute settlement in place of unilateralism (unilateral actions by Members in the resolution of trade conflicts). This multilateral system is based on the principles for the management of disputes developed under Articles [XXII](#) and [XXIII](#) of GATT 1947 (and now of GATT 1994), as further elaborated and modified by the DSU ([Article 3.1](#) of the DSU).

Besides excluding unilateral actions by the Members, [Article 23](#) of the DSU **also precludes the use of other fora for the resolution of disputes regarding any provision of the WTO covered Agreements**. In other words, the WTO dispute settlement mechanism has primacy over outside fora as far as the adjudication of disputes and the enforcement of WTO law is concerned.

Therefore, **WTO adjudicating bodies have exclusive jurisdiction to adjudicate rights and obligations under the WTO covered Agreements**. Furthermore, a panel is not in a position to choose freely whether or not to exercise such jurisdiction. According to the Appellate Body, a decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of [Article 23](#) of the DSU and would not be consistent with a panel's duties under the DSU ([Mexico - Taxes on Soft Drinks](#), Appellate Body Report, paras. 52-53).

### III.B.6. WHAT ARE THE DIFFERENT TYPES OF COMPLAINTS UNDER THE WTO DISPUTE SETTLEMENT SYSTEM ?

As explained above, Articles [XXII](#) and [XXIII](#) of the GATT 1994 are the original legal basis for GATT/WTO dispute settlement system. They contain "consultation and dispute settlement" provisions which are nowadays set out in more detail in the DSU.

[Article XXIII](#) retains its significance mainly for specifying in paragraph 1 (a to c) the **conditions** under which the complainant can invoke the dispute settlement system. Accordingly, a WTO Member can resort to the dispute settlement system if it considers 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 one of the three scenarios or types of complaint specified below:

- a. **violation complaint:** the respondent fails to carry out its obligations under the GATT 1994 or other covered Agreement. In the case of violation of a WTO covered Agreement,

**nullification or impairment is presumed to exist** ([Article 3.8](#) of the DSU);

- b. **non-violation complaint:** a **WTO-consistent measure frustrates the benefit a Member legitimately expects** from another Member under the WTO covered Agreements (for an example see [Japan- Film, DS44](#)): and,
- c. **situation complaint:** situation other than those mentioned in subparagraphs (a) and (b).

Among these, the so-called "**violation complaint**" is by far the most frequent. Only a few cases have been brought on the basis of an allegation of non-violation nullification or impairment of trade benefits. No "situation complaint" has ever resulted in a panel or Appellate Body report based on [Article XXIII:1\(c\)](#) of the GATT 1994.

With respect to WTO Agreements falling under [Annex 1A](#) of the Agreement Establishing the WTO (dealing with **trade in goods**), the complainant generally has to demonstrate that benefits accruing to it under a WTO Agreement have been nullified or impaired by another Member's measure, whether or not the measure violates a provision of the covered Agreement ([Article XXIII:1](#) of the GATT 1994).

With respect to **trade in services**, under the **GATS** (Annex 1B of the WTO Agreement), the failure by any Member to carry out its obligations or specific commitments under GATS gives another Member the right to have recourse to the DSU ([Article XXIII:1](#) of the GATS). Nullification or impairment of a benefit which could be reasonably expected to accrue to a Member under a specific commitment can be alleged in the absence of a conflict with the provisions of GATS ([Article XXIII:3](#) of the GATS). Regarding the TRIPS Agreement, in principle, the three types of complaints as explained above apply to it. However, [Article 64.2](#) of the TRIPS Agreement excluded "non-violation" and "situation complaints" for the first five years from the entry into force of the WTO Agreement. This "moratorium" has been extended several times, while the TRIPS Council has continued its examination of the scope and modalities of such complaints with a view to making recommendations.

### III.C. THE PROCESS OF THE WTO DISPUTE SETTLEMENT SYSTEM

In order to promote the settlement of disputes, the DSU sets out in considerable detail the procedures and the timetable for the various stages of a dispute.

#### STAGES OF THE WTO DISPUTE SETTLEMENT PROCESS

There are **three main stages** to the WTO dispute settlement process:

- (i) **Consultations** between the parties;
- (ii) **Adjudication** by **panels** and, **if applicable**, by the **Appellate Body**; and,
- (iii) **Implementation of the ruling**, which includes the possibility of suspending concessions or other obligations in the event of failure by the losing party to implement the ruling.



20 days (+10 days if  
the DG asked to compose  
the panel)

6 months from panel  
composition 3 months if  
urgent

up to 9 months  
from the establishment  
of the panel

60 days from panel  
report unless appealed...  
30 days for

Appellate Body report

reasonable  
period of time

Panel established by the DSB

Terms of reference (Article  
7 of the DSU) Composition of  
Panel (Article 8 of the DSU)

Panel meetings with parties and third  
parties (Articles 10, 12 of the DSU)

Interim review (Article 15 of the DSU)

Panel report issued to the parties  
(Article 12.8 of the DSU)

DSB adopts panel report/  
Appellate Body report  
(Articles 16.1, 16.4, 17.14 of the DSU)

Implementation  
(Article 21.3 of the DSU)

Negotiation of compensation in cases  
of non-implementation  
(Article 22.2 of the DSU)

Retaliation if no agreement on  
compensation  
(Article 22 of the DSU)

During all stages:  
Possibility to request  
good offices,  
conciliation or  
mediation

(Article 5 of the DSU)

60 - 90 days

Appellate Body  
review

(Articles 16.4, and  
17 of the DSU)

Dispute over  
implementation -

implementation  
panel (Article 21.5  
of the DSU)

Possibility of  
[redacted] on  
level of suspension  
(Articles 22.6 and  
22.7 of the DSU) -  
60 days after  
'reasonable period  
of time' expires

**30 days after**

### **Flow chart of the Dispute Settlement Process**

The flow chart above illustrates the **main stages and timeframes of the WTO dispute settlement process**. As shown in the chart, the sum of the underlined timeframes represents the approximate total time generally needed to settle a WTO dispute.



### **Total Time for Report Adoption**

For the **adjudicating stage** (from "the establishment of the panel" to "the adoption of panel/Appellate Body report"), it normally takes **9 months without appeal**, and **12 months with appeal** ([Article 20](#) of the DSU).

### III.C.1. CONSULTATIONS

As mentioned earlier, the preferred objective of the DSU is for the Members concerned to settle the dispute between themselves in a manner that is consistent with the WTO Agreements ([Article 3.7](#) of the DSU). Accordingly, **bilateral consultations are the first stage of formal dispute settlement.**



**Figure:** Consultations

#### a. OBJECTIVES AND MAIN FEATURES

Consultations are subject to [Article 4](#) of the DSU and any relevant WTO covered Agreements. As mentioned earlier, their objective is to allow parties to obtain satisfactory adjustment of the matter before resorting to further actions ([Article 4.5](#) of the DSU). They are a **mandatory stage** of the WTO dispute settlement process. Consultations have a confidential character ([Article 4.6](#) of the DSU). Nevertheless, any mutually agreed solutions reached even during this stage must be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating to them ([Article 3.6](#) of the DSU). Even when consultations have failed to resolve the dispute, it always remains possible for the parties to find a mutually agreed solution at any later state of the proceedings.

#### b. PROCEDURE FOR CONSULTATIONS

##### 1. Request For Consultations

The **complaining Member addresses the request for consultations to the responding Member. It must also notify the request to the DSB and to relevant Councils and Committees** overseeing the Agreement(s) in question (Articles [4.3](#) & [4.4](#) of the DSU). The request must be made in writing and shall give the reasons for the request, including **identification of the measures at issue and an indication of the legal basis** of the complaint ([Article 4.4](#) of the DSU). The request for consultations formally initiates a dispute in the WTO.

The Member to which a request for consultation is made, is required, unless otherwise mutually agreed, to reply to the request within ten days after the date of its receipt and to enter into consultations in good faith within a period of no more than 30 days after the date of receipt. If the requested Member does not do so, the Member that requested consultations may proceed directly to request the establishment of a panel ([Article 4.3](#) of the DSU).

## 2. Requests by Third Parties

A third party requesting to join consultations must have a substantial trade interest. However, such a third party may participate at the consultation stage only if consultations were requested pursuant to Article XXII:1 of GATT 1994, Article XXII:1 of GATS, or corresponding provisions of the covered Agreements, and if the Member to which the request is made agrees that the third party has a substantial trade interest (Article 4.11 of the DSU). The request must be addressed to the other Members and the DSB within ten days after the circulation of the request for consultations.

## 3. Timeframes

The consultations stage shall take a minimum of 60 days (unless both parties agree to conclude it earlier). This means that the complainant is entitled to request the establishment of a panel after this period, although very often it takes more time. In cases of urgency (e.g. perishable goods), this stage takes a minimum of 30 days.

### III.C.2. ADJUDICATION

**If the consultations have failed to settle the dispute, the complaining party may request the establishment of a panel to adjudicate the dispute.** The adjudicating stage is intended to resolve the legal dispute. The process of adjudication starts before a panel and may continue before the Appellate Body if one of the parties decides to appeal the report of the panel. As we will see, the rulings of the adjudicating bodies are binding for the parties after their adoption by the DSB.



Figure : Panel Stage

#### a. PANEL

##### 1. Request for the Establishment of a Panel

A request for the establishment of a panel must be made in writing and indicate whether consultations were held, **identify the specific measures at issue and provide a brief summary of the legal basis** of the complaint sufficient to present the problem clearly ([Article 6.2](#) of the DSU). **The content of the request of establishment of a panel is crucial since it defines and limits the scope of the dispute.**

**The panel will be established at the latest at the DSB meeting following that at which the request first appears as an item on the agenda** of the DSB, unless the complaining party no longer requests it or the DSB decides by consensus at that meeting not to establish a panel ([Article 6.1](#) of the DSU). If the

complaining party so requests, a special meeting of the DSB must be convened for the purpose of establishing the panel within 15 days of the request, provided that at least ten days' advance notice is given ([footnote 5](#) to Article 6.1 of the DSU).

## 2. Constitution of a Panel

A panel is considered to be properly constituted after the terms of reference have been agreed upon and the panelists have been selected (Articles [7](#) and [8](#) of the DSU).

Panels usually have standard **terms of reference** (to examine, in light of the relevant provisions in the covered Agreements cited by the parties, the matter referred to the DSB by the complaining party), unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel ([Article 7.1](#) of the DSU). The DSB may authorize its Chairman to draw up special terms of reference in consultation with the parties to the dispute ([Article 7.3](#) of the DSU) - as an example, see [Brazil - Desiccated Coconut](#), DS22).

The **composition of the panel** ([Article 8](#) of the DSU) takes place once the panel has been established by the DSB. As explained earlier, potential candidates must meet certain requirements in terms of qualifications. Panels are composed of three panelists unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five panelists ([Article 8.5](#) of the DSU). The Secretariat proposes nominations for the panel to the parties to the dispute. The parties to the dispute must not oppose nominations except for compelling reasons ([Article 8.6](#) of the DSU). **If there is no agreement on the composition of the panel** within 20 days after the date of its establishment, **either party may request the Director-General to determine the composition of the panel** by appointing panelists, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee ([Article 8.7](#) of the DSU).

Where more than one Member requests the establishment of a panel related to the same matter, the DSB should, whenever feasible, establish a single panel to examine these complaints taking into account the rights of all Members concerned ([Article 9.1](#) of the DSU).

## 3. Panel Process

### First Step - Organizational Meeting

Panel procedures are primarily set out in [Article 12](#) and [Appendix 3](#) of the DSU. During a first "organizational" meeting, the panel, guided by the suggested timetable in [Appendix 3](#) of the DSU, determines its in consultation with the parties ([Article 12.3](#) of the DSU).

### Second Step - Submissions and Oral Hearings

Parties exchange written submissions, and the panel convenes at least two hearings where parties are entitled to present their views orally and where the panel may seek clarifications and ask questions. Panels have the right to ask written questions. Third parties with a substantial interest in the matter before the panel, and who have notified their interest to the DSB, are to be granted an opportunity to be heard by the panel and make written submissions ([Article 10.2](#) of the DSU).

### Third Step - Preparation of the Panel Report

Once written submissions have been received and the parties and third parties have been heard, the panel issues the draft **descriptive part of its panel report** (containing facts and arguments) **for comments** in writing by the parties ([Article 15.1](#) of the DSU). In accordance with the proposed timetable in Appendix 3 of the DSU, parties are invited to make comments on the draft descriptive part (within two weeks).

After the receipt of comments on the descriptive part, the panel issues its **interim report** containing the revised descriptive part and the findings of the report. Parties are again invited to make comments and may request an interim review meeting of the panel further to argue specific points raised with respect to the interim report. This is the interim review stage ([Article 15](#) of the DSU). The **final report must contain a reference to all the arguments raised by the parties during the interim review stage** ([Article 15.3](#) of the DSU).

Panel deliberations are confidential. reports of panels are drafted without the presence of the parties to the dispute, in the light of the information provided, and the statements made. The opinions expressed in the panel report by individual panelists are anonymous ([Article 14](#) of the DSU). **Where a decision cannot be arrived at by consensus, the matter at issue has to be decided by a majority of the panelists.**

### Fourth Step - Final Report

The panel issues its final report to the parties within two weeks following the interim review meeting, if one is held, and **circulates it to all WTO Members** once the report has been translated into all three of the official languages of the WTO (English, French and Spanish).

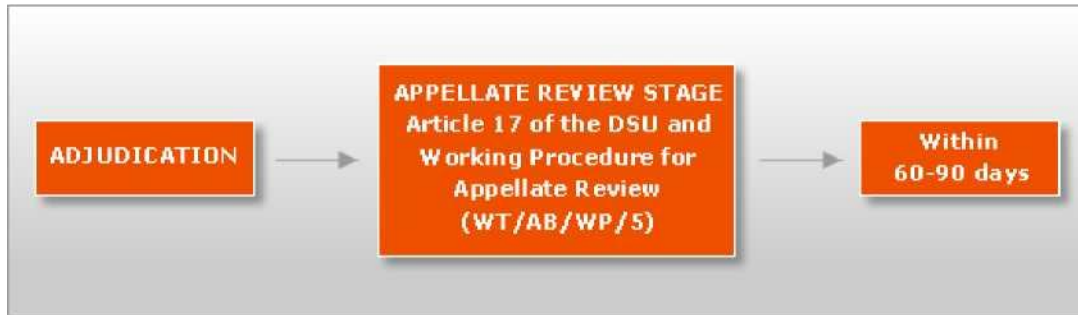
### Timeframes

As a general rule, panels are required to issue the final report to the parties within six months from the date when the composition and the terms of reference of the panel have been agreed upon. In cases of urgency, the panel is to aim to issue its report to the parties to the dispute within three months from its constitution ([Article 12.8](#) of the DSU). When the panel considers that it cannot issue its report within six months, or three months in case of urgency, it must inform the DSB in writing of the reasons for the delay and provide an estimate of the period within which it will issue its report. In any case, the examination is to be completed within nine months of the establishment of the panel ([Article 12.9](#) of the DSU). [Appendix 3](#) DSU provides a proposed timetable for panel work.

Accelerated procedures with shorter time periods apply under the Agreement and Subsidies and Countervailing Measures, with respect to dispute settlement on prohibited subsidies and actionable subsidies (see [Articles 4](#) and [7](#) of the SCM Agreement).

#### 4. Adoption of the Panel Report

A panel report may be considered for adoption 20 days after it is circulated to all the Members (Article 16.1 of the DSU). **It shall be adopted at a DSB meeting within 60 days after the date of circulation of a panel report to the Members**, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report ([Article 16.4](#) of the DSU).



**Figure:** Appellate Review

## **b. APPELLATE REVIEW**

### 1. Who Can Appeal?

The Appellate Body is responsible for hearing appeals from panel decisions ([Article 17](#) of the DSU). **Only parties to the dispute, not third parties, may appeal** a panel report. Third parties which have notified the DSB of a substantial interest in the matter before the panel may make written submissions to, and be given an opportunity to be heard by, the Appellate Body ([Article 17.4](#) of the DSU).

Any appeal of a **panel report must occur before the report is adopted by the DSB**. The appeal process begins when a party to the dispute formally notifies the DSB of its decision to appeal ([Article 16.4](#) of the DSU).

### 2. What Can be Subject to Appeal?

Appeals are limited to **issues of law covered in the panel report and legal interpretations developed by the panel** ([Article 17.6](#) of the DSU). The Appellate Body must address, but also limit its review to, each of the issues of law covered by the panel report and the legal interpretations developed by the panel which were appealed during the appellate proceeding (Articles [17.6](#) and [12](#) of the DSU). The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel ([Article 17.13](#) of the DSU).

### 3. Timeframe

The Appellate Body shall generally complete its review process within 60 days. In no case shall it exceed 90 days ([Article 17.5](#) of the DSU).

## **c. ADOPTION OF APPELLATE BODY REPORT**

An Appellate Body report must 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 30 days following its circulation to Members. **In case of appeal, the panel and the Appellate Body reports will be adopted by the DSB together** ([Article 17.14](#) of the DSU). As mentioned above, **the panel and Appellate Body reports will only be binding upon the parties after adopted by the DSB**.

## **III.C.3. IMPLEMENTATION & NON-COMPLIANCE**

In the WTO, **there is no independent policing body responsible for enforcing the recommendations of panels and the Appellate Body**. The DSB, which is composed of all WTO Members, **supervises the implementation** of panel and Appellate Body reports ([Article 2](#) of the

DSU). The DSU states that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes ([Article 21.1](#) of the DSU).

**a. SURVEILLANCE AND IMPLEMENTATION OF REPORTS**

At a meeting within 30 days after the adoption of the report, the **"losing" Member has to inform the DSB of its intentions to implement** the recommendations and rulings of the DSB and whether it is able to comply immediately with the recommendations and rulings.

1. Implementation within a "Reasonable Period of Time"

**If it is impracticable to comply immediately, the party will be granted a reasonable period of time to comply.** This reasonable period of time can be decided in three different ways: (i) proposed by the Member concerned with the approval of the DSB ([Article 21.3\(a\)](#) of the DSU); or, (ii) agreed upon by the parties within 45 days after the adoption of the report ([Article 21.3\(b\)](#) of the DSU); or, (iii) determined by arbitration within 90 days after the adoption of the report ([Article 21.3\(c\)](#) of the DSU).

When the reasonable period of time is arbitrated, a guideline for the arbitrator is that the reasonable period of time to implement the panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report (may be shorter or longer, depending upon the particular circumstances).

The period from the date of establishment of a panel by the DSB until the date of determination of the reasonable period of time is also not to exceed 15 months, unless the parties to the dispute agree otherwise. Unless the DSB decides otherwise, **the issue of implementation** is placed on the agenda of the DSB, six months following the date of establishment of the reasonable period of time. It **remains on the DSB's agenda until the issue is resolved.**

**Disagreement on Implementation**

If there is disagreement as to the consistency with the WTO Agreement of measures taken to comply with DSB recommendations, a party may have recourse to the dispute settlement procedures, referring the matter to the initial panel wherever possible for expedited adjudication ([Article 21.5](#) of the DSU). In cases of non-compliance, parties may agree to compensation. In the absence of such agreement, the "winning" Member may suspend concessions or other obligations, but only after obtaining the prior authorization from the DSB. Compensation and the suspension of concessions or other obligations are **temporary** measures available in the event that the recommendations and rulings are not implemented within the reasonable period of time. Neither compensation, nor the suspension of concessions, nor other obligations are preferred to the full implementation of a recommendation to bring a measure into conformity with the covered Agreements ([Article 22.1](#) of the DSU).

1. First Step- Voluntary Compensation

If the WTO Member concerned fails within the reasonable period of time to bring the measure found to be inconsistent with the covered Agreement into compliance in accordance with the recommendations, that Member must, if so requested, enter into negotiations with a view to agreeing on mutually acceptable compensation ([Article 22.2](#) of the DSU). This **compensation does not mean monetary payment**; it means that the respondent is supposed to offer a benefit, for example a tariff reduction, which is equivalent to the benefit that the respondent has nullified or impaired by applying its measure. The **compensation is voluntary** and, if granted, must also be consistent with the covered Agreements.

## 2. Second Step - Suspension of Concessions

Authorization for suspension of concessions or other obligations may be sought from the DSB by the Member concerned if no satisfactory compensation has been agreed upon within 20 days after the date of expiry of the reasonable period of time. The **DSB is required to grant such authorization** within 30 days of the expiry of the reasonable period of time unless it decides by consensus to reject the request.

### **Conditions for the Suspension of Concessions or Other Obligations**

As a general principle, the complaining party should first seek to suspend concessions or other obligations with respect to the same "sector"(s) as that in which nullification or impairment has been found. If it is not practicable or effective to do so in the same sector(s), the suspension of concessions or other obligations may be made in other sector(s) under the same Agreement. If even that is not practicable and the circumstances are serious enough, the complaining party may seek to suspend concessions or obligations under another Agreement. This is referred to as "**cross-retaliation**". For these purposes, "sectors" are classified in three categories: (i) goods (comprises all goods); (ii) services - as identified in relevant GATS documents; and, (iii) intellectual property as categorized in relevant sections of the TRIPS Agreement) (see [Article 22.3\(f\)](#) of the DSU). The "Agreements" are: (i) for goods, the Agreements listed in Annex 1A of the Agreement Establishing the WTO (as well as in Annex 4, as applicable); (ii) with respect to services, the GATS; and, (iii) with respect to intellectual property rights, the TRIPS Agreement.

The level of suspension of obligations authorized by the DSB must be "**equivalent**" to the level of **nullification or impairment** - that is, it may not go beyond the harm caused by the respondent ([Article 22.4](#) of the DSU). The **suspension of obligations is prospective** (it includes only the time-period after the DSB has granted the authorization-not the period of the dispute or maintenance of the measure)



### **Disagreement on the Level of Suspension of Concessions**

In case of disagreement regarding either the equivalence of the level of nullification with the level of suspension or the conditions applicable to cross-retaliation, arbitration may be requested (Articles [22.6](#) and [7](#) of the DSU). Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General, and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration ([Article 22.6](#) of the DSU).

#### **c. SURVEILLANCE UNTIL FINAL IMPLEMENTATION**

As mentioned above, surveillance by the DSB is an important feature of the dispute settlement mechanism of the WTO. The **DSB must continue to keep under surveillance the implementation of adopted recommendations or rulings**, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered Agreements have not been implemented ([Article 22.8](#) of the DSU).

Developing country Members have been active participants in the dispute settlement system since 1995, both as complainants and respondents. They have initiated disputes against developed country Members, but also against other developing country Members. Furthermore, the participation of developing countries as third parties has been quite frequent. By contrast, least-developed country (LDC) Members have so far had a very low level of involvement in dispute settlement.

As with the special and differential treatment for developing country, as provided in various WTO Agreements, the DSU also addresses the particular status of developing country Members and LDC Members through additional or privileged procedures and legal assistance during the WTO dispute settlement process. In general, developing countries may choose a **faster procedure, request longer time limits, or request legal assistance**. WTO Members are encouraged to give special consideration to the situation of developing country Members. The provisions on special and differential treatment include:

#### **III.D.1. ACCELERATED PROCEDURE AT THE REQUEST OF A DEVELOPING COUNTRY MEMBER**

The **Decision of 5 April 1996** (the 1996 Decision, **BISD 14S/18**) operates in cases where a complaint based on any of the covered Agreements is brought by a developing country Member against a developed country Member ([Article 3.12](#) of the DSU). Among others, the 1966 Decision provides good offices conducted by the Director-General with a view to facilitate a solution, as well as reduced timeframes. In case of conflict between a provision of the DSU and a provision of the 1966 Decision, the latter prevails.

### III.D.2. SPECIAL CONSIDERATION OF A LDC MEMBER INVOLVED IN A CASE

Particular consideration shall be given to the special situation of LDC Members at all stages of the dispute. Members are to exercise due restraint in bringing a dispute against LDC Members. The Director-General or the Chairman of the DSB are required, upon request by a LDC Member, to offer their good offices, conciliation or mediation to help the parties to settle the dispute, before having to resort to requesting the establishment of a panel. If a measure adopted by a LDC Member has been found to be inconsistent with WTO rules, complaining parties are to exercise due restraint in asking for compensation, or seeking authorization to suspend the application of concessions or other obligations ([Article 24](#) of the DSU).

### III.D.3. ADDITIONAL LEGAL ADVICE AND ASSISTANCE

While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat must make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert must assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat ([Article 27.2](#) of the DSU).

### III.D.4. SPECIFIC PROVISIONS DURING THE DISPUTE SETTLEMENT PROCESS

- **During consultations** - Members should give special attention to the particular problems and interests of developing country Members in consultations ([Article 4.10](#) of the DSU). If the measure subject to consultations was taken by a developing country Member, the parties may agree to extend the regular period for consultations. If there is no agreement, the DSB chairperson may extend the time-period ([Article 12.10](#) of the DSU);
- **Composition of panels** - at least one panelist should be selected from a developing country Member in a dispute between a developing country Member and a developed country Member, if the developing country Member so requests ([Article 8.10](#) of the DSU);
- **During the panel stage** - if the developing country is the respondent, the panel must accord to it sufficient time to prepare and present its defence ([Article 12.10](#) of the DSU). In addition, if the developing country raises rules on special and differential treatment of the DSU or the covered Agreements, the panel report must explicitly indicate the form in which these rules have been taken into account ([Article 12.11](#) of the DSU);
- **During implementation** - particular attention should be paid to matters affecting the interest of developing country Members (e.g. in the determination of the reasonable period of time ([Article 21.2](#) of the DSU). The DSB shall consider what further action it might take in addition to surveillance, which would be appropriate to the circumstance, if a matter relating to implementation has been raised by a developing country Member ([Article 21.7](#) of the DSU). To take such action, the DSB should take into account the trade coverage of the challenged measures and its impact on the economy of the developing country Member ([Article 21.8](#) of the DSU).

## SUMMARY

The dispute settlement mechanism is aimed at providing a forum for the settlement of disputes between WTO Members. As compared to its predecessor - the dispute settlement mechanism provided in the GATT 1947 - the mechanism agreed in the Uruguay Round and embodied in the **Dispute Settlement Understanding (DSU)** offers unquestionably more advantages to the WTO Members. Contrary to the GATT 1947, the DSU provides near automaticity in decision-making in certain key issues related to the settlement of disputes for example panels establishment and adoption of panel and Appellate Body reports by the DSB. In addition the DSU provides one single procedure with clearly-defined rules for the resolution of trade disputes among the Members and the possibility to appeal the reports of the panels. In doing so the DSU provides an effective mechanism to settle disputes which has contributed to the stability and predictability of the MTS. This constitutes a significant benefit for all Members and specially for developing Members who can have resort to a mechanism in which decisions are made on the basis of rules.

Only WTO Member governments have standing to initiate dispute settlement proceedings. They can act either as "complainant" or "respondent" (enjoy full rights) or "third parties" (enjoy some rights - explained below). Other entities have no legal right to participate in WTO dispute settlement proceedings, although adjudicating bodies may deem appropriate to accept or consider their submissions in certain cases and after consulting with the parties.

The dispute settlement process applies to all disputes brought under the covered Agreements and includes three main stages: 1. consultations; 2. adjudication (panels and in case of appeal the Appellate Body); and, 3. implementation.

A dispute starts formally with a request for consultations. The objective of this stage is to give the parties an opportunity to discuss the matter and find a mutually agreed solution consistent with the WTO Agreements (preferred solution). If an agreed solution is not possible the complainant may request the establishment of a panel which after composed will make an objective assessment of the matter in order to submit a report with its rulings and recommendations. Either party may appeal the report of the panel but only with respect to issues of law. The Appellate Body main function is to correct legal errors of the panels and provide consistency of decisions contributing in this way with the stability and predictability of the system. The recommendations of the panels and Appellate Body have to be adopted by the DSB before becoming binding for the parties to the dispute. As explained above this adoption is quasi-automatic due to the negative consensus rule. Approximately the total time of a dispute is 12 months (up to the panel stage) and one year and three months (if there is appeal).

Besides the complainant and the respondent other Members with a substantial interest on the matter in dispute may participate as "third parties" during the whole process and enjoy some rights. To participate in consultations, they require to have a substantial trade interest (imposes a higher standard than substantial interest - the latter is requested to participate in the panel stage) and the approval of the party to which the request for consultations was addressed.

The last stage concerns the implementation of the reports of the adjudicating bodies, after their adoption by the DSB, which maintains surveillance of the implementation of the rulings until their compliance. If immediate compliance is not possible, the respondent has a reasonable period of time to comply. The DSU provides to the complainant remedies applicable in case of non-compliance with the reports: trade compensation and suspension of concessions. The suspension of concessions is a remedy of last resort, which has been used only in few occasions. These remedies are only temporary since the main objective of the system is to secure the withdrawal of the measure found inconsistent with the WTO covered Agreements.

**SUBSIDIES AND  
COUNTERVAILING MEASURES**

(Source: WTO)

## **Introduction**

Subsidies have been provided widely throughout the world as a tool for realizing government policies. They can take the form of grants (normal subsidies), tax exemptions, low-interest financing, investments, and export credits. There are six primary categories of subsidies categorized by purpose: 1) export subsidies; 2) subsidies contingent upon the use of domestic over imported goods; 3) industrial promotion subsidies; 4) structural adjustment subsidies; 5) regional development subsidies; and 6) research and development subsidies. Subsidies are also categorized by beneficiary as either specific subsidies, which are limited to specific businesses and industries, or non-specific subsidies, which are not limited.

Although governments articulate ostensibly legitimate goals for their subsidy Programmes, it is widely perceived that government subsidies may give excessive protection to domestic industries. In such cases, subsidies act as a barrier to trade by distorting the competitive relationships that develop naturally in a free trading system. Exports of subsidized products may injure the domestic industry producing the same product in the importing country. Similarly, subsidized products may gain artificial advantages in third-country markets and impede the exports of other countries to those markets.

Because of this potential effect on trade, the WTO Agreements prohibit with respect to industrial goods any export subsidies and subsidies contingent upon the use of domestic over imported goods as having a particularly high trade-distorting effect. Furthermore, even for subsidies that are not prohibited, it allows Members importing subsidized goods to enact countermeasures such as Countervailing duties if such goods injure that Member's domestic industry and if certain procedural requirements are met. For agricultural products, the WTO Agreements require obligations such as reducing export subsidies and domestic supports.

The legal disciplines on subsidies are found in Articles VI and XVI of the GATT, which define the basic principles in this area. General implementation provisions for subsidies are found in the "Agreement on Subsidies and Countervailing Measures" (hereinafter the "Subsidies Agreement"). The current Subsidies Agreement was developed during the Uruguay Round negotiations as a new discipline to take the place of the 1979 "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade." In comparison with the previous agreement, it provides more explicit definitions of subsidies with stronger and clearer disciplines on countervailing measures. The current Subsidies Agreement begins by defining the subsidies covered and classifying them into three types depending upon their purpose and nature. It then defines the relationship of each category to countervailing measures and relief measures as well as the procedures to be followed. It concludes with special and differential treatment for developing country Members and transitional arrangement for Members in the process of transformation from a centrally planned economy into a market, free-enterprise economy.

Multilateral disciplines are the rules regarding whether or not a subsidy may be provided by a Member. They are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the SCM Agreement are satisfied.

## **Structure of the SCM Agreement**

Part I provides that the SCM Agreement applies only to subsidies that are specifically provided to an enterprise or industry or group of enterprises or industries, and defines both the term “subsidy” and the concept of “specificity.” Parts II and III divide all specific subsidies into one of two categories: prohibited and actionable(1), and establish certain rules and procedures with respect to each category. Part V establishes the substantive and procedural requirements that must be fulfilled before a Member may apply a countervailing measure against subsidized imports. Parts VI and VII establish the institutional structure and notification/surveillance modalities for implementation of the SCM Agreement. Part VIII contains special and differential treatment rules for various categories of developing country Members. Part IX contains transition rules for developed country and former centrally-planned economy Members. Parts X and XI contain dispute settlement and final provisions.

## **Coverage of the Agreement**

Part I of the Agreement defines the coverage of the Agreement. Specifically, it establishes a definition of the term “subsidy” and an explanation of the concept of “specificity”. Only a measure which is a “specific subsidy” within the meaning of Part I is subject to multilateral disciplines and can be subject to countervailing measures.

## **Definition of subsidy**

Unlike the Tokyo Round Subsidies Code, the WTO SCM Agreement contains a definition of the term “subsidy”. The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.

The concept of “financial contribution” was included in the SCM Agreement only after a protracted negotiation. Some Members argued that there could be no subsidy unless there was a charge on the public account. Other Members considered that forms of government intervention that did not involve an expense to the government nevertheless distorted competition and should thus be considered to be subsidies. The SCM Agreement basically adopted the former approach. The Agreement requires a financial contribution and contains a list of the types of measures that represent a financial contribution, e.g., grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, the purchase of goods.

In order for a financial contribution to be a subsidy, it must be made by or at the direction of a government or any public body within the territory of a Member. Thus, the SCM Agreement applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as state-owned companies.

A financial contribution by a government is not a subsidy unless it confers a “benefit.” In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex. For example, when does a loan, an equity infusion or the purchase by a government of a good confer a benefit? Although the SCM Agreement does not provide complete guidance on these issues, the Appellate Body has ruled (Canada – Aircraft) that the existence of a benefit is to be determined by comparison with the market-place (i.e., on the basis of what the recipient could have received in the market). In the context of countervailing duties, Article 14 of the SCM Agreement provides some guidance with respect to determining whether certain types of measures confer a benefit. In the context of multilateral disciplines, however, the issue of the meaning of “benefit” is not fully resolved.

**Specificity.** Assuming that a measure is a subsidy within the meaning of the SCM Agreement, it nevertheless is not subject to the SCM Agreement unless it has been specifically provided to an enterprise or industry or group of enterprises or industries. The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus, only “specific” subsidies are subject to the SCM Agreement disciplines. There are four types of “specificity” within the meaning of the SCM Agreement:

- Enterprise-specificity. A government targets a particular company or companies for subsidization;
- Industry-specificity. A government targets a particular sector or sectors for subsidization.
- Regional specificity. A government targets producers in specified parts of its territory for subsidization.
- Prohibited subsidies. A government targets export goods or goods using domestic inputs for subsidization.

### **Categories of Subsidies**

The SCM Agreement creates two basic categories of subsidies: those that are prohibited, those that are actionable (i.e., subject to challenge in the WTO or to countervailing measures). All specific subsidies fall into one of these categories.

**Prohibited subsidies:** Two categories of subsidies are prohibited by Article 3 of the SCM Agreement. The first category consists of subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance (“export subsidies”). A detailed list of export subsidies is annexed to the SCM Agreement. The second category consists of subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods (“local content subsidies”). These two categories of subsidies are prohibited because they are designed to directly affect trade and thus are most likely to have adverse effects on the interests of other Members.

The scope of these prohibitions is relatively narrow. Developed countries had already accepted the prohibition on export subsidies under the Tokyo Round SCM Agreement, and local content subsidies

of the type prohibited by the SCM Agreement were already inconsistent with Article III of the GATT 1947. What is most significant about the new Agreement in this area is the extension of the obligations to developing country Members subject to specified transition rules, as well as the creation in Article 4 of the SCM Agreement of a rapid (three-month) dispute settlement mechanism for complaints regarding prohibited subsidies.

**Actionable subsidies:** Most subsidies, such as production subsidies, fall in the “actionable” category. Actionable subsidies are not prohibited. However, they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member. There are three types of adverse effects. First, there is injury to a domestic industry caused by subsidized imports in the territory of the complaining Member. This is the sole basis for countervailing action. Second, there is serious prejudice. Serious prejudice usually arises as a result of adverse effects (e.g., export displacement) in the market of the subsidizing Member or in a third country market. Thus, unlike injury, it can serve as the basis for a complaint related to harm to a Member's export interests. Finally, there is nullification or impairment of benefits accruing under the GATT 1994. Nullification or impairment arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidization.

The creation of a system of multilateral remedies that allows Members to challenge subsidies which give rise to adverse effects represents a major advance over the pre-WTO regime. The difficulty, however, will remain the need in most cases for a complaining Member to demonstrate the adverse trade effects arising from subsidization, a fact-intensive analysis that panels may find difficult in some cases(2).

Agricultural subsidies Article 13 of the Agreement on Agriculture establishes, during the implementation period specified in that Agreement (until 1 January 2003), special rules regarding subsidies for agricultural products. Export subsidies which are in full conformity with the Agriculture Agreement are not prohibited by the SCM Agreement, although they remain countervailable. Domestic supports which are in full conformity with the Agriculture Agreement are not actionable multilaterally, although they also may be subject to countervailing duties. Finally, domestic supports within the “green box” of the Agriculture Agreement are not actionable multilaterally nor are they subject to countervailing measures. After the implementation period, the SCM Agreement shall apply to subsidies for agricultural products subject to the provisions of the Agreement on Agriculture, as set forth in its Article 21.

### **Countervailing Measures**

Part V of the SCM Agreement sets forth certain substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as in-depth procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance in place of countervailing measures. A failure to respect either the substantive or procedural requirements of Part V can be taken to dispute settlement and may be the basis for invalidation of the measure.

Substantive rules: A Member may not impose a countervailing measure unless it determines that there are subsidized imports, injury to a domestic industry, and a causal link between the subsidized imports and the injury. As previously noted, the existence of a specific subsidy must be determined in accordance with the criteria in Part I of the Agreement. However, the criteria regarding injury and causation are found in Part V. One significant development of the new SCM Agreement in this area is the explicit authorization of cumulation of the effects of subsidized imports from more than one Member where specified criteria are fulfilled. In addition, Part V contains rules regarding the determination of the existence and amount of a benefit.

Procedural rules: Part V of the SCM Agreement contains detailed rules regarding the initiation and conduct of countervailing investigations, the imposition of preliminary and final measures, the use of undertakings, and the duration of measures. A key objective of these rules is to ensure that investigations are conducted in a transparent manner, that all interested parties have a full opportunity to defend their interests, and that investigating authorities adequately explain the bases for their determinations. A few of the more important innovations in the WTO SCM Agreement are identified below:

- **Standing:** The Agreement defines in numeric terms the circumstances under which there is sufficient support from a domestic industry to justify initiation of an investigation.
- **Preliminary investigation.** The Agreement ensures the conduct of a preliminary investigation before a preliminary measure can be imposed.
- **Undertakings.** The Agreement places limitations on the use of undertakings to settle CVD investigations, in order to avoid Voluntary Restraint Agreements or similar measures masquerading as undertakings
- **Sunset.** The Agreement requires that a countervailing measure be terminated after five years unless it is determined that continuation of the measure is necessary to avoid the continuation or recurrence of subsidization and injury.
- **Judicial review.** The Agreement requires that Members create an independent tribunal to review the consistency of determinations of the investigating authority with domestic law.

### **Transition Rules and Special and Differential Treatment**

**Developed countries** Members not otherwise eligible for special and differential treatment are allowed three years from the date on which for them the SCM Agreement enters into force to phase out prohibited subsidies. Such subsidies must be notified within 90 days of the entry into force of the WTO Agreement for the notifying Member.

**Developing countries** The SCM Agreement recognizes three categories of developing country Members: least-developed Members (“LDCs”), Members with a GNP per capita of less than \$1000 per year which are listed in Annex VII to the SCM Agreement, and other developing countries. The lower a Member's level of development, the more favourable the treatment it receives with respect to subsidies disciplines. Thus, for example, LDCs and Members with a GNP per capita of less than \$1000 per year listed in Annex VII are exempted from the prohibition on export subsidies. Other



developing country Members have an eight-year period to phase out their export subsidies (they cannot increase the level of their export subsidies during this period). With respect to import-substitution subsidies, LDCs have eight years and other developing country Members five years, to phase out such subsidies. There is also more favourable treatment with respect to actionable subsidies. For example, certain subsidies related to developing country Members' privatization programmes are not actionable multilaterally.. With respect to countervailing measures, developing country Members' exporters are entitled to more favourable treatment with respect to the termination of investigations where the level of subsidization or volume of imports is small.

Members in transformation to a market economy Members in transformation to a market economy are given a seven-year period to phase out prohibited subsidies. These subsidies must, however, have been notified within two years of the date of entry into force of the WTO Agreement (i.e., by 31 December 1996) in order to benefit from the special treatment. Members in transformation also receive preferential treatment with respect to actionable subsidies.

### **Notifications**

Subsidies Article 25 of the SCM Agreement requires that Members notify all specific subsidies (at all levels of government and covering all goods sectors, including agriculture) to the SCM Committee. New and full notifications are due every three years with update notifications in intervening years. The notifications are the subject of extensive review and discussion by the SCM Committee.

### **Countervailing legislation and measures**

All Members are required to notify their countervailing duty laws and regulations to the SCM Committee pursuant to Article 32.6 of the SCM Agreement. Members are also required to notify all countervailing actions taken on a semi-annual basis, and preliminary and final countervailing actions at the time they are taken. Members also are required to notify which of their authorities are competent to initiate and conduct countervailing investigations.

### **Dispute Settlement**

The SCM Agreement generally relies on the dispute settlement rules of the DSU. However the Agreement contains extensive special or additional dispute settlement rules and procedures providing, inter alia, for expedited procedures, particularly in the case of prohibited subsidy allegations. It also provides special mechanisms for the gathering of information necessary to assess the existence of serious prejudice in actionable subsidy cases.

### **Conclusion:**

Government subsidization may have far-reaching implications. When a government subsidizes projects, such as research projects in advanced technology, the benefits may extend well beyond the industry directly concerned. The results of these projects spill over into a wide range of fields. Government assistance for research activities can contribute not only to domestic economic development, but also to the development of the world economy as a whole.

Subsidies may also be used to encourage less competitive industries to reduce excess capacity or to withdraw from unprofitable fields. They may, therefore, smooth the way for structural adjustment and shifts in employment. Such subsidies therefore promote the appropriate allocation of resources and encourage imports of competitive goods.

On the other hand, subsidies can also distort trade when they are used to protect a domestic industry despite its non-competitiveness. Governments have often used subsidies to needlessly prolong the natural adjustment process in certain industries. Over the short term, such subsidies may place a domestic product in a better competitive position. They may maintain or increase the profitability of the products and keep employment in that industry stable. Over the longer term, however, the disadvantages of the subsidies become clear. They impede the productivity gains that come from intensely competitive environments and undermine the efforts of companies to rationalize operations. Thus from a medium- and long-term perspective, subsidies may obstruct an industry's development or impede the rational allocation of domestic resources.

On a global economic level, distortions in the allocation of resources and the international division of labour become serious problems as well. And even when subsidies are used to make up for short-term market failures, there is still potential for their purposes and terms to be subverted. Subsidies that are used as part of a "beggar-thy-neighbour" policy ultimately may induce counter subsidies, leading to "subsidy wars." Subsidy policies will then be to blame not only for preventing a product from achieving its proper competitive position, but for needlessly draining the treasuries of the countries involved. The result is a larger burden for taxpayers. In no way, therefore, do such policies improve the economic welfare of anyone concerned.

# DUMPING AND ANTI-DUMPING IN THE GATT/WTO

(Source: WTO)

## What is dumping?

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply 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 in order to determine the appropriate price in the market of the exporting country (known as the “normal value”) and the appropriate price in the market of the importing country (known as the “export price”) so as to be able to undertake an appropriate comparison.

## Article VI of GATT and the Anti-Dumping Agreement

The GATT 1994 sets forth a number of basic principles applicable in trade between Members of the WTO, including the “most favoured nation” principle. It also requires that imported products not be subject to internal taxes or other changes in excess of those imposed on domestic goods, and that imported goods in other respects be accorded treatment no less favourable than domestic goods under domestic laws and regulations, and establishes rules regarding quantitative restrictions, fees and formalities related to importation, and customs valuation. Members of the WTO also agreed to the establishment of schedules of bound tariff rates. Article VI of GATT 1994, on the other hand, explicitly authorizes the imposition of a specific anti-dumping duty on imports from a particular source, in excess of bound rates, in cases where dumping causes or threatens injury to a domestic industry, or materially retards the establishment of a domestic industry.

The Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, provides further elaboration on the basic principles set forth in Article VI itself, to govern the investigation, determination, and application, of anti-dumping duties.

## Previous Agreements

As tariff rates were lowered over time following the original GATT agreement, anti-dumping duties were increasingly imposed, and the inadequacy of Article VI to govern their imposition became ever more apparent. For instance, Article VI requires a determination of material injury, but does not contain any guidance as to criteria for determining whether such injury exists, and addresses the methodology for establishing the existence of dumping in only the most general fashion. Consequently, contracting parties to GATT negotiated more detailed Codes relating to anti-dumping. The first such Code, the Agreement on Anti-Dumping Practices, entered into force in 1967 as a result of the Kennedy Round. However, the United States never signed the Kennedy Round Code, and as a result the Code had little practical significance.

The Tokyo Round Code, which entered into force in 1980, represented a quantum leap forward. Substantively, it provided enormously more guidance about the determination of dumping and of injury than did Article VI. Equally important, it set out in substantial detail certain procedural and due process requirements that must be fulfilled in the conduct of investigations. Nevertheless, the Code still represented no more than a general framework for countries to follow in conducting investigations and imposing duties. It was also marked by ambiguities on numerous controversial

points, and was limited by the fact that only the 27 Parties to the Code were bound by its requirements.

## **The UR Agreement**

### **Basic principles**

Dumping is defined in the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement) as the introduction of a product into the commerce of another country at less than its normal value. Under Article VI of GATT 1994, and the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two. In addition to substantive rules governing the determination of dumping, injury, and causal link, the Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures.

### **Committee on Anti-Dumping Practices**

The Committee, which meets at least twice a year, provides Members of the WTO the opportunity to discuss any matters relating to the Anti-Dumping Agreement (Article 16). The Committee has undertaken the review of national legislations notified to the WTO. This offers the opportunity to raise questions concerning the operation of national anti-dumping laws and regulations, and also questions concerning the consistency of national practice with the Anti-Dumping Agreement. The Committee also reviews notifications of anti-dumping actions taken by Members, providing the opportunity to discuss issues raised regarding particular cases.

The Committee has created a separate body, the Ad Hoc Group on Implementation, which is open to all Members of the WTO, and which is expected to focus on technical issues of implementation: that is, the “how to” questions that frequently arise in the administration of anti-dumping laws.

### **Dispute settlement**

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding (“DSU”) (Article 17). Members may challenge the imposition of anti-dumping measures, in some cases may challenge the imposition of preliminary anti-dumping measures, and can raise all issues of compliance with the requirements of the Agreement, before a panel established under the DSU. In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel's review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. The standard of review is only for anti-dumping disputes, and a Ministerial Decision provides that it shall be reviewed after three years to determine whether it is capable of general application.

### **Notifications**

All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices. While the Committee does not “approve” or “disapprove” any Members' legislation, the legislations are reviewed in the Committee, with questions posed by Members, and discussions about the consistency of a particular Member's implementation in national legislation of the requirements of the Agreement.

In addition, Members are required to notify the Committee twice a year about all anti-dumping investigations, measures, and actions taken. The Committee has adopted a standard format for these notifications, which are subject to review in the Committee. Finally, Members are required to promptly notify the Committee of preliminary and final anti-dumping actions taken, including in their notification certain minimum information required by Guidelines agreed to by the Committee. These notifications are also subject to review in the Committee.

### **Refund or reimbursement**

The Agreement requires Members to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount. The Agreement specifies two mechanisms to ensure that excessive duties are not collected. The choice of mechanism depends on the nature of the duty collection process. If a Member allows importation and collects an estimated anti-dumping duty, and only later calculates the specific amount of anti-dumping duty to be paid, the Agreement requires that the final determination of the amount must take place as soon as possible, upon request for a final assessment. In both cases, the Agreement provides that the final decision of the authorities must normally be made within 12 months of a request for refund or final assessment, and that any refund should be made within 90 days.

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation.

### **Determination of injury and causal link**

#### **Like product**

##### **Definition (Article 2.6)**

An important decision must be made early in each investigation to determine the domestic “like product”. Like product is defined in the Agreement as “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”. The determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate “like product”. The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

#### **Domestic industry**

##### **Definition (Article 4)**

The Agreement defines the term “domestic industry” to mean “the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products”.

### **Related domestic producers**

The Agreement recognizes that in certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry. Thus, Members are permitted to exclude from the domestic industry producers related to the exporters or importers under investigation, and producers who are themselves importers of the allegedly dumped product. The Agreement provides that a producer can be deemed “related” to an exporter or importer of the allegedly dumped product if there is a relationship of control between them, and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers.

### **Regional domestic industry**

The Agreement contains special rules that allow in exceptional circumstances, consideration of injury to producers comprising a “regional industry”. A regional industry may be found to exist in a separate competitive market if producers within that market sell all or almost all of their production of the like product in that market, and demand for the like product in that market is not to any substantial degree supplied by producers of the like product located outside that market. If this is the case, investigating authorities may find that injury exists, even if a major proportion of the entire domestic industry, including producers outside the region, is not materially injured. However, a finding of injury to the regional industry is only allowed if (1) there is a concentration of dumped imports into the market served by the regional industry, and (2) dumped imports are causing injury to the producers of all or almost all of the production within that market.

### **Imposition of duties in regional industry cases**

If an affirmative determination is based on injury to a regional industry, the Agreement requires investigating authorities to limit the duties to products consigned for final consumption in the region in question, if constitutionally possible. If the Constitutional law of a Member precludes the collection of duties on imports to the region, the investigating authorities may levy duties on all imports of the product, without limitation, if anti-dumping duties cannot be limited to the imports from specific producers supplying the region. However, before imposing those duties, the investigating authorities must offer exporters an opportunity to cease dumping in the region or enter a price undertaking.

## **Injury**

### **Types of injury**

The Agreement provides that, in order to impose anti-dumping measures, the investigating authorities of the importing Member must make a determination of injury. The Agreement defines the term “injury” to mean either (i) material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of a domestic industry, but is silent on the evaluation of material retardation of the establishment of a domestic industry.

### **Basic requirements for determination of material injury**

The Agreement does not define the notion of “material”. However, it does require that a determination of injury must be based on positive evidence and involve an objective examination of (i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of the dumped imports on domestic producers of the like

product. Article 3 contains some specific additional factors to be considered in the evaluation of these two basic elements, but does not provide detailed guidance on how these factors are to be evaluated or weighed, or on how the determination of causal link is to be made.

### **Basic requirements for determination of threat of material injury**

The Agreement sets forth factors to be considered in the evaluation of threat of material injury. These include the rate of increase of dumped imports, the capacity of the exporter(s), the likely effects of prices of dumped imports, and inventories. There is no further elaboration on these factors, or on how they are to be evaluated. The Agreement does, however, specify that a determination of threat of material injury shall be based on facts, and not merely on allegation, conjecture, or remote possibility, and moreover, that the change in circumstances which would create a situation where dumped imports caused material injury must be clearly foreseen and imminent.

### **Demonstration of causal link**

The Agreement requires a demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry. This demonstration must be based on an examination of all relevant evidence. The Agreement does not specify particular factors or give guidance in how relevant evidence is to be evaluated. Article 3.5 does require, however, that known factors other than dumped imports which may be causing injury must be examined, gives examples of factors (such as changes in the pattern of demand, and developments in technology) which may be relevant, and specifies that injury caused by such “other factors” must not be attributed to dumped imports. Thus, the investigating authorities must develop analytical methods for determining what evidence is or may be relevant in a particular case, and for evaluating that evidence, taking account of other factors which may be causing injury.

### **Cumulative analysis**

Cumulative analysis refers to the consideration of dumped imports from more than one country on a combined basis in assessing whether dumped imports cause injury to the domestic industry. Obviously, since such analysis will increase the volume of imports whose impact is being considered, there is a greater possibility of an affirmative determination in a case involving cumulative analysis. The practice of cumulative analysis was the subject of much controversy under the Tokyo Round Code, and in the negotiations for the Agreement. Article 3.3 of the Agreement establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. The authorities must determine that the margin of dumping from each country is not de minimis, that the volume of imports from each country is not negligible, and that a cumulative assessment is appropriate in light of the conditions of competition among the imports and between the imports and the domestic like product. De minimis dumping margins and negligible import volumes are defined in the Agreement.

### **Procedural requirements**

#### **Investigation**

##### **Initiation**

Agreement Article 5 of the Agreement establishes the requirements for the initiation of investigations. The Agreement specifies that investigations should generally be initiated on the basis of written request submitted “by or on behalf of” a domestic industry. This “standing” requirement includes numerical limits for determining whether there is sufficient support by domestic producers to

conclude that the request is made by or on behalf of the domestic industry, and thereby warrants initiation. The Agreement establishes requirements for evidence of dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief, and specifies that, in special circumstances when authorities initiate without a written application from a domestic industry, they shall proceed only if they have sufficient evidence of dumping, injury, and causality. In order to ensure that investigations without merit are not continued, potentially disrupting legitimate trade, Article 5.8 provides for immediate termination of investigations in the event the volume of imports is negligible or the margin of dumping is de minimis, and establishes numeric thresholds for these determinations. In order to minimize the trade-disruptive effect of investigations, Article 5.10 specifies that investigations should be completed within one year, and in no case more than 18 months, after initiation.

### **Conduct**

Article 6 of the Agreement sets forth detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. In addition, to ensure the transparency of proceedings, authorities are required to disclose the information on which determinations are to be based to interested parties and provide them with adequate opportunity to comment. The Agreement establishes the rights of parties to participate in the investigation, including the right to meet with parties with adverse interests, for instance in a public hearing. Further guidance on the conduct of investigations is contained in two Annexes to the Agreement, which set forth rules for the on-the-spot investigations to verify information obtained from foreign parties, as well as rules for the use of best information available in the event a party refuses access to, or does not provide, requested information, or significantly impedes the investigation.

### **Provisional measures and price understandings**

#### **Imposition of provisional measures**

Article 7 of the Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures—generally four months, with a possible extension to six months at the request of exporters. If a Member, in its administration of anti-dumping duties, imposes duties lower than the margin of dumping when these are sufficient to remove injury, the period of provisional measures is generally six months, with a possible extension to nine months at the request of exporters.

#### **Price undertakings**

Article 8 of the Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the



investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

### **Collection of duties**

#### **Imposition and collection of duties**

Article 9 of the Agreement establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met. It also states the desirability of application of a “lesser duty” rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping if this level is adequate to remove injury. In addition, the Agreement contains rules intended to ensure that duties in excess of the dumping margin are not collected, and rules for applying duties to new shippers.

#### **Retroactive application of duties**

The Agreement sets forth the general principle that both provisional and final anti-dumping duties may be applied only as of the date on which the determinations of dumping, injury and causality have been made. However, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty, Article 10 contains rules for the retroactive imposition of dumping duties in specified circumstances. If the imposition of anti-dumping duties is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, anti-dumping duties may be collected as of the date provisional measures were imposed. If provisional duties were collected in an amount greater than the amount of the final duty, or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. Article 10.6 provides for retroactive application of final duties to a date not more than 90 days prior to the application of provisional measures in certain exceptional circumstances involving a history of dumping, massive dumped imports, and potential undermining of the remedial effects of the final duty.

### **Review and public notice**

#### **Duration, termination, and review of anti-dumping measures**

Article 11 of the Agreement establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the practice of some countries of leaving anti-dumping duties in place indefinitely. The “sunset” requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year “sunset” provision also applies to price undertakings. The Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

#### **Public notice**

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency

of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.

## ANNEX 1B

### GENERAL AGREEMENT ON TRADE IN SERVICES

#### PART I SCOPE AND DEFINITION

Article I Scope and Definition

#### PART II GENERAL OBLIGATIONS AND DISCIPLINES

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Article VII	Recognition
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Annex on Telecommunications

Annex on Negotiations on Basic Telecommunications

**GENERAL AGREEMENT ON TRADE IN SERVICES**

*Members,*

*Recognizing* the growing importance of trade in services for the growth and development of the world economy;

*Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

*Desiring* the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

*Recognizing* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

*Desiring* to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

*Taking* particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows:

## PART I

### SCOPE AND DEFINITION

#### *Article I*

##### *Scope and Definition*

1. This Agreement applies to measures by Members affecting trade in services.
2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

- (a) "measures by Members" means measures taken by:
  - (i) central, regional or local governments and authorities; and
  - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

- (b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
- (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

## PART II

### GENERAL OBLIGATIONS AND DISCIPLINES

#### *Article II*

### *Most-Favoured-Nation Treatment*

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may 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.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

### *Article III*

#### *Transparency*

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit

within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

#### *Article III bis*

##### *Disclosure of Confidential Information*

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

#### *Article IV*

##### *Increasing Participation of Developing Countries*

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

- (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;
- (b) the improvement of their access to distribution channels and information networks; and
- (c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:



- (a) commercial and technical aspects of the supply of services;
- (b) registration, recognition and obtaining of professional qualifications; and
- (c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

#### *Article V*

#### *Economic Integration*

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

- (a) has substantial sectoral coverage<sup>23</sup>, and
- (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
  - (i) elimination of existing discriminatory measures, and/or
  - (ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

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<sup>23</sup> This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

*Article V bis*

*Labour Markets Integration Agreements*

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration<sup>24</sup> of the labour markets between or among the parties to such an agreement, provided that such an agreement:

- (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;
- (b) is notified to the Council for Trade in Services.

*Article VI*

*Domestic Regulation*

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2.
  - (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.
  - (b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

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<sup>24</sup> Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations<sup>25</sup> applied by that Member.

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<sup>25</sup> The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

## *Article VII*

### *Recognition*

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

- (a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;
- (b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

- (c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

### *Article VIII*

#### *Monopolies and Exclusive Service Suppliers*

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

## *Article IX*

### *Business Practices*

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

## *Article X*

### *Emergency Safeguard Measures*

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.
2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.
3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

## *Article XI*

### *Payments and Transfers*

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

## *Article XII*

### *Restrictions to Safeguard the Balance of Payments*

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

- (a) shall not discriminate among Members;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
- (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.



3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.
4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.
5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.
- (b) The Ministerial Conference shall establish procedures<sup>26</sup> for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.
- (c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:
- (i) the nature and extent of the balance-of-payments and the external financial difficulties;
- (ii) the external economic and trading environment of the consulting Member;
- (iii) alternative corrective measures which may be available.
- (d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).
- (e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

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<sup>26</sup> It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

### *Article XIII*

#### *Government Procurement*

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

### *Article XIV*

#### *General Exceptions*

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;<sup>27</sup>
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

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<sup>27</sup> The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
- (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective<sup>28</sup> imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

*Article XIV bis*

*Security Exceptions*

1. Nothing in this Agreement shall be construed:
  - (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

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<sup>28</sup> Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
- (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

- (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
  - (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
  - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

#### *Article XV*

#### *Subsidies*

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.<sup>29</sup> The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

### PART III

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<sup>29</sup> A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

## SPECIFIC COMMITMENTS

### *Article XVI*

#### *Market Access*

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.<sup>30</sup>
  
2. In sectors where market-access commitments are undertaken, the measures which a 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, are defined as:
  - (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
  
  - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
  
  - (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;<sup>31</sup>
  
  - (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

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<sup>30</sup> If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

<sup>31</sup> Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

## *Article XVII*

### *National Treatment*

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.<sup>32</sup>
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

## *Article XVIII*

### *Additional Commitments*

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

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<sup>32</sup> Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

## PART IV

### PROGRESSIVE LIBERALIZATION

#### *Article XIX*

##### *Negotiation of Specific Commitments*

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.
2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.
3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.
4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

#### *Article XX*

### *Schedules of Specific Commitments*

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. 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) undertakings 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.
2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.
3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

### *Article XXI*

#### *Modification of Schedules*

1.
  - (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.
  - (b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.



2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.  
  
(b) Compensatory adjustments shall be made on a most-favoured-nation basis.
3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.  
  
(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.
4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.  
  
(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.
5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

## PART V

### INSTITUTIONAL PROVISIONS

## *Article XXII*

### *Consultation*

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.
2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.
3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.<sup>33</sup> The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

## *Article XXIII*

### *Dispute Settlement and Enforcement*

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.
2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

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<sup>33</sup> With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

#### *Article XXIV*

##### *Council for Trade in Services*

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.
2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.
3. The Chairman of the Council shall be elected by the Members.

#### *Article XXV*

##### *Technical Cooperation*

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.
2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

#### *Article XXVI*

##### *Relationship with Other International Organizations*

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

## PART VI

### FINAL PROVISIONS

#### *Article XXVII*

##### *Denial of Benefits*

A Member may deny the benefits of this Agreement:

- (a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;
- (b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:
  - (i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and
  - (ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;
- (c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

#### *Article XXVIII*

##### *Definitions*

For the purpose of this Agreement:

- (a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
- (b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;
- (c) "measures by Members affecting trade in services" include measures in respect of
  - (i) the purchase, payment or use of a service;
  - (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
  - (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;
- (d) "commercial presence" means any type of business or professional establishment, including through
  - (i) the constitution, acquisition or maintenance of a juridical person, or
  - (ii) the creation or maintenance of a branch or a representative office,within the territory of a Member for the purpose of supplying a service;
- (e) "sector" of a service means,
  - (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
  - (ii) otherwise, the whole of that service sector, including all of its subsectors;
- (f) "service of another Member" means a service which is supplied,

- (i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or
  - (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;
- (g) "service supplier" means any person that supplies a service;<sup>34</sup>
- (h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;
- (i) "service consumer" means any person that receives or uses a service;
- (j) "person" means either a natural person or a juridical person;
- (k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:
- (i) is a national of that other Member; or
  - (ii) has the right of permanent residence in that other Member, in the case of a Member which:
    1. does not have nationals; or
    2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more

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<sup>34</sup> Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

- (l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
- (m) "juridical person of another Member" means a juridical person which is either:
  - (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or
  - (ii) in the case of the supply of a service through commercial presence, owned or controlled by:
    - 1. natural persons of that Member; or
    - 2. juridical persons of that other Member identified under subparagraph (i);
- (n) a juridical person is:
  - (i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
  - (ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;
  - (iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;
- (o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes

on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

#### *Article XXIX*

#### *Annexes*

The Annexes to this Agreement are an integral part of this Agreement.

### ANNEX ON ARTICLE II EXEMPTIONS

#### *Scope*

1. This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.
2. Any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement.

#### *Review*

3. The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.
4. The Council for Trade in Services in a review shall:
  - (a) examine whether the conditions which created the need for the exemption still prevail; and
  - (b) determine the date of any further review.

#### *Termination*



5. The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.

6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.

7. A Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with paragraph 1 of Article II of the Agreement.

#### *Lists of Article II Exemptions*

[The agreed lists of exemptions under paragraph 2 of Article II will be annexed here in the treaty copy of the WTO Agreement.]

### ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across,

its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.<sup>35</sup>

## ANNEX ON AIR TRANSPORT SERVICES

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.

2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

- (a) traffic rights, however granted; or
- (b) services directly related to the exercise of traffic rights,  
  
except as provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting:

- (a) aircraft repair and maintenance services;
- (b) the selling and marketing of air transport services;
- (c) computer reservation system (CRS) services.

4. The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.

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<sup>35</sup> The sole fact of 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 commitment.

5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

6. Definitions:

(a) "Aircraft repair and maintenance services" mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.

(b) "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.

(c) "Computer reservation system (CRS) services" mean services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

(d) "Traffic rights" mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

## ANNEX ON FINANCIAL SERVICES

1. *Scope and Definition*

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

## 2. *Domestic Regulation*

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

## 3. *Recognition*

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member

accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

#### 4. *Dispute Settlement*

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

#### 5. *Definitions*

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

##### *Insurance and insurance-related services*

(i) Direct insurance (including co-insurance):

(A)

(B) non-life

life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

##### *Banking and other financial services (excluding insurance)*

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A)

(B)

(C)

(D)

(E)

(F)

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

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(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term "financial service supplier" does not include a public entity.

(c) "Public entity" means:

(i) 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, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

#### SECOND ANNEX ON FINANCIAL SERVICES

1. Notwithstanding Article II of the Agreement and paragraphs 1 and 2 of the Annex on Article II Exemptions, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement.

2. Notwithstanding Article XXI of the Agreement, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, improve, modify or withdraw all or part of the specific commitments on financial services inscribed in its Schedule.

3. The Council for Trade in Services shall establish any procedures necessary for the application of paragraphs 1 and 2.

#### ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:

- (a) the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,
- (b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member's Schedule.

3. From the conclusion of the negotiations referred to in paragraph 1, and before the implementation date, a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI.

## ANNEX ON TELECOMMUNICATIONS

### 1. *Objectives*

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

### 2. *Scope*

(a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.<sup>36</sup>

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<sup>36</sup> This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.



(b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

(c) Nothing in this Annex shall be construed:

(i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

### 3. *Definitions*

For the purposes of this Annex:

(a) "Telecommunications" means the transmission and reception of signals by any electromagnetic means.

(b) "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) "Public telecommunications transport network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) "Intra-corporate communications" means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, "subsidiaries", "branches" and, where applicable, "affiliates" shall be as defined by each Member. "Intra-corporate communications" in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. *Transparency*

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. *Access to and use of Public Telecommunications Transport Networks and Services*

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).<sup>37</sup>

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

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<sup>37</sup> The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services; or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;

(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

## 6. *Technical Cooperation*

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

## 7. *Relation to International Organizations and Agreements*

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

#### ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:

(a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

# THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

(Source: WTO)

## 1. What is the main purpose of the GATS?

The creation of the GATS was one of the landmark achievements of the Uruguay Round, whose results entered into force in January 1995. The GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization.

While services currently account for over 60 percent of global production and employment, they represent no more than 20 per cent of total trade (BOP basis). This — seemingly modest — share should not be underestimated, however. Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend is likely to continue, owing to the introduction of new transmission technologies (e.g. electronic banking, tele-health or tele-education services), the opening up in many countries of long-entrenched monopolies (e.g. voice telephony and postal services), and regulatory reforms in hitherto tightly regulated sectors such as transport. Combined with changing consumer preferences, such technical and regulatory innovations have enhanced the “tradability” of services and, thus, created a need for multilateral disciplines.

## 2. Which countries participate?

All WTO Members, some 140 economies at present, are at the same time Members of the GATS and, to varying degrees, have assumed commitments in individual service sectors.

## 3. What services are covered?

The GATS applies in principle to all service sectors, with two exceptions.

Article I (3) of the GATS excludes “services supplied in the exercise of governmental authority”. These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and any other public service, such as health or education, that is provided at non-market conditions.

Further, the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.

## 4. Is it true that the GATS not only applies to cross-border flows of services, but additional modes of supply?

The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons.

**Cross-border supply** is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail);

**Consumption abroad** refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service;

**Commercial presence** implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and

**Presence of natural persons** consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

### **5. Why was it necessary to introduce, apart from the traditional concept of cross-border trade, three additional modes of supply?**

The supply of many services is possible only through the simultaneous physical presence of both producer and consumer. There are thus many instances in which, in order to be commercially meaningful, trade commitments must extend to cross-border movements of the consumer, the establishment of a commercial presence within a market, or the temporary movement of the service provider himself.

### **6. Does the GATS affect a Member's ability to pursue national policy objectives and priorities?**

The GATS expressly recognizes the right of Members to regulate the supply of services in pursuit of their own policy objectives, and does not seek to influence these objectives. Rather, the Agreement establishes a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner and do not constitute unnecessary barriers to trade.

### **7. What are the basic obligations under the GATS?**

Obligations contained in the GATS may be categorized into two broad groups: General obligations, which apply directly and automatically to all Members and services sectors, as well as commitments concerning market access and national treatment in specifically designated sectors. Such commitments are laid down in individual country schedules whose scope may vary widely between Members. The relevant terms and concepts are similar, but not necessarily identical to those used in the GATT; for example, national treatment is a general obligation in goods trade and not negotiable as under the GATS.

#### **(a) General obligations**

**MFN Treatment:** Under Article II of the GATS, Members are held to extend immediately and unconditionally to services or services suppliers of all other Members "treatment no less favourable than that accorded to like services and services suppliers of any other country". This amounts to a prohibition, in principle, of preferential arrangements among groups of Members in individual sectors or of reciprocity provisions which confine access benefits to trading partners granting similar treatment.

Derogations are possible in the form of so-called Article II-Exemptions. Members were allowed to seek such exemptions before the Agreement entered into force. New exemptions can only be granted to new Members at the time of accession or, in the case of current Members, by way of a waiver under Article IX:3 of the WTO Agreement. All exemptions are subject to review; they should in principle not last longer than 10 years. Further, the GATS allows groups of Members to enter into economic integration agreements or to mutually recognize regulatory standards, certificates and the like if certain conditions are met.

**Transparency:** GATS Members are required, *inter alia*, to publish all measures of general application and establish national enquiry points mandated to respond to other Member's information requests.

Other generally applicable obligations include the establishment of administrative review and appeals procedures and disciplines on the operation of monopolies and exclusive suppliers.

#### **(b) Specific Commitments**

**Market Access:** Market access is a negotiated commitment in specified sectors. It may be made subject to various types of limitations that are enumerated in Article XVI(2). For example, limitations may be imposed on the number of services suppliers, service operations or employees in the sector; the value of transactions; the legal form of the service supplier; or the participation of foreign capital.

**National Treatment:** A commitment to national treatment implies that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the Member's own service industry. Again, the extension of national treatment in any particular sector may be made subject to conditions and qualifications.

Members are free to tailor the sector coverage and substantive content of such commitments as they see fit. The commitments thus tend to reflect national policy objectives and constraints, overall and in individual sectors. While some Members have scheduled less than a handful of services, others have assumed market access and national treatment disciplines in over 120 out of a total of 160-odd services.

The existence of specific commitments triggers further obligations concerning, *inter alia*, the notification of new measures that have a significant impact on trade and the avoidance of restrictions on international payments and transfers.

### **8. What information is contained in services “schedules”?**

Each WTO Member is required to have a Schedule of Specific Commitments which identifies the services for which the Member guarantees market access and national treatment and any limitations that may be attached. The Schedule may also be used to assume additional commitments regarding, for example, the implementation of specified standards or regulatory principles. Commitments are undertaken with respect to each of the four different modes of service supply.

Most schedules consist of both sectoral and horizontal sections. The “Horizontal Section” contains entries that apply across all sectors subsequently listed in the schedule. Horizontal limitations often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. The “Sector-Specific Sections” contain entries that apply only to the particular service.

All schedules are available on the WTO website.

### **9. When did Members' specific commitments enter into force?**

The majority of current commitments entered into force on 1 January 1995, i.e. the date of entry into force of the WTO. New commitments have since been scheduled by participants in extended negotiations (see below) and by new Members that have joined the WTO.

### **10. Can commitments be introduced or improved outside the context of multilateral negotiations?**



Yes, any Member is free to expand or upgrade its existing commitments at any time.

### **11. Can specific commitments be withdrawn or modified?**

Pursuant to Article XXI, specific commitments may be modified subject to certain procedures. Countries which may be affected by such modifications can request the modifying Member to negotiate compensatory adjustments; these are to be granted on an MFN basis.

### **12. Are there any specific exemptions in the GATS to cater for important national policy interests?**

The GATS permits Members in specified circumstances to introduce or maintain measures in contravention of their obligations under the Agreement, including the MFN requirement or specific commitments. The relevant Article provides cover, *inter alia*, for measures necessary to:

- protect public morals or maintain public order;
- protect human, animal or plant life or health; or
- secure compliance with laws or regulations not inconsistent with the -Agreement including, among others, measures necessary to prevent deceptive or fraudulent practices.

Moreover, the Annex on Financial Services entitles Members, regardless of other provisions of the GATS, to take measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.

Finally, in the event of serious balance-of-payments difficulties Members are allowed to temporarily restrict trade, on a non-discriminatory basis, despite the existence of specific commitments.

### **13. Are there special provisions for developing countries?**

Developing country interests have inspired both the general structure of the Agreement as well as individual Articles. In particular, the objective of facilitating the increasing participation of developing countries in services trade has been enshrined in the Preamble to the Agreement and underlies the provisions of Article IV. This Article requires Members, *inter alia*, to negotiate specific commitments relating to the strengthening of developing countries' domestic services capacity; the improvement of developing countries' access to distribution channels and information networks; and the liberalization of market access in areas of export interest to these countries.

While the notion of progressive liberalization is one of the basic tenets of the GATS, Article XIX provides that liberalization takes place with due respect for national policy objectives and Members' development levels, both overall and in individual sectors. Developing countries are thus given flexibility for opening fewer sectors, liberalizing fewer types of transactions, and progressively extending market access in line with their development situation. Other provisions ensure that developing countries have more flexibility in pursuing economic integration policies, maintaining restrictions on balance of payments grounds, and determining access to and use of their telecommunications transport networks and services. In addition, developing countries are entitled to receive technical assistance from the WTO Secretariat.

### **14. What is the so-called “built-in agenda” of the GATS?**

The GATS, including its Annexes and Related Instruments, sets out a work programme which is normally referred to as the “built-in” agenda. The programme reflects both the fact that not all services-related negotiations could be concluded within the time frame of the Uruguay Round, and that Members have already committed themselves, in Article XIX, to successive rounds aimed at achieving a progressively higher level of liberalization (see below). In addition, various GATS Articles provide for issue-specific negotiations intended to define rules and disciplines for domestic regulation (Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). These negotiations are currently under way.

At the sectoral level, negotiations on basic telecommunications were successfully concluded in February 1997 and negotiations in the area of financial services in mid-December 1997. In these negotiations, Members achieved significantly improved commitments with a broader level of participation.

**15. Are the results of the extended sectoral negotiations in telecommunications and financial services legally different from other sector-specific commitments?**

No. The results of sectoral negotiations are new specific commitments and/or MFN exemptions related to the sector concerned. Thus, they are neither legally independent from other sector-specific commitments nor constitute agreements different from the GATS. The new commitments and MFN exemptions have been incorporated into the existing Schedules and Exemption Lists by way of separate Protocols to the GATS.

**16. Why was a new services round necessary?**

In services, the Uruguay Round was only a first step in a longer-term process of multilateral rule-making and trade liberalization. Observers tend to agree that, while the negotiations succeeded in setting up the principle structure of the Agreement, the liberalizing effects have been relatively modest. Barring exceptions in financial and telecommunication services, most schedules have remained confined to confirming status quo market conditions in a relatively limited number of sectors. This may be explained in part by the novelty of the Agreement and the perceived need of Members to gather experience before considering wider and deeper commitments. Moreover, many administrations needed time to develop the necessary regulation — including quality standards, licensing and qualification requirements — that ensures that external liberalization is compatible with, and conducive to, core policy objectives (quality, equity, etc.) in socially or infrastructurally important services.

More than ten years have passed since the Agreement's inception, and the economic importance of services — in terms of production, income, employment and trade — has continued to rise. There thus appears ample scope for new and/or improved commitments in new negotiations.

## AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

*Members,*

*Considering* that Ministers agreed in the Punta del Este Declaration that "Following an examination of the operation of GATT Articles related to the trade-restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade";

*Desiring* to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition;

*Taking into account* the particular trade, development and financial needs of developing country Members, particularly those of the least-developed country Members;

*Recognizing* that certain investment measures can cause trade-restrictive and distorting effects;

Hereby *agree* as follows:

### *Article 1*

#### *Coverage*

This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs").

### *Article 2*

#### *National Treatment and Quantitative Restrictions*

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

### *Article 3*

#### *Exceptions*

All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.

### *Article 4*

#### *Developing Country Members*

A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as 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 (BISD 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.

### *Article 5*

#### *Notification and Transitional Arrangements*

1. Members, within 90 days of the date of entry into force of the WTO Agreement, shall notify the Council for Trade in Goods of all TRIMs they are applying that are not in conformity with the provisions of this Agreement. Such TRIMs of general or specific application shall be notified, along with their principal features.<sup>38</sup>

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<sup>38</sup> In the case of TRIMs applied under discretionary authority, each specific application shall be notified. Information that would prejudice the legitimate commercial interests of particular enterprises need not be disclosed.

2. Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.
3. On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMs notified under paragraph 1 for a developing country Member, including a least-developed country Member, which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.
4. During the transition period, a Member shall not modify the terms of any TRIM which it notifies under paragraph 1 from those prevailing at the date of entry into force of the WTO Agreement so as to increase the degree of inconsistency with the provisions of Article 2. TRIMs introduced less than 180 days before the date of entry into force of the WTO Agreement shall not benefit from the transitional arrangements provided in paragraph 2.
5. Notwithstanding the provisions of Article 2, a Member, in order not to disadvantage established enterprises which are subject to a TRIM notified under paragraph 1, may apply during the transition period the same TRIM to a new investment (i) where the products of such investment 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 enterprises. Any TRIM so applied to a new investment shall be notified to the Council for Trade in Goods. The terms of such a TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

## *Article 6*

### *Transparency*

1. Members reaffirm, with respect to TRIMs, their commitment to obligations 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 adopted on 28 November 1979 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

2. Each Member shall notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories.

3. Each Member shall accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member. In conformity with Article X of GATT 1994 no Member is required to disclose information the disclosure of 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.

#### *Article 7*

##### *Committee on Trade-Related Investment Measures*

1. A Committee on Trade-Related Investment Measures (referred to in this Agreement as the "Committee") is hereby established, and shall be open to all Members. The Committee shall elect its own Chairman and Vice-Chairman, and shall meet not less than once a year and otherwise at the request of any Member.

2. The Committee shall carry out responsibilities assigned to it by the Council for Trade in Goods and shall afford Members the opportunity to consult on any matters relating to the operation and implementation of this Agreement.

3. The Committee shall monitor the operation and implementation of this Agreement and shall report thereon annually to the Council for Trade in Goods.

#### *Article 8*

##### *Consultation and Dispute Settlement*

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

#### *Article 9*

*Review by the Council for Trade in Goods*

Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

ANNEX

*Illustrative List*

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
  - (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
  - (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.
  
2. 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, or compliance with which is necessary to obtain an advantage, and which restrict:
  - (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
  - (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
  - (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

# **AGREEMENT ON TRADE RELATED INVESTMENT MEASURES**

(Source: WTO)

The Agreement on Trade-Related Investment Measures (TRIMS) recognizes that certain investment measures can restrict and distort trade. It states that WTO members may not apply any measure that discriminates against foreign products or that leads to quantitative restrictions, both of which violate basic WTO principles. A list of prohibited TRIMS, such as local content requirements, is part of the Agreement. The TRIMS Committee monitors the operation and implementation of the Agreement and allows members the opportunity to consult on any relevant matters.

## **Uruguay Round Negotiations on Trade-Related Investment Measures**

The Punta del Este Ministerial Declaration which launched the Uruguay Round included the subject of trade-related investment measures as a subject for the new round through a carefully drafted compromise:

“Following an examination of the operation of GATT Articles related to the trade-restrictive and trade-distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.” The emphasis placed in this mandate on trade effects made it clear that the negotiations were not intended to deal with the regulation of investment as such. The Uruguay Round negotiations on trade-related investment measures were marked by strong disagreement among participants over the coverage and nature of possible new disciplines. While some developed countries proposed provisions that would prohibit a wide range of measures in addition to the local content requirements found to be inconsistent with Article III in the FIRA panel case, many developing countries opposed this. The compromise that eventually emerged from the negotiations is essentially limited to an interpretation and clarification of the application to trade-related investment measures of GATT provisions on national treatment for imported goods (Article III) and on quantitative restrictions on imports or exports (Article XI). Thus, the TRIMS Agreement does not cover many of the measures that were discussed in the Uruguay Round negotiations, such as export performance and transfer of technology requirements.

## **The TRIMS Agreement**

### **Objectives**

The objectives of the Agreement, as defined in its preamble, include “the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country members, while ensuring free competition”.

### **Limitation of Coverage to Trade in Goods**

The coverage of the Agreement is defined in Article 1, which states that the Agreement applies to investment measures related to trade in goods only. Thus, the TRIMS Agreement does not apply to services.

### **What is a “Trade-Related Investment Measure”?**

The term “trade-related investment measures” (“TRIMs”) is not defined in the Agreement. However, the Agreement contains in an annex an Illustrative List of measures that are inconsistent with GATT Article III:4 or Article XI:1 of GATT 1994.

## **The TRIMs Agreement and Regulation of Foreign Investment**



As an agreement that is based on existing GATT disciplines on trade in goods, the Agreement is not concerned with the regulation of foreign investment. The disciplines of the TRIMs Agreement focus on investment measures that infringe GATT Articles III and XI, in other words, that discriminate between imported and exported products and/or create import or export restrictions. For example, a local content requirement imposed in a non-discriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement because it involves discriminatory treatment of imported products in favour of domestic products. The fact that there is no discrimination between domestic and foreign investors in the imposition of the requirement is irrelevant under the TRIMs Agreement.

### **Basic Substantive Obligations: Article 2 and the Illustrative List**

Article 2.1 of the TRIMs Agreement requires Members not to apply any TRIM that is inconsistent with the provisions of Article III (national treatment of imported products) or Article XI (prohibition of quantitative restrictions on imports or exports) of GATT 1994. An Illustrative List annexed to the TRIMs Agreement lists measures that are inconsistent with paragraph 4 of Article III and paragraph 1 of Article XI.

### **Mandatory and Non-mandatory Measures**

The Illustrative List covers both TRIMs which are mandatory or enforceable under domestic law or under administrative rulings and TRIMs compliance with which is necessary to obtain an advantage.

### **Distinction between Paragraphs 1 and 2 of the Illustrative List**

TRIMs identified in paragraph 1 of the Illustrative List as being inconsistent with Article III:4 concern the purchase or use of products by an enterprise, while the TRIMs listed in paragraph 2 as inconsistent with Article XI:1 of GATT 1994 concern the importation or exportation of products by an enterprise.

### **TRIMs which are inconsistent with the national treatment obligation of Article III:4 of GATT 1994**

Paragraph 1(a) of the Illustrative List covers local content TRIMs, which require the purchase or use by an enterprise of products of domestic origin or domestic source (local content requirements) while paragraph 1(b) covers trade-balancing TRIMs, which limit the purchase or use of imported products by an enterprise to an amount related to the volume or value of local products that it exports. In both cases, the inconsistency with Article III:4 of GATT 1994 results from the fact that the measure subjects the imported products (to be purchased or used by an enterprise) to less favourable conditions than domestic products (to be purchased or used by an enterprise).

### **TRIMs which are inconsistent with the prohibition on imposition of quantitative restrictions of Article XI:1 of GATT 1994**

Paragraph 2(a) of the Illustrative List covers measures which limit the importation by an enterprise of products used in its local production, generally or to an amount related to the volume or value of local production exported by the enterprise. There is a conceptual similarity between this paragraph and paragraph 1(b) in that they both cover trade-balancing measures. The difference is that paragraph 1(b) deals with internal measures that affect products after they have been imported, while paragraph 2(a) deals with border measures affecting the importation of products.

Measures identified in paragraph 2(b) of the list involve a restriction of imports in the form of a foreign exchange balancing requirement. Importation by an enterprise of products used in or related to local production is limited by restricting the enterprise's access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise.

Finally, paragraph 2(c) covers measures involving restrictions on the exportation of or sale for export by an enterprise, whether specified in terms of particular products, volume or value of products or in terms of a proportion of volume or value of its local production. Since paragraph 2 applies the provisions of Article XI:1 of GATT 1994, it deals only with measures that restrict exports. Other measures relating to exports, such as export incentives and export performance requirements, are therefore not covered by the TRIMs Agreement.

## **Exceptions**

### **General exceptions**

Article 3 of the TRIMs Agreement provides that all exceptions under GATT 1994 shall apply, as appropriate, to the provisions of the TRIMs Agreement.

### **Developing countries**

Article 4 allows developing countries to deviate temporarily from the obligations of the TRIMs Agreement, as provided for in Article XVIII of GATT 1994 and related WTO provisions on safeguard measures for balance-of-payments difficulties.

### **Notification requirements**

Under Article 5.1 Members were required to notify to the Council for Trade in Goods, within 90 days after the date of entry into force of the WTO Agreement, any TRIMs that were not in conformity with the Agreement. A decision adopted by the WTO General Council in April 1995 provided that governments that were not Members of the WTO on 1 January 1995, but were entitled to become original Members within a period of two years after 1 January 1995, were to notify under Article 5.1 within 90 days after the date of their acceptance of the WTO Agreement.

Countries that are not original Members of the WTO, in other words, newly acceding Members, may be required to notify in accordance with any terms and conditions specified in their Accession Protocols.

### **Notifications received under Article 5.1**

Notifications under Article 5.1 were submitted by 27 Members. These notifications have been circulated in the G/TRIMS/N/1/COUNTRY/—series of documents.

### **Transition period for the elimination of TRIMs which are inconsistent with the Agreement**

Members were obliged under Article 5.2 of the TRIMs Agreement to eliminate TRIMs which were notified under Article 5.1. Such elimination was to have taken place within two years after the date of the entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of developing countries and within seven years in the case of a least developed country Member.

### **Limitation of the benefits of the transition period to existing measures**

TRIMs introduced less than 180 days before the date of the entry into force of the WTO Agreement did not benefit from these transition periods. Thus, the transition provisions of the TRIMs Agreement did not permit the introduction of new TRIMs that are inconsistent with the Agreement.

### **“Standstill” requirement during the transition period**

The Agreement precluded Members from changing measures notified under Article 5.1 in a manner which would increase their inconsistency with the Agreement (Article 5.4). However, if a Member had notified a TRIM under Article 5.1, it could have applied, during the transition period, the same

TRIM to a new investment in order to avoid a distortion of competition between the new investment and existing investments (Article 5.5).

### **Possible extension of the transition period**

Under Article 5.3, the Council for Trade in Goods may, on request, extend the transition period for the elimination of TRIMs in the case of a developing country which demonstrates particular difficulties in implementing the provisions of the Agreement.

In August 2001, the Council for Trade in Goods adopted a series of Decision to extend the transition period for eight Members to December 2001, with the possibility of a further extension of two years. In November 2001, the CTG adopted another series of Decisions to extend the transition period for these same members for another two years, to December 2003 (for one Member the period was extended to May 2003 and for another to June 2003).

### **Transparency**

Provisions designed to ensure transparency with respect to the application of TRIMs are contained in Article 6 of the TRIMs Agreement. This Article provides in particular for the notification to the WTO Secretariat of lists of publications in which TRIMs may be found. Notifications received under these provisions are listed in the document G/TRIMS/N/2/- series.

### **Committee on Trade-Related Investment Measures**

Article 7 of the TRIMs Agreement establishes a Committee on Trade-Related Investment Measures as a forum to examine the implementation operation of the Agreement. The Committee meets not less than once a year. Much of the early work of the Committee focused on the notifications received under Article 5.1 of the Agreement. Today, the Committee's work is mainly focused on discussing specific concerns raised by certain Members regarding other Members' trade-related investment measures.

### **Dispute Settlement**

The general WTO dispute settlement procedure, as laid down in the Dispute Settlement Understanding, applies to disputes arising under the TRIMs Agreement (Article 8). Issues relating to the alleged inconsistency of particular measures with the TRIMs Agreement have been raised in 34 requests for consultations under the DSU. 16 of these cases have moved to the establishment of a panel, while 6 have been settled or terminated through a mutually agreed solution. The remainder are still in consultation phase.

### **Review of the TRIMs Agreement: Investment Policy and Competition Policy as Subjects for Future Consideration**

Article 9 stipulates that, not later than five years after the date of entry into force of the Agreement, the Council for Trade in Goods shall review the operation of the TRIMs Agreement. In this review, consideration is to be given as to whether the Agreement should be supplemented with provisions on investment policy and competition policy. The CTG discussed the Article 9 Review at its meetings from October 1999 to November 2006. In October 2002, India and Brazil proposed that a study on the impacts of TRIMs and their elimination be carried out under the Review. At the November 2006 CTG meeting, the Chairman stated that members were unable to reach a consensus on the desirability of conducting the proposed study. The CTG agreed to revert to the Article 9 Review at a future meeting at the request of any interested Member. To date, no such request has been made.

***European Communities — Regime for the Importation, Sale and Distribution of Bananas, WT/DS 27, 5 Feb., 1996***

**Key facts**

Short title:	EC – Bananas III
Complainant:	Ecuador; Guatemala; Honduras; Mexico; United States
Respondent:	European Communities
Third Parties:	Belize; Cameroon; Canada; Colombia; Costa Rica; Dominica; Dominican Republic; Ghana; Grenada; India; Jamaica; Japan; Mauritius; Nicaragua; Panama; Philippines; Saint Lucia; Saint Vincent and the Grenadines; Senegal; Suriname; Venezuela, Bolivarian Republic of; Côte d'Ivoire; Brazil; Madagascar
Agreements cited: (as cited in request for consultations)	Agriculture: Art. <u>19</u> Services (GATS): Art. <u>II</u> , <u>IV</u> , <u>XVI</u> , <u>XVII</u> GATT 1994: Art. <u>I</u> , <u>II</u> , <u>III</u> , <u>X</u> , <u>XI</u> , <u>XIII</u> Import Licensing: Art. <u>1</u> , <u>3</u> Trade-Related Investment Measures (TRIMs): Art. <u>2</u> , <u>5</u>
<u>Request for Consultations</u> received:	5 February 1996
<u>Panel Report</u> circulated:	22 May 1997
<u>Appellate Body Report</u> circulated:	9 September 1997
<u>Article 21.3(c) Arbitration Report</u> circulated:	7 January 1998
<u>Article 21.5 Panel Report</u> (Ecuador) circulated:	12 April 1999
<u>Article 21.5 Panel Report</u> (European Communities) circulated:	12 April 1999
<u>Recourse to Article 22.6 Arbitration Report</u> circulated:	9 April 1999
<u>Mutually Agreed Solution</u> notified:	2 July 2001
<u>Second Recourse to Article 21.5 Panel Report</u> (Ecuador) circulated:	7 April 2008

<u>Article 21.5 Panel Report</u> (United States) circulated:	19 May 2008
<u>Second Recourse to Article 21.5 Appellate Body Report</u> (Ecuador) circulated:	26 November 2008
<u>Article 21.5 Appellate Body Report</u> (United States) circulated:	26 November 2008

### **Consultations**

Complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.

The complainants in this case other than Ecuador had requested consultations with the European Communities on the same issue on 28 September 1995 (DS16). After Ecuador's accession to the WTO, the current complainants again requested consultations with the European Communities on 5 February 1996. The complainants alleged that the European Communities' regime for importation, sale and distribution of bananas is inconsistent with Articles I, II, III, X, XI and XIII of the GATT 1994 as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS.

On 11 April 1996, the five complainants requested the establishment of a panel. At its meeting on 24 April 1996, the DSB deferred the establishment of a panel.

### **Panel and Appellate Body proceedings**

Further to a second request by the five complainants, a panel was established at the DSB meeting on 8 May 1996. On 29 May 1996, the five complainants requested the Director-General to determine the composition of the Panel. On 7 June 1996, the panel was composed. The panel report was circulated to Members on 22 May 1997. The panel found that the European Communities' banana import regime and the licensing procedures for the importation of bananas in this regime are inconsistent with the GATT 1994. The panel further found that the Lomé waiver waives the inconsistency with Article XIII of the GATT 1994, but found no inconsistencies arising from the licensing system.

On 11 June 1997, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body report was circulated to Members on 9 September 1997. The Appellate Body mostly upheld the panel's findings, but reversed the panel's findings that the inconsistency with Article XIII of the GATT 1994 is waived by the Lomé waiver, and that certain aspects of the licensing regime violated Article X of GATT 1994 and the Import Licensing Agreement.

At its meeting on 25 September 1997, the Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB.

### **Reasonable period of time**

On 17 November 1997, the complainants requested that the reasonable period of time (RPT) for implementation of the recommendations and rulings of the DSB be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. The Award of the Arbitrator was circulated to Members on 7 January 1998. The Arbitrator determined that the RPT for implementation to be 15 months and 1 week from the date of the adoption of the reports i.e. it expired on 1 January 1999.

### **Compliance proceedings**

On 18 August 1998, further to the European Communities' revision of their legislation and despite holding that Article 21.5 does not require parties to consult as a prior condition to resort to these proceedings the complainants requested, in the interest of avoiding any further delay, consultations with the European Communities for the resolution of the disagreement between them over the WTO-consistency of measures introduced by the European Communities in purported compliance with the recommendations and rulings of the Panel and Appellate Body. The European Communities then

adopted a second Regulation which it said completed the implementation of the recommendations and rulings regarding this dispute insofar as its new system would be fully applicable from 1 January 1999, date of the expiry of the RPT. On 13 November 1998, Ecuador requested the reactivation of consultations initiated by a letter sent jointly with the other co-complainants on 18 August 1998 and held on 17 September 1998. On 18 November 1998, the European Communities confirmed their willingness to reactivate the consultations with a view to concluding the discussion of the subjects that were not discussed during the September consultations. Consultations between Ecuador and the European Communities took place on 23 November 1998 with the presence of Mexico who joined as a co-complainant in the same meeting.

On 15 December 1998 the European Communities requested the establishment of a panel under Article 21.5 (the EC compliance panel). The European Communities' request for a compliance panel was made in response to measures taken by the United States regarding the EC implementing measures, which the United States considered had failed to implement the WTO recommendations. More specifically, the European Communities requested the compliance panel to determine that the EC implementing measures must be presumed to conform to WTO rules unless challenged in accordance with DSU procedures. The complainants other than Ecuador objected in writing to the fact that the European Communities' request be considered as constituting recourse to Article 21.5 alleging that there was no procedural basis for treating a forthcoming meeting as the second DSB meeting at which the panel could be established and that the European Communities had not satisfied its own stipulated precondition for the lodging of such request insofar as it had not sought consultations on the matter.

On 18 December 1998, Ecuador requested the re-establishment of the original panel to examine whether the EC measures to implement the recommendations of the DSB were WTO-consistent. (Ecuador compliance panel).

At its meeting on 12 January 1999, the DSB agreed to reconvene the original panel, pursuant to Article 21.5 of the DSU, to examine both Ecuador's and the European Communities' compliance panel requests. Jamaica, Nicaragua, Colombia, Costa Rica, Côte d'Ivoire, Dominican Republic, Dominica, St. Lucia, Mauritius, St. Vincent, indicated their interest to join as third parties in both requests, while Ecuador and India indicated their third-party interest only in the European Communities' request. The four original complaining parties other than Ecuador (i.e. Guatemala, Honduras, Mexico and the United States) refrained from requesting a panel or from joining the procedure initiated by Ecuador.

On 14 January 1999, the United States requested pursuant to Article 22.2 of the DSU, the DSB's authorization to suspend concessions or other obligations (see below). On 8 November 1999, and prior to the adoption of the reports of the European Communities and Ecuador compliance panels, Ecuador also requested authorization from the DSB to suspend the application to the European Communities of concessions or other related obligations (see below). On 18 January 1999, the compliance panels were composed. The two compliance panel reports were circulated on 12 April 1999.

The EC compliance panel found that, because a challenge had actually been made by Ecuador regarding the WTO-consistency of the EC measures taken in implementation of the DSB recommendations, it was unable to agree with the European Communities that the European Communities must be presumed to be in compliance with the recommendations of the DSB. The report of the EC compliance panel was never adopted by the DSB.

The compliance panel requested by Ecuador found that the implementation measures taken by the European Communities in compliance with the recommendations of the DSB were not fully compatible with the European Communities' WTO obligations. The report of the Ecuador compliance panel was adopted by the DSB on 6 May 1999.

#### **Proceedings under Article 22 of the DSU (remedies)**

On 14 January 1999, the United States requested, pursuant to Article 22.2 of the DSU, the DSB's authorization to suspend of concessions or other obligations to the European Communities in an amount of USD520 million. The European Communities objected to the level of suspension proposed

by the United States on the ground that it was not equivalent to the level of nullification or impairment of benefits suffered by the United States and claimed that the principles and procedures set out in Article 22.3 of the DSU had not been followed. Pursuant to Article 22.6 of the DSU, the European Communities requested that the original panel carry out the arbitration on the level of suspension of concessions requested by the United States. The DSB referred the issue of the level of suspension to the original panel for arbitration on 29 January 1999. The decision by the arbitrator was circulated on 9 April 1999. The Arbitrator found that the level of suspension sought by the United States was not equivalent to the level of nullification and impairment suffered as a result of the EC's new banana regime not being fully compatible with the WTO. The Arbitrator accordingly determined the level of nullification suffered by the United States to be equal to USD191.4 million per year and that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of USD191.4 million per year would be consistent with Article 22.4 of the DSU.

On 9 April 1999, the United States, pursuant to Article 22.7 of the DSU, requested that the DSB authorize suspension of concessions to the European Communities equivalent to the level of nullification and impairment, i.e. USD191.4 million. On 19 April 1999, the DSB authorized the United States to suspend concessions to the European Communities as requested. On 8 November 1999, and prior to the adoption of the compliance panel report by Ecuador (see above), Ecuador requested authorization from the DSB to suspend the application to the European Communities of concessions or other related obligations under the TRIPS Agreement, GATS and GATT 1994, pursuant to Article 22.2 of the DSU, in an amount of USD450 million. At the DSB meeting on 19 November 1999, the European Communities objected to the proposed level of suspension alleging it exceeded the level of nullification or impairment Ecuador had suffered and to Ecuador's request for cross-retaliation stating Ecuador has not followed the principles and procedures set forth in Article 22.3 of the DSU. The European Communities therefore requested, pursuant to Article 22.6 of the DSU, the matter be referred to arbitration. At its meeting on 19 November 1999, the DSB referred the issue to the original panel for arbitration in accordance with Article 22.6 of the DSU.

The Arbitrator's decision on the Ecuadorian request for suspension of concessions was circulated to Members on 24 March 2000. The Arbitrator found that the level of nullification and impairment suffered by Ecuador amounted to USD201.6 million per year. The Arbitrator found that Ecuador's request for retaliation did not follow the principles and procedures set forth in Article 22.3, especially regarding the suspension of concessions under the GATT 1994 with respect to goods destined for final consumption and that the level of suspension requested by Ecuador exceeded the level of nullification and impairment suffered by it as a result of the European Communities' failures to bring the EC banana import regime into compliance with WTO law within the RPT. Accordingly, the Arbitrator found that Ecuador may request authorization by the DSB to suspend concessions or other obligations under GATT 1994 (not including investment goods or primary goods used as inputs in manufacturing and processing industries); under GATS with respect to "wholesale trade services" (CPC 622) in the principal distribution services; and, to the extent that suspension requested under GATT 1994 and GATS was insufficient to reach the level of nullification and impairment determined by the Arbitrator, under TRIPS in the following sectors of that Agreement: Section 1 (copyright and related rights); Article 14 on protection of performers, producers of phonograms and broadcasting organisations), Section 3 (geographical indications), Section 4 (industrial designs). The Arbitrator also noted that, pursuant to Article 22.3 of the DSU, Ecuador should first seek to suspend concessions or other obligations with respect to the same sectors as those in which the panel reconvened at the request of Ecuador pursuant to Article 21.5 of the DSU had found violations, i.e. GATT 1994 and the sector of distribution services under GATS. On 8 May 2000, Ecuador requested, pursuant to Article 22.7 of the DSU, that the DSB authorize the suspension of concessions to the EC equivalent to the level of nullification and impairment, i.e. US\$201.6 million. On 18 May 2000, the DSB authorized Ecuador to suspend concessions to the European Communities as requested.

### **Compliance proceedings (second recourse)**

On 30 November 2005, Honduras, Nicaragua and Panama requested consultations with the European Communities under Article 21.5 of the DSU concerning the measures adopted on 29 November 2005 by the European Communities to address the requirements provided for by the Waiver adopted in Doha Ministerial in November 2001 with regard to banana trade (“Doha Waiver”) (see below). The measures at issue are relevant provisions of the recently passed EC Council Regulation governing the import regime for banana. The measures at issues were adopted following two Arbitrations under the Doha Waiver, both of which ruled against previous proposals by the European Communities to address the same matter. According to the requests, the EC Council Regulation is WTO-inconsistent in the following respects:

- The 176€/mt MFN rate is inconsistent with the Doha Waiver in all its parts, the Arbitration Awards of 1 August and 27 October 2005, GATT Article XXVIII, and the Appellate Body report and the Panel report as modified by the Appellate Body Report in EC-Bananas III; and
- The zero-duty ACP tariff quota of 775,000 mt and over-quota ACP tariff of 176€/mt are inconsistent with the Doha Waiver in all its parts, the Arbitration Awards of 1 August and 27 October 2005, GATT Articles I and XIII, and the Appellate Body report and the Panel report as modified by the Appellate Body Report in EC-Bananas III.

On 16 November 2006, Ecuador requested consultations under Article 21.5 of the DSU and Article XXIII of the GATT 1994 with respect to measures taken by the European Communities to comply with the recommendations and rulings contained in Council Regulation No. 1964/2005 (“Regulation 1964”) and its associated implementing regulations taken in the framework of the two “Understandings on Bananas” the European Communities reached in April 2001 with the United States and Ecuador (see below). On 28 November 2006, Ecuador submitted a revised request for consultations under Article 21.5 of the DSU and Article XXII of the GATT 1994. On 30 November 2006, Belize, Côte d'Ivoire, Dominica, the Dominican Republic, St. Lucia, St. Vincent and the Grenadines, and Suriname requested to join the consultations. On 4 December 2006, Cameroon requested to join the consultations. On 6 December 2006, Jamaica requested to join the consultations. On 11 December 2006, Panama and the United States requested to join the consultations. The European Communities informed the DSB that they had accepted all the requests to join the consultations. On 23 February 2007, Ecuador requested the establishment of a compliance panel. At its meeting on 20 February 2007, the DSB deferred the establishment of a compliance panel. At its meeting on 20 March 2007, the DSB agreed to refer to the original panel, if possible, the question of whether the new EC banana regime was in conformity with the DSB's recommendations and rulings. Cameroon, Colombia, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Jamaica, Japan, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and the United States reserved their third-party rights. Subsequently, Belize, Brazil, Madagascar, Nicaragua, Panama and Suriname reserved their third-party rights.

On 5 June 2007, Ecuador requested the Director-General to determine the composition of the compliance panel. On 15 June 2007, the Director-General composed the compliance panel. On 5 December 2007, the Chairman of the compliance panel informed the DSB that it would not be possible to circulate its report within 90 days after the date of referral. The compliance panel expected to issue its final report to parties in December 2007 and, following translation, the final report was expected to be circulated to Members in February 2008.

On 29 June 2007, the United States requested the establishment of a compliance panel as it considered that the European Communities had failed to bring its import regime for bananas into compliance with its WTO obligations and the regime remains inconsistent. At its meeting on 12 July 2007, the DSB referred the matter to the original panel, if possible. Brazil, Cameroon, Colombia, the Dominican Republic, Ecuador, Jamaica, Japan, Nicaragua and Panama reserved their third-party rights. Subsequently, Belize, Côte d'Ivoire, Dominica, Mexico, St. Lucia, St. Vincent and the Grenadines, and Suriname reserved their third-party rights.

On 3 August 2007, the United States requested the Director-General to determine the composition of the compliance panel. On 13 August 2007, the Director-General composed the compliance panel. On



21 February 2008, the Chairman of the compliance panel informed the DSB that it would not be possible to circulate its report within 90 days after the date of referral. The compliance panel expected to issue its final report to parties no later than the end of the first week of March 2008.

On 7 April 2008, the compliance panel report requested by Ecuador was circulated to Members. The Panel rejected the preliminary issue raised by the European Communities that Ecuador is prevented from challenging the EC current import regime for bananas, including the preference for ACP countries, because of the Understanding on Bananas, signed by both Members in April 2001. Accordingly, and after having examined the substantive claims raised by Ecuador as well as the defences invoked by the European Communities, the compliance panel concluded that:

- The preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and is therefore inconsistent with Article I:1 of GATT 1994;
- With the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, there is no evidence that, during the period that is relevant for this Panel's findings, that is, from the time of the establishment of the Panel until the date of this Report, any waiver from Article I:1 of GATT 1994 has been in force to cover the preference granted by the European Communities to the duty-free tariff quota of imported bananas originating in ACP countries;
- The EC current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1, with the chapeau of Article XIII:2, and with Article XIII:2(d) of the GATT 1994;
- The tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the EC Schedule. This tariff is therefore inconsistent with the first sentence of Article II:1(b) of the GATT 1994; and,
- It is unnecessary, for the resolution of this dispute, to make a separate finding on Ecuador's claim under Article II:1(a) of the GATT 1994.

In consequence, the compliance panel concluded that, through its current regime for the importation of bananas, established in Council Regulation (EC) No. 1964/2005 of 29 November 2005, including the duty-free tariff quota for bananas originating in ACP countries and the MFN tariff currently set at €176/mt, the European Communities had failed to implement the recommendations and rulings of the DSB.

The compliance panel recommended that the DSB request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994.

On 19 May 2008, the compliance panel report requested by the United States was circulated to Members. Regarding the preliminary objections advanced by the European Communities, the compliance panel found that:

- the United States had, under the DSU, the right to request the initiation of the current compliance dispute settlement proceedings;
- the European Communities has not succeeded in making a prima facie case that the United States is prevented from challenging the EC current import regime for bananas, including the preference for ACP countries, because of the Bananas Understanding, signed between the United States and the European Communities in April 2001; and

- the European Communities has failed in making a case that the United States' complaint under Article 21.5 of the DSU should be rejected, because the EC current import regime for bananas, including the preference for ACP countries, is not a “measure taken to comply” with the recommendations and rulings of the DSB in the original proceedings.

The compliance panel accordingly rejected the preliminary issues raised by the European Communities.

After having examined the substantive claims raised by the United States, as well as the defences invoked by the European Communities, the compliance panel concluded that:

- The preference granted by the European Communities to an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constitutes an advantage for this category of bananas, which is not accorded to like bananas originating in non-ACP WTO Members, and is therefore inconsistent with Article I:1 of the GATT 1994;
- With the expiration of the Doha Waiver from 1 January 2006 as it applied to bananas, the European Communities has failed to demonstrate the existence of a waiver from Article I:1 of the GATT 1994 to cover the preference granted by the European Communities to the duty-free tariff quota of imported bananas originating in ACP countries; and
- the EC current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is also inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994;

In consequence, the compliance panel concluded that, through its current regime for the importation of bananas, established in Council Regulation (EC) No. 1964/2005 of 29 November 2005, in particular its duty-free tariff quota for bananas originating in ACP countries, the European Communities had failed to implement the recommendations and rulings of the DSB.

The compliance panel also concluded that, to the extent that the current EC bananas import regime contains measures inconsistent with various provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement.

Since the original DSB recommendations and rulings in this dispute remain operative through the results of the current compliance proceedings, the compliance panel made no new recommendation.

Pursuant to a request from Ecuador and the European Communities, at its meeting on 2 June 2008, the DSB agreed to an extension of the time-period in Article 16.4 to enable them to explore the possibility of reaching a mutually agreed solution.

Pursuant to a request from the United States and the European Communities, at its meeting on 24 June 2008, the DSB agreed to an extension of the time-period in Article 16.4 to enable them to explore the possibility of reaching a mutually satisfactory solution.

On 28 August 2008, the European Communities notified its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the compliance panel relating to the compliance panels requested by Ecuador and the United States. On 9 September 2008, Ecuador notified its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the compliance panel.

On 21 October 2008, the Chairman of the Appellate Body notified the DSB that it would not be able to circulate its reports within 60 days due to the time required for completion and translation of the report. It was estimated that the reports would be circulated no later than 26 November 2008.

On 26 November 2008, the Appellate Body reports were circulated to Members.

In the appeal of the compliance panel report requested by Ecuador, with respect to procedural issues, the Appellate Body found the compliance panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States; and upheld

the compliance panel's finding, albeit for different reasons, that Ecuador was not barred by the Understanding on Bananas from initiating this compliance proceeding.

With respect to Article XIII of the GATT 1994, the Appellate Body upheld the compliance panel's findings that, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, the compliance panel was not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador; and that, therefore, the compliance panel did not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador. The Appellate Body also upheld, albeit for different reasons, the compliance panel's finding that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994.

With respect to Article II of the GATT 1994, the Appellate Body reversed the compliance panel's finding that the Doha Article I Waiver constituted a subsequent agreement between the parties extending the tariff quota concession for bananas listed in the European Communities' Schedule of Concessions beyond 31 December 2002, until the rebinding of the EC tariff on bananas. The Appellate Body also reversed the compliance panel's finding that the EC tariff quota concession for bananas was intended to expire on 31 December 2002 on account of paragraph 9 of the Bananas Framework Agreement.

The Appellate Body upheld, albeit for different reasons, the compliance panel's findings that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that provided for in the EC Schedule of Concessions, and thus inconsistent with Article II:1(b) of the GATT 1994 and that the European Communities, by maintaining measures inconsistent with different provisions of the GATT 1994, including Article XIII, had nullified or impaired benefits accruing to Ecuador under that Agreement.

The Appellate Body recommended that the DSB request the European Communities to bring its measure, found to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

In the appeal of the compliance panel report requested by the United States, with respect to procedural issues, the Appellate Body found that the compliance panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States, albeit for different reasons, upheld the compliance panel's findings that the United States was not barred by the Understanding on Bananas from initiating this compliance proceeding and that the EC Bananas Import Regime constituted a "measure taken to comply" within the meaning of Article 21.5 of the DSU and was therefore properly before the compliance panel. The Appellate Body also found that the compliance panel did not err in making findings with respect to a measure that had ceased to exist subsequent to the establishment of the compliance panel, but before the compliance panel issued its report. The Appellate Body also found that the deficiencies in the European Communities' Notice of Appeal do not lead to dismissal of the European Communities' appeal.

With respect to Article XIII of the GATT 1994, the Appellate Body upheld, albeit for different reasons, the compliance panel's finding that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994 and the compliance panel's finding that to the extent that the EC Bananas Import Regime contained measures inconsistent with various provisions of the GATT 1994, it nullified or impaired benefits accruing to the United States under that Agreement.

As the measure at issue was no longer in existence, the Appellate Body did not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

At its meeting on 11 December 2008, with respect to the compliance panel requested by Ecuador, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

At its meeting on 22 December 2008, with respect to the compliance panel requested by the United States, the DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report.

### **Implementation of adopted reports**

At the DSB meeting on 19 November 1999 and following the first series of compliance panel proceedings (see above), the European Communities informed the DSB of its proposal for reform of the banana regime, which envisages a two-stage process, comprising a tariff rate quota system for several years. This system should then be replaced by a tariff only system no later than 1 January 2006. The proposal includes a decision to continue discussions with interested parties on the possible systems for distribution of licences for the tariff rate quota regime. If no feasible system can be found, the proposal for a transitional tariff rate quota regime would not be maintained and negotiations under Article XXVIII of GATT 1994 would be envisaged to replace the current system with a tariff only regime. At the DSB meeting on 24 February 2000, the EC explained that there continued to be divergent views expressed by the main parties concerned and that, as a result, no agreed conclusions could be reached.

At the DSB meeting of 27 July 2000 and following the Arbitrator's decision on the Ecuadorian request for suspension of concessions (see above), the European Communities stated with respect to implementation of the recommendations of the DSB that it had begun examining the possibility of managing the proposed tariff rate quotas on a first come, first served basis because negotiations with interested parties on tariff rate quota allocation on the basis of traditional trade flows had reached an impasse. The European Communities also said that its examination would include a tariff only system and its implications. At the DSB meeting of 23 October 2000, the European Communities stated that it was finalizing its internal decision-making process with a view to implementing the new banana regime. To this effect, the European Communities considered that, during a transitional period of time, its new banana regime should be regulated by the establishment of tariff-rate quotas and managed on the basis of a "first-come, first-served" (FCFS) system. Before the end of transitional period of time, the European Communities would initiate Article XXVIII negotiations with a view to establishing a tariff-only system. On 1 March 2001, the European Communities reported to the DSB that on 29 January 2001, the Council of the European Union adopted Regulation (EC) No 216/2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas. The modifications made in Council Regulation 216/2001 provide for three tariff quotas open to all imports irrespective of their origin: (1) a first tariff quota of 2.200.000 tonnes at a rate of 75€/tonnes, bound under the WTO; (2) a second autonomous quota of 353.000 tonnes at a rate of 75€/tonnes; (3) a third autonomous quota of 850.000 tonnes at a rate of 300€/tonnes. Imports from ACP countries will enter duty-free. In view of contractual obligations towards these countries and the need to guarantee proper conditions of competition, they will benefit from a tariff preference limited to a maximum of 300€/tonnes. The tariff quotas are a transitional measure leading ultimately to a tariff-only regime. According to the European Communities, substantial progress has been achieved with respect to the implementing measures necessary to manage the three tariff rate quotas on the basis of the First-come, First-served method.

On 3 May 2001, the European Communities reported to the DSB that intensive discussions with the United States and Ecuador, as well as the other banana supplying countries, including the other co-complainants, have led to the common identification of the means by which the long-standing dispute over the EC's bananas import regime will be resolved. In accordance with Article 16(1) of Regulation No (EC) 404/93 (as amended by Council Regulation No (EC) 216/2001), the EC will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. GATT Article XXVIII negotiations will be initiated in good time to that effect. In the interim period, starting on 1 July 2001, the European Communities will implement an import regime based on three tariff rate quotas, to be allocated on the basis of historical licensing.

On 22 June 2001, the European Communities notified an "Understanding on Bananas between the European Communities and the United States" of 11 April 2001, and an "Understanding on Bananas between the European Communities and Ecuador" of 30 April 2001. Pursuant to these

Understandings with the United States and Ecuador, the European Communities will implement an import regime on the basis of historical licensing as follows:

- effective 1 July 2001, the European Communities will implement an import regime on the basis of historical licensing as set out in annex to each of the Understandings;
- effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of an Article XIII waiver, the European Communities will implement an import regime on the basis of historical licensing as set out in annex to each of the Understandings.

The Commission will seek to obtain the implementation of such an import regime as soon as possible. Pursuant to its Understanding with the European Communities, the United States:

- upon implementation of the new import regime described under (1) above, would provisionally suspend its imposition of the increased duties;
- upon implementation of the new import regime described under (2) above, would terminate its imposition of the increased duties;
- may reimpose the increased duties if the import regime described under (2) does not enter into force by 1 January 2002; and
- would lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described under (2) above until 31 December 2005.

Pursuant to its Understanding with the European Communities, Ecuador:

- took note that the European Commission will examine the trade in organic bananas and report accordingly by 31 December 2004;
- upon implementation of the new import regime, Ecuador's right to suspend concessions or other obligations of a level not exceeding US\$201.6 million per year vis-à-vis the EC would be terminated;
- Ecuador would lift its reserve concerning the waiver of Article I of the GATT 1994 that the European Communities has requested for preferential access to the European Communities of goods originating in ACP states signatory to the Cotonou Agreement; and would actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994 needed for the management of quota C under the import regime described in paragraph C(2) until 31 December 2005.

The European Communities notified the Understandings as mutually satisfactory solutions within the meaning of Article 3.6 of the DSU. Both Ecuador and the United States communicated that the Understandings did not constitute mutually satisfactory solutions within the meaning of Article 3.6 of the DSU and that it would be premature to take the item off the DSB agenda. At the DSB meeting on 25 September 2001, Ecuador made an oral statement whereby it criticised the Commission proposal aimed at reforming the EC common organization for bananas in order to honour the above Understandings.

On 4 October 2001, the European Communities circulated a status report on the implementation where it indicated that it was continuing to work actively on the legal instruments required for the management of the three tariff quotas after 1 January 2002. In addition, the European Communities' report indicated that no progress had been made since the previous DSB meeting regarding the waiver request submitted by the European Communities and the ACP States. The European Communities further indicated that in the event that no progress was made at the meeting of the Council of Trade in Goods scheduled for 5 October 2001, the European Communities and the ACP States would be forced to reassess the situation in all respects. At the DSB meeting on 15 October 2001, the European Communities recalled that the procedure for the examination of the waiver request had been unblocked at the meeting of the Council for Trade in Goods on 5 October 2001, and expressed its readiness to work and discuss with all interested parties in the course of this examination. Ecuador said that if the waiver was limited to what was required during the transitional import regime then it could be granted quickly. Guatemala said that it would carefully follow the outcome of the European Communities' actions and requested that the item should remain on the DSB agenda. Honduras noted that the European Communities had an obligation to describe the measures to be put in place after 2005. It also reiterated its concerns that the rights of developing countries were not being respected. Panama supported the statement by Honduras and urged the European Communities to take into account the concerns of Latin American banana exporters. The United States expressed satisfaction that the examination procedure of the waiver request had started and hoped that the process would be expeditious. St. Lucia said that the statement by Honduras that the European Communities disregarded the rights of some developing countries was inaccurate. It welcomed the start of the examination procedure and hoped that any current differences would soon be resolved. At the DSB meeting on 5 November 2001, the European Communities informed that the Working Party to examine the waiver requests submitted by the European Communities and ACP had made some progress. Ecuador said that tariff preferences to be applied by the European Communities would reproduce the same inconsistencies in the banana import regime. Honduras indicated that it was necessary to ensure that the scope of the waiver did not go beyond what was required for the implementation of the new regime. Panama said that even if the waiver was granted, the dispute would not be settled.

At the DSB meeting on 18 December 2001, the European Communities welcomed the granting of the two waivers by the Ministerial Conference, which were the prerequisite for the implementation of phase II of the Understandings reached with the United States and Ecuador. The European Communities noted that the Regulation implementing phase II would be adopted on 19 December 2001, with effect on 1 January 2002. Ecuador, Honduras, Panama and Colombia noted the progress made and sought information from the European Communities concerning the granting of import licences by one EC member State in a manner that was inconsistent with the Understandings. On 21 January 2002, the European Communities announced that Regulation (EC) No. 2587/2001 had been adopted by the Council on 19 December 2001 and indicated that through this Regulation the European Communities had implemented phase 2 of the Understandings with the United States and Ecuador. Pursuant to the Understandings on Bananas and the Doha Waiver, the European Communities adopted the 2005 Regulation which was challenged in the second series of compliance panel proceedings (see above). Following the Appellate Body reports in such compliance proceedings, the European Communities informed the DSB on 9 January 2009 that it intends to bring itself into compliance with its recommendations and rulings by modifying its scheduled tariff commitments on bananas through an agreement on the level of the new EC bound tariff duty with Latin American banana supplying countries pursuant to negotiations under Article XXVIII of the GATT.

At the DSB meeting on 21 December 2009, the European Union reported that it had reached a historic agreement with Latin American banana suppliers the previous week (the so-called "Geneva Agreement on Trade in Bananas"). The agreement, together with an agreement regarding the settlement of the case brought by the United States, had been initialled on 15 December 2009. Those agreements provided for final settlement of all current disputes regarding the EU import regime on bananas upon certification of a new EU tariff schedule on bananas. On 7 January 2010, the European Union and Ecuador notified the DSB that in light of the Geneva Agreement on Trade in Bananas, it

was not necessary for the European Union to continue to provide status reports in this dispute while the European Union is taking the necessary steps to implement the terms of the Agreement.

### **Mutually agreed solution**

On 8 November 2012, the parties notified the DSB of a mutually agreed solution pursuant to Article 3.6 of the DSU.

## ***asures Affecting the Automotive Sector WT/DS146/R, 5 April, 2002***

### **Key facts**

Short title:	India – Autos
Complainant:	European Communities
Respondent:	India
Third Parties:	Japan; Korea, Republic of
Agreements cited: (as cited in request for consultations)	GATT 1994: Art. <u>III</u> , <u>XI</u> Trade-Related Investment Measures (TRIMs): Art. <u>2</u>
<u>Request for Consultations</u> received:	6 October 1998
<u>Panel Report</u> circulated:	21 December 2001
<u>Appellate Body Report</u> circulated:	19 March 2002

### **Consultations**

#### **Complaint by the European Communities.**

On 6 October 1998, the EC requested consultations with India concerning certain measures affecting the automotive sector being applied by India. The EC stated that the measures include the documents entitled “Export and Import Policy, 1997-2002”, “ITC (HS Classification) Export and Import Policy 1997-2002” (“Classification”), and “Public Notice No. 60 (PN/97-02) of 12 December 1997, Export and Import Policy April 1997-March 2002”, and any other legislative or administrative provision implemented or consolidated by these policies, as well as MoUs signed by the Indian Government with certain manufacturers of automobiles. The EC contended that:

- under these measures, imports of complete automobiles and of certain parts and components were subject to a system of non-automatic import licenses.
- in accordance with Public Notice No. 60, import licenses might be granted only to local joint venture manufacturers that had signed an MoU with the Indian Government, whereby they undertook, *inter alia*, to comply with certain local content and export balancing requirements.
- The EC alleged violations of Articles III and XI of GATT 1994, and Article 2 of the TRIMs Agreement.

On 1 May 1999, the United States requested consultations (WT/DS175) with India in respect of certain Indian measures affecting trade and investment in the motor vehicle sector. The United States contended that the measures in question required manufacturing firms in the motor vehicle sector to:

- i. achieve specified levels of local content;
- ii. achieve a neutralization of foreign exchange by balancing the value of certain imports with the value of exports of cars and components over a stated period; and
- iii. limit imports to a value based on the previous year's exports.

According to the United States, these measures were enforceable under Indian law and rulings, and manufacturing firms in the motor vehicle sector must comply with these requirements in order to obtain Indian import licenses for certain motor vehicle parts and components. The United States considered that these measures violate the obligations of India under Articles III and XI of GATT 1994, and Article 2 of the TRIMS Agreement.

On 15 May 2000, the US requested the establishment of a panel. At its meeting on 19 June 2000, the DSB deferred the establishment of a Panel.

### **Panel and Appellate Body proceedings**

Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 27 July 2000. The EC, Japan and Korea reserved their third-party rights.

On 12 October 2000, the EC also requested the establishment of a panel. At its meeting on 23 October 2000, the DSB deferred the establishment of a Panel. Further to a second request by the EC, the DSB established a panel at its meeting of 17 November 2000. Since a panel had already been established with a similar mandate in the framework of the case WT/DS175, the DSB decided to join the panel with the already established panel in that case pursuant to Article 9.1 of the DSU. Japan reserved its third-party rights. On 14 November 2000, the US requested the Director-General to determine the composition of the Panel. On 24 November 2000, the Panel was composed.

On 21 December 2001, the Panel circulated its report to the Members. The Panel concluded that:

- India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing on automotive manufacturers an obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles (“indigenization” condition);
- India had acted inconsistently with its obligations under Article XI of the GATT 1994 by imposing on automotive manufacturers an obligation to balance any importation of certain kits and components with exports of equivalent value (“trade balancing” condition); and,
- India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing, in the context of the trade balancing condition, an obligation to offset the amount of any purchases of previously imported restricted kits and components on the Indian market, by exports of equivalent value.

The Panel recommended that the DSB requests India to bring its measures into conformity with its obligations under the WTO Agreements.

On 31 January 2002, India appealed the above Panel Report. In particular, India sought review of the following Panel's conclusion on the grounds that they are in error and based upon erroneous findings on issues of law and related legal instruments:

- Articles 11 and 19.1 of the DSU required it to address the question of whether the measures found to be inconsistent with Articles III:4 and XI:1 of the GATT had been brought into conformity with the GATT as a result of measures taken by India during the course of the



proceedings,

and

- the enforcement of the export obligations that automobile manufacturers incurred until 1 April 2001 under India's former import licensing scheme is inconsistent with Articles III:4 and XI:1 of the GATT.

On 14 March 2002, India withdrew its appeal. Further to India's withdrawal of its appeal, the Appellate Body issued a short Report outlining the procedural history of the case. At the DSB meeting on 5 April 2002, the US commended India's decision to withdraw its appeal and shared some of India's reservations with regard to Section VIII of the Panel Report. The EC considered that the Panel's findings were justified. Despite its decision to withdraw its appeal as a result of the introduction of its new auto policy, India indicated that the findings contained in Section VIII were outside of the Panel's terms of reference and were both factually and legally incorrect. India requested that the DSB adopt only a part of the Panel Report and consider the adoption of Section VIII only at its next meeting. The EC responded that the Reports should be adopted unconditionally by the parties, thus there was no justification for India's request. The DSB proceeded with the adoption in full of the Appellate Body and Panel reports.

#### **Implementation of adopted reports**

On 2 May 2002, India informed the DSB that it would need a reasonable period of time to implement the recommendations and rulings of the DSB and that it was ready to enter into discussions with the EC and the US in this regard.

On 18 July 2002, the parties informed the DSB that they had mutually agreed that the reasonable period of time to implement the recommendations and rulings of the DSB, shall be five months, that is from 5 April 2002 to 5 September 2002.

On 6 November 2002, India informed the DSB that it had fully complied with the recommendations of the DSB in this dispute by issuing Public Notice No. 31 on 19 August 2002 terminating the trade balancing requirement. India also informed that earlier it had removed the indigenization requirement vide Public Notice No. 30 on 4 September 2001.

### ***U.S. –Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS 436/AB/R (19 December 2014)***

#### **Key facts**

Short title: US – Carbon Steel (India)

Complainant:	India
Respondent:	United States
Third Parties:	Australia; Canada; China; European Union; Saudi Arabia, Kingdom of; Turkey
Agreements cited: (as cited in request for consultations)	GATT 1994: Art. <u>I</u> , <u>VI</u> Subsidies and Countervailing Measures: Art. <u>1</u> , <u>2</u> , <u>10</u> , <u>11</u> , <u>12</u> , <u>13</u> , <u>14</u> , <u>15</u> , <u>19</u> , <u>21</u> , <u>22</u> , <u>32</u> Agreement Establishing the World Trade Organization: Art. <u>XVI:4</u>
<u>Request for Consultations</u> received:	12 April 2012
<u>Panel Report</u> circulated:	14 July 2014
<u>Appellate Body Report</u> circulated:	8 December 2014

## Consultations

### Complaint by India.

On 12 April 2012, India requested consultations with the United States with regard to the imposition of countervailing duties by the United States on certain hot rolled carbon steel flat products from India (“subject goods”).

India challenges countervailing duties levied on those products through various instruments, as well as provisions of the US Tariff Act and Code of Federal Regulations on customs duties. India claims that the countervailing duty investigation and related measures are inconsistent with Articles I and VI of the GATT 1994 and with Articles 1, 2, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the SCM Agreement. India also claims that the challenged provisions of US Law are inconsistent “as such” with Articles 12, 14, 15, 19 and 32 of the SCM Agreement.

On 7 May 2012, Canada requested to join the consultations.

On 12 July 2012, India requested the establishment of a panel. At its meeting on 23 July 2012, the DSB deferred the establishment of a panel.

### Panel and Appellate Body proceedings

At its meeting on 31 August 2012, the DSB established a panel. Australia, Canada, China, the European Union, Saudi Arabia and Turkey reserved their third-party rights. On 7 February 2013, India requested the Director-General to determine the composition of the panel. On 18 February 2013, the Director-General composed the panel. On 8 July 2013, the Chair of the panel informed the DSB that the panel expected to issue its final report to the parties by April 2014, in accordance with the timetable adopted after consultation with the parties.

On 14 July 2014, the panel report was circulated to Members.

### Summary of key findings

This dispute concerned the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India challenged certain provisions of the United States Tariff Act, 1930, as codified in the United States Code (USC), and the United States Code of Federal Regulations (CFR). In addition, India challenged a number of measures relating to the application of the USC and CFR in the context of the countervailing original investigation and subsequent reviews at issue. India's claims pertained to various procedural and substantive provisions

of the SCM Agreement and, consequently, to Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

With regard to the United States' request for preliminary ruling relating to the scope of these proceedings, the Panel concluded that India's claims that the United States acted inconsistently with Articles 11.1, 11.2 and 11.9 of the SCM Agreement in connection with the alleged initiation of an investigation, despite the insufficiency of evidence in the domestic industry's written application, fell outside the Panel's terms of reference. The Panel dismissed the United States' remaining preliminary objections to India's claims.

With regard to India's claims that were within the scope of these proceedings, the Panel concluded that the United States acted inconsistently with:

- a. in connection with the provision of high grade iron ore by the NMDC:
  - i. Article 2.1(c) of the SCM Agreement by failing to take account of all the mandatory factors in its determination of *de factospecificity* regarding NMDC; and
  - ii. Article 14(d) of the SCM Agreement by failing to consider the relevant domestic price information for use as Tier I benchmarks, in respect of which the United States sought to rely on *ex post* rationalization;
- b. in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:
  - i. Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information;
  - ii. Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act; and
  - iii. Article 14(d) of the SCM Agreement in connection with the USDOC's rejection of certain domestic price information when assessing benefit in respect of mining rights for iron ore;
- c. Article 15.3 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with the "cross-cumulation" of the effects of imports that are subject to a CVD investigation with the effects of imports that are not subject to simultaneous CVD investigations;
- d. Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with injury assessments based *oninter alia* the volume, effects and impact of non-subsidized, dumped imports;
- e. Article 12.7 of the SCM Agreement by applying "facts available" devoid of any factual foundation in connection with the following determinations:
  - i. JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review;
  - ii. VMPL used and benefited from the 1993 KIP, 1996 KIP, 2001 KIP and 2006 KIP subsidy programmes;
  - iii. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the 2001 JSIP: (1) capital investment incentive; (2) feasibility study and project report cost reimbursement; (3) incentive for quality certification; and (4) employment incentives;
  - iv. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes: (1) 6 programmes at issue administered by the SGOG; (2) 8 programmes at issue administered by the SGOM;

- (3) 10 programmes at issue administered by the SGAP; (4) 9 programmes at issue administered by the SGOC; and (5) 22 programmes at issue administered by the SGOK;
- v. Tata used and benefited from the subsidy provided through the purchase of high-grade iron ore from NMDC during the period covered by the 2008 administrative review;
- vi. Tata used and benefited from the MDA and MAI subsidy programmes during the period covered by the 2008 administrative review; and
- vii. Tata used and benefited from the six sub-programmes of the SEZ Act at issue during the period covered by the 2008 administrative review;
- f. Article 22.5 of the SCM Agreement by failing to provide adequate notice of the USDOC's consideration of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore.

The Panel exercised judicial economy in connection with a small number of India's claims, and rejected India's remaining claims.

On 8 August 2014, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report. On 13 August 2014, the United States filed an other appeal in the same dispute. On 6 October 2014, the Chair of the Appellate Body informed the DSB that it estimated that the Appellate Body report would be circulated no later than 8 December 2014.

On 8 December 2014, the Appellate Body report was circulated to Members.

## Summary of key findings

### Public Body

India appealed the Panel's findings regarding the USDOC's determination that the National Mineral Development Corporation (NMDC) is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. For its part, the United States argued that the Panel interpreted and applied Article 1.1(a)(1) in a manner consistent with the Appellate Body report in **US — Anti-Dumping and Countervailing Duties (China)**. Further, the United States requested, in its other appeal, that the Appellate Body clarify that “an entity that is controlled by the government, such that the government may use the entity's resources as its own” is also a public body. The Appellate Body recalled that a public body is “an entity that possesses, exercises or is vested with governmental authority”, and explained that whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. The Appellate Body found that the Panel erred in its application of Article 1.1(a)(1) to the USDOC's public body determination in the underlying investigation, in effect treating the GOI's ability to control the NMDC as determinative for purposes of establishing whether the NMDC constitutes a public body. The Appellate Body consequently reversed the Panel's findings, and completed the legal analysis and found that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1).

### Financial Contribution

India appealed the Panel's findings regarding whether India's captive mining rights and Steel Development Fund (SDF) loans constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement. Finding that the Panel correctly determined that there was a reasonably proximate relationship between India's grant of mining rights for iron ore and coal and the beneficiary's use or enjoyment of the final extracted goods, the Appellate Body upheld the Panel's finding in respect of Article 1.1(a)(1)(iii). With respect to SDF loans, the Appellate Body found that the Panel correctly found that the role of the SDF Managing Committee in making critical decisions regarding the issuance and terms of the SDF loans supported a conclusion that the SDF loans constitute direct transfers of funds, and upheld the Panel's finding in respect of Article 1.1(a)(1)(i).

## **Benefit**

India appealed multiple findings of the Panel concerning Section 351.511(a)(2)(i)-(iv) of the United States Code of Federal Regulations, setting forth the US benchmarking mechanism for calculating benefit. The Appellate Body rejected India's "as such" claims regarding benefit benchmark selection. Although the Appellate Body disagreed with the Panel to the extent it suggested that investigating authorities could, at the outset, discard all prices of government-related entities in a benchmark analysis, the Appellate Body considered that, under Section 351.511(a)(2)(i), the USDOC is required to consider in its benchmark analysis all market-determined prices in the country of provision for the good in question, including such prices of government-related entities other than the entity providing the financial contribution. The Appellate Body also rejected India's "as such" claims that the Panel erred in finding that Article 14(d) permits the use of out-of-country benchmarks in situations in which the government is not the predominant provider of the good in question, and that Section 351.511(a)(2)(ii) requires the USDOC to make adjustments to out-of-country benchmarks to ensure that such benchmarks reflect prevailing market conditions in the country of provision. The Appellate Body also rejected India's claims that the Panel erred in finding that the use of "as delivered" benchmarks under Section 351.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d). Contrary to India's suggestion, the Appellate Body did not consider that the US benchmarking mechanism precludes adjustments to benchmarks to reflect delivery charges that approximate the generally applicable delivery charges for the good in question in the country of provision.

India also advanced several "as applied" claims under Article 14 of the SCM Agreement. Regarding iron ore provided by the NMDC, the Appellate Body found that the Panel erred by suggesting that government prices are not an indicator of prevailing market conditions, and reversed the Panel's finding rejecting India's claim that the USDOC's exclusion of the NMDC's export prices from its benchmark is inconsistent with Article 14(d). The Appellate Body completed the legal analysis and found that the USDOC's exclusion of such export prices is inconsistent with Article 14(d). The Appellate Body also reversed the Panel's finding rejecting India's claim that the use of benchmarks from Australia and Brazil is inconsistent with Article 14(d), finding that the Panel had not properly concluded that the "as delivered" prices at issue reflect prevailing market conditions in India. The Appellate Body also found that the USDOC had not provided a reasoned and adequate explanation of the basis for its use of these "as delivered" prices. The Appellate Body completed the legal analysis and found that the USDOC's use of these prices as benchmarks is inconsistent with Article 14(d) of the SCM Agreement. Regarding India's claim in respect of captive mining rights, the Appellate Body found it permissible for an investigating authority to construct a government price in a benefit calculation, and upheld the Panel's finding rejecting India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d). Regarding India's claim in respect of SDF loans, the Appellate Body found that the Panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan programme to the recipient. The Appellate Body reversed the Panel's finding rejecting India's claim as it relates to the USDOC's determination that loans provided under the SDF conferred a benefit under Articles 1.1(b) and 14(b), but found that it was unable to complete the legal analysis.

## **Specificity**

India appealed aspects of the Panel's analysis concerning the USDOC's determination that the sale of iron ore by the NMDC is specific within the meaning of Article 2.1(c) of the SCM Agreement because it concerns the "use of a subsidy programme by a limited number of certain enterprises". The Appellate Body upheld each of the Panel's findings challenged by India in respect of Article 2.1(c), namely: that there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy programme; that specificity need not be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities; and that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, it is not necessary, in establishing specificity, that the subsidy be limited to a subset of this industry.

## **Facts Available**

India appealed aspects of the Panel's interpretation and application of Article 12.7 of the SCM Agreement. India's appeal concerned the “as such” and certain “as applied” findings of the Panel regarding Section 1677e(b) of the United States Code and Section 351.308(a)-(c) of the United States Code of Federal Regulations. The Appellate Body reaffirmed that an investigating authority must use those “facts available” that reasonably replace the missing information with a view to arriving at an accurate determination, and it modified the Panel's interpretation of Article 12.7 to the extent that the Panel's interpretation excluded, in all instances, a comparative evaluation of all available evidence. The Appellate Body found, in this regard, that Article 12.7 calls for a process of evaluation of available evidence to be reflected in the determination, the extent and nature of which depends on the particular circumstances of a given case. The Appellate Body found further that the Panel failed, under Article 11 of the DSU, to make an objective assessment of India's “as such” claim, because the Panel disregarded certain evidence submitted by the parties regarding the meaning of the challenged US measures. The Appellate Body thus reversed the Panel's rejection of India's “as such” claim under Article 12.7 and sought to complete the legal analysis, finding that India had not established that Section 1677e(b) of the United States Code and Section 351.308(a)-(c) of the United States Code of Federal Regulations are inconsistent “as such” with Article 12.7 of the SCM Agreement. Regarding India's “as applied” claims under Article 12.7 of the SCM Agreement, the Appellate Body found that the Panel did not apply an “unnecessary burden of proof” regarding the application of an alleged “rule” on selecting the highest non-*de minimis* subsidy rates in the instances identified by India. It thus upheld the Panel's finding that India failed to establish a *prima facie* case of inconsistency with Article 12.7 in that regard.

### **New Subsidy Allegations**

India appealed the Panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement. The Appellate Body held that, in principle, Articles 21.1 and 21.2 permit investigating authorities to examine new subsidy allegations in the conduct of an administrative review. Such examination, while subject, *mutatis mutandis*, to the public notice requirements set out in Article 22, are not subject to the obligations set out in Articles 11 and 13. Accordingly, while the Appellate Body upheld the Panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, and 21.2 of the SCM Agreement, the Appellate Body reversed the Panel's finding rejecting India's claims as they relate to inconsistency under Articles 22.1 and 22.2. However, the Appellate Body was unable to complete the legal analysis in respect of India's claims under Articles 22.1 and 22.2.

### **Cross-Cumulation**

Finally, the United States appealed the Panel's finding that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of subsidized imports with the effects of non-subsidized, but dumped imports. Although the Appellate Body found that the Panel did not err in this regard, it found that the Panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter in finding that Section 1677(7)(G) of the United States Code is inconsistent “as such” with Article 15. Completing the legal analysis with respect to one part of Section 1677(7)(G), the Appellate Body found that Section 1677(7)(G)(iii) of the United States Code is inconsistent “as such” with Article 15 of the SCM Agreement.

At its meeting on 19 December 2014, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

### **Reasonable period of time**

At the DSB meeting on 16 January 2015, the United States stated that it intended to implement the DSB's recommendations and ruling in a manner that respects its WTO obligations and that it would need a reasonable period of time to do so. On 24 March 2015, India and the United States informed the DSB that they had agreed that the reasonable period of time for the United States to implement the DSB recommendations and rulings shall be 15 months from the date of adoption of the Appellate

Body and panel reports. Accordingly, the reasonable period of time was set to expire on 19 March 2016. On 9 March 2016, India and the United States informed the DSB that they had mutually agreed to modify the previously notified reasonable period of time for implementation of the recommendations and rulings of the DSB so as to expire on 18 April 2016.

### **Implementation of adopted reports**

At the DSB meeting on 22 April 2016, the United States stated that with respect to the United States International Trade Commission (USITC) determination, on 7 March 2016, the USITC issued a new determination rendering the findings with respect to injury in the underlying proceeding on the product from India consistent with the DSB recommendations and rulings in this dispute. The United States further indicated that, with respect to the United States Department of Commerce (USDOC) determination, on 14 April 2016, the USDOC issued a new final determination rendering its determination with respect to subsidization and the calculation of countervailing duty rates consistent with the DSB recommendations and rulings in this dispute. Accordingly, the United States considered that it had completed implementation with respect to the DSB recommendations and rulings in this dispute.

On 6 May 2016, India and the United States informed the DSB of Agreed Procedures under Articles 21 and 22 of the DSU.

## ***India-Certain Measures Relating to Solar Cells and Solar Modules, WT/DS 456, 6 Feb. 2013*** (Appellate Body Report, 16 Sept. 2016)

### **Key facts**

Short title:	India — Solar Cells
Complainant:	United States
Respondent:	India
Third Parties:	Brazil; Canada; China; European Union; Japan; Korea, Republic of; Malaysia; Norway; Russian Federation; Turkey; Ecuador; Saudi Arabia, Kingdom of; Chinese Taipei
Agreements cited: (as cited in request for consultations)	GATT 1994: Art. <a href="#">III:4</a> Trade-Related Investment Measures (TRIMs): Art. <a href="#">2.1</a> Subsidies and Countervailing Measures: Art. <a href="#">3.1(b)</a> , <a href="#">3.2</a> , <a href="#">5(c)</a> , <a href="#">6.3(a)</a> , <a href="#">6.3(c)</a> , <a href="#">25</a>
<a href="#">Request for Consultations</a> received:	6 February 2013

<a href="#">Panel Report</a> circulated:	24 February 2016
<a href="#">Appellate Body Report</a> circulated:	16 September 2016
Current Status:	Report(s) adopted, with recommendation to bring measure(s) into conformity on 14 October 2016

## Consultations

### Complaint by the United States.

On 6 February 2013, the United States requested consultations with India concerning certain measures of India relating to domestic content requirements under the Jawaharlal Nehru National Solar Mission (“NSM”) for solar cells and solar modules.

The United States claims that the measures appear to be inconsistent with:

- Article III:4 of the GATT 1994;
- Article 2.1 of the TRIMs Agreement; and
- Articles 3.1(b), 3.2, 5(c), 6.3(a) and (c), and 25 of the SCM Agreement.

The United States also claims that the measures appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.

On 13 February 2013, Japan requested to join the consultations. On 21 February 2013, Australia requested to join the consultations.

On 10 February 2014, the United States requested supplementary consultations concerning certain measures of India relating to domestic content requirements under “Phase II” of the Jawaharlal Nehru National Solar Mission (“NSM”) for solar cells and solar modules.

On 21 February 2014, Japan requested to join the consultations.

On 14 April 2014, the United States requested the establishment of a panel. At its meeting on 25 April 2014, the DSB deferred the establishment of a panel.

### Panel and Appellate Body proceedings

At its meeting on 23 May 2014, the DSB established a panel. Brazil, Canada, China, the European Union, Japan, Korea, Malaysia, Norway, the Russian Federation and Turkey reserved their third party rights. Subsequently, Ecuador, Saudi Arabia and Chinese Taipei reserved their third party rights. Following the agreement of the parties, the panel was composed on 24 September 2014.

On 24 March 2015, the Chair of the panel informed the DSB that the panel expects to issue its final report to the parties by late August 2015, in accordance with the timetable adopted after consultation with the parties.

On 24 February 2016, the panel report was circulated to Members. A day later, on 25 February 2016, the Chair of the panel informed the DSB that it had issued the final report to the parties on 28 August 2015 and that public circulation of the report was originally scheduled for late December 2015. However, due to several requests from the parties that the circulation be delayed due to continuing discussions relating to the dispute, the circulation of the panel report was delayed until 24 February 2016.

### Summary of key findings



The claims brought by the United States concern domestic content requirements (DCR measures) imposed by India in the initial phases of India's ongoing National Solar Mission. These requirements, which are imposed on solar power developers selling electricity to the government, concern solar cells and/or modules used to generate solar power.

The Panel found that the DCR measures are trade-related investment measures covered by paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement. The Panel found that this suffices to establish that they are inconsistent with both Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Panel decided nonetheless to assess the parties' additional arguments under Article III:4 of the GATT 1994, and found that the DCR measures do accord "less favourable treatment" within the meaning of that provision.

Concerning the government procurement derogation in Article III:8(a) of the GATT 1994, the Panel found that the DCR measures are not distinguishable in any relevant respect from the domestic content requirements previously examined under this provision by the Appellate Body in Canada — Renewable Energy / Feed-In Tariff Program. Following the Appellate Body's interpretation of Article III:8(a) of the GATT 1994 in that case, the Panel found that the discrimination relating to solar cells and modules under the DCR measures is not covered by the government procurement derogation in Article III:8(a) of the GATT 1994. In particular, the Panel found that the electricity purchased by the government is not in a "competitive relationship" with the solar cells and modules subject to discrimination under the DCR measures.

India argued that the DCR measures are justified under the general exception in Article XX(j) of the GATT 1994, on the grounds that its lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption in imports, makes these "products in general or local short supply" within the meaning of that provision. The Panel found that the terms "products in general or local short supply" refer to a situation in which the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market. The Panel also found that the terms "products in general or local short supply" do not cover products at risk of becoming in short supply, and found that in any event India had not demonstrated the existence of any imminent risk of a short supply. The Panel therefore found that India failed to demonstrate that the challenged measures are justified under Article XX(j).

India argued that the DCR measures are also justified under Article XX(d) of the GATT 1994, on the grounds that they secure India's compliance with "laws or regulations" requiring it to take steps to promote sustainable development. The Panel considered that international agreements may constitute "laws or regulations" within the meaning of Article XX(d) only insofar as they are rules that have "direct effect" in, or otherwise form part of, the domestic legal system of the Member concerned. The Panel found that most of the instruments identified by India did not constitute "laws or regulations" within the meaning of Article XX(d), or were not laws or regulations in respect of which the DCR measures "secure compliance". Therefore, the Panel found that India failed to demonstrate that the challenged measures are justified under Article XX(d).

On 20 April 2016, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report.

On 17 June 2016, upon expiry of the 60-day period provided for in Article 17.5 of the DSU, the Appellate Body informed the DSB that the circulation date of the Appellate Body report in this appeal was to be communicated to the participants and third participants shortly after the oral hearing, in the light of the scheduling of parallel appeals, the number and complexity of the issues raised in this or concurrent appellate proceedings, and the availability of translation services. On 8 July 2016, the Appellate Body informed the DSB that it expected to circulate its report in this appeal no later than 16 September 2016.

On 16 September 2016, the Appellate Body report was circulated to Members.

### **Summary of key findings**

The Panel sustained the United States' claims that India's DCR measures are inconsistent with WTO non-discrimination obligations under Article III:4 of the GATT 1994 and Article 2.1 of the

TRIMs Agreement. The Panel also found that the measures are not covered by the government procurement exemption under Article III:8(a) of the GATT 1994, because the product being procured (electricity) was not in a “competitive relationship” with the product discriminated against (solar cells and modules). Moreover, the Panel found that India had not demonstrated that its measures are justified under Article XX(j), applicable to measures that are essential to the acquisition or distribution of “products in general or local short supply”, or Article XX(d), which establishes a general exception for measures necessary to “secure compliance” with a WTO Member’s “laws or regulations” which are not themselves GATT-inconsistent. The Appellate Body upheld each of these Panel conclusions appealed by India.

With respect to Article III:8(a), the Appellate Body found that the Panel was properly guided by the Appellate Body’s report in *Canada — Renewable Energy / Canada — Feed-in Tariff Program*, where the Appellate Body interpreted and applied Article III:8(a) to closely analogous facts involving the purchase of electricity and discrimination against generation equipment. Regarding Article XX(j), the Appellate Body stated that an assessment of whether products are in short supply should take into account the quantity of available supply of a product from all domestic and international sources, and that consideration should be given to all relevant factors, including the availability of imports, the level of domestic production, potential price fluctuations in the relevant market, and the purchasing power of foreign and domestic consumers. As for Article XX(d), the Appellate Body explained that in determining whether a respondent has identified a “rule” that falls within the scope of “laws or regulations” under Article XX(d), it may be relevant for a panel to consider factors such as the degree of normativity of the domestic or international instrument and the extent to which it operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member.

One Appellate Body Member attached a separate opinion offering remarks regarding how he viewed the Appellate Body’s adjudicatory function as well as its limits, and, consequently, why in his view the Division did — or did not — need to rule on certain of the issues appealed.

At its meeting on 14 October 2016, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

### **Reasonable period of time**

On 8 November 2016, India informed the DSB that, pursuant to Article 21.3 of the DSU, it intended to implement the DSB’s recommendations and rulings in this dispute. On 1 December 2016, the United States and India informed the DSB that in order to allow sufficient time for them to discuss a mutually agreed period, they had agreed on deadlines for arbitration under Article 21.3(c) of the DSU.

On 16 June 2017, India and the United States informed the DSB that they had agreed that the reasonable period of time to implement the DSB’s recommendations and rulings would be 14 months. Accordingly, the reasonable period of time was set to expire on 14 December 2017

# STANDARD TRADE TERMS

## CIF AND FOB

CIF (Cost, Insurance & Freight) contract is that when the seller has delivered the goods or provides them afloat. He has to perform the contract by tendering conforming documents to the buyer. The significant feature of a CIF contract is that performance of bargain is to be fulfilled by delivery of documents and not by actual physical delivery of goods by the seller.

FOB (Free On Board) contract can be described as a flexible instrument. Because, the buyer has to nominate a ship and the seller has to put the goods on board of vessel for account of the buyer and procuring a bill of lading.

The important differences between FOB and CIF contract is that, FOB contract specifies the port of loading, however CIF contract specifies the port of arrival.

### A) The Right and Duties of Seller and Buyer

#### *Seller's Rights and Duties*

1. The main duty of the seller under the FOB contract is loading. The seller must deliver the goods on board the vessel, at a place where the buyer has already identified as the port of loading and within the period of shipment which the parties indicated in the contract of sale. Name of the port in a FOB contract is a condition.

For instance, the seller sends the goods to the other port from the port where it has been identified in the contract of sale. The seller commits a breach of a condition, so the buyer is entitled to refuse the delivery of the goods.<sup>39</sup>

Under the CIF contract, the seller is required to deliver the goods on board of the vessel at the agreed port of delivery. However, in contrast to an FOB contract, the seller can also procure the goods afloat which are already shipped.

2. Under the FOB contract, the seller has to bear all cost such as the payment of handling, transferring the goods to the ship and loading. Furthermore the seller has to make all necessary arrangements for the buyer's account such as making a contract of carriage by sea and insuring the goods under an insurance contract. Moreover, the seller is not responsible to pay the freight and cannot be force to

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<sup>39</sup> Manbre S. Co. Ltd. v Corn p. Co. Ltd. [1915] 1 KB 198

provide “freight pre-paid bill of lading” from the carrier. This is because; the contract of carriage and the freight are made between the carrier and the buyer.

According to the CIF contract, the seller has to bear all costs relating to the goods until delivery of the goods on board the vessel. However, under the CIF contract, the seller’s duty to provide a contract of carriage and has to insure the goods under the insurance contract. Moreover, the insurance policy has to protect to the buyer. Otherwise, the seller commits to breach of the contract<sup>40</sup>

3. Under the English Law, there is no general rule to obtain an export licence. It depends on the contract, which the party, who has the best position to obtain it. According to Brandt &co. case is that, “..... both seller and buyer were British traders albeit that the buyer was securing goods from an overseas merchant so he has to apply for the export licence, because he alone knows full facts regarding the destination of the goods.”<sup>41</sup> On the other hand, if the seller is in a better position than the buyer, he is responsible to provide a licence.

Under the CIF contract, it is also seller’s responsibility to provide an export licence.

4. Under the FOB contract, unless otherwise agreed, the seller has to provide the documents such as bills of lading, which is necessary for the buyer to obtain a possession of the goods. These documents have to deliver to the buyer in return for payment. Compared with the FOB contract, CIF seller has to provide a commercial invoice in order to get a payment. These documents must include the full description of the goods, the parties, price, shipping mark and numbers, the part of loading, route, and the port of discharging. The seller must tender the documents to the buyer.

5. The seller must give notice to the buyer that this notice may enable him insure the goods during the sea transit. The notice must be given without delay. Any fail to give notice, makes the seller still liable on the goods during the sea transit. According to the CIF contract, the seller has also to give the buyer sufficient notice that the goods have been delivered on board the vessel.

### ***Buyer’s Rights and Duties***

1. Under the FOB contract, the buyer’s duty is identify to the port of shipment. If it is not clean in the contract of sale, three different alternatives can be choose: First,

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<sup>40</sup> Hickox v Adams [1876] 34 L.T.404.

<sup>41</sup> Brandt & co. v Morris & co. Ltd. [1917] 2 K.B. 784

the seller can choose the port of shipment, second the buyer can choose it, and third the contract is left for ambiguously.<sup>42</sup>

The buyer has also provided a suitable ship for loading. He has to determine a shipping period, place and also must give notice to the buyer of readiness to the vessel.<sup>43</sup> Nomination of vessel is a condition of the contract. When the seller failure to nominate vessel, the buyer can refuse the contract and claim damages. Unless otherwise agreed, the buyer can also make a second nomination within a shipment period, if the first one is insufficient. By comparison with the FOB contract, under the CIF contract the buyer has no under obligation to procure a ship, place, and shipping time. On the other hand, the buyer main duty is to accept the documents, which will be explained in detail later, if these documents are in conformity with the contract of sale.

2. The buyer's duty under the FOB contract, to pay the price is determined by the contract. However, there is no such a time in the contract; the buyer must pay the price in due as soon as the seller delivered the goods according to the contract. In contrast to the FOB contract, when a CIF buyer has accepted the documents; he must pay the full price of the goods. Furthermore, the buyer must take delivery of the goods at the agreed destination and has to bear all unloading costs.

3. Under the FOB contract, the buyers must pay all cost to the goods, when the goods

passed the ship's rail. According to the CIF contract, the buyer has only to pay any customs or other duties, which may impose in a CIF contract. For instance, payment of the freight is the buyer's duty and also it is a condition of the contract.

## **A) Passing of Title and Passing of Risk**

### ***Passing of Title***

Under the FOB contract, when the goods are placed on board the vessel, the buyer has a title of the goods, because property in goods passes at the same time. Another reason of this, he becomes a shipper of the goods after shipment and he has a contractual relationship with the carrier. However, the problem may arise when property in goods were supposed to pass on shipment. This could be leave the seller exposed to the risk of not to paid the balance of the full price. So property in goods will not pass until the full price is paid and bill of lading is delivered to the buyer.<sup>44</sup>

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<sup>42</sup> David t. Boyd & Co. ltd. v Louis Louca [1973]1 Llyod's Rep. 209

<sup>43</sup> Bunse Corporation v Tradax Export SA. [1918] 2 ALL ER

<sup>44</sup> Mitsui &Co. ltd. v Flota Mercante Grancolumbiana SA. [1989] 1 ALL ER 951

Under the CIF contract, the documents play a very important role. When the buyer has received the documents, he has a title on the goods. After receiving documents, he can demand to delivery of the goods at the port of the arrival and also can sue if there is any damage or loses in the goods. That is to say, the general presumption is that the property in goods pass to the buyer, when the documents is delivered to him, but the buyer, at the same time, has to do payment.<sup>2</sup> Shortly, the buyer takes responsibilities from the seller which is the whole rights and liabilities in the commercial contract.

However, his responsibility occurs if only tendered documents such as the bill of lading, policy insurance, and the commercial invoice, are in conformity with the contract. The essential feature of an ordinary CIF contract is that, performance of the bargain is to be fulfilled by delivery of documents and not by the physical delivery of the goods.<sup>45</sup>

Moreover, when the buyer received both the documents and the goods, he has a right to reject them. If the documents are not in conformity with the contract, he may reject them.

However, the seller has an opportunity to remedy the defect by a new and conforming tender of documents, if he has got enough time to do. Having accepted the documents, if the buyer found any nonconformity on the goods with the contract, he can still reject the goods. This rule is applied by a FOB contract as well.

### ***Passing of Risk***

Under the FOB contract, risk passes on shipment. When the seller delivered the goods on a ship's rail, he will not be responsible of any damages or loses after that. It is presumed that property in goods passed at he same time. However, the passing of property has been delayed as a result of the failure of the parties; this will not affect the passing of risk.<sup>46</sup>

Under the CIF contract, risk passes on shipment to the buyer while property in them passed,<sup>47</sup> or as from shipment. This rule indicates two different methods of passing of risk under the CIF contract. First one is that, when the seller completed his contractual duty on CIF terms and delivered the goods on board the vessel, and then risk passes to the buyer on shipment. Second one is that, the seller bought the goods which are already afloat; he thereupon can make the goods subject of the contract

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<sup>45</sup> *Manbre Sacchrie Co. Ltd. v Corn Products Co. Ltd.* [1919] 1KB 198

<sup>46</sup> *Inglis v Stock* [1885] 10 App. Cas. 263.

<sup>47</sup> *Tregelles v Sewell* [1862] 7 H. & N. 575 ER. 600.

with the buyer, then the risk passed “as from shipment.” In this sense, it can be said that risk passed before the shipment, because of the intention of the parties.<sup>48</sup>

Another important thing of the passing of risk is that when the seller delivered the goods on board the vessel, he has to give notice to the buyer, which the buyer may insure the goods during the sea transit. If he seller fails to notify him, the goods will be at his own risk during the sea transit.

Relationships between the parties to contract on fob term were described in details by Lord Hewart CJ in *J. & J. Cunningham, Ltd. v Robert A. Munro & Co., Ltd.* (1922) 13 Ll. L. Rep. 216 at pp.216-217: The contract under consideration was for 200 tons of Dutch bran for shipment during October, 1920, price £13 per ton “*f.o.b. Rotterdam, buyers finding freight room*”. Under such an agreement it was he duty of the purchasers to provide a vessel at the appointed place, Rotterdam, at such a time as would enable the vendors to bring the goods alongside the ship and put them over the ship’s rail, so as to enable the purchasers to receive them within the appointed time – in this case October. It would not, for example, be sufficient for the vendors to bring them to a warehouse in Rotterdam or bring them alongside the vessel at five minutes before midnight on Oct. 31. The usual practice under such a contract is for the buyer to nominate the vessel and to send notice of her arrival to the vendor in order that the vendor may be in a position to fulfil his part of the contract. When the vendors tender the goods in question to the purchasers theoretically by placing them on the ship’s rail, it is open to the purchasers to reject if the goods are not in accordance with the contract. This being the relationship between the parties the liability on either side may be varied:

- (1) by express contract altering the place or date of loading
- (2) by the conduct of the parties.

For example, there may be circumstances which disentitle the purchaser to reject the goods when they are being placed on the ship’s rail, as for instance where he has by his conduct already accepted them before their arrival there; there may also be circumstances where, although the purchaser may be entitled to reject when the goods are being placed over the ship’s rail, yet the vendor may be entitled to recover damages in respect of the deterioration of the goods. Assuming the sale of a perishable cargo, say of fresh vegetables for October shipment, suppose the purchasers nominate their vessel and write to the vendors saying “she will be at the quayside in three days time.” The vendors gather their vegetables and send them to the quayside; but the nominated ship does not arrive for a fortnight, during which time the vegetables go bad. It may be that the purchasers are entitled to reject the vegetables which have so deteriorated, but the vendors are then entitled to rely upon and bring into play another legal principle. It is not exactly an estoppel which

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<sup>48</sup> *Wiebe v Dennis Bros* [1913] 29 TLR. 250.

prevents the purchasers from rejecting, but it is the doctrine that where one person makes a statement to another meaning that statement to be relied upon and acted upon by that other, if the other suffers damage by so relying and acting upon it he is entitled to recover such damage from the person making the statement. In the case put forward the damage would be the loss of price which the vendors would otherwise have obtained from the purchasers. This legal doctrine might be put in ordinary language as it is put in the case stated by the arbitrator, viz., that under such circumstances after the vendor has brought the goods to the quay at the invitation of the purchaser the goods remained at the purchaser's risk.

Buyer has a right but not duty to examine the goods upon delivery to him at the place of destination and reject them if they do not meet contractual specification. Risk of loss or damage passes from the seller [to the buyer together with property on goods crossing 'ship's rail'](#) or, generally, [on the loading of the goods onto the vessel](#). Such point of the risk transfer is peculiar to FOB contracts and must be carefully examined [when FOB terms applied to containerised and roll on roll off shipments](#). FOB term is considered to be best suited for shipments of bulk commodity cargoes such as oil or grain, where the goods invariably pass the 'ship's rail'. In instances where the parties intend to have the risk transfer to be passed at a point other than 'ship's rail' they might option for FCA (Free Carrier) term which limits the seller's responsibility by the moment when the goods are [delivered to the named place and collected by the carrier nominated by the buyer](#).

Recent development of the matter of risk transfer at the crossing of ship's rail, is a decision in *Soufflet Negoce S.A. v Bunge S.A.* [2010] EWCA Civ 1102 where it was held that if the buyer assumes the risk of loading the cargo into unclean holds the seller cannot reject loading on the basis that holds are not clean enough, because the state of the holds is not a matter in which he has any real legitimate interest.

CIF and FOB contracts are the most important contracts in the field of International Trade. Both of them resemble each other. However, CIF contract has a very significant difference from FOB contract. Mainly, under the CIF contract, the parties have to deal with delivery of documents and not actual physical delivery of goods by the seller. As a matter of fact, FOB contract is known as a flexible instrument which could be useful to International Trade companies while on the other hand, CIF contract is in demand much more than FOB contracts by companies in the field of International Trade.

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### **FREE ALONGSIDE SHIP (FAS)**

FAS is a less commonly known or used incoterm. It is used most commonly in sales of bulk cargo such as grains, oil, etc. In FAS – Free Alongside Ship – the seller/exporter arranges to have the goods placed alongside the vessel at the named



port of origin. FAS is ONLY used for ocean or inland waterway transport. Under FAS terms, the seller's risk and responsibility end the moment the goods are delivered alongside the vessel at the named port of origin :

**Seller's Responsibilities:**

- 1) Produces the goods and commercial documents as required by the sales contract.
- 2) Arranges for export clearance – IF stipulated in the sales contract.
- 3) Makes the goods available to the buyer alongside the vessel at the named port of shipment.
- 4) Assumes all risk to the goods (loss or damage) only up to the point they have been delivered to the port at the named place and time stipulated in the sales contract.
- 5) Seller must advise the buyer of the location and time that goods have been delivered alongside the named vessel.
- 6) Seller has to provide the buyer with proof of delivery to the carrier or transport documents.

**Buyer's Responsibilities:**

- 1) Buyer must pay for the goods as per the sale contract
- 2) Buyer must obtain all commercial documentation, licenses, authorizations, and import formalities at own risk and cost.
- 3) Buyer must take delivery of the goods when they have been made available by the seller alongside the vessel at the named port of origin.
- 4) Buyer must assume all risk and responsibility for the goods from the time the goods have been delivered alongside the vessel to delivery into the buyer's warehouse or other specified location.
- 5) Buyer pays for all costs of transportation, insurance, export and import customs and duty fees, and all other formalities and charges related to the transportation of the shipment from the time the goods have been delivered alongside the vessel. This includes all costs relating to loss or damage of goods or non-delivery from the time the goods have been delivered alongside the vessel.
- 6) Buyer would accept the seller's proof of delivery to the carrier or transport documents.

**Difference between F.O.B. & F.A.S.**

In a F.O.B. (Free on Board) shipment, the risk passes to buyer at the F.O.B. point. The F.O.B. point can be the seller's factory or warehouse. In that case, the sale price quoted does not include freight which is the responsibility of the buyer as is the risk from the warehouse onward. If, however, the term is F.O.B. point of destination, seller bears the risk during transit and is responsible for payment of the freight. The term F.A.S. (Free Alongside) followed by "vessel" at some specific port is a variation of F.O.B. The sale is consummated when the seller delivers the goods alongside the vessel. The difference between the terms "F.O.B. vessel" and "F.A.S.

vessel" is that in the F.O.B. the seller bears the risk until the loading has been completed. C.I.F. stands for Cost, Insurance, Freight, a term followed by the port of destination. "C.I.F. London", for example, would mean that the quoted price would include the price of the goods plus freight up to London and insurance.

## **Letter of Credit**

A Letter of Credit, simply defined, is a written instrument issued by a bank at the request of its customer, the Importer (Buyer), whereby the bank promises to pay the Exporter (Beneficiary) for goods or services, provided that the Exporter presents all documents called for, exactly as stipulated in the Letter of Credit, and meet all other terms and conditions set out in the Letter of Credit. A Letter of Credit is also commonly referred to as a Documentary Credit. There are two types of Letters of Credit: revocable and irrevocable. A revocable Letter of Credit can be revoked without the consent of the Exporter, meaning that it may be cancelled or changed up to the time the documents are presented. A revocable Letter of Credit affords the Exporter little protection; therefore, it is rarely used. An irrevocable Letter of Credit cannot be cancelled or changed without the consent of all parties, including the Exporter. Unless otherwise stipulated, all Letters of Credit are irrevocable. A further differentiation is made between Letters of Credit, depending on the payment terms. If payment is to be made at the time documents are presented, this is referred to as a sight Letter of Credit. Alternatively, if payment is to be made at a future fixed time from presentation of documents (e.g. 60 days after sight), this is referred to as a term, usance or deferred payment Letter of Credit. The International Chamber of Commerce (ICC) publishes internationally agreed-upon rules, definitions and practices governing Letters of Credit, called "Uniform Customs and Practice for Documentary Credits" (UCP). The UCP facilitates standardization of Letters of Credit among all banks in the world that subscribe to it. These rules are updated from time to time; the last revision became effective January 1, 1994, and is referred to as UCP 500. Copies of the UCP 500 are available from your TD branch or Global Trade Finance office.

A key principle underlying Letters of Credit is that banks deal only in documents and not in goods. The decision to pay under a Letter of Credit is entirely on whether the documents presented to the bank appear on their face to be in accordance with the terms and conditions of the Letter of Credit. It would be prohibitive for the banks to physically check all merchandise shipped under Letters of Credit to ensure merchandise has been shipped exactly as per each Letter of Credit. Accordingly, the

integrity of both the Exporter and Importer are very important in a Letter of Credit transaction. The appropriate due diligence should be exercised by both parties.

### ***Elements of a Letter of Credit***

- A payment undertaking given by a bank (issuing bank)
- On behalf of a buyer (applicant)
- To pay a seller (beneficiary) for a given amount of money
- On presentation of specified documents representing the supply of goods
- Within specified time limits
- Documents must conform to terms and conditions set out in the letter of credit
- Documents to be presented at a specified place

### ***Step by Step Process***

The following is a step-by-step description of a typical Letter of Credit transaction:

1. An Importer (Buyer) and Exporter (Seller) agree on a purchase and sale of goods where payment is made by Letter of Credit.
2. The Importer completes an application requesting its bank (Issuing Bank) to issue a Letter of Credit in favour of the Exporter. Note that the Importer must have a line of credit with the Issuing Bank in order to request that a Letter of Credit be issued.
3. The Issuing Bank issues the Letter of Credit and sends it to the Advising Bank by telecommunication or registered mail in accordance with the Importer's instructions. A request may be included for the Advising Bank to add its confirmation. The Advising Bank is typically located in the country where the Exporter carries on business and may be the Exporter's bank but it does not have to be.
4. The Advising Bank will verify the Letter of Credit for authenticity and send a copy to the Exporter.
5. The Exporter examines the Letter of Credit to ensure: a) it corresponds to the terms and conditions in the purchase and sale agreement; b) documents stipulated in the Letter of Credit can be produced; and c) the terms and conditions of the Letter of Credit may be fulfilled.
6. If the Exporter is unable to comply with any term or condition of the Letter of Credit or if the Letter of Credit differs from the purchase and sale agreement, the Exporter should immediately notify the Importer and request an amendment to the Letter of Credit.

7. When all parties agree to the amendments, they are incorporated into the terms of the Letter of Credit and advised to the Exporter through the Advising Bank. It is recommended that the Exporter does not make any shipments against the Letter of Credit until the required amendments have been received.

8. The Exporter arranges for shipment of the goods, prepares and/or obtains the documents specified in the Letter of Credit and makes demand under the Letter of Credit by presenting the documents within the stated period and before the expiry date to the “available with” Bank. This may be the Advising/Confirming Bank. That bank checks the documents against the Letter of Credit and forwards them to the Issuing Bank. The drawing is negotiated, paid or accepted as the case may be.

9. The Issuing Bank examines the documents to ensure they comply with the Letter of Credit terms and conditions. The Issuing Bank obtains payment from the Importer for payment already made to the “available with” or the Confirming Bank.

10. Documents are delivered to the Importer to allow them to take possession of the goods from the transport company. The trade cycle is complete as the Importer has received its goods and the Exporter has obtained payment. Note: In the diagram below, the Advising Bank is also acting as the Confirming Bank.

### **Advantages and Disadvantages of Using a Letter of Credit**

#### **Advantages to the Importer**

- Importer is assured that the Exporter will be paid only if all terms and conditions of the Letter of Credit have been met.
- Importer is able to negotiate more favourable trade terms with the Exporter when payment by Letter of Credit is offered.

#### **Disadvantages to the Importer**

- A Letter of Credit does not offer protection to the Importer against the Exporter shipping inferior quality goods and/or a lesser quantity of goods. Consequently, it is important that the Importer performs the appropriate due diligence to assess the reputation of the Exporter. If the Exporter acts fraudulently, the only recourse available to the Importer is through legal proceedings.
- It is necessary for the Importer to have a line of credit with a bank before the bank is able to issue a Letter of Credit. The amount outstanding under each Letter of Credit issued is applied against this line of credit from the date of issuance until final payment.

#### **Advantages to the Exporter**

- The risk of payment relies upon the creditworthiness of the Issuing Bank and the political risk of the Issuing Bank’s domicile, and not the creditworthiness of the Importer.

- Exporter agrees in advance to all requirements for payment under the Letter of Credit. If the Letter of Credit is not issued as agreed, the Exporter is not obligated to ship against it.
- Exporter can further reduce foreign political and bank credit risk by requesting confirmation of the Letter of Credit by a Canadian bank.

### **Disadvantages to the Exporter**

- Documents must be prepared and presented in strict compliance with the requirements stipulated in the Letter of Credit.
- Some Importers may not be able to open Letters of Credit due to the lack of credit facilities with their bank which consequently inhibits export growth.

## **BILL OF LADING**

“Bill of lading” is a multiple purpose document; it acts as contract of carriage of goods by sea, as a formal receipt for the goods shipped and as a document of title. The function attributed to Bill of lading is based on ancient customs and usages followed by merchants in trade known as *lex\_marcantia* (law merchants).

Unlike charter party, the contract of carriage of goods by sea in liner trade is evidenced by “Bill of lading” which itself is not a contract of carriage of goods rather an evidence of an already concluded contract of carriage between shipper and carrier orally. The terms and conditions appearing on reverse side of every standard “Bill of lading” do not form a contract of carriage. Thus if the terms and conditions mentioned in standard bill of lading are inconsistent with the oral commitment, the parties are at liberty to adduce evidence in support of their oral contract. *Leduc & Co v Wards* (1888); where the “Bill of lading” contained a clause enabling the carrier to deviate from agreed route which caused the ship to be lost and delivery of goods was delayed. The lawful holder sued the carrier. The carrier took the plea that the shipper knew about the deviation clause in the “Bill of lading”. Therefore no breach of contract whatsoever has been created. However the court refused to accept the plea of carrier and held that “Lawful holder who has no knowledge of any such commitment may not be made, bound to follow it”

A bill of lading is a document of title, written receipt issued by a carrier, a transport company, that it has taken possession and received an item of property and usually also confirming the details of delivery (such as method, time, place or to whom), and serves as the carrier’s title for the purpose of transportation. A ‘document of title’, is “any document used in the ordinary course of business, purporting to authorize the possessor of the document to receive goods thereby represented.”

A bill of lading serves as evidence for a contract of affreightment. This usually arises when a ship owner, or other person authorized to act on his behalf employs his

vessel as a general ship by advertising that he is willing to accept cargo from people for a particular voyage.

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of the shipment as against the master or other person signing the bill of lading, notwithstanding that the goods or some part thereof may not have been shipped, unless the holder of the bill of lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary, but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims.

In addition to acknowledging the receipt of goods, a bill of lading indicates the particular vessel on which the goods have been placed, their intended destination, and the terms for transporting the shipment to its final destination.

A bill of lading can be used as a traded object. The standard short form bill of lading is evidence of the contract of carriage of goods and it serves a number of purposes:

- It is evidence that a valid contract of carriage, or a chartering contract, exists, and it may incorporate the full terms of the contract between the consignor and the carrier by reference (i.e. the short form simply refers to the main contract as an existing document, whereas the long form of a bill of lading issued by the carrier sets out all the terms of the contract of carriage);
- It is a receipt signed by the carrier confirming whether goods matching the contract description have been received in good condition (a bill will be described as clean if the goods have been received on board in apparent good condition and stowed ready for transport); and
- It is also a document of transfer, being freely transferable but not a negotiable instrument in the legal sense, i.e. it governs all the legal aspects of physical carriage, and, like a cheque or other negotiable instrument, it may be endorsed affecting ownership of the goods actually being carried. This matches everyday experience in that the contract a person might make with a commercial carrier like FedEx for mostly airway parcels, is separate from any contract for the sale of the goods to be carried; however, it binds the carrier to its terms, irrespectively of who the actual holder of the B/L, and owner of the goods, may be at a specific moment.

The BL must contain the following information:

- Name of the shipping company;
- Flag of nationality;
- Shipper's name;
- Order and notify party;
- Description of goods;
- Gross/net/tare weight; and
- Freight rate/measurements and weighment of goods/total freight

While an air waybill (AWB) must have the name and address of the consignee, a BL may be consigned to the order of the shipper. Where the word order appears in the consignee box, the shipper may endorse it in blank or to a named transferee. A BL endorsed in blank is transferable by delivery. Once the goods arrive at the destination they will be released to the bearer or the endorsee of the original bill of lading. The carrier's duty is to deliver goods to the first person who presents any one of the original BL. The carrier need not require all originals to be submitted before delivery.

It is therefore essential that the exporter retains control over the full set of the originals till payment is effected or a bill of exchange is accepted or some other assurance for payment has been made to him. In general, the importer's name is not shown as consignee. The bill of lading has also provision for incorporating notify party. This is the person whom the shipping company will notify on arrival of the goods at destination. The BL also contains other details such as the name of the carrying vessel and its flag of nationality, the marks and numbers on the packages in which the goods are packed, a brief description of the goods, the number of packages, their weight and measurement, whether freight costs have been paid or whether payment of freight is due on arrival at the destination. The particulars of the container in which goods are stuffed are also mentioned in case of containerised cargo. The document is dated and signed by the carrier or its agent. The date of the BL is deemed to be the date of shipment. If the date on which the goods are loaded on board is different from the date of the bill of lading then the actual date of loading on board will be evidenced by a notation on the BL. In certain cases a carrier may issue a separate on board certificate to the shipper.

## **Main Types of BOL**

### **Order bill of lading**

This bill uses express words to make the bill negotiable, e.g. it states that delivery is to be made to the further order of the consignee using words such as "delivery to A Ltd. or to order or assigns". Consequently, it can be indorsed (legal spelling of endorse, maintained in all statute, including Bills of Exchange Act 1909 (CTH)) by A Ltd. or the right to take delivery can be transferred by physical delivery of the bill accompanied by adequate evidence of A Ltd.'s intention to transfer.

### **Bearer bill of lading**

This bill states that delivery shall be made to whosoever holds the bill. Such bill may be created explicitly or it is an order bill that.

### **Surrender bill of lading**

Under a term import **documentary credit** the bank releases the documents on receipt from the negotiating bank but the importer does not pay the bank until the maturity of the draft under the relative credit. This direct liability is called Surrender Bill of Lading (SBL), i.e. when we hand over the bill of lading we surrender title to the goods and our power of sale over the goods.

A **clean bill of lading** states that the cargo has been loaded on board the ship in apparent good order and condition. Such a BL will not bear a clause or notation which expressively declares a defective condition of goods and/or the packaging. Thus, a BL that reflects the fact that the carrier received the goods in good condition. The opposite term is a **soiled bill of lading**, which reflects that the goods are received by the carrier in anything but good condition.

### **Other Terminology**

A sea or air *waybill* is a non-negotiable receipt issued by the carrier. It is most common in the container trade either where the cargo is likely to arrive before the formal documents or where the shipper does not insist on separate bills for every



item of cargo carried (e.g. because this is one of a series of loads being delivered to the same consignee). Delivery is made to the consignee who identifies himself. It is customary in transactions where the shipper and consignee are the same person in law making the rigid production of documents unnecessary.

A straight bill of lading by land or sea, or sea/air waybill are not documents that can convey title to the goods they represent. They do no more than require delivery of the goods to the named consignee and (subject to the shipper's ability to redirect the goods) to no other. This differs from an "order" or "bearer" bill of lading which are possessory title documents and negotiable, i.e. they can be endorsed and so transfer the right to take delivery to the last endorsee. Nevertheless, bills of lading are "documents of title", whether negotiable or not, under the terms of the Uniform Commercial Code.