CHAPTER 3

THE REGULATION OF INTERNATIONAL TRADE

Overview The regulation of international trade is nearly as old as international trade itself. For years, states regulated international trade through national laws and international treaties. A multilateral approach in the regulation of international trade is, however, a thing of the relatively recent past.

The multilateral approach, which started gradually after the Second World War, promoted a market economy—a system, which allows the interplay of market forces (such as the balance between supply and demand) to play a primary role in shaping the overall direction of economic relations. A free market requires, *inter alia,* liberalisation of the movement of goods and services as well as the prohibition of restrictions on competition by the market participants.

However, beginning in the 1950s and early 1960s, there was a growing consensus that the rules of the market could not fully serve the interests of developing countries. Because of chronic balance-of-payments problems affecting these countries, trade liberalisation was believed only to worsen their trade deficits.[1] UNCTAD (United Nations Conference on Trade and Development; see paragraph 2.24) was established in 1964 to address the widening gap between rich and poor countries, and soon came up with a policy of special and differential treatment in favour of developing countries.[2] The concept and actual impact of special and differential treatment on the economic situation of its intended beneficiaries might be a matter of debate. However, the principle remains a central part of the trading system's attempts to improve the terms-of-trade situation of the developing world.

[1] For an interesting discussion of how the multilateral trading system has been responding to the perceived problems of developing countries, see Whalley, J. *Special and Differential Treatment in the Millennium Round* (Blackwell Publishers, Oxford, 1999) pp. 1065–1093.

[2] As summarised by Hudec, the creation of UNCTAD was also a response to the Cold War situation that prevailed at the time: "'Cold war' competition for the loyalty of these emerging countries intensified when the Soviet Union began to press for the creation of a global trade organization, within the United Nations, that would provide an alternative to the Western-dominated GATT. The prospect of a rival United Nations organisation grew more substantial each year and finally materialised in the form of the United Nations Conference on Trade and Development (UNCTAD)": R. Hudec, *Developing Countries in the GATT Legal System* (Trade Policy Research Centre, London, 1987), at 39.

PART I: LIBERALISATION OF INTERNATIONAL TRADE

The GATT/WTO system: overview

3.02 **General** The acronym "GATT" (General Agreement on Tariffs and Trade) is often used in two senses: as an international agreement embodying the rules and principles governing cross-border trade, and as the international organisation overseeing the implementation of the agreement.[3] In the sense of an international agreement, GATT was negotiated as part of the endeavour to establish a world-wide regulation for trade and to found an international trade organisation to that end. However, the Havana Charter, which was to have created an international trade organisation, and which was signed in 1948, never came into effect due to lack of support from the United States. This lack of enthusiasm is surprising as the United States had taken the initiative for the diplomatic conference leading to the Charter of Havana.[4] The GATT was given "provisional" effect from January 1, 1948 by a Protocol of Provisional Application (the PPA).[5]

3.03 **"Codes"** The GATT has been amended on a number of occasions. Since the Tokyo Round (1973–1979), the contracting states have preferred not to amend the GATT, but to enter into supplementary treaties (side agreements) that are not always signed by all GATT members.[6] These side agreements are usually called Codes. They concern, amongst other things, dumping (see paragraph 3.64),

[3] The text of the GATT can be found in S. Zamora & R. A. Brand, *Basic documents of international economic law* (CCH, Chicago, 1990) I, pp. 9 *et seq.* C.J. Cheng, *Basic documents of international trade law* (2nd ed., M. Nijhoff Dordrecht, 1990) pp. 867 *et seq.* P. Kunig, N. Lau and W. Meng (eds.), *International economic law—Basic documents* (de Gruyter, Berlin, 1993) pp. 483 *et seq.* In the extensive literature on GATT, consult *inter alia* J. Barton and B. Fischer, *International Trade Regulation: Regulating International Business* (Boston, 1986); W. Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Springer, Berlin, 1990); K.W. Dam, *Law and International Economic Organisation* (Chicago, 1970); D. Carreau, T. Flory and P. Juillard, *Droit international économique* (2nd ed., LGDJ, Paris, 1990) pp. 95 *et seq.*; R.E. Haddock, *The GATT Legal System and World Trade Diplomacy* (Butterworth, London, 1990); M. Hilf, F.G. Jacobs and E.U. Petersmann (eds), *The European Community and GATT* (Kluwer Law & Taxation, Deventer, 1986); J. Jackson, *World Trade and the Law of GATT* (Bobbs—Merril, Indianapolis, 1969); O. Long, *Law and its Limitations in the GATT Multilateral Trade System* (M. Nijhoff, Dordrecht, 1985); E. McGovern, *International Trade Regulation: GATT, the United States and the European Community* (2nd ed., Exeter, 1986); P.J. Kuyper, "The law of GATT as a special field of international law— Ignorance, further refinement or self-contained system of international law?" (1994), 25 N.Y.I.L. 227–257; R. Silvestre J. Martha, "Precedent in world trade law" (1997) N.I.L.R. 346–377; F. Weiss, "The WTO and the progressive development of international trade law" (1998), 29 N.Y.I.L. 71–115; J.L. Dunoff, "The death of the trade regime" (1999) 10 E.J.I.L. 733–762; J.M. Jackson, "The perils of globalisation and the word trading system"(2000) 24 Ford I.L.J. 371–382; D. Palmeter, "The WTO as a Legal System" (2000) 24 Ford I.L.J. 444–480; E. Canal-Forgues, "Sur l'interprétation dans le droit de l'OMC" (2001) 105 R.G.D.I.P. 5–24.

[4] See J. Diebold, *The End of the ITO* (Princeton, 1952).

[5] On the relationship between the GATT and the Havana Charter, see Art. XXIX of the GATT. Pursuant to the Protocol, the participating countries were allowed to maintain certain restrictions (so-called "Grandfather" clause); see M. Hansen and E. Vermulst, "The GATT Protocol of provisional application: a dying grandfather?" (1989) Colum.J.Transnat.L. 263.

[6] One exception from the pre-Tokyo Round period was the Kennedy Round Anti-Dumping Code.

export subsidies (see paragraph 3.72), public procurement (see paragraph 3.34), customs value of goods (see paragraph 3.17) and technical standards (see paragraph 3.45).

The relationship between the GATT and the Codes was not always clear. Many assumed that the GATT took precedence over the Codes. Others argued that the Codes, as full-bodied treaties, had superiority over the GATT, which had only provisional application. Some also held that there was no hierarchy between treaties in international law, and that the GATT and the Codes were equivalent. In the event, the GATT and the Codes operated side by side and the Codes superseded the GATT only when the respective provisions were clearly incompatible.[7]

This problem came to an end with the conclusion of the Uruguay Round (1986–1994), which brought two important developments in this respect. First, all preceding side agreements (Codes) have been excluded from the GATT 1994 (see paragraph 3.7). Secondly, nearly all issues previously covered by the side agreements have been the subject of separate agreements annexed to the WTO Agreement which had to be accepted in their totality by all WTO members.[8]

"Understandings" During the Uruguay Round negotiations the GATT contracting parties specified the interpretation of several GATT provisions in "Understandings". The original GATT and the respective Understandings are now together known as "GATT 1994". The Uruguay Round also led to other agreements applying to specific sectors and issues.[9] The GATT 1994 and these specific agreements are termed Multilateral Agreements on Trade in Goods and constitute Annex 1A to the Marrakesh Agreement establishing the World Trade Organisation (WTO).

The newly negotiated agreements on services (the General Agreement on Trade in Services, GATS) and on intellectual property rights (Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPs) form Annexes 1B and 1C to the Marrakesh Agreement, respectively.

Annex 2 to the Marrakesh Agreement provides for the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) and Annex 3 provides for the Trade Policy Review Mechanism (the TPRM). The agreements and associated legal instruments in Annexes 1, 2 and 3 are called the "Multilateral Trade Agreements"—agreements covered by the "package deal" principle and applying to all WTO Members. On the other hand, Annex 4 provides for

[7] See P.J. Kuyper, "Het GATT en het Volkenrecht" (1993) 107 Med.Ned.Ver.Int.R. 25.

[8] By virtue of the all-or-nothing approach of the package deal principle adopted by the Uruguay Round (see para. 3.108).

[9] They are the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Textiles and Clothing, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, the Agreement on Preshipment Inspection, the Agreement on Rules of Origin, the Agreement on Import Licensing Procedures, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.

the two (originally four) so-called Plurilateral Trade Agreements, falling outside the package deal principle and from which countries could pick and choose.[10]

The WTO administers both the Multilateral and the Plurilateral Agreements annexed to the Marrakesh Agreement.

3.05 **Direct effect** There is no clear answer to the question of whether the provisions of GATT have direct effect, *i.e.* whether they give rights to individual natural and legal persons and whether these rights can be invoked in the national courts by them (see paragraph 1.04).[11]

A number of authors have argued that the GATT should have direct effect to give it more legal significance; some earlier American judgments went in this direction.[12] However, most writers are of the opinion that the limited sanctions available in the event of the violation of GATT rules and, in particular, the vague wording of the GATT provisions, prevent those provisions from being self-executing. Indeed, in the United States the Uruguay Round Implementation Act expressly states that "No person other than the United States . . . shall have any cause of action or defence under any of the Uruguay Round Agreements or by virtue of Congressional approval of such an agreement."[13] The European Court of Justice has also clearly denied direct effect to GATT rules,[14] basing its decision on:

- the great flexibility of the GATT provisions;
- the many exceptions;
- the non-enforceable dispute regulation in the GATT.[15]

[10] At the beginning of the WTO, there were four such Plurilateral Agreements: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement. However, the International Meat Council (administering the Bovine Meat Agreement) and the International Dairy Council (administering the Dairy Agreement), terminated their respective Agreements as of the end of 1997 (see WTO Press Release of September 30, 1997, PRESS/78.) As a result, only two Plurilateral Agreements remain in force today. The Arrangement Regarding Bovine Meat and the International Dairy Arrangement came into operation on January 1, 1980 after the Tokyo Round with the objective of expanding and liberalising world trade in their respective sectors. Both agreements—renamed the International Bovine Meat Agreement and the International Dairy Agreement—were annexed to the WTO Agreement.

[11] P. Eeckhout, "The domestic legal status of the WTO Agreement: interconnecting legal systems" (1997) 34 C.M.L.Rev. 11–58.

[12] See, *e.g.* J. Jackson, "The GATT in United States domestic Law" (1967) Mich.L.Rev. 249.

[13] s.102(c)(1)(A) of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103–465. See also R. Brand, "Direct effect of international economic law in the United States and the European Union" (1997) 17 NW.J.Int'l.L.&Bus. 556.

[14] See, *inter alia*, Case 21–24/72, *International Fruit Company* [1972] E.C.R. 1219, Case 9/73, *Schluter* [1973] E.C.R. 1135, Case 38/75, *Douaneagent der Nederlandse Spoorwagen* [1976] E.C.R. 1439, and Case C–280/93, *Germany v. Council* [1994] E.C.R. I–4973. Consult M. Marcesceau, "The GATT in the case law of the European Court of Justice", in M. Hilf, F.G. Jacobs and E.U. Petersmann (eds), *op.cit.* pp. 107 *et seq.* (with further commentaries on recent judgments of the Court); C. D. Ehlermann, "Application of GATT rules in the European Community", in *ibid.*, pp. 127 *et seq.*, and R. Brand, *op.cit.* n. 13.

[15] The recent substantive development of the GATT dispute regulation weakens this argument of the Court; see para. 3.108.

This means that neither an individual within the E.U. nor a Member State, can challenge a legal act on the grounds of incompatibility with a GATT provision.[16] The incorporation of the GATT into the WTO has strengthened the GATT decision mechanism and dispute regulation (see paragraph 3.106). However, the following summary of an ECJ case between Portugal and the Council indicates that the impact of this development on the question of direct effect seems to have been limited.

Portugal v. Council In this case,[17] Portugal challenged the legality of a Council decision, claiming that it constituted a breach of certain rules and principles of the WTO, *i.e.* those of GATT 1994. In response, the Council relied on what it called "the special characteristics of the WTO agreements" which, in its view, still necessitated denial of direct effect, just like GATT 1947. Portugal stressed the fact that "it is not GATT 1947 that is in issue in the present case but the WTO agreements" that are "significantly different from GATT 1947, in particular in so far as they radically alter the dispute settlement procedure."

The Court agreed with Portugal that the WTO agreements differed significantly from the provisions of GATT 1947, mainly on account of the strengthening of the dispute settlement system. However, it reiterated that "the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties". In a manner that magnifies the political aspect of its decision, the Court even went outside the confines of its system and observed that

> "some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law."

It thus concluded that the WTO agreements were not in principle among the rules in the light of which the Court would review the legality of measures adopted by the Community institutions.

GATT 1994 As pointed out, the expression "GATT 1994" is shorthand for the 1947 version of the General Agreement as amended over time, the tariff concession and accession protocols and other decisions taken under GATT 1947,

[16] How individuals somehow can rely on the GATT rules is described in the "new instrument for trade policy" of the E.U., which allows individuals to lodge a complaint with the Commission against "illicit commercial trade practices" from third countries, *i.e.* practices that are incompatible "with the international law or generally accepted rules" (see para. 3.54). In that event, individuals can rely on the GATT rules: Case 70/87, *Fediol* [1989] E.C.R. 1781. Moreover, the ECJ has admitted an action with respect to a Community act (Council Regulation 404/93), which is based *inter alia* on infringement of the GATT rules (Case C–280/93, *Federal Republic of Germany against the Council of the European Communities* [1993] O.J. C173/17). See however, J. Osterhond Berkey, "The European Court of Justice and direct effect for the GATT, a question worth revisiting" (1998) 8 E.J.I.L. 626–657.

[17] See *Portugal v. Council*, Case C–149/96, para. 25.

as well as the understandings reached on the interpretation of GATT provisions such as Articles II.1(b), XVII, XXIV, etc. The acronym "GATT" is used here in this wide sense.

3.08 **Substance of GATT** The GATT includes some important principles (*e.g.* non-discrimination and most favoured nation treatment in respect of other GATT members, see paragraph 3.09) and prohibitions. It also provides for procedures to advance the liberalisation of trade. The GATT thus counters:

- tariff restrictions (taxes, such as customs duties, which are charged when goods cross a border) (see paragraph 3.13);
- quantitative restrictions (quotas, import and export licences) (see paragraph 3.26);
- other non-tariff barriers (NTBs) (various protective measures which have the same effect as tariffs and quantitative restrictions) (see paragraph 3.32).

Most favoured nation treatment

3.09 **General** It is significant of the objectives of the GATT that its Article I provides for a general most favoured nation treatment (see paragraph 1.08):

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

The various liberalisation measures which have been introduced pursuant to the GATT by members of the WTO must thus in principle be extended to all other WTO members. Although Article I applies mainly to customs and other duties, it is deemed that it is also applicable to other trade policy measures.[18] For instance, when identical instances of dumping (see paragraph 3.64) have been established in a contracting state on the occasion of imports from different contracting states, the country of importation must in principle enact the same anti-dumping measures against any such dumped imports.[19] Moreover, it appears from the words "any other country" that the most favoured treatment also applies when a contracting state gives preferences to a country that is not a contracting state of the GATT.[20]

[18] M. Broszkamp, *Meistbegünstigung und Gegenseitigkeit im GATT* (Carl Heymanns, Cologne, 1990); D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 105 *et seq.*; E. McGovern, *op.cit.* pp. 202 *et seq.*

[19] GATT, Basic Documents and Selected Instruments (1961) p. 198.

[20] The General Agreement on Trade in Services (GATS) also provides for an unconditional MFN in its Article II. For further discussion on this point, see para. 3.81.

Substance of the rule The rule must be applied "unconditionally". This means, for instance, that a state can invoke most favoured nation treatment without granting in return some advantage. In other words, the rule is not based on reciprocity. **3.10**

Every "tariff concession" (see paragraph 3.15) granted by a Member State thus has *erga omnes* effect for all other Member States. However, derogation from the rule of most favoured nation treatment could be obtained on the basis of a waiver adopted with a qualified majority by WTO members (see paragraph 3.56). Furthermore, the rule does not apply to customs unions and free trade areas that satisfy the requirements set by pertinent GATT provisions (see paragraph 3.11). Neither does the rule apply to developing countries (see paragraph 3.49).

Customs unions and free trade areas The MFN principle embodied in Article I of the General Agreement testifies to the global approach adopted by GATT in the liberalisation of international trade. GATT was not, however, oblivious to the potential attractions of regional trade agreements (RTAs). Indeed, recognition was given to "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."[21] To reconcile these apparently contradictory approaches, GATT Article XXIV provided that "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."[22] Article XXIV(5) of GATT thus provides for a general exception to the rule of most favoured nation treatment for customs unions and free trade areas (see paragraph 2.34), as does Article V of GATS from the MFN principle enshrined under Article II thereof. **3.11**

However, a number of conditions are attached to this recognition of the use of free trade areas and customs unions. Article XXIV(8) of GATT gives a description of free trade areas and customs unions:

- A free trade area is a grouping of two or more customs territories for which the customs duties and other trade restrictions are lifted for an essential part of trade between the Member States.[23] It only relates to the free movement of goods between the Member States. In respect of third countries there is neither a common customs tariff nor a common trade policy.
- A customs union replaces one or more customs territories by one customs territory so that customs duties and other trade restrictions between the Member States are lifted for substantially all the trade between these states. Each Member State applies identical duties and other trade restrictions in respect to third states. This entails in practice that besides the internal free trade in goods, a common customs tariff and a common trade policy is applied to third countries.

[21] GATT 1994, Art. XXIV:4.

[22] *ibid.* Art. XXIV:5.

[23] R.S. Imhoof, "Le GATT et les zones de libre-échange" (Geneva, 1979).

In customs unions (but not free trade areas) restrictions on trade in respect of third countries are not allowed to be greater or more restrictive than the individual restrictions applied by the Member States before they entered into the customs union (Article XXIV 5(a)). This means in real terms, *inter alia*, that the common customs tariff may only be equal to or less than the average of the national tariffs before the establishment of the customs union.[24]

3.12 **Applications** It has been accepted that the E.U. satisfies the description of a customs union.[25] The question of whether certain E.U. provisions (*e.g.* concerning agriculture[26] and the preferential agreements with some third states such as the Mediterranean or ACP countries) are compatible with the GATT crops up regularly.[27]

As regards the European Coal and Steel Community, a special waiver for admission was granted by the contracting states, since this regional union does not apply to "substantially all the trade" between the Member States.[28]

Various regional unions fall within the exception of Article XXIV(5), including:

- the association between the E.U. and the countries of the European Free Trade Association (EFTA)(see paragraph 2.35)[29];
- the association between the United States and Canada to establish a free trade area between both countries[30];
- the free trade zone between the United States, Mexico and Canada (NAFTA) (see paragraph 2.36) [31];

[24] For problems on the application of this rule in respect of the E.U., see D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 127 *et seq.*

[25] Consult, *inter alia*: G. de la Charriére, "L'examen par le GATT du traité de Rome instituant la Communauté économique européenne" (1958) A.F.D.I. 621; M. Hilf, F.G. Jacobs and E.U. Petersmann, *op.cit.* pp.127 *et seq.*

[26] See GATT Oil Seeds Panel Report (1992) BISD 37S/86 http://www.worldtradelaw.net/reports/gattpanels/oilseedsII.pdf.

[27] See in particular: E.U. Petersmann, "The EEC as a GATT member: legal conflicts between GATT law and European community law" in M. Hilf, F.G. Jacobs and E.U. Petersmann, *op.cit.* pp. 23 *et seq.*; I. Nordgren, "The GATT Panels during the Uruguay Round" (1991/4) J.W.T. 57.

[28] GATT, Basic documents and selected instruments (1953) p. 17.

[29] F. Schoneveld, "The E.C. and free trade agreements—stretching the limits of GATT exceptions to non-discriminatory trade?" (1992/5) J.W.T. 59. See, *e.g.* the agreement between the E.C. and Switzerland, in S. Zamora & R.A. Brand, *op.cit.* II, pp. 337 *et seq.* (with explanation by H. Van Houtte); [1972] O.J. L300/191. These various agreements refer expressly to Art. XXIV of the GATT.

[30] See text in S. Zamora and R.A. Brand, *op.cit.* II, pp. 353 *et seq.* See, *inter alia*, S.A. Baker and S.P. Battram, "The Canada-United States free trade agreement" (1989) *International Lawyer* 37; R.M. Bierwagen and V. Heegemann, "Das Freihandelsabkommen zwischen Kanada und den Vereinigten Staaten: Bestandsaufnahme aus europäischer Sicht" (1989)R.I.W. 33; T. Flory, "L'examen par le GATT de l'Accord de libre-échange Etats-Unis-Canada" (1991) A.F.D.I. 700; D. Stevens, "The Canada–US trade agreement: an analysis of its main provisions" (1989) *Revue de Droit des Affaires Internationales* 918, 1022; A. Weber, "Das amerikanisch-kanadische Freihandelsabkommen vom 2. January 1988" (1988) R.I.W. 975.

[31] J. Jackson, "Reflections on the implications of NAFTA for the world trading system" (1992) 30 Colum.J.Transnat.L. 501; F. Abbott, "Integration without institutions: the NAFTA mutation of the E.C. model and the future of the GATT regime" (1992) 40 Am.J. Comp. L. 917. See the Symposium on NAFTA in (1993) 27 *International Lawyer* 589 *et seq.*

- various free trade areas in Central and South America,[32] South East Asia,[33] and in Africa (see paragraphs 2.38 *et seq.*)

An Understanding on the interpretation of Article XXIV determines the procedural and substantive conditions that the regional unions have to satisfy in order to benefit from the exception. Disputes are submitted to the general dispute settlement procedure of the WTO (see paragraphs 3.106 *et seq.*).

The relationship between the MFN principle and free trade areas and customs unions is the subject of Article XXIV of the GATT. Customs unions and free trade areas may not have the effect that new restrictions are created for trade between members of the regional union and third countries).[34] They should be "trade creating, not trade diverting".[35] In 1947, these two forms of regional trade arrangements were viewed as trade-creating instruments, but there were also concerns about their possible trade-distorting effects. Trade liberalisation under the GATT paralleled a process of increasing economic integration among contracting parties. In order to monitor compliance with the requirements of Article XXIV and the Uruguay Round Understanding, the WTO General Council established the Committee on Regional Trade Agreements ("CRTA"),[36] with the mandate of, *inter alia*, examining all RTAs notified to the Council for Trade in Goods ("CTG") under Article XXIV.[37] Nearly all Members of the WTO have notified participation in one or more RTAs. According to the WTO, in the period 1948–1994, the GATT received 124 notifications of RTAs (relating to trade in goods). Since 1995, 100 additional arrangements covering trade in goods or services have been notified.[38]

GATT recognised the beneficial effect of regional trade arrangements for the integration of particularly developing countries into the global trading system, but also reaffirmed "the primacy of the multilateral trading system, which

[32] *e.g.* the treaty establishing a common market between Argentina, Brazil, Paraguay and Uruguay (MERCOSUR), March 26, 1991, (1991) 30 I.L.M. 1041, Treaty on Central American Economic Integration between Costa Rica, Guatemala, Honduras, El Salvador and Nicaragua, December 13, 1960 (S. Zamora and R.A. Brand, *op.cit.* II, pp. 525 *et seq.*), the Cartegena Agreement on subregional integration between Bolivia, Colombia, Ecuador, Peru and Venezuela (Andean Pact), May 26, 1969, (1969) 30 I.L.M. 910 substantially modified by the Protocol of Quito, May 11, 1987, (1989) 28 I.L.M. 1165, Treaty of April 7, 1973 on the establishment of a Caribbean Community and a Caribbean Common Market (CARICOM), July 4, 1973, (1973) 12 I.L.M. 1033. See, for a survey on the American and Latin American customs unions or free trade areas in relation to the GATT, I. Bernier, "Le nouveau visage de l'intégration économique en Amérique: vers une régionalisation du GATT?" in *Perspectives Convergentes et Divergentes sur l'Intégration Économique* (Pedone Paris, 1993) p. 123.

[33] An Agreement on the Preferential Tariff (CAPT) Scheme for the Asian Free Trade Area (ACTA), (1992) 31 I.L.M. 513.

[34] Art. XXIV (4). This provision has given rise to a number of disputes between the E.U. and the U.S. See D. Carreau, T. Flory and P. Juillard, *op.cit.*, pp. 127 *et seq.*

[35] For a useful summary, see "Turkey—Restrictions on Imports of Textile and Clothing Products", Panel and Appellate Body Reports (WT/DS34/R) May 31, 1999, paras 2.2–2.9 and 9.97–9.192; see also Madeleine Hosli and Arild Saether (eds), *Free Trade Agreements and Customs Unions: Experiences, Challenges and Constraints* (EIPA, Maastricht, 1997).

[36] WT/L/127; http://www.wto.org/english/tratop_e/region_e/regcom_e.htm.

[37] See "Turkey Textiles", report of the panel, para. 2.7. http://www.worldtradelaw.net/reports/wtopanels/turkey-textiles(panel).pdf.

[38] See http://www.wto.org/english/tratop_e/region_e/regfac_e.htm See also *Turkey Textiles*, report of the panel, paras 2.3–2.6.

includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules."[39]

Lowering of customs duties

3.13 **Tariff restrictions (customs duties)** Countries establish their customs duties product by product. Generally, goods, the importation of which is encouraged, enjoy a favourable customs duty; goods, the importation of which should rather be slowed down, are burdened with a higher duty.

The GATT does not prohibit the imposition of customs duties. It merely states that restrictions only applied to imported goods must be in the form of customs duties and not, for instance, in the form of discriminatory internal taxes (Article III), exorbitant import fees (Artice VIII) or quantitative restrictions (Article XI).

However, the GATT does impose an obligation on the contracting states to negotiate regularly on the reciprocal granting of tariff concessions, *i.e.* on the lowering of customs duties (Article XXVIII *bis*). So far eight negotiation rounds have been held. They are called after a city, a person or a country; Geneva (1947), Annecy (1949), Torquay (1950–1951), Geneva (1955–1956), Dillon Round (1960–1962), Kennedy Round (1963–1967), Tokyo Round (1973–1979),[40] Uruguay Round (1986–1993). A ninth round is widely expected

Earlier rounds were largely restricted to tariff negotiations. Since the Kennedy Round, and particularly since the Tokyo Round, however, the negotiations have also involved various other problems in international trade. These negotiation rounds are therefore called multilateral trade negotiations (MTN).

3.14 **The negotiation rounds** Two principles govern the negotiation rounds[41]:

(a) Reciprocity (GATT, Article XXVII), which means that a contracting state concedes to other states advantages of the same order as the advantages the state has obtained for itself.[42] This also means that, for instance, after acceding to the GATT, new contracting states have the benefit of advantages already in existence, but must in turn also grant these advantages to the other contracting states.

[39] The 1996 Singapore Ministerial Declaration: WT/MIN(96)/DEC, para. 7.

[40] The designations "Tokyo Round" and "Uruguay Round" indicate the increasingly important role of both Japan and the developing countries in the regulation of international trade. See particularly D. Carreau, "Les négociations commerciales multilatérales au sein du GATT: le Tokyo Round" (1980) Cah.Dr.Eur. 145; J.H. Jackson, J.V. Louis and M. Matsuhita, *Implementing the Tokyo Round* (Ann Arbor, Mich., 1984); G.R. Winham, *International Trade and the Tokyo Round* (1986, Princeton).

[41] See, *inter alia*, M. Broszkamp, Meistbegünstigung und Gegenseitigkeit im GATT (Carl Heymanns, Cologne, 1990).

[42] Obviously it is difficult in practice to calculate exactly the various trade concessions. See on this, E. McGovern, *op.cit.* pp. 136–137.

(b) Most favoured nation treatment (GATT, Article I): this principle has as a consequence that every tariff concession granted by one contracting state to another contracting state must unconditionally apply to all other contracting states.

The tariff negotiations are conducted multilaterally.

3.15 **Negotiating technique** Until the Dillon Round there were "product-by-product" negotiations. Each contracting state made up a list of its proposed tariff concessions. These lists were then compared, "weighted"[43] and negotiated. This technique produced few concrete results.

Since the Kennedy Round, a technique of linear tariff reduction has been applied.[44] The negotiations concern first a formula for general tariff reductions that applies to all products (*i.e.* the percentage of reduction and its application in time). After approving the principal formula of tariff reduction, exceptions are negotiated and so-called "negative lists" are drawn up. The result of the global negotiations is then "consolidated" product by product for each contracting state: that state can no longer apply higher customs duties on goods from other contracting states than those agreed during the negotiation round. The consolidated list of customs duties becomes a new protocol to the GATT.[45]

The schedule consists of three parts for each country, *i.e.*:

- customs duties for countries which enjoy most favoured treatment (see paragraph 3.09);
- preferential customs duties for developing countries (see paragraphs 3.49 *et seq.*);
- non-tariff concessions per product (see paragraphs 3.32 *et seq.*).

The schedules are binding. If a contracting state wants to depart from its schedule, the other contracting states must in principle agree unanimously to this. Nonetheless, Article XXVIII provides for a more flexible procedure: tariff changes may also be negotiated directly with the states that are most affected by such change.[46] Furthermore, states may call on the safeguards clauses of Article XIX (massive imports that could cause major injury to local business) for a temporary increase in certain import duties or quantitative restrictions (see paragraph. 3.54).

[43] Tariff concessions for a product that is seldom exported and/or for which there is little or no local supply, "weighs" less than a concession for products that are frequently imported and/or for which there are also local suppliers.

[44] G. Curzon, *Multilateral Commercial Diplomacy: the GATT and its Impact on National Commercial Policies and Techniques* (Praeger, New York, 1966).

[45] The tariff negotiations of the Uruguay Round are, for instance, consolidated in the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994.

[46] The Uruguay Round includes an "Understanding on the Interpretation of Article XXVIII (Modification of GATT schedules)" which establishes new procedures for the negotiation of compensation when tariff bindings are modified or withdrawn, including the creation of a new negotiating right for the country for which the product in question accounts for the highest proportion of its exports.

International rules for customs duties

3.16 **Product classification** There are different kinds of products. Customs clearance therefore requires product classification so that the customs officials are able to determine the specific nature of the goods, in order to establish the customs duties due.

An efficient passage through customs demands, therefore, a common and uniform system for the classification of goods. In this way the same good will be classified identically in each country for customs purposes. The harmonisation of customs classification is in the hands of the World Customs Organisation (WCO), representing 153 customs administrations world-wide, responsible for processing more than 45 per cent of all international trade. [47] The WCO has developed and introduced the Harmonised Commodity Description and Coding System, which is used world-wide as the basis for classifying goods and for the collection of customs revenue.[48] The WCO keeps the classification up to date by issuing "Recommendations".[49]

The "harmonised system" has a list of chapters (ranging from simple to more complex goods) under which all goods can be accommodated. Each chapter is divided into a number of headings; each heading is subdivided into sub-posts. They are all arranged according to the decimal system. The chapters are collated in sections. For example, in Chapter 1 (live animals), heading 01.01 applies to: "live horses, asses, mules"; sub-post 01.01.11 concerns "Pure-bred breeding horses". In Chapter 95, "toys, games and sports requisites", sub-post 95.06 applies to: "Articles and equipment for gymnastics, athletics and other sports or outdoor games, not specified or included elsewhere in Chapter 95". Sub-post 95.06.21 applies to "sail boards".

Some general principles for interpretation of the classification apply:

- The headings of the sections and chapters are only for easy reference; the products must be classified according to the text of the different product descriptions and the general guidelines, as mentioned in an introductory note in each section or chapter.
- A product that is not yet assembled, or is unfinished or incomplete, will be considered as a finished product for the classification when it possesses the intrinsic characteristics of the finished product.
- When a product can be categorised under more than one product description, the most characteristic description is preferred; for composite products or mixtures the description of the good or of the part that gives the product its intrinsic character applies; if neither can be applied, the product description that comes numerically last prevails.

[47] In fact the WCO is merely the new name for the Customs Co-operation Council, established in 1952. http://www.wcoomd.org/

[48] *ibid.*

[49] *ibid.*

- Goods which according to the above rules are not covered by any product description, are placed under the description of a product with which they show the most likeness.

3.17 **Customs value** Customs duties are sometimes charged by item, sometimes by volume or sometimes by weight. However, they are usually charged on the value of the imported goods (*ad valorem*). This requires that the customs officials determine the value of the goods. Up until 1981 the importer was given very little scope to influence the determination of the customs value. Although Article VII of the GATT excluded valuation on an arbitrary or fictitious basis, it left the customs officials the choice between the real value of the imported goods and the value of similar foreign goods. The value of the imported goods themselves was seldom applied. The duty was usually charged on the basis of the price for which similar foreign goods were bought or offered for sale.[50] Moreover, whereas GATT formally excluded valuation on the basis of the value of national goods, the United States valued some goods on the basis of the price of domestically produced goods with which the imported goods compete (the American Selling Price—ASP).

3.18 **Customs valuation rules** Article VII is the principal provision governing the valuation of goods in GATT. Subsequently, the Tokyo Round introduced the so-called Valuation Code, which was signed by the most important trading nations which used its uniform criteria for the determination of the customs value of goods.[51] Many developing countries hesitated to do so, wishing to avoid the restraint of the Code (which excludes overvaluation). Indeed, it was easier for them to charge import duties than income tax. Since customs duties are frequently the principal source of revenue in developing countries, they are often inclined to inflate the customs value of imported goods, which they would no longer be able to do under the Customs Valuation Code. The Uruguay Round built upon this foundation and introduced the WTO Valuation Agreement. This Agreement is essentially the same as the Tokyo Round Valuation Code and applies to the valuation of imported goods for the purpose of levying *ad valorem* duties on such goods. It applies to all WTO Members. Developing countries have been granted a delay in the application of the Agreement.[52]

The WTO Valuation Agreement mandates the WCO to administer the Agreement through its Technical Committee for Customs Valuation. This Committee ensures uniformity in the interpretation and application of the Agreement at a

[50] The "selling price on the free market", the criterion of the Brussels Customs Value Convention (1950), generally applied during the 1950s and 1960s.

[51] Agreement on the application of Art. VII of the General Agreement of Tariffs and Trade, *inter alia* [1980] O.J. L71/107. See on the Code, H. Glashoff, "Der 'Kauf von Waren' im neuen Zollwert-System" (1980) R.I.W. 626; S. Sherman, "Reflections on the new customs valuation code" (1980) L. and Pol. Int'l. Bus. 119; S. Sherman & H. Glashoff, *Customs Valuation, Commentary on the GATT Customs Valuation Code* (Kluwer, Deventer, 1988); H. de Pagter and R. van Raan, *The Valuation of Goods for Custom Purposes* (Kluwer, Deventer, 1981).

[52] For more on this, see http://www.wto.org/english/tratop_e/cusval_e/cusval_e.htm. Y. Shin, "Implementation of the WTO Customs Valutation Agreement in Developing Countries—Issues and Recommendations" (1999) 33 J.W.T., No. 1, pp. 125–144.

The GATT regulation on quantitative restrictions, however, has a limited effect because of the many exceptions. Article XI allows for the following exceptions to this prohibition:

- temporary export restrictions of foodstuffs or other "essential" products when there is a shortage of such products on the national market;
- import restrictions on agricultural and fishery products when these restrictions are part of a national policy of subsidising agricultural prices (see paragraph 3.57)[63];
- restrictions on basic products which follow from an international agreement on basic products (see paragraph 2.65).

Moreover, Article XIII–1 prohibits any form of discrimination in the establishment or application of import or export restrictions; quantitative restrictions must apply equally to all third countries (thus, not only to the other GATT members).

Furthermore, quantitative restrictions are also permitted on the basis of other exceptions, particularly for the protection of the balance of payments and the currency reserves of contracting states (see paragraph 3.52) and for the protection of domestic industries against serious injury (see paragraph 3.54). Quantitative restrictions are mainly lifted within regional unions or on the basis of other co-operation agreements (*e.g.* OECD, which also liberalises the trade in services).

3.27 **Import licensing procedures** Countries use import licensing mechanisms for a variety of purposes, including the administration of quotas, tariffs, rate quotas and the like. In general, licensing regimes are not prohibited under the GATT, but, they are not permitted to operate as independent restrictive mechanisms in themselves. On that basis, there is a well-developed case law that while automatic licensing procedures are generally permitted, discretionary licensing procedures are generally prohibited. Even then, however, as the *Korea Beef* panel put it, "where a quota is [legally] in place, the use of a discretionary licensing system need not necessarily result in any additional restriction."[64]

An Agreement on import licensing procedures was concluded at the end of the Tokyo Round (1979). The main purpose of this convention was to simplify the import formalities and to communicate timely relevant information to the other contracting states. The new Agreement on import licensing procedures, concluded during the Uruguay Round, increases transparency and predictability. Amongst other things it requires the contracting states to publish enough information concerning the basis on which licences are granted. Automatic licensing

[63] See a further discussion in D. Carreau, T. Flory, and P. Juillard, *op.cit.*, pp. 117 *et seq.*

[64] See Korea Beef, report of the panel, para. 782. http://www.wto.org/english/tratop_e/dispu_e/161r_e.pdf.

procedures are deemed not to have trade restrictive effects when certain conditions are fulfilled.

Textile and clothing Trade in textile and clothing products (understood in a wider sense, *i.e.* from fibre to clothing) was governed by special regimes outside the normal GATT rules. Both bilateral as well as multilateral arrangements have been used to limit the importation of textiles from developing countries (particularly South East Asia) to the industrialised countries. 3.28

The 1974 Multifibre Arrangement (MFA), concluded within the framework of GATT, offered "a framework for bilateral agreements or unilateral actions that established quotas limiting imports".[65] This agreement was initially concluded for a period of four years and has been repeatedly extended with some amendments. The last version, known as MFA IV, was itself extended several times until 1994 when it was finally taken over by the Uruguay Round Agreement on Textiles and Clothing.[66]

In its own terms, the MFA aimed at liberalisation of the international trade in textiles, the increase of textile export from developing countries, the prevention of imbalances in the market and an "orderly growth" in the textile trade. To reconcile these conflicting objectives the Arrangement allowed for specific import restrictions under international supervision.[67]

The MFA confirmed that it was appropriate and consistent with equity to favour the importation of textiles from developing countries. Nevertheless, most restrictions affected the importation of cheaper textiles from such countries.

A Textiles Surveillance Body (TSB), established within the framework of GATT, oversaw observation of the Multifibre Arrangement. It also acted as mediator in multilateral negotiations or disputes. The TSB could only issue recommendations to the contracting states.

The Uruguay Round Agreement on Textiles and Clothing (the ATC) The Uruguay Round envisaged the formulation of modalities that would permit the eventual integration of the sector of textile and clothing into GATT".[68] To that end, the Agreement on Textiles and Clothing (the ATC) was concluded as a 3.29

[65] See WTO, *Introduction to the WTO: Trading into the Future* (2nd ed., 1999), p. 20.

[66] For the 1986 version see GATT, *Basic Instruments and Selected Documents* (1987), pp. 7 *et seq.* *cf.* A. Majmudar, "The Multifibre Agreement (1986–1991): a move towards a liberalised system?" (1988/2) J.W.T. 109. For more on this, see Jackson, J., W. Davey, and A. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text* (3rd ed., West Publishing Co., St Paul, Minn., 1995), pp. 1184–1195.

[67] Consult V. Aggarwal, *Liberal Protectionism: The International Politics of International Textile Trade* (Berkeley, 1985); H. Zheng, *The Legal Structure of International Textile Trade* (New York, 1988); A. Majmudar, *op.cit.*; W.R. Cline, *The Future of World Trade in Textiles* (Washington, D.C., 1986); F.A. Khavand, "Droit international des textiles et pays en développement" (1987) Rev.gen-.dr.int.pub. 1241; H.G. Krenzler, "The Multifibre Arrangement as a special regime under GATT", in M. Hilf, F.G. Jacobs and E.U. Petersmann (eds), *The European Community and GATT, op.cit.* pp. 141 *et seq.*; N. Blokker, *International Regulation of World Trade in Textiles* (Nijhoff, Dordrecht, 1990); R. Khanna, "Market sharing under Multifibre Arrangement: consequences of non-tariff barriers in the textiles trade" (1990/1) J.W.T. 71; F. Marrella, "L'organisation mondiale du commerce et les textiles"(2000) 104 R.G.D.I.P. pp. 659–693.

[68] See preamble to the ATC, para. 1.

transitional instrument intended to phase out the GATT-inconsistent arrangement of the MFA over a period of 10 years.

Article 2 is "the core of the ATC".[69] According to this provision, the reintegration process is carried out on the basis of importing countries' notifications of their respective quantitative restrictions that they maintained under the MFA on the eve of the entry into force of the WTO Agreement in 1995.[70] Any restrictions that had not been duly notified had to be terminated forthwith.[71] No new restrictions in terms of products or Members were to "be introduced except under the provisions of this Agreement or relevant GATT provisions".[72] The restrictions are governed only by the provisions of the ATC. Moreover, the ATC sets a four-stage process leading to their total elimination and the full reintegration of the textile industry into the mainstream rules of the WTO system by 2005.[73] This means that, by the first day of 2005, the ATC will have accomplished its task of reintegrating the textile industry into GATT 1994 and make itself superfluous—hence the ATC itself will cease to exist after the end of 2004. Indeed, the Agreement on Textiles and Clothing is "the only WTO agreement that has self-destruction built in."[74]

The ATC also has a special provision concerning the possible use of a special safeguard measure, here termed a "transitional safeguard". These measures may be taken only if a member determines that a particular product is being imported into its territory in such increased quantities as to cause (or threaten) serious damage to the domestic industry producing like and/or directly competitive products. The ATC stresses that there should be a clear causal link between the increased quantity of imports and the resulting damage or threat thereof. The Agreement also contains an "indicative list" of economic variables that should be considered in the assessment of the adverse effect of these imports on the domestic industry, such as output, productivity, utilisation of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and

[69] "Turkey—Restrictions on Imports of Textile and Clothing Products", report of the panel, WT/DS34/R, http://www.worldtradelaw.net/reports/wtopanels/turkey-textiles(panel).pdf of May 31, 1999, para. 9.68.

[70] It is notable that "under the ATC the right to maintain MFA derived quantitative restrictions and the integration process by stages are not related. The provisions of the ATC make clear that the fact that a product has not yet been re-integrated into the general GATT rules does not in any manner imply a right to introduce new import restrictions under Article 2.1 of the ATC on such products. The main benefit for Members resulting from the notification of an integration programme within 6 months of the entry into force of the WTO Agreement, is the use of the special safeguard mechanism under the ATC. There is no relation between the safeguard provisions of the ATC and the right to introduce new quantitative restrictions under Article 2.1 of the ATC.": "Turkey—Restrictions on Imports of Textile and Clothing Products", report of the panel, *op.cit.*, at para. 9.74.

[71] Apparently, only four WTO members notified existing restrictions to the TMB pursuant to Art. 2.1 of the ATC: Canada, the European Communities, Norway and the United States. See *Turkey Textiles* panel report *op.cit.* at para. 9.69. This means that only these countries are allowed to maintain GATT-inconsistent restrictions for the duration of the transitional period of ten years provided that the provisions of the ACT are complied with. For an interesting practical application of this provision, see "Turkey Textiles" panel report, *op.cit.*

[72] See Art. 2.4 of the ATC.

[73] Taking the total volume of a member's 1990 textile imports as the benchmark, the ATC provides that each member must integrate the sector according to the following schedule: 16% on January 1, 1995; 17% on January 1, 1998; 18% on January 1, 2002; and 49% on January 1, 2005.

[74] WTO, *Introduction to the WTO: Trading into the Future* (2nd ed., 1999), p. 20.

investment.[75] Unlike general safeguard measures, transitional safeguards are applied on a member-by-member basis provided that there is a "sharp and substantial increase in imports . . . from such a Member or Members individually . . . "[76]

In order to supervise implementation of the Agreement, the ATC has also established the Textiles Monitoring Body (TMB), a standing organ composed of a chairman and 10 members appointed by WTO members designated by the Council for Trade in Goods but who act in their personal capacity. The TMB serves as a forum for consultations, reviews measures and deals with disputes at the request of Members, and gives non-binding recommendations reached by consensus. The TMB reports to the Council for Trade in Goods. In cases where the recommendations of the TMB leaves a dispute unresolved, the dispute settlement provisions of GATT 1994 as well as the DSU (see paragraphs 3.106 *et seq.*) remain applicable.

Voluntary export restraints Besides the Multifibre Arrangement, many so-called voluntary export restrictions (voluntary export restraint agreements, VERs—also called orderly market arrangements, OMAs) were negotiated bilaterally at the instigation of the country of importation. In exceptional circumstances a voluntary export restraint was even granted unilaterally after warnings from the country of importation that it would take retaliatory measures. **3.30**

The VERs were intended as a means of reducing the export of products from a particular state to one or more other states for an agreed period on a "voluntary" basis. Many such agreements concerned the export of private cars or electronics from Japan to the United States and the E.U. Mainly the markets of the United States and the E.U. were protected by such agreements; the restrictions particularly affected exports from Japan, South Korea, the E.U. and Taiwan.[77]

According to the GATT, certain import restrictions are permitted under the terms set out in Article XIX in the event of a surge of imports that causes or threatens serious injury to relevant domestic producers (see paragraph 3.54). The purpose of many VERs was, however, to by-pass the application of this provision because measures taken pursuant to Article XIX must, in principle, be applied in a non-discriminatory manner, *i.e.* equally to all other contracting states,[78] whereas a voluntary restraint agreement only operates bilaterally. Moreover,

[75] See Art. 6, para. 3 of the ATC. See also "United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India", WT/DS33/R, report of the panel, January 6, 1997. http://www.worldtradelaw.net/reports/wtopanels/us-woolshirts(panel).pdf.

[76] See Art. 6, para. 4 of the ATC.

[77] See, *e.g.* R. Carbaugh and D. Wassink, "Steel voluntary restraint agreements and steel-using industries" (1991/4) J.W.T. 73; T. Flory, "L'accord bilatéral CEE-Japon sur l'automobile" (1991) A.F.D.I. 689; M. Kostecki, "Marketing strategies and voluntary export restraints" J.W.T. 87; M.W. Lochmann, "The Japanese voluntary restraint on automobile exports" (1986) Harv.Int'l.L.J. 99; H.G. Preusse, "Voluntary export restraint—an effective means against a spread of neo-protectionism?" (1991/2) J.W.T. 5.

[78] M.C. Bronckers, "Selective safeguard measures in multilateral trade relations" in *Issues of Protectionism in GATT, European Community and United States Law* (Kluwer Deventer, 1985) p. 81. Similarly, various Panel Reports; see *e.g.* GATT, *Basic Instruments and Selected Documents*, 1981, 126.

VERs were also often enacted when the conditions of Article XIX were not satisfied because it could not, for instance, be proved that there was a causal link between large imports and injury to local producers.

3.31 **Compatibility with GATT** Initially some had argued that VERs were compatible with the GATT.[79] However, in 1988 a GATT Panel (see paragraph 3.09) declared the VERs and the national implementing measures incompatible with the GATT. The Panel, reviewing the arrangement mainly in the light of Article XI(1) of the GATT, which prohibits quantitative restrictions (see paragraph 3.26), concluded that Article XI(1) applies to any measure of a contracting state in respect of export restrictions, "irrespective of the legal status of the measure". Based on this decision, a VER was prohibited when the effects of the VER depend mainly on an intervention by the authorities.

VERs are now prohibited by the new Agreement on Safeguards.[80] This Agreement, drafted during the Uruguay Round, rejects emphatically the use of VERs: "a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side."[81] Any VER in effect at the time of entry into force of the Agreement also had to be brought into conformity with the Agreement or be phased out. Measures maintained in accordance with GATT provisions (other than Article XIX) and Multilateral Trade Agreements in Annex 1A (other than the Safeguards Agreement) are not covered by this prohibition.[82]

Other non-tariff restrictions

3.32 **General** The more contracting states had to reduce their customs duties and were prevented by the GATT from introducing import restrictions, the more they relied on "non-tariff barriers" (NTB), which achieved the same restrictions on international trade but by different means.[83]

Protection of the national market can take many forms. It appears from an inventory made up by the GATT that there are about a thousand different types of distortions of international trade.[84]

The GATT contains a general rule on non-tariff barriers under Article XI. According to this provision, all border measures other than "duties, taxes or other charges" are prohibited. The prohibition applies to all non-tariff measures that

[79] *cf.* G. Burdeau, "Les engagements d'autolimitation et l'évolution de commerce international" (1991) A.F.D.I. 748; D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 261 *et seq.*; G. Fievet, "Les accords d'autolimitation, une nouvelle technique d'accords communautaire" (1983) Rev.Marché-.Comm. 597; J.H. Jackson, "Consistency of export-restraint arrangements with the GATT" (1988) World Ec. 485; Jones, "Voluntary export restraints, political economy, history and the role of GATT" (1989/3) J.W.T. 134; M. Tatsuta, "Voluntary export restraints, implementation and implications" (1985) RabelsZ 328.

[80] WTO Agreement on Safeguards, Art. 11.

[81] *ibid* Art. 11:1(b).

[82] *ibid* Art. 11:1(c).

[83] See D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 140 *et seq.* A.E. Scaperlanda, *Prospect for Eliminating Non-tariff Distortions* (Sijthoff, Leiden, 1973).

[84] GATT, *Basic Instruments and Selected Documents* (1981), p. 18.

are made effective through "quotas, import or export licences or other measures"—a provision with a quite comprehensive scope. Furthermore, this prohibition applies to barriers affecting both imports as well as exports. There are of course exceptions to this principle, which include those applying agricultural and fisheries products under Article XI:2, the balance-of-payments exceptions under Articles XII and XVIII, and the general exceptions under Article XX.

A number of specific non-tariff barriers have also been the subject of specific agreements (see paragraph 3.03). All but one of these agreements have been included in the WTO Agreement, which applies to all members thereof. The Agreement on Government Procurement (see paragraph 3.34) has, however, continued in the WTO as a "plurilateral" agreement.

3.33 **State trading enterprises** State trading enterprises with varying degrees of monopolistic or quasi-monopolistic control over the importation and exportation of goods and services have been a common feature of the modern world. Although they were more widely used by the centrally planned economies, they are by no means unknown in the typical free-market economies (see paragraph 2.02).

The "Understanding on the Interpretation of Article XVII", negotiated during the Uruguay Round, has adopted the following working definition for "state trading enterprises":

> "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."[85]

The presence *per se* of these enterprises does not violate the rules of the system[86]; but their operations could be restrictive to trade and thereby violate the WTO Agreement (GATT Article XVII).[87]

The rules of the GATT therefore apply to the import and export transactions of state trading enterprises. Purchases and sales may only be based on commercial

[85] "Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994", para. 1. http://www.wto.org/english/thewto_e/whatis_e/eol/e/pdf/notstr1.pdf

[86] Art. XVII:1(a) stipulates that if a Member "establishes or maintains a state enterprise, 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." On the applicable GATT rules see, particularly, J.H. Jackson, "State trading and nonmarket economies" in W.F. Ebke and J.J. Norton (eds), *Festschrift in honor of Sir Joseph Gold* (Heidelberg, 1990) pp. 175 *et seq.* For a practical application, see P.D. McKenzie, "China's application to the GATT: State trading and the problem of market access" (1990/5) J.W.T. 133.

[87] See "Korea Beef", report of the panel, WT/DS161/R, WT/DS169/ R of July 31, 2000 http://www.wto.org/english/tratop_e/dispu_e/161r_e.pdf para. 568.

considerations such as price, quality, quantity, availability, marketability and transport. Enterprises of other GATT states must have adequate opportunities to enter into contracts of sale with state enterprises.

State trading enterprises are therefore required to operate in the same way as purely commercial enterprises: all their activities must be based on commercial considerations. Indeed, the general prohibition of non-tariff barriers (GATT Article XI:1) also applies to quantitative restrictions made effective through import monopolies. The terms "import and export restrictions" include restrictions made effective through state trading operations in order "to extend to state trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations."[88]

Transparency in the operation of state trading enterprises has been the main concern of the Uruguay Round Understanding on the Interpretation of Article XVII. To that end, WTO members are required to notify such enterprises to the Council for Trade in Goods for review by a working party set up for that purpose. Members are further required to "ensure the maximum transparency possible" in their notifications "so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade." The option of counter-notification has been introduced for members that have reason to believe that another member has not adequately met its notification obligation.

Special agreements

3.34 **Government procurement** Supplies of goods and services to the government usually involve substantial quantities. In order to advance the national economy and sustain employment, in many countries this trade is reserved directly or indirectly for local enterprises. Although such practices are in conflict with the principles of free trade, they are not prohibited by the GATT. Indeed, they are even expressly permitted for purchases by state-owned enterprises (see paragraph 2.03).

3.35 **Government procurement under the WTO** An Agreement on government procurement was concluded on the margin of the WTO Agreement.[89] It binds only those Members of the WTO that have specifically ratified the Agreement—

[88] Note to Arts XI, XII, XIII, XIV and XVIII. See "Japan—Agricultural Products", report of the panel, para. 5.2.2.2; "Canada—Marketing Agencies", report of the panel, (1988) para. 4.24.

[89] A. Reich, "The new GATT agreement of government procurement—the pitfalls of plurilateralism and strict reciprocity" (1997) 31 J.W.T. Issue 2, 125–151; S. Arrowsmith, "Towards a multilateral agreement on transparency in government procurement" (1998) 47 I.C.L.Q. 793–816; C. Bovis, "The European public procurement rules and their interplay with international trade" (1997) 31 J.W.T. Issue 3, 83–91.

currently about 27 states (including the E.U. and the United States).[90] An earlier version of the Agreement was concluded in 1979 during the Tokyo Round. However, the present Agreement has a broader scope. The Agreement applies to statutory provisions as well as to administrative practices for public procurement of goods and services, including construction services. The Agreement applies not only to central government purchases of goods and services for SDR 130,000 (see paragraph 9.26) or more. It also applies to such purchases by local government entities (threshold generally SDR 200,000) and by utilities (threshold generally SDR 400,000). For construction contracts the threshold is generally SDR 5 million. Annexes to the Agreement list the different entities that are subject to its rules. The Agreement only concerns the signatory states. New states may be admitted if they are willing to open their procurement market to a sufficient extent. However, although the Agreement allows for a special and differential treatment of developing countries, no developing countries are as yet party to it. The one hundred-plus WTO members which are not yet bound by the Agreement, are free to pursue protectionist procurement policies, since government purchasing was explicitly made an exception to the GATT obligation of "national treatment". Even states that are party to the Agreement may practise protection against any country or any area of procurement not covered by the Agreement.[91]

3.36 **Preferential bilateral agreements** The Agreement is not a multilateral agreement in the classic sense. It should be rather described as an accumulation of preferential bilateral agreements. Indeed, each contracting state can indicate to which local government entities and public enterprises the Agreement will be applicable. Moreover contracting states can request that the Agreement is only applicable for specific goods or services on the condition of strict reciprocity between the country of procurement and the country of the offeror. Or they can exclude specific countries, or exclude the application of the Agreement in matters that concern, for instance, the protection of national security (supply of weapons, ammunition and other *matériel*), public morality, public health of people, animals and plants, and intellectual property.

3.37 **Applicable rules** The basic principle of the Agreement is national treatment, *i.e.* no discrimination in public procurement on the basis of nationality or country

[90] See, *e.g.* S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement, National and International Perspectives* (Kluwer Law International, The Hague, 2000) ; A. Reich, *International Public Procurement Law* (Kluwer Law International, The Hague, 1999). As of August 2001, the following were parties to the agreement: Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and United States; negotiating their accession were Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama; and observer governments were Argentina, Australia, Bulgaria, Cameroon, Czech Republic, Chile, Colombia, Croatia, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Malta, Moldova, Mongolia, Oman, Panama, Poland, Slovak Republic, Slovenia, Taiwan and Turkey.

[91] See A. Reich, "The New GATT Agreement on Government Procurement", J.W.T. 1996, 125, at 136.

of origin of goods. However, the procuring state remains entitled to levy import duties on the goods to be imported.

The Agreement also prescribes very detailed tendering procedures, *i.e.* a tendering notice to be published in a previously determined publication inviting suppliers from all Agreement states to bid for the contract on equal terms. Such notice must be published, at least in a summary form, in one of the official languages of the WTO (English, French or Spanish). Technical specifications for the goods to be supplied should as far as possible be based upon international standards, rather than on national standards which may give local producers an unfair advantage (see paragraph 3.47). The Agreement moreover requires that the award procedure for open or restricted tenders for government contracts must comply with the terms of the Agreement; for instance on conditions for qualification of suppliers eligible to bid (no discrimination between domestic and foreign suppliers in technical, commercial and financial qualifications), on time limits for tendering and delivery and on contents of tender documentation. The tender period must be sufficiently long to allow foreign enterprises to participate in the tender procedure. The Agreement also contains rules on the submission, receipt and opening of tenders and the awarding of the contract. The public notice of the award procedure must clearly set out:

(a) the nature and quality of the products;

(b) the award procedure;

(c) the delivery date;

(d) the last date for tendering and the language of the tender;

(e) the government authorities awarding the contract;

(f) the payments terms;

(g) the award criteria (other than price). Even for the restricted award procedure the relevant authorities must approach foreign as well as national suppliers in so far as this is compatible with an efficient award procedure.

Unless the national authorities decide not to award the contract for reasons concerning the public interest, the contract must be awarded to the foreign or national supplier:

(a) who is known to be able to perform the contract; and

(b) who offers the lowest price (or who, if evaluation criteria other than the price are considered, enters the most advantageous tender).

Normally, the national authorities may not insist on a condition for awarding the contract which requires the suppliers to "compensate", for instance, by purchasing a proportion of parts or other material in the country concerned (see paragraph 9.42). If, however, compensation is part of the procurement condition,

this has to be made clear and the suppliers of one state should not be given preference over suppliers of another state.

Consultation and disputes An aggrieved supplier is encouraged to enter into consultations with the procuring entity. The Agreement requires the states to allow aggrieved companies to challenge the bid procedure in a court or before an independent review body. These procedures should be "non-discriminatory, timely, transparent and effective" and should allow for rapid interim measures to correct breaches of the Agreement or to preserve the commercial opportunities. Thus, not only recommencement of tendering procedures not yet completed, but also termination of a contract already awarded should be possible. As an alternative, compensation to the supplier for the loss or damage suffered may be granted.[92] A breach of the Agreement can also be discussed by the Dispute Settlement Body (see paragraph 9.108). **3.38**

Each party to the Agreement has to give the Committee on Government Procurement, composed of representatives of the parties to the agreement, statistics on the procurements covered by the Agreement This Committee offers a basis for consultation about the operation of the Agreement.

Other government procurement regulations The Agreement applies between states that are parties thereto. Separate regulations, which may implement the Agreement but may also go beyond that, often regulate public procurement in a more specific way. The NAFTA Agreement (see paragraph 2.36), applicable between the United States, Mexico and Canada, for instance, contains in Chapter 10 a complete body of procurement rules.[93] The European Union also has enacted directives on public supplies and on public works, which are applicable for procurements within the E.U. for suppliers from within the E.U.[94] In Central Europe, public procurement is being liberalised by the Central European Free Trade Agreement (CEFTA).[95] Finally, in 1994 UNCITRAL (see paragraph 2.23) has drafted a model law on procurement of goods, construction and services with rules for a fair procurement procedure—as required by the Agreement on Public Procurement—which has now been adopted by a number of countries.[96] **3.39**

Prohibition of discriminatory internal measures

General Article III of the GATT prohibits the imposition of direct or indirect internal taxes or other fiscal charges on imported goods that are higher than those **3.40**

[92] This compensation, however, may be limited to costs for tender preparation and protest, so that no lost profits can be awarded (Art. XX,7 c.l).

[93] Mexico, not being a member to the WTO Agreement, is not bound by its rules.

[94] Directive 97/52, Co-ordination of procedures for the award of public service contracts, public supply contracts and public works contracts ([1997] O.J. L328/1) and Directive 98/4, Co-ordinating the procurement procedures of entities operating in the water, energy, transport an telecommunication sectors.

[95] This Agreement is concluded between the Czech Republic, Hungary, Poland and the Slovak Republic (see S. Arrowsmith, *op.cit.*, p. 221).

[96] *e.g.* in Albania, Kyrgyzstan, Poland and Slovakia.

applied to like national products (national treatment).[97] It prohibits protectionism in the application of internal tax and regulatory measures.[98]

The prohibition on discrimination concerns not only national taxes. Imported goods must also receive the same treatment as local products in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution and use.[99] This requirement is violated if (a) imported and domestic products are "like" products; (b) 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) the measure affords to imported products a treatment less favourable than that accorded to like domestic products.[1]

3.41 **"Effective equality"** This provision focuses on the "effective equality of opportunities for imported products" in respect of the application of the measures, and not on their actual trade impacts.[2] The following Appellate Body statements may summarise the core elements of this important provision:

> "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. '[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given'. Moreover, it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[3]

3.42 **"Like products"** The definition of "like products" has been one of the most controversial issues in the application of Article III. The assessment of "likeness" is a difficult task, involving "an unavoidable element of individual,

[97] See E. McGovern, *op.cit.* pp. 189 *et seq.*

[98] See "Japan—Taxes on Alcoholic Beverages", report of the Appellate Body (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R) adopted on November 1, 1996, p. 18:http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).pdf.

[99] See Art. III:4 in particular.

[1] See "Korea Beef", report of the Appellate Body, (WT/DS161/R, WT/DS169/R) para. 133. http://www.wto.org/english/tratop_e/dispu_e/161r_e.pdf.

[2] See "United States—Section 337 of the Tariff Act of 1930", Report of the Panel (L/6439–36S/345) adopted on November 7, 1989, para. 5.11; *Korea Beef, loc.cit.*, para. 624; "United States—Taxes on Petroleum and Certain Imported Substances", BISD 34S/136, para. 5.1.9; "Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages", BISD 34S/83, para. 5.5(b); "Italian Discrimination against Imported Agricultural Machinery", BISD 7S/60, para. 11; A. Mattoo, "National treatment in the GATS—corner-stone or Pandora's Box" (1997) 31 J.W.T. 107–135.

[3] See "Japan—Taxes on Alcoholic Beverages" report of the Appellate Body (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R) adopted on November 1, 1996, p. 16; http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).pdf.

discretionary judgement"[4] to be made on a case-by-case basis. According to the Appellate Body,

> "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."[5]

In actual dispute settlement reports, by far the most widely used approach in the assessment of "likeness" is that developed by the Report of the Working Party on Border Tax Adjustments. As summarised by the Appellate Body in *Asbestos*, this approach employs four general criteria in analysing "likeness":

> "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits—more comprehensively termed consumers' perceptions and behaviour—in respect of the products; and (iv) the tariff classification of the products . . . these four criteria comprise four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes."[6]

The Appellate Body has reiterated that this is not a closed list and that any of these or other relevant evidence should be considered as a whole in resolving the issue of likeness under Article III.[7]

Exceptions to the GATT rules

3.43 **General exceptions** Article XX, one of the most important and most controversial provisions of GATT, contains a list of general exceptions to the leading principles of the General Agreement. Article XX enables members, on certain conditions, to take measures (such as import or export bans) that would otherwise

[4] *ibid.* at p. 24.

[5] *ibid.* at p. 18.

[6] See "European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products" (WT/DS135/R), Panel Report, circulated on September 18, 2000 http://www.worldtradelaw.net/reports/wtopanels/ec-asbestos(panel).pdf and Appellate Body report (WT/DS135/AB/R), adopted April 5, 2001 para. 101. http://www.worldtradelaw.net/reports/wtoab/ec-asbestos(ab).pdf.

[7] See also A. Mattoo, "National treatment in the GATS: A cornerstone or a Pandora's Box" (1997) 31 J.W.T. 107–135.

be contrary to basic GATT principles. The conditions, contained in the 10 paragraphs as well as the headnote of Article XX, could be divided into general conditions and specific conditions.

The specific conditions require that measures could be justified under Article XX only if they are:

- necessary to protect public morals, human, animal or plant life or health[8];
- related to the import or export of gold or silver;
- necessary to secure compliance with laws or regulations which are not inconsistent with GATT provisions, such as the protection of patents (see paragraph 6.03) trade marks or copyright, as well as to the prevention of counterfeit practices;
- related to products of prison labour;
- imposed for the protection of national artistic, historical and archaeological treasures;
- related to the conservation of exhaustible natural resources, in so far as the measures are applied equally to local production or consumption;
- undertaken in pursuance of agreements on basic products, in so far as they conform with the criteria adopted by contracting states (see paragraph 2.65);
- temporary export restrictions for products which are indispensable for local industry when the price is held below the world price as part of a governmental stabilisation plan;
- essential to the acquisition or distribution of products in short supply.

The fulfilment of these specific conditions does not in itself ensure full justification under the GATT; the general conditions contained in the chapeau of Article XX need to be satisfied as well. These conditions require that measures may not

[8] See discussion below on the Agreement on Sanitary and Phytosanitary Measures.

amount to arbitrary or unjustifiable discrimination or to a disguised restriction of international trade.[9]

Dispute settlement practice has established that Article XX is "a limited and conditional" exception from obligations under other provisions of the General Agreement. Most disputes under Article XX have been concentrated on paragraphs (b), (d) and (g) dealing, respectively, with protection of health, compliance with regulations, and conservation of exhaustible natural resources. Relevant "case law" shows that "(i) Panels examine Article XX only if it has expressly been invoked by a party to the dispute, (ii) Panels have interpreted Article XX narrowly, and (iii) the party invoking Article XX bears the burden of proof."[10] In terms of sequence, as well, the Appellate Body report on *Gasoline* summarised the established practice as follows:

> "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX."[11]

[9] J. Klabbers, "Jurisprudence in international trade law—Article XX of GATT" (1992/6) J.W.T. 63; *ibid.*, "Trade protectionism and environmental regulations: the new nontariff barriers" (1990) 11 N.W.J.Int'l.L.&Bus. 47; T.L. McDorman, "The GATT consistency of U.S. fish import embargoes to stop driftnet fishing and save whales, dolphin and turtles" (1991) Geo.Wash.J.Int'l.L. 477; T. Skilton, "GATT and the environment in conflict: the dolphin dispute and the quest for an international conservation strategy" (1993) 26 Cornell Int'l L.J. 455; "Dispute settlement panel report on U.S. restrictions on imports of tuna [1991]" 30 (1991) I.L.M. 1594; S. Thaveechaiyagarn, "The GATT and the cigarette case against Thailand—A Thai perspective" (1990) L.&Pol.Int'lBus. 367; E. Phillips, "World trade and the environment: the cafe case" (1995–96), Mich.J.I.L. 827–863; P. Bentley Q.C., "A re-assessment of Article XX, paragraphs (b) and (g) of GATT 1994 in the light of growing consumer and environmental concern about biotechnology" (2000) 24 Ford I.L.J. 107–131; H.J. Priess and C. Pitschas, "Protection of public health . . . under WTO law" (2000) 24 Ford I.L.J. 519–553; "United States—Prohibition of Imports of Tuna and Tuna Products from Canada", adopted on February 22, 1982, BISD 29S/108; "Canada—Measures Affecting Exports of Unprocessed Herring and Salmon", adopted on March 22, 1988, BISD 35S/98; "Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes", adopted on November 7, 1990, BISD 36S/200; "United States—Restrictions on Imports of Tuna", September 3, 1991, not adopted, BISD 39S/155; "United States—Restrictions on Imports of Tuna", June 16, 1994, not adopted, DS29/R; "United States—Taxes on Automobiles", October 11, 1994, not adopted, DS31/R; "United States—Standards for Reformulated and Conventional Gasoline", reports of the panel (WT/DS2/9): http://www.worldtradelaw.net/reports/wtopanels/us-gasoline(panel).pdf and the Appellate Body (WT/DS2/AB/R) http://www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf adopted on May 20, 1996; "United States—Import Prohibition of Certain Shrimp and Shrimp Products", panel report (WT/DS58/R) and Appellate Body report (WT/DS58/AB/R), adopted November 6, 1998; and "European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos Products" *loc.cit.*

[10] For a useful summary of the GATT/WTO jurisprudence on Art. XX, see "GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT: Note by the Secretariat: Revision" (WT/CTE/W/53/Rev.1) October 26, 1998.

[11] *Gasoline*, Appellate Body Report, p. 22: http://www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf.

The general exceptions of Article XX have given birth to such highly complex and distinct agreements as the SPS Agreement (see paragraph 3.44) and the TBT Agreement (see paragraph 3.46).

3.44 **Sanitary and phytosanitary measures** One of the notable achievements of the Uruguay Round was the conclusion of a separate agreement dealing comprehensively with the use of measures to protect human, animal or plant life or health without undermining the multilateral trading system, called the Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement).[12] A measure qualifies as a "sanitary or phytosanitarymeasure"[13] if it is designed and applied to protect animal or plant life or health against risks arising from: (a) the entry, establishment or spread of pests, diseases, disease-carrying or disease-causing organisms; (b) additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; and (c) diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests. Basing itself on GATT Article XX(b), the SPS Agreement tries to balance the right of countries to adopt and enforce such measures against the multilateral interest to minimise their negative effects on trade.

Article 2 of the SPS Agreement recognises countries' rights to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health. At the same time, member countries are required to do so "only to the extent necessary" to achieve their legitimate objectives, based on scientific principles and sufficient scientific evidence. However, the Agreement also assigns a conditional role to the so-called precautionary principle under Article 5:7 so that countries would be able to introduce such measures even in the absence of sufficient evidence, but only provisionally and subject to an obligation to promptly seek for additional information and objectively review the measures within a reasonable period of time.[14] At the same time, the SPS Agreement requires that sanitary and phytosanitary measures should not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail, including between their own territory and that of other members.[15]

One aim of the SPS Agreement is to further the use of harmonised sanitary and phytosanitary measures between members. Members are thus required to base their sanitary and phytosanitary measures on international standards, guidelines

[12] C. Thorn and M. Carlson, "The agreement on the application of sanitary and phytosanitary measures and the agreement on technical barriers to trade" (2000) LawP.I.B. 31, pp. 841–854.

[13] As defined under Annex 1 of the SPS Agreement.

[14] In *Hormones*, the panel observed that "the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement" (see "European Communities—Measures Affecting Meat and Meat Products, complaint by the United States" (WT/DS26/R/USA) para. 8.158; and "European Communities—Measures Affecting Meat and Meat Products, complaint by Canada" (WT/DS48/R/CAN) para. 8.161.) The Appellate Body affirmed this view such that "the precautionary principle indeed finds reflection in Article 5.7 of the SPS Agreement." See "European Communities—Measures Affecting Meat and Meat Products" (WT/DS26/AB/R/USA, WT/DS48/AB/R/CAN) adopted February 13, 1998, para. 124. No ruling was made on the issue of whether the precautionary principle has developed into a general principle of (customary) international law.

[15] For an interesting study, see J. Pauwelyn, "The WTO agreement on sanitary and phytosanitary (SPS) measures as applied in the first three disputes: *EC—Hormones; Australia—Salmon; and Japan—Varietals*" [1999] 2 J.Int'l.Econ.L. No. 4.

and recommendations developed by the relevant international organisations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organisations operating within the framework of the International Plant Protection Convention.[16] This obligation is further strengthened by the principle that measures which conform to international standards, guidelines or recommendations "shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994".[17] Higher standards are allowed if there is a scientific justification for so doing, or if, as a consequence of risk assessment conducted in accordance with Article 5, such a level of protection is found to be necessary.

It is fundamental that sanitary or phytosanitary measures be based on a risk assessment which takes into account available scientific evidence as well as other relevant factors enumerated[18] under Article 5:2. They include relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment. The SPS Agreement requires members to "ensure that measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection."[19]

3.45 **Technical barriers to trade** Importation is often made difficult due to statutory and regulatory provisions in the importing country for, *inter alia*, quality, composition, packaging and control of goods. These provisions generally differ from country to country and could become a barrier to international trade: for instance, products which satisfy the quality demands of the country of exportation, will not be admitted for sale or use in the country of importation if it imposes tighter quality regulations.

The requirements imposed on goods are usually justified either by public interest considerations (mainly protection of public health and safety), or for reasons of standardisation. It may also happen that, under the pretext of objective requirements, measures are taken which are actually intended to hinder the importation of certain foreign products.

While recognising that states are justified in introducing measures to protect public health and safety of people, animals and plants or the environment, provided that these measures are not discriminatory (Artice XX; see paragraph 3.47),[20] the GATT prohibits in principle the introduction of requirements which have the effect of "technical barriers" to import and export. Similarly, states are

[16] See preamble to the SPS Agreement, para. 6 and Art. 3.

[17] See Art. 3.2 of the SPS Agreement.

[18] The Appellate Body has ruled in this context that "there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list." See "Hormones", report of the Appellate Body, para. 187.

[19] SPS Agreement, Art. 6.

[20] See, on the prohibition on advertising of cigarettes in Thailand as a non-tariff barrier, S. Thaveechaiyagarn, "Cigarette case against Thailand: a Thai perspective" (1990) L.&Pol. Int'l.Bus. 367.

justified in restricting imports and exports for the protection of national security (Article XXI; see paragraph 3.51).

3.46 **The Agreement on Technical Barriers to Trade** An Agreement on Technical Barriers to Trade was concluded during the Tokyo Round (the GATT standards code) and came into effect on January 1, 1980. [21] During the Uruguay Round this agreement was replaced by a new Agreement on Technical Barriers to Trade (the TBT Agreement), which extended and clarified the previous regime.

The main objective of the TBT Agreement is the harmonisation of national regulations. It distinguishes in this respect between "technical regulations" and "standards":

- "technical regulations" are mandatory requirements of a product or a production process in the area of, *e.g.* quality, performance, safety or dimensions; usually they include also terminology, symbols, testing and test methods, packaging and labelling;
- "standards" are technical specifications approved by a recognised standardising body for repeated or continuous application, compliance with which is not mandatory.

The technical regulations and standards cover not only goods, but may also cover processing and production methods related to the characteristics of the products themselves.

The TBT Agreement follows the principles of GATT Article XX.: In principle, countries are free to introduce the technical standards and regulations they deem necessary to achieve legitimate goals. However, they are required to ensure that such standards and specifications do not create unnecessary obstacles to international trade. Moreover, such standards have to respect the national treatment and MFN principles of the trading system—*i.e.* "products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country." [22]

3.47 **Introduction of technical regulations and standards** Technical Regulations should not be more trade-restrictive than necessary to fulfil a legitimate objective. Three legitimate objectives are mentioned in the Agreement: national security, the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or the environment.[23] In such cases, a national standard should still be based on relevant international standards if any. If that is the case, "it shall be rebuttably presumed not to create an

[21] See R.W. Middleton, "The GATT Standards code" (1980) J.W.T. 201; H. van Houtte, "Health and safety regulations in international trade", in *Legal Issues in International Trade* (Nijhoff, 1990) pp. 128 *et seq.* See also G. Foy, "Extension of the GATT Standards code to production processes" (1992/6) J.W.T. 121.
[22] TBT Agreement, Art. 2.1.
[23] *ibid.*, Art. 2.2.

unnecessary obstacle to international trade." [24] In cases where there are no international standards, or where the national standards do not conform therewith, any Member State taking such a measure needs to comply with a number of procedural and substantive obligations, including prior publication of proposed regulations, prior notification of products to be affected, and consideration of the views of other interested parties in the preparation of the final version of such a regulation. The only way to by-pass these quite rigorous requirements is by proving urgency as provided under Article 2.10 of the Agreement, which may not always be easy to demonstrate.

Standards should be adopted in conformity with the Code of good practice for the preparation, adoption and application of standards, an annex of the TBT Agreement and intended for the private sector bodies as well as the public sector. The Code confirms that public and private standardising bodies must observe the fundamental GATT rules, for instance relating to most favoured nation treatment and liberalisation of trade. If a proposed national standard is not compatible with an existing international standard, the other parties must receive advance notice of this standard.

In the adoption of national regulations or standards, account should be taken of the comments made by the members. As soon as such standards have been introduced, Member States must be notified. The new standards can only come into effect after a "reasonable period", in order to enable enterprises to adjust their production processes to the new requirements.

Each Member State must also have an information service to respond to reasonable requests for information from other countries or foreign interested parties.

3.48 **Conformity examination and certification** The examination for conformity with technical regulations and standards must treat national and foreign products on the same foot; the examination of foreign products must be reasonably priced; test results have to be communicated so that corrective action may be taken; information about imported products has to remain confidential, etc.

Whenever possible, Member States must recognise the test results and certificates issued by relevant bodies in other Member States, even when the test methods differ from their own. Member States are encouraged to become parties to international certification systems. In states where conformity with technical regulations or standards is examined by local government bodies and non-governmental entities, states must take reasonable measures to ensure that these institutions comply with the provisions of the Code of good practice.

3.49 **Developing countries** As in every instrument annexed to the WTO Agreement, the TBT Agreement allows for a special and differential treatment of developing countries.[25] Member States are generally required, if so requested, to be sympathetic to the problems of developing countries and to help them in the preparation, adoption and enforcement of technical regulations as well as in the

[24] *ibid.*, Art. 2.5.
[25] See in particular Arts 11 TBT Agreement.

establishment of national standardising bodies. Moreover, developing countries can ask the Committee on Technical Barriers to Trade "to grant specified, time-limited exceptions in whole or in part from obligations under this Agreement."[26]

3.50 **Consultation and disputes** The Agreement has established a "Committee on Technical Barriers to Trade", composed of Member States' representatives. This Committee functions as a forum for consultation and as a supervisory body.

Disputes have to be settled under the auspices of the Dispute Settlement Body (see paragraph 3.108). In line with the integrated nature of the dispute settlement process under the WTO, the applicable rules for any disputes arising in the context of the TBT Agreement are GATT Articles XXII and XXIII as elaborated and applied by the Dispute Settlement Understanding. Reflecting the specific features of the TBT Agreement, panels may "establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts."[27] (See paragraph 3.108.)

3.51 **Protection of security** Under Article XXI of the GATT the contracting states are allowed to take measures for the protection of national security, thereby derogating from the fundamental principles of the GATT. These measures may concern trade in nuclear fissionable material, arms, ammunition, implements of war and traffic in other goods and materials to supply a military establishment. Moreover, in time of war or other international crisis, contracting states may take all measures necessary to protect their national security. Furthermore, the contracting states may adopt economic embargoes or other measures, normally contrary to the GATT, when required under UN resolutions.

The contracting states themselves decide whether a trade restriction is justified pursuant to Article XXI. Indeed, GATT Panels prefer not to get involved in such political matters.[28]

The export restrictions, applied by NATO countries within the structure of the "Cocom" (Co-ordinating Committee on Export Controls),[29] were justified on the basis of Article XXI of GATT. The Cocom drew up lists of "security sensitive" products and data, the exportation of which, to Cocom appointed countries, was only permitted if all Member States agreed.[30] Cocom was replaced in 1994 by the "New Forum", a group also including former communist countries to harmonise the national policies for transfer of technology to the third world. [31]

[26] TBT Agreement, Art. 12.8.
[27] *ibid.*, Art. 14.2.
[28] See D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 134–135.
[29] Sometimes also known as the Co-ordinating Committee for East-West Trade Policy.
[30] On Cocom see, *inter alia*, C. Taquet, "La Belgique et le Cocom" (1984–85) R.B.D.I. 713; B. Crossfeld and A. Junker, *Das Cocom im internationalen Wirtschaft* (Mohr, Tübingen, 1991); S. Oeten, "Cocom und das System der Koordinierten Exportkontrollen" (1991) RabelsZ 436.
[31] C. Hoelscher and H.M. Wolffgang, "The Wassenaar-Arrangement between International Trade, Non-Proliferation, and Export Controls", *Journal of World Trade*, vol. 32, pp. 45–63.

Protection of the balance of payments WTO Member States may introduce import restrictions when this is necessary to safeguard their external financial position and their balance of payments (Article XII). The GATT requires proportionality between the objective (restoring the equilibrium in the balance of payments) and the means (import restrictions). Moreover, it imposes restrictions on the scope and duration of the measures.[32] Developing countries, which often are affected by balance-of-payments problems, have some flexibility to introduce import restrictions (Article XVIII): they have a "special and differential treatment in respect of their balance-of-payments measures" (Article XVIII:B).[33] 3.52

Addressing balance of payments problems may involve the supervision and help of the International Monetary Fund (IMF). Indeed the GATT imposes on the contracting states the duty to confer with the IMF on measures for the protection of the balance of payments (Article XV[2]).

Originally, restrictions on the quantity or value of imports were considered a permissible exception to Article XI.[34] However, over time, state practice introduced the use of non-quantitative restrictions such as import surcharges and import deposit schemes[35] which are generally less restrictive to trade than quantitative restrictions.[36] This practice was later put on a more stable ground by a Declaration that contracting parties would "give preference to the measure which has the least disruptive effect on trade".[37]

The Uruguay Round Understanding on the Balance-of-Payments Provisions of GATT 1994 This Understanding also confirmed the commitment of Member States "to give preference to those measures which have the least disruptive effect on trade".[38] To that end, the Understanding provides that such price-based measures (including import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods) could be applied in excess of bound duty levels found in Member's Schedules of Concessions. While Member States are required to "seek to avoid" the imposition of new quantitative restrictions and to use only price-based measures, in cases where they decide to adopt quantitative restrictions, they 3.53

[32] F. Roessler, "Selective balance of payments adjustment measures affecting trade: roles of GATT and IMF" (1975) J.W.T. 627; R. Eglin, "Surveillance of balance of payments measures in the GATT" (1987) World Ec. 1; I. Frank, "Import quotas, the balance of payments and the GATT" (1987) World Ec. 307; D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 119 *et seq.*
[33] See "India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products", report of the panel, WT/DS90/R, adopted September 22, 1999, para. 5.28.
[34] GATT, Arts XII and XVIII:B.
[35] Import deposit schemes require the importer to deposit a sum of money, corresponding to the whole or partial value of the imported products, for a certain period in an interest-free bank account in the country of importation.
[36] On the practice of states prior to 1979, see *GATT Analytical Index: Guide to GATT Law and Practice* (6th ed. 1995), pp. 362–367.
[37] 1979 Declaration on "Trade Measures Taken for Balance-of-Payments Purposes", GATT, Basic instruments and selected documents (1980) pp. 205 *et seq.* See also the text in P. Kunig, N. Lau and W. Meng (eds), *International economic law—Basic documents* (de Gruyter, Berlin, 1993) pp. 579 *et seq.*
[38] See Uruguay Round Understanding on the Balance-of-Payments Provisions of GATT 1994, para. 2; See also A. Nadal Egea, "Balance-of-payments provisions in the GATT and NAFTA" (1996) 30 J.W.T. 5–24.

The agreement makes it clear that the "safeguard measures shall be applied to a product being imported irrespective of its source".[50] This means that Article XIX despite earlier contentions by some states can in principle not be used selectively to prevent the importation of products from a particular country. The requirement of non-discriminatory application of safeguard measures applies without exception particularly in the case of safeguard measures taking the form of additional duties. In cases where safeguard measures take the form of quotas, the general principles of non-discriminatory application of quantitative restrictions enshrined under Article XIII of GATT 1994 apply subject to a very carefully and strictly crafted exception under Article 5.2(b) of the Safeguards Agreement. An important condition is that the importing country should be able to demonstrate that imports from certain contracting parties had increased disproportionately in relation to the total increase and that such departure would be justified and equitable to all suppliers.[51]

The agreement also sets time limits on the measures that the parties to the agreement can take. Furthermore, a Safeguards Committee is to be entrusted with the collection of data and consultation when Article XIX is invoked. Disputes involving safeguards measures are subject to the general rules of Articles XXII and XXIII of GATT 1994 as elaborated by the DSU (see paragraphs 3.106 *et seq.*).

3.56 **Waiver** In exceptional circumstances, a two-thirds majority of the contracting states (or the General Council) may waive some of the GATT obligations for a specific state (Article XXV:5). At least half of the contracting states must take part in the vote on a waiver. Waivers are common in the GATT; for instance, a waiver allowed the European Coal and Steel Community to be considered as a customs union, although it did not satisfy all conditions of Article XXIV(8) (see paragraph 3.11).[52] In addition, the system of general tariff preferences in favour of developing countries (see paragraph 3.49) was originally approved pursuant to Article XXV(5).[53]

The guidelines in respect of the granting of waivers were adopted in 1956[54] but were amended during the Uruguay Round.[55] Extensive consultation, in which the interests of all relevant countries are considered, must take place in advance. A waiver can only be applied for a certain period. There should also be annual reports on the application of waivers and waivers need to be reviewed annually

[50] Agreement on Safeguards, Art. 2.2.

[51] In an interesting case between the U.S. and the E.C., an issue arose as to whether the U.S., after including imports from all sources in its investigation of "increased imports" of wheat gluten into its territory and the consequent effects of such imports on its domestic wheat gluten industry, was justified in excluding imports from Canada from the application of the safeguard measure. The panel ruled that "the United States was not justified in departing from the explicit provisions of Articles 2.1 and 4.2 SA by excluding from the application of its safeguard measure imports from Canada after having included such imports for the purposes of reaching its overall finding of serious injury caused by increased imports of the product concerned." See "US—Wheat Gluten", report of the panel, *loc.cit.*, para. 8.182.

[52] GATT, *Basic Instruments and Selected Documents* (1953), p. 85.

[53] *ibid.*, p. 85.

[54] GATT, *Basic Instruments and Selected Documents* (1972), p. 24.

[55] See Understanding on the Interpretation of Article XXV and the Agreement on the WTO.

by the contracting parties. Existing waivers may be extended when they are still justified by "exceptional circumstances".

3.57 **Agriculture** Both historically as well as today, the multilateral trading system has treated agricultural products differently from non-agricultural products in many senses. The subsidies provision of GATT Article XVI and Article XI(2)(c) have been the most important areas in which agricultural products have been so subjected to discriminatory treatment. While Article XVI in principle prohibited export subsidies on non-agricultural products, countries have been free to provide unlimited subsidies contingent on the exportation of their agricultural products. The same situation prevailed as regards quantitative restrictions under Article XI(2)(c). GATT, in principle, prohibited the use of quantitative restrictions as means of protection while Article XI(2)(c) explicitly allowed such quantitative restrictions for agricultural products.

A number of real or apparent reasons have been invoked to keep agriculture outside the framework of the basic rules and principles of the system, including food security, preservation of rural community culture, the environment, and a host of other factors. Lately, a new term called "multifunctionality" has been invented to designate all such extraneous issues that are believed to have close relations with agricultural trade liberalisation.

There were also other GATT provisions at hand to keep agricultural products outside the scope of application of specific GATT rules.[56] A waiver (see paragraph 3.56) could have the same effect: the national agricultural policy of the United States, for example, has been exempted from the GATT obligations since 1955 by virtue of waiver.[57]

3.58 **E.U.–U.S. Differences** There has been for some years a difference of opinion on the compatibility of the common agricultural policy of the E.U. with the GATT rules. This agricultural policy was challenged during the Tokyo Round, particularly by the United States, but no decision was then made by the contracting states on this issue.

The issue of the European Common Agricultural Policy was again raised during the Uruguay Round.[58] Differences, particularly between the E.U. and the U.S., forced the postponement of conclusion of the Uruguay Round of negotiations.

For the first time in the history of multilateral trade regulation, the Uruguay Round negotiations have resulted in a specific Agreement on Agriculture, which provides a framework for the long-term reform of agricultural trade over the

[56] See examples in E. McGovern, *op.cit.* pp. 334 *et seq.*

[57] GATT, *Basic Instruments and Selected Documents* (1955), p. 32. In March 1990 the GATT Council, after a complaint from the E.C., adopted a Panel decision on the validity of the agricultural restrictions of the U.S. based on the waiver of 1955.

[58] See, *e.g.* L.J. Emmerij, "On agricultural subsidies and the GATT negotiations" (1990) S.E.W. 267; F. Schoneveld, "The European Community Reaction to the 'Illicit' Commercial Trade Practices of Other Countries" (1991/2) J.W.T. 17; D.C. Hathaway, *Agriculture and the GATT: Issues in a New Trade Round* (Washington D.C. 1987).

years to come.[59] The Agreement has taken the most important first steps for the stage-by-stage integration of agriculture into the mainstream rules of the system. However, reflecting the delicate balance of negotiating power between the reformers (led mainly by the so-called Cairns Group countries and the United States), on the one hand, and the conservatives (led by the E.U. and backed by countries like Japan), on the other, the Agreement on Agriculture is a highly technical legal text with several major rules subject to sometimes strange exceptions (such as the "due restraint" clause of Article 13 of the Agriculture Agreement).

In what is often termed a process of "tariffication", all previous quantitative restrictions have been converted into their tariff equivalents and the resulting tariffs are subject to reduction commitments over an implementation period of six years (10 years for developing countries). In an attempt to allay the fears of some developed countries, a special safeguards provision has been included which allows the introduction of additional duties on certain quantitative and price trigger levels and regardless of domestic injury considerations. It goes to the credit of the Agreement on Agriculture that all non-tariffs barriers, including such notorious mechanisms as variable import levies, have been prohibited.

3.59 **Export subsidies** Export subsidies in general are prohibited under the SCM Agreement. However, the SCM Agreement does not apply to agricultural products, which are subject to the provisions of the Agriculture Agreement. A look at the relevant provisions of the Agriculture Agreement shows that export subsidies are expressly allowed only in the agricultural sector. The Agriculture Agreement puts all export subsidies in either of two categories—listed and non-listed export subsidies. While all listed export subsidies are subject to reduction commitments of a dual nature (quantitative and outlay), the non-listed export subsidies are simply allowed subject only to the condition of non-circumvention of the export subsidies discipline created by the Agreement.

One of the notable achievements of the Uruguay Round has been the breakthrough on the subject of internal measures of support. Such practices as market price support mechanisms and deficiency payments have now been brought under a more or less defined discipline. A classification of all such measures has been introduced on the basis of their trade-distortive impact and the pragmatic need to accommodate the special interests of important trading powers such as the E.U. and the United States. Accordingly, all domestic support measures are divided into three categories: green (permitted), amber (subject to reduction commitments), and blue (permitted on production limitation conditions). The constraining power of the discipline in the short term is almost negligible. The basic innovation in this respect consists in the agreement in principle that domestic support schemes should be decoupled from production decision.

The Agriculture Agreement has established the Committee on Agriculture that reviews implementation of the commitments in agricultural trade. The Committee performs its duty of review on the basis of notifications made by WTO

[59] R. Green, "The Uruguay Round Agreement on Agriculture" (2000) 31 L. & Pol. Int'l Business 819–836.

Member States. It also serves as a consultative forum on any matter relevant for the implementation of the reform commitments.[60]

Agriculture is one of two areas (the other being services) where an in-built agenda for further negotiations was agreed during the Uruguay Round negotiations and included in the final agreement. The envisaged negotiations already had commenced in March 2000 and were expected to push the reform process further.[61] The E.U. and many other WTO Member States are currently pushing for the launching of a comprehensive round so that agriculture and services would also be brought into such a round which is believed to allow more room for trade-offs and a more meaningful progress.

PART II: INTERNATIONAL COMPETITION RULES

General The prohibition or gradual abolition of tariff and non-tariff barriers to trade is, on its own, not sufficient for the full liberalisation of international trade. The world market is also distorted by unfair trade practices from states or enterprises. **3.60**

When, after the Second World War, plans were made for the regulation of international trade and the foundation of an international trade organisation, there was the clear intention to introduce, besides the regulation of tariff and non-tariff restrictions to trade, also rules for fair trade practices.[62] Article 46 of the Charter of Havana included a fairly extensive regulation on fair trade practices.

However, the Charter never came into force. The GATT, which was initially intended as a provisional regulation until the coming into effect of the Charter, does not include an extensive regulation of unfair trade practices.[63] It contains only rules in respect of dumping (by enterprises) or subsidies (by states). These rules were later further elaborated in additional Codes and separate Agreements.

The basic goal of competition policy is "to promote and maintain healthy inter-firm rivalry in markets, wherever this is viable."[64] Two principal ways of achieving this goal are generally recognised: the use of competition law to address anti-competitive market structures and enterprise practices that impede competition and the use of pro-competitive regulation, and the reduction or elimination of government measures that pose unnecessary obstacles to trade and competition.[65]

[60] Agreement on Agriculture, Art. 18.
[61] All documents submitted in the negotiation process are available at http://www.wto.org/english/tratop_e/agric_e/negoti_e.htm.
[62] See, *e.g.* J. L'Huillier, Restrictive business practices (GATT Geneva, 1959) pp. 69–75.
[63] See also A. von Bogdandy, "Eine ordnung für das GATT" (1991) R.I.W. 56.
[64] See WTO Secretariat, *The Fundamental Principles Of Competition Policy: Background Note by the Secretariat*, (WTO doc. WT/WGTCP/W/127), June 7, 1999, para. 16.
[65] *ibid.*

3.61 **Trade Barriers Regulation**[66] The Trade Barriers Regulation (TBR)[67] is the second of the E.U.'s Regulations concerning commercial policy.[68] The old concept of "illicit commercial practice", has been replaced with "obstacles to trade", which are defined as "any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action".[69] The scope of the TBR has been broadened to apply to services (not involving the movement of persons) as well as goods (pursuant on the Uruguay Round agreements). Intellectual property rights may also be covered, where a violation of international rules has an impact on trade between the E.U. and a third country.

The TBR establishes two procedures:

(a) A procedure aimed at "responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the injury resulting therefrom".[70]

(b) A procedure aimed at "responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom".[71]

The more significant of these is the latter, which provides a mechanism for Community firms and industries to act against trade barriers affecting their access to third country markets or the E.U. market, by requesting the Commission to investigate complaints and to seek redress—whether by negotiated bilateral agreement, dispute settlement at the WTO, or retaliatory measures.

3.62 **UNCTAD Restrictive Business Practices Code** Within the framework of UNCTAD, attempts have been made to introduce a code of conduct for restrictive

[66] M.C.E.J. Bronkers, "Private participation in the enforcement of WTO law: the new E.C. Trade Barriers Regulation" (1996) 32 C.M.L.Rev. 299–318. Consult, *inter alia*, I. van Bael and J.F. Bellis, *Anti-dumping and other Trade Protection Laws of the EEC* (3rd ed., CCH, 1996) pp. 467 *et seq.*

[67] Reg. 3286/94 [1994] O.J. L349/94.

[68] The first Regulation was "on the strengthening of the Common Commercial Policy with regard to Protection against Illicit Commercial Practices" [1984] O.J. L252/1, as amended [1994] O.J. L66, The concept of "illicit commercial practices" was broadly described as "practices in international trade attributable to third countries which are incompatible with international law or generally accepted rules". A practice may, for instance, be incompatible with the GATT rules. See the legal reasoning in the *Fediol* judgment of the Court of Justice, June 22, 1989: Case 70/87 *Fediol* [1989] E.C.R. 1781, [1991] 2 C.M.L.R. 489. For a discussion of the old text see P. Kunig, N. Lay and W. Meng (eds.), *op.cit.* pp. 617 *et seq.*; Arnold and Bronckers, "The EEC new trade policy instrument" (1988/6) J.W.T. 19; D. Carreau, T. Flory and P. Juillard, *op.cit.* pp. 160 *et seq.*; J. Bourgeois and P. Laurent, "Le nouvel instrument de politique commercials: un pas en avant vers l'élimination des obstacles aux échanges internationaux" (1985) Rev. Trim. Dr. Eur. 41.

[69] Reg. 3286/94, Art. 2(1). The international trade rules referred to are considered to be primarily the rules established by the WTO, however, they may also refer to any agreements to which the E.U. is a party.

[70] Reg. 3286/94, Art. 1(a).

[71] *ibid.*, Art. 1(b)

business practices.[72] In April 1980 agreement was reached on a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices[73] (Restrictive Business Practices Code). This code of conduct is soft law (see paragraph 1.13) and is binding neither on states nor on enterprises. Nevertheless, it puts into words the "equitable principles and rules" to which the states and enterprises must adhere.

One of the principles of the Code is that the restrictive business practices may not put at risk the liberalisation of international trade, and particularly of trade with developing countries.

Enterprises must be urged to observe competition legislation in all countries where they operate and to co-operate with the competent authorities to remove restrictive practices. Except within groups or concerns that form a single economic entity, enterprises may not apply certain specific restrictive practices if these hinder access to markets or unreasonably restrict competition.

The following restrictive practices must, *inter alia*, be banned:

- price fixing for, *inter alia*, imports and exports;
- understandings in respect of public tenders (collusive tendering);
- market or customer allocation arrangements;
- collective sales refusal;
- abuse of a dominant economic position, which can involve:
  - — elimination of competitors through below-cost pricing;
  - — price discrimination;
  - — mergers and acquisitions;
  - — restrictions on the importation of goods which have been legitimately marked abroad with a legitimate trade mark.

A "Group of Experts on Restrictive Business Practices" was set up within UNCTAD with responsibility for research, consultation and documentation.

3.63 **Other international initiatives** At a more regional level, the OECD has made several recommendations to its Member States in relation to international co-operation on anti-competitive practices affecting international trade (1995), potential conflicts between trade policies and competition policy (1986), effective action against hard-core cartels (1998), and competition in regulated sectors (1979 and 2001).[74]

[72] Consult, *inter alia*, J. Davidow, "The UNCTAD restrictive business practices code" in N. Horn (ed.), *Legal Problems of Codes of Conduct for Multilateral Enterprises* (Kluwer Law & Taxation, Deventer, 1980) pp. 193 *et seq.*

[73] This text was adopted in a resolution of the General Assembly of the UN in December 1980; see the text in P. Kunig, N. Lau and W. Meng (eds), *op. cit.* p. 720; A. Ham, "De UNCTAD Code van 1980 voor de controle op beperkingen van de mededinging" (1992) S.E.W. 6.

[74] See www.oecd.org.

A WTO Working Group on the Interaction between Trade and Competition Policy[75] has held several meetings and covered a wide-range of issues, including the relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy, their relationship to development and economic growth, and the interaction between trade and competition policy in general. According to the WTO Secretariat, about 80 WTO Member States, including some 50 developing and transitional countries, have adopted competition laws which typically provide:

> "remedies to deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuses of a dominant position or monopolsation, mergers that limit competition, and agreements between suppliers and distributors ('vertical agreements') that foreclose markets to new competitors."[76]

Dumping

3.64 **Basic regulation** Dumping is described in Article VI(1) of the GATT as introducing products of one country into the commerce of another country at less than the normal value of the products.[77]

Dumping is not prohibited by GATT; it is only condemned when it causes material injury to an existing sector of business or hinders considerably the setting up of a new industry in the country of importation. The affected state may then under certain circumstances introduce anti-dumping duties in order to offset or prevent such practices.

Dumping is carried out by enterprises. However, the rules of the GATT are not directed at enterprises, but exclusively at the contracting states, which are responsible for the transposition of the GATT anti-dumping rules into national law.

3.65 **Principles** Article VI of the GATT sets out basic principles on dumping. These principles were given more substance by the Anti-dumping Codes of the Kennedy Round (1967) and the Tokyo Round (1979). The 1979 Code was replaced after the Uruguay Round by the WTO, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement). Unlike both the Kennedy and Tokyo Round Codes, the new Anti-Dumping Agreement is binding on all Members of the WTO, because of the package-deal approach adopted in Uruguay Round negotiations. At the

[75] See WTO doc. WT/MIN(96)/DEC, December 18, 1996.

[76] For further information on trade and competition policy issues within the WTO, see http://www.wto.org/english/tratop_e/comp_e/comp_e.htm.

[77] D. Palmeter, "A commentary on the WTO Anti-Dumping Code" (1996) 30 J.W.T. 43–69.

substantive level, the basic difference between these two instruments lies in the fact that the latter provides for more detailed procedural requirements.[78]

3.66 **Description of dumping** A product is deemed to be brought into circulation below its "normal value" in the country of importation when the price is lower than the comparable price in the ordinary course of trade for the like[79] product when destined for consumption in the exporting country.[80] If there is no such local price in the country of export,[81] then there is dumping when the import price is lower than either:

(a) either a comparable price of the like product when exported to a relevant third country provided that this price is representative; or

(b) or the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits.[82]

Sometimes goods are not imported directly from the country of origin, but are imported via another country (*e.g.* chemicals manufactured in Canada are sent to a subsidiary in Sweden, from where they are sold in Germany). In this case the price in the country of export (Sweden) is used as the normal price. However, a comparison with the price of the country of origin (Canada, in the above example) is permitted when the goods were merely transshipped through the second country, when the products are not manufactured in the country of export or when there is no comparable price for the products in that country.

The prices must each time be compared at the same level of trade; this is usually the "ex factory" price (see paragraph 4.56) and in respect of sales made at (as nearly as possible) the same time. Due allowance shall be made for differences which affect price comparability, such as differences in conditions and terms of sale, taxation, deeds of trade, quantities and physical characteristics.

The difference between the price at importation and the higher price in the country of origin is called the "dumping margin".

3.67 **Other conditions** Dumping is only condemned under the GATT when it causes material injury to domestic industry, when it causes a threat of such injury or when it causes material retardation of the establishment of a new domestic

[78] See D. Palmeter, "A commentary on the WTO Anti-Dumping Code", 4 J.W.T. 30 (1996) at 45; P. C. Rosenthal and R. T. C. Vermylen, "The WTO Antidumping and Subsidies Agreements: Did the United States achieve its objectives during the Uruguay Round?" (2000) 31 L. & Pol. Int'l Business 871–896.

[79] The concept of "like product" is in practice very important because the domestic products that are affected by the dumping are not always identical to the imported product. Not only identical products but also products which are not identical but with similar characteristics to the imported product, are considered to be "like products".

[80] Anti-Dumping Agreement, Art. 2(1).

[81] *e.g.* because the product has not been brought into circulation in this country, or because the product is not the subject of normal "business transactions" (*i.e.* on the market), since the country of origin is a country with a state economy.

[82] The profit cannot be higher than the profit which is normally realised for like products in the country of origin.

industry. This injury must be established on the basis of an objective examination as to the volume of the dumped goods and their effect on the price of like products on the local market, as well as on the local industry of said products. Both criteria are given further definition in the Anti-Dumping Agreement. Only injury caused by dumping itself is considered, not injury that can be attributed to other factors.

The concept of "domestic industry" in the country of importation is explained in the Anti-Dumping Agreement to mean the domestic producers as a whole of the like products, or those whose collective output of the products constitutes a major proportion of the total domestic production of these products.

3.68 **Procedure** The existence, importance and effects of the alleged dumping must be investigated. The investigation can be initiated upon a written application by or on behalf of the domestic industry that claims to have been affected by the dumped imports. This investigation must concentrate on both the existence of the dumping and of the resulting material injury or threat thereof. Evidence has to be provided that there is both dumping as well as a serious injury to domestic industry, and that there is a causal link between the two. The investigation must in principle be concluded within a year from its start.[83]

Interested parties, particularly foreign exporters, must be heard and given the opportunity to defend themselves. Parties are entitled to have access to all information gathered during the investigation, except when this information is 'by nature confidential' (*i.e.* information the disclosure of which "would be of significant competitive advantage to a competitor or . . . would have a significantly adverse effect upon a person supplying the information") or provided on a confidential basis.[84]

When the competent authorities decide after their investigation that the terms of the Anti-Dumping Agreement have been satisfied, they can take anti-dumping measures (in particular, they may charge anti-dumping duties). They must notify the interested parties of their decision.

3.69 **Anti-dumping duties and price undertakings** During the investigation, or after having been notified of the result of the investigation, the exporter may offer voluntary price undertakings, in which he can increase his export prices or stop exporting the dumped goods to the relevant territory.[85] The authorities are under no obligation to accept the price undertakings, and no exporter can be compelled

[83] In no case may the investigations extend beyond 18 months from the date of initiation. See Art. 5.10 of the Anti-Dumping Agreement.

[84] See Art. 6(5) of the Anti-Dumping Agreement. Examples could include: information on costs, including those of each stage of the production process; information on prices, including both the prices paid by the producer to upstream suppliers, the prices charged to downstream buyers—the names of these customers may also be treated as confidential; information on performance, including profitability of operations, margins on individual products, as well as prospectives for investment and future strategy; certain information supplied in the context of a public interest assessment (*e.g.* company performance forecasts), etc. For a summary of discussions at the WTO on the issue of confidential information, see WTO, *Synthesis of Discussion within the Ad Hoc Group Concerning the Treatment of Confidential Information: Note from the Secretariat* (G/ADP/AHG/W/65, April 16, 1999).

[85] Anti-Dumping Agreement, Art. 8.

to make such undertakings. Price increases conceded in price undertakings should not exceed the dumping margin.[86]

The normal sanction for dumping, however, is the levying of anti-dumping duties. These may not exceed the established dumping margin. They are only levied for so long and in so far as it is necessary to neutralise the dumping that is causing injury. In all events, any anti-dumping duty or price undertaking shall be terminated after five years from its imposition, unless the authorities determine that the expiry of the duty or undertaking would be likely to lead to continuation or recurrence of dumping and injury.[87]

Anti-dumping duties can be levied on imports from developing countries only after other constructive remedies have been explored.[88]

During the dumping investigation the authorities may take provisional measures to prevent injury. These provisional measures can take the form of provisional anti-dumping duties or of a security for estimated anti-dumping duties. The provisional measures can only apply for four (exceptionally six) months.

Consultation and disputes There is within the WTO a "Committee on Anti-Dumping Practices", where states confer with each other on any matters relating to the operation of the Agreement, including provisional and definitive anti-dumping measures. The Anti-dumping Agreement requests states to show "sympathetic consideration" for representations made by other Member States with respect to any matter affecting the operation of the Agreement.[89] As in other cases, Member States are required to enter into consultations before the dispute settlement process of the WTO is called into play. In principle, if the consultation phase fails to produce a mutually acceptable solution, Members are allowed to request the establishment of a panel, which is generally governed by the general rules of the Dispute Settlement Understanding, subject of course to any specific provisions of the Anti-Dumping Agreement.[90] In the case of disputes involving anti-dumping measures, however, failure to achieve mutually acceptable solutions does not suffice for Member States to request establishment of a panel; "final action" needs to have been taken by the administering authorities of the importing Member State to levy definitive anti-dumping duties or to accept price undertakings, or, in the case of provisional measures, the measures need to have had a significant impact on the Member State that requested the consultations.[91] **3.70**

E.U. anti-dumping regulation WTO Member States are entitled to take anti-dumping measures in accordance with the relevant provisions of the GATT **3.71**

[86] P. Vander Schueren, "New anti-dumping rules and practice: wide discretion, held on a tight leash?" (1996) 32 C.M.L.Rev. 271–297; K. Adamantopoulos & D. De Notaris, "The future of the WTO and the reform of the Anti-Dumping Agreement: a legal perspective" (2000) 24 Ford I.L.J. U.S. 30–61.

[87] Anti-Dumping Agreement, Art. 11, paras 3 and 5.

[88] Anti-Dumping Agreement, Art. 16.

[89] *ibid.*, Art. 17.2.

[90] For a discussion of the integrated system of dispute settlement under the WTO, see paras 3.106 *et seq.*

[91] Anti-Dumping Agreement, Art. 17.4. See also E.U. Petersmann, "GATT dispute settlement proceedings in the field of antidumping law" (1991) C.M.L.Rev. 69.

and the Anti-dumping Agreement. Within the E.U., the Council of Ministers is, by virtue of Article 113 of the EEC Treaty, responsible for trade policy in respect of third countries and therefore also for the adoption of protective measures against dumped imports from those countries.

The first regulation in this respect dates from April 5, 1968, and has subsequently been modified several times. The current basic anti-dumping regulations,[92] which form the legal basis of anti-dumping investigations in the E.U., entered into force between March 1996 and April 1998. In its internal legislation, the E.U. has gone further than required by the WTO in a number of areas—including the so-called "Community interest test" and the "lesser duty rule". The Community interest test

> "corresponds to a public interest clause, and foresees that measures can only be taken if they are not contrary to the overall interest of the Community. This requires an appreciation of all the economic interests involved, including the interests of the domestic industry, users and consumers. The lesser duty rule allows the measures imposed by the Community to be lower than the dumping . . . margin, if such a lower duty rate is sufficient to protect the Community industry adequately."[93]

The E.U. anti-dumping regulation is frequently applied and is the subject of extensive case law of the European Court of Justice.[94] The regulation gives a detailed description of concepts such as "normal value",[95] "export price", "like product", "dumping margin" and the injury caused by dumping, as well as the procedure for the investigation into dumping and the protective measures.

Subsidies

3.72 **General** The use of subsidies in both domestic as well as export trade as means of benefiting national producers and exporters by a state can have the same effect as dumping by an enterprise: the price on the market is kept artificially low. Under Article VI of GATT, a country that imports subsidised products can levy countervailing duties to offset the effect of subsidies provided by another state. Furthermore, Article XVI provides for consultation when subsidies cause material injury to one or more contracting states.

Article XVI distinguishes between domestic or production subsidies on the one hand, and export subsidies, on the other. In principle, while domestic

[92] Reg. 384/96.

[93] See *Report from the Commission Eighteenth Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities*, (COM(2000) 440 final) July 2000, p. 12.

[94] It has sometimes been commented that the E.U. anti-dumping regulation is used for protectionist purposes: R.M. Bierwagen, *op.cit., passim*; R. Kulms, "Competition, trade policy and competition policy in the EEC: the example of antidumping" (1990) C.M.L.Rev. 285.

[95] See Art. 2(a) and in particular 2(a)7 for determination of "normal value" on imports from non-market economy countries, modified by Reg. 905/98 and 2238/2000.

subsidies have been permitted, export subsidies have been prohibited.[96] These rules were subsequently interpreted and applied during the Tokyo Round in a Subsidies Code that was accepted by a limited number of countries. During the Uruguay Round an Agreement on Subsidies and Countervailing Measures (the SCM Agreement) was concluded as part of the Uruguay Round package replacing the Subsidies Code and binding on all Members of the WTO.

3.73 **Terms of applications** The substantive rules of the SCM Agreement are largely based on those of the Code, but enormous developments have also resulted from the Uruguay Round negotiations on the subject.

For the first time in GATT history, the SCM Agreement has defined the notion of "subsidy". The controversial term has now been given a broad definition. It covers not just direct subsidies but also any form of income or price support that results directly or indirectly in the acquisition of a benefit by the recipient. Article 1 of the SCM Agreement defines it in terms of a public financial contribution conferring a benefit on a recipient. As the Appellate Body pointed out in "Canada Dairy", the "benefit" to the recipient is measured against what would have been otherwise available to the recipient in the market place.[97]

The discipline introduced by the SCM Agreement concerns mainly "specific" subsidies—for the most part, subsidies available only to an enterprise or industry, or to a group of enterprises or industries.

An important feature of the SCM Agreement is the so-called "traffic light approach" adopted to introduce a classification of subsidies. Accordingly, a subsidy may be prohibited (red), actionable (amber), or non-actionable (green); each with a Part devoted to itself.

3.74 **Prohibited subsidies** Export subsidies and the so-called local content subsidies (*i.e.* subsidies contingent upon the use of domestic rather than imported goods) fall in the category of prohibited subsidies. While Article 3 of the SCM Agreement describes export subsidies as subsidies contingent (*de facto* or *de jure*) on export performance, Annex I to the SCM Agreement gives an illustrative list of export subsidies covered by the Code and Agreement. The practices covered by the illustrative list annexed to the SCM Agreement are largely the same as those listed by the Tokyo Round Subsidies Code.

3.75 **Actionable subsidies** This category covers those subsidies which are not prohibited *per se* but against which actions may be taken depending on their "trade effects". According to Article 5, Members are obliged not to use subsidies to cause adverse effects to the interests of other Members.

3.76 **Non-actionable subsidies** These are subsidies which are generally considered to have minimal impact on the flow of international trade on either of two grounds: they are not "specific" to any enterprise or industry or group of enterprises or industries; or they qualify, as a "green" subsidy, for any of three

[96] See Article XVI, paras 3 and 4, respectively.

[97] *Canada Dairy*, report of the Appellate Body, para. 87.

specifically designated forms of practices as defined under Article 8 of the SCM Agreement[98] relating to research and development activities, regional development programmes, or schemes to help adaptation to new environmental standards and while they are not *per se* non-actionable,[99] they may not be the subject of unilateral countervailing action.

3.77 **Countervailing measures** A country that is adversely affected by subsidised imports has two basic alternative remedies—unilateral countervailing measures and the multilateral dispute settlement option.

The imposition of countervailing measures is subject to certain substantive conditions, including:

(a) a countervailing measure could be taken only after investigations are initiated and conducted according to prescribed lines to determine the existence, degree and effect of a subsidy;

(b) countervailing measures are allowed only when the subsidy is determined to have caused, or is capable of causing, material injury to an existing industry, or of delaying significantly the setting up of a new industry;

(c) an investigation could normally be initiated upon a written request made to the authorities by or on behalf of the domestic industry producing the like product which is claimed to have been affected by the subsidised imports[1];

(d) countervailing measures could take the form only of additional duties;

(e) the level of such duties may not exceed the estimated amount of the subsidy granted; and

(f) countervailing duties cannot be applied in a discriminatory manner; they should be applied to all products that have actually received the disputed subsidy, no matter what their origin.

The SCM Agreement provides for an elaborate system of rules governing the investigation procedure to be followed before countervailing measures can be imposed. The investigation must establish, first, that a subsidy is being granted on the specific product under investigation; and, secondly, that it is this subsidy that caused the claimed injury to the relevant domestic industry. To find out whether there is such subsidy, the subsidising country required to give its full co-operation. Each investigation must in principle be concluded within the period of one year.

[98] Agreement on Subsidies & Countervailing Measures www.wto.org/english/docs_e/legal_e/24-scm.pdf.

[99] They may be referred, after consultations, to the Committee on Subsidies and Countervailing measures by a WTO member believing that they have suffered "serious adverse effects to the domestic industry of that member, such as to cause damage which would be difficult to repair" (Art. 9.1 SCM).

[1] SCM Agreement, Art. 11. Note also that, under Art. 11.6, there is room for the authorities to initiate an investigation on their own.

Proceedings in respect of subsidies may be suspended or concluded if the country of import accepts undertakings in which either the subsidising country promises to suspend or reduce the subsidies or the exporter agrees to revise his prices in such a way that the negative effect of the subsidy has been removed.

3.78 **Provisional measures** The importing country can impose provisional measures during the investigation before final countervailing measures are introduced if a preliminary affirmative decision has been made that a subsidy has been granted and injury has been caused to local industry and the authorities judge that such provisional measures are necessary to prevent further injury from being caused. The provisional measures usually take the form of mandatory deposits or bank guarantees (see paragraph 8.52). If the final countervailing duty is higher than the deposited or guaranteed amount the importing country cannot lay claim to the difference; if on the other hand the duty is lower, the importing country must pay back the extra amount or release the bank guarantee in proportion to that amount.

The duration of a countervailing measure is required to be proportionate to the damage suffered and it may not exceed five years (often called the "sunset clause"), unless it is established that the expiry of the duty would likely lead to recurrence of subsidy and injury. It is the duty of the state implementing the countervailing measures to check regularly whether they are still justified under GATT.

3.79 **Multilateral remedies** Under the SCM Agreement, the "Committee on Subsidies and Countervailing Measures" has to be informed of existing subsidy regulations; it may be consulted by any Member State, to which it may give advisory opinions on the nature of any subsidy this Member State proposes or maintains. Disputes involving subsidies have to be submitted to the Dispute Settlement Body and they are largely subject to the rules of the Dispute Settlement Understanding. The SCM Agreement also has what are known as "special or additional rules and procedures" which are intended to reflect the peculiarities of some of the covered agreements while keeping the integrated nature of the dispute settlement system intact.[2] The "special or additional rules and procedures" of the SCM Agreement generally prescribe shorter deadlines on the different stages of the dispute settlement process as defined by the DSU.[3]

3.80 **The E.U. anti-dumping regulation and subsidies** The rules concerning dumping are *mutatis mutandis* applicable to subsidies. This applies in particular to determination and calculation of the injury caused, procedure, consultation, investigation, undertakings given by the country of origin or exportation, imposition of provisional or final countervailing duties and possible restitution of collected duties.[4]

[2] For more on dispute settlement, see paras 3.106 *et seq.*

[3] See, *e.g.* Art. 4.12 of the SCM Agreement which provides that, in the case of disputes involving prohibited subsidies, "time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein."

[4] For more on this, see para. 3.71

PART III: TRADE IN SERVICES: THE GATS

The international trade in services

3.81 GATT only concerns trade in goods; it does not cover trade in services, such as the business of banking, insurance, tourism, etc. that represents about 35 per cent of international trade transactions and more than 60 per cent of the GNP of many industrialised countries. The absence of international trade rules for the regulation of trade in services has seriously limited the reach of multilateral trade liberalisation.

One of the success stories of the Uruguay Round negotiations (1986–1993) consisted in the conclusion of a General Agreement on Trade in Services (GATS).[5] The GATS is therefore the services version of GATT and, for the first time in history, extends "internationally-agreed rules and commitments . . . into a huge and still rapidly growing area of international trade."[6]

3.82 **Service definition** By "service" is understood "any service in any sector, except services supplied in the exercise of governmental functions" (Article I(3)(b)).[7] It has been said that this description is too wide and that it therefore makes little sense to liberalise the trade in services in the same way as the trade in goods, because services are more person-related than goods.[8]

With this understanding of the term "services", trade in services is defined to include four modes of supply activities:

(a) the supply of a service from the territory of one Member State into the territory of any other Member State often called "cross-border supply" (*e.g.* telecommunication services);

(b) the supply of a service in the territory of one Member State to the service consumer of any other Member State, called "consumption abroad" (*e.g.* tourism services);

(c) the supply of a service by a service supplier of one Member State, through commercial presence in the territory of any other Member State, called "commercial presence" (*e.g.* establishment of branches of banks and insurance companies in another country);

[5] See M. Footer, "GATT and the multilateral regulation of banking services" (1993) 27 *International Lawyer* 343; F. Lazar, "Services and the GATT" (1990/1) J.W.T. 135; P. Nicolaides, *Liberalising Service Trade* (Chatham House, London, 1989); F. Weiss, "The General Agreement on Trade in Services 1994" (1995) 32 C.M.L.Rev. 1177–1225; J. M. Lang, "The First Five Years of the WTO: General Agreement on Trade in Services" (2000) 31 LawP.I.B. 801–810.

[6] See WTO Secretariat, Trade in Services Division, *An Introduction to the GATS* (October 1999).

[7] Sub-para. (c) then defines a "service supplied in the exercise of governmental authority" to mean "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers"; A. K. Abu-Akeel, "Definition of trade in services under the GATs: legal implications" (1999) 32 Geo.Wash.J.Int'l.L.Econ 189–210.

[8] M. van Empel, "The visible hand of the invisible trade" (1990/2) L.I.E.I. 26–27, 38–39 ("whereas 'goods', once produced, take on an identity of their own, 'services' are determined by the identity of their producer").

(d) the supply of a service by a service supplier of one Member State, through presence of natural persons of a Member State in the territory of any other Member State, called "presence of natural persons" (*e.g.* consultants or accountants moving to another country to do some work).

The importance of this definition can hardly be over-emphasised. The definition indeed holds the key to understanding the nature of the challenges involved in trying to liberalise trade in services and the solutions currently adopted by the GATS.

3.83 **General principles: comparison with GATT** Like the GATT, the GATS also incorporates a number of fundamental principles including the non-discrimination rules of most favoured nation and national treatment as well as the transparent administration of national regulations affecting services trade. However, there are also important differences between these two instruments, and a closer look at some of these principles is crucial at this point.

3.84 **Most favoured nation treatment** GATS Article II embodies the fundamental most favoured nation treatment principle in the following words:

> "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."[9]

However, the GATS MFN principle has been subject to an important exception—that Member States are allowed to maintain a measure inconsistent with this principle "provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions". As a result of this opening, "more than 70 WTO members made their scheduled services commitments subject to a further list of exemptions from Article II."[10] Like the GATT, the MFN principle of the GATS also allows an exception in the case of regional integration initiatives.[11]

3.85 **National treatment** Like GATT Article III, Article XVII of the GATS also enshrines the principle of national treatment. The similarities between them are, however, rather limited. The essence of the national treatment principle in both cases of course remains the protection of foreign products and services (and/or service suppliers) from being discriminated against once they are in the territory of other Member States. But, while this principle applies in GATT as a matter of general rule, the same principle under the GATS applies only as regards what

[9] A. K. Abu-Akeel, "The MFN as it applies to service trade—new problems for an old concept" (1999) 33 J.W.T. 103–130.

[10] See WTO Secretariat, Trade in Services Division, *An Introduction to the GATS* (October 1999). The full text of this useful introduction is available at http://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

[11] See Art. V of the GATS. GATS does not make any distinction between customs unions and free trade areas.

each Member State has specifically undertaken in its own schedule. Article XVII of GATS, which is found in Part III of the Agreement on specific commitments, thus provides as follows:

> "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."

3.86 **Market access** Article XVI provides that "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." This is the same as the bindings of GATT Article II. Article XVI further sets out six forms of practices which a Member "shall not maintain or adopt":

(i) limitations on the number of service suppliers;

(ii) limitations on the total value of services transactions or assets;

(iii) limitations on the total number of service operations or the total quantity of service output;

(iv) limitations on the number of persons that may be employed in a particular sector or by a particular supplier;

(v) measures that restrict or require supply of the service through specific types of legal entity or joint venture; and

(vi) percentage limitations on the participation of foreign capital, or limitations on the total value of foreign investment.[12]

3.87 **Transparency** Another basic principle of the GATS is transparency—making all laws and regulations affecting services trade known to other Member States so that their private sectors can be in a position to take advantage of the market opening effects of the GATS. The GATS thus stipulates that Member States "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."[13] Additionally, Member States are also required to "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." Member States establish enquiry points to provide specific relevant information to other Members States upon request.

[12] GATS, Art. XVI:2; see also WTO Secretariat, Trade in Services Division, *An Introduction to the GATS* (October 1999).
[13] GATS, Art. III:1.

3.88 **Other principles** Other major principles of the GATS include progressive liberalisation through multilateral trade negotiations, as is already the case for the trade in goods, and greater participation of developing countries in international trade in services, *inter alia*, through access to technology, distribution channels and information networks. There are also some provisions on general exceptions and security exceptions in GATS which are similar to Articles XX and XXI, respectively, of the GATT (see paragraph 3.43). Indeed, these provisions "are perhaps the closest of all to their GATT equivalents".

3.89 **Major missing features** New as the GATS is, it contains a number of noticeable regulatory gaps. These include emergency safeguards, and subsidies and countervailing measures, which the Agreement only mentions in the sense of setting agenda for future negotiations.[14] Article X originally set a three-year deadline (from entry into force of the Agreement) for the completion of multilateral negotiations on emergency safeguard measures. This deadline was extended first to December 15, 2000 and then to March 15, 2002. Unlike Article X on emergency safeguards, Article XV on subsidies does not even set deadlines for the envisaged negotiations.

3.90 **Annexes to the GATS** The GATS text contains eight annexes which, in the words of Article XXIX, form an integral part of the Agreement. They deal with exemptions from the MFN principle, the movement of natural persons supplying services under the Agreement, air transport services, financial services, maritime transport, and telecommunications.

3.91 **Movement of natural persons** To the disappointment of most developing countries during the Uruguay Round negotiations, the Annex on the movement of natural persons is not concerned with immigration and related issues. Indeed a closer look at this part of the Agreement shows that the Annex was included only to underline this fact. Paragraph 2 thus stresses that 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." The Annex in this respect simply states the obvious and declares that "Members *may* negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement." (Emphasis supplied.)

3.92 **Air transport services** Although this Annex starts with a comprehensive-sounding statement to cover all primary and ancillary measures affecting trade in air transport services (scheduled as well as non-scheduled), a closer look indicates a different reality. For example, it is provided 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." The established principle

[14] Y. S. Lee, "Emergency safeguard measures under Article X in GATS—applicability of the concepts in the WTO Agreement on Safeguards" (1999) 33 J.W.T. pp. 47–60.

of general international law that, in case of inconsistency, the later agreement in time prevails, is thus explicitly excluded. Existing arrangements in international air transport services are largely governed by the 1944 International Air Services Transit Agreement, known as the Chicago Convention. The GATS Annex specifically excludes from its coverage this "complex network of bilateral agreements on air traffic rights",[15] encompassing all traffic rights as well as services directly related to the exercise of traffic rights. The scope of the Annex on Air Transport Services is therefore limited to aircraft repair and maintenance, the selling and marketing of air transport services, and computer reservations.

3.93 **Financial services** This Annex applies to measures affecting the supply of financial services which is defined to cover all insurance and insurance-related services as well as all banking and other financial services.[16] It does not apply to financial services normally supplied by governmental authorities such as activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies. Even in the case of covered financial services, Member States are free to take what are called "prudential measures", *e.g.* measures taken for reasons of the protection of investors, depositors, policy-holders etc.

3.94 **Telecommunications** The telecommunications sector is important both in itself and in the sense of the provision of several other services. This is what is known as the "dual role" of telecommunications—as a distinct sector of economic activity and as the underlying means of transportation for other economic activities. The purpose of the Annex on Telecommunications is therefore to elaborate upon GATS provisions with respect to measures affecting access to and use of public telecommunications transport networks and services. It does not however apply to measures affecting the cable or broadcast distribution of radio or television programming.

The fundamental rule in this respect provides that:

> "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."[17]

This is a general obligation applicable to every Member State regardless of their specific commitments. Indeed, this is a necessary corollary of Member States' specific commitments on the supply of other services, as it would be practically impossible to render many other services in the absence of full access to the underlying infrastructure of telecommunication services. The only permissible conditions that could be imposed by Member States for access to and use of public telecommunications transport networks and services are those necessary

[15] WTO Secretariat, Trade in Services Division, *An Introduction to the GATS* (October 1999).
[16] An elaborate definition of the different forms of banking (and banking-related) and insurance (and insurance-related) services is included in the Annex.
[17] Annex on Telecommunications, para. 5.

to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, to protect the technical integrity of public telecommunications transport networks or services, and to ensure that service suppliers of any other Member State do not supply services unless permitted pursuant to commitments in the Member State's Schedule.

GATS emphasises the importance of international organisations such as the International Telecommunications Union (ITU) and IOS in the development of standards for the global compatibility and interoperability of telecommunication networks and services.

Developing countries and GATS

3.95 The GATS also incorporates the principle of special and differential treatment for developing countries, both in its general provisions as well as in the annexes. Article XXV provides that 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. The Annex on telecommunications, for instance, provides that developing countries may "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".[18]

Institutional features

3.96 Within the WTO, the Council for Trade in Services oversees the functioning of the GATS.[19] The dispute settlement system which evolved over time in the course of GATT also applies to the resolution of disputes under the GATS. In case of complaints, while Member States are required to "afford adequate opportunity" for consultations at the bilateral level, multilateral consultations through the GATS Council or the DSB are also available at the request of interested Member States.[20] If consultations do not solve a matter, Member States have the option of invoking the dispute settlement provisions of the DSU on both violation as well as non-violation grounds.

The non-violation nullification or impairment of the GATS is expressed as follows:

> "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."[21] (See paragraph 3.108.)

[18] *ibid.*, para. 6(g).
[19] GATS, Art. XXIV.
[20] *ibid.*, Art. XXII.
[21] *ibid.*, Art. XXIII.

The future agenda

3.97 The discipline introduced by GATS for the regulation of services trade is still in its infancy. Aware of this situation, GATS made provision for the continuation of negotiations. GATS Article XIX set this agenda as follows:

> "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."[22]

GATS Article XIX also provides for a kind of differential treatment to developing countries, mainly the LDCs. The first of the negotiations envisaged by this provision has already started pursuant to a General Council decision of February 7–8, 2000.[23]

PART IV: INTELLECTUAL PROPERTY

3.98 **Trade restrictions as a result of intellectual property rights** One of the important achievements of the Uruguay Round has been the conclusion of a comprehensive agreement on trade-related aspects of intellectual property rights, TRIPs. For many years the industrialised countries complained about the fact that developing countries gave insufficient legal protection to various industrial property rights such as patents, trade marks and service marks, industrial drawings, models and copyrights. Moreover, they considered that the developing countries particularly were treated too softly with regard to trade in counterfeit products (see paragraph 6.34).

For their part, the developing countries were reluctant to grant exclusivity to the owners of intellectual property rights. In their opinion, the enjoyment of exclusive rights by companies from industrialised countries will obstruct the transfer of technology to developing countries. Furthermore, many developing countries believe that for certain essential products (particularly pharmaceuticals), no, or only limited, exclusivity should be granted.[24]

The TRIPs Agreement covers copyright and related rights (such as the rights of performers, producers of sound recordings and broadcasting organisations),

[22] *ibid.*, Art. XIX:2.
[23] WTO Press Release, Press/167, February 7, 2000.
[24] Symposium: "Public and private initiatives after TRIPs" 9 (1998) DukeJ.C.I.L., No. 1; C. S. Levy, "Implementing TRIPs—A test of political will" (2000) 31 LawP.I.B. 789–796.

trade marks including service marks, geographical indications including appellations of origin, industrial designs, the layout designs of integrated circuits, and trade secrets.[25]

The TRIPs Agreement has three major features. First, it sets out the minimum standards of protection to be provided by each Member State with respect to each form of intellectual property (*e.g.* copyright protection for the lifetime of the author plus 50 years; after patent protection for a period of 20 years from the filing date; etc.). Secondly, it prescribes certain mandatory domestic procedures and remedies for the enforcement of intellectual property rights which include civil, administrative and criminal procedures and remedies. Thirdly, it applies the stringent dispute settlement rules of the WTO (see paragraph 3.108) to intellectual property issues.[26]

Like GATT as well as the GATS, the TRIPs Agreement enshrines the basic principles of non-discrimination, such as the MFN clause and national treatment.[27] Moreover, parties are required to comply with the substantive provisions of the Berne Convention on copyright and the Paris Patent Convention.

Some of the major forms of intellectual property rights protected by the TRIPS Agreement summarised below.

3.99 **Copyrights and "neighbouring" rights** Section 1 of Part II of the TRIPs Agreement is devoted to copyrights and related or neighbouring rights (such as the rights of performers, producers of sound recordings and broadcasting organisations). Article 9 essentially incorporates the Berne Convention (1971) and the Appendix thereto. Consequently the Berne Convention Article 7 obligation to accord copyright protection for the lifetime of the author plus 50 years after his/her death is the standard imported by the TRIPs Agreement.[28] Article 14 of the TRIPs Agreement also protects the rights of performers, producers of phonograms, and broadcasting organisations, with the possibility of preventing the unauthorised recording of their performance on a phonogram as well as the broadcasting by wireless means and the communication to the public of their live performances.

3.100 **Trade marks** TRIPS defines a trade mark as "any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings."[29] The unregulated use of a trade mark affects the interests of both companies using those marks as well as members of the public, who might be confused as to what product or service is produced by which company, etc. The TRIPs Agreement in this respect incorporates the provisions of the Paris Convention (1967).

[25] For a useful introduction to the TRIPs Agreement, see http://www.wto.org/english/tratop_e/trips_e/trips_e.htm.
[26] T. Einhorn, "The impact of the WTO Agreement on TRIPs (Trade Relted Aspects of Intellectual Property Rights) on E.C. Law: A challenge to regionalism" (1998) C.M.L.Rev. 320.
[27] G.E. Evans, "The principle of national treatment and the international protection of industrial property" (1996) 3 E.I.P.R. 149; see also "Canada—Patent Protection of Pharmaceutical Products", report of the panel, WT/DS114/R, adopted April 7, 2000, para. 7.94.
[28] TRIPs Agreement, Art. 9.
[29] *ibid.*, Art. 15.

Trade mark protection is conferred on registration by the competent authorities. In the interest of transparency and security, Members are required to publish each trade mark "either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration."[30] Once registered, the owner of a trade mark enjoys the exclusive right to prevent all third parties not having his consent from using it in such manner as would result in a likelihood of confusion. There is a presumption of such a likelihood of confusion in case of the use of an identical sign for identical goods or services.

A seven-year minimum period of protection is accorded for the initial registration as well as for each of the subsequent renewals that may made an indefinite number of times. While Member States are free to determine conditions on the licensing and assignment of trade marks, the owner of a registered trade mark "shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs."[31]

3.101 **Geographical indications** Place names and appellations of origin often serve as important symbols of the quality of products. They identify a good as originating in a particular country, or even in a particular region or locality in that country, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.[32] In this connection, the TRIPs Agreement requires that Member States provide the legal means for interested parties to prevent the use of misleading geographical indications, which constitute unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).[33]

3.102 **Patents** Under the TRIPs Agreement, patents must be available for any inventions, whether products or processes, in all fields of technology. The fundamental conditions of patentability are that inventions be "new, involve an inventive step and are capable of industrial application".[34] However, countries are allowed to deny the patenting of specific inventions when necessary to protect public policy or morality.[35] Most importantly, Member States are allowed to exclude from patentability "diagnostic, therapeutic and surgical methods for the treatment of humans or animals" and plants and animals other than micro-organisms.[36]

Once granted, a patent confers on its owner exclusive rights, *inter alia*, to prevent third parties from making, using, offering for sale or importing for these purposes such a product, and where the subject matter of a patent is a process, to prevent third parties from using the process or selling or importing for sale the

[30] *ibid.*, Art. 15.
[31] *ibid.*, Art. 21.
[32] *ibid.*, Art. 27.
[33] *ibid.*, Art. 22:2, for wines and spirits: Art. 23:1.
[34] *ibid.*, Art. 27:1. A footnote to this provision defines the terms "inventive step" and "capable of industrial application" as being synonymous with the terms "non-obvious" and "useful" respectively.
[35] *ibid.*, Art. 27:2.
[36] *ibid.*, Art. 27:3.

product obtained directly by that process.[37] Furthermore, the holder of a right, who has valid grounds for suspecting that items with counterfeit trade mark or pirated copyright are being imported can request the customs authorities not to release these goods.

3.103 **Layout designs (topographies) of integrated circuits** In protecting layout designs of integrated circuits, the TRIPs Agreement relies largely on the Treaty on Intellectual Property in Respect of Integrated Circuits (the IPIC Treaty), which was negotiated in 1989 under the auspices of the WIPO. The exclusive rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes.

The duration of protection of the exclusive rights of the owner of such a right depends on the type of legal regime applicable in Member States. In cases where Member States require registration as a condition of protection, the minimum term for protection of layout designs shall be a period of 10 years from the date of filing an application for registration or from the first commercial exploitation, wherever in the world it occurs. In cases where Member States do not require registration as a condition for protection, layout designs shall be protected for a term of not less than 10 years from the date of the first commercial exploitation, wherever in the world it occurs.[38] Given that the duration of protection under the IPIC was eight years, the TRIPs Agreement has improved the rights of the beneficiaries.

3.104 **Protection of undisclosed information** Basing itself on the 1967 Paris Convention, the TRIPs Agreement also accords protection to what is generally known as undisclosed information, or trade secrets. Companies and individuals are thus allowed to prevent information "lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices".[39] However, important conditions are attached to this right, including the requirement that the information:

- be secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- has commercial value because it is secret; and
- has been subject to reasonable steps to keep it secret.

3.105 **Institutional aspect of the TRIPs Agreement** A Council for Trade Related Aspects of Intellectual Property Rights supervises compliance with the agreement and institutes consultations mechanisms between the states concerned. The TRIPs Council has established appropriate arrangements for a co-operation with

[37] *ibid.*, Art. 28.
[38] *ibid.*, Art. 38.
[39] *ibid.*, Art. 39.

WIPO and its organs. Dispute settlement would take place under the Integrated Dispute Settlement Procedure (see paragraph 3.07).

An important obligation of Member States is to ensure the availability of adequate enforcement procedures under their domestic legal systems, so as to permit effective action against any act of infringement of intellectual property rights. To that end, Members are required to make available to rights holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Criminal sanctions should also be made available "at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale" and such sanctions must include imprisonment and/or monetary fines "sufficient to provide a deterrent".[40] As such, national judicial and administrative machinery also play an important institutional role in the enforcement of intellectual property rights.[41]

PART V: THE DISPUTE SETTLEMENT SYSTEM OF THE WTO

3.106 **General** Dispute settlement stands at the centre of the WTO system. With binding rules for a Member State to enter into consultations, and subsequent disputes procedures involving a panel and an appellate body process, the WTO enjoys one of the most well-developed law enforcement mechanisms under public international law. Indeed, it is believed that the dispute settlement process is believed to be the single most important contribution of the multilateral trading system to general international law.[42]

As pointed out already, the dispute settlement is considered the jewel in the crown. However, this is not the result of an overnight development; it is something that has evolved over nearly half a century of experience and trial and error. When GATT 1947 was first agreed, it had only two provisions on dispute settlement: Article XXII on consultation and Article XXIII on nullification or impairment. Over the years, the detailed dispute settlement procedure grew progressively, to become one of the most sophisticated legal systems.[43]

[40] *ibid.*, Art. 61.
[41] *ibid.*, Art. 41.
[42] S. P. Croley, J. H. Jackson, "WTO dispute procedures, standard of review and defence to national governments" (1996) 90 A.J.I.L. 193–213.
[43] For details, see E.U. Petersmann, *The GATT/WTO Dispute Settlement: International Law, International Organisations and Dispute Settlement* (Kluwer, 1997). See also E. Canal-Forgues and R. Ostrihansky, "New developments in the GATT dispute settlement procedures" (1990/2) J.W.T. 67; J. Castel, "The Uruguay Round and the improvements to the GATT dispute settlement rules and procedures" (1989) I.C.L.Q. 434; R. Ostrihansky, "The future of dispute settlement within GATT: conciliation v. adjudication" (1990) Leiden J. of Int. L. 125. How the GATT dispute settlement has become more legalistic is described in E. Canal-Forgues, "L'institution de la Conciliation dans le Cadre du GATT" (Bruylant, Brussels, 1993); P.J. Kuiper, "Het GATT en het Volkenrecht" (1993) 107 Med.Ned.Ver.Int.R. 9–23; E.U. Petersmann, "The settlement system of the World Trade Organisation and the evolution of GATT dispute settlement system since 1948" (1994) 31 C.M.L.Rev. 1157–1244; P.E. Kuruvila, "Developing countries and the GATT/WTO dispute settlement mechanism" (1997) 31 J.W.T. 171–208; M.Clough, "The WTO dispute settlement system—a practitioner perspective"(2000) 24 Ford I.L.J., 252–274; J. Cameron and K.R. Gray, "Principles of international law in the WTO dispute settlement body"(2001) 50 I.C.L.Q. U.K. 248–298.

3.107 **Standing in WTO dispute settlement proceedings** GATT/WTO rules regulate the relationships between states; enterprises are in principle not entitled to commence legal action on the grounds of the GATT provisions. Yet, enterprises, and particularly exporters, are served by observance of the trade rules, as any infringements may cause them serious damage. In such cases, enterprises can only try to convince their respective governments to lodge a complaint against a country that affects their interests in a manner contrary to multilateral trade rules.[44] However, governments always have the discretion (the same as for diplomatic protection) in deciding whether they lodge such a complaint.

In the E.U., enterprises have the right to petition the E.U. Commission to lodge such a complaint on their behalf.[45] To this end, the E.U. has issued the Trade Barriers Regulation that "establishes rights for private parties to complain about illegal trade practices of third countries, and to request the E.U. authorities to intervene swiftly and effectively."[46]

3.108 **An integrated system** After the conclusion of the Tokyo Round of trade negotiations, one of the serious problems of the GATT dispute settlement system was the existence of different dispute settlement rules for the different "Codes". Since the different systems differed in the manner in which they addressed the interests of countries, there was a problem of "forum shopping". A Panel established under one Code would not have the competence to interpret the provisions of other relevant agreements. Indeed, a complaining state could bring a dispute before a Panel under one agreement where its position was more favourable but where the defendant state would be unable to invoke defences based on another agreement.

To overcome this situation, the Uruguay Round did two things: first, with its "all-or-nothing" approach, almost all Tokyo Round Codes were replaced by multilateral agreements, binding on all Member States. This has effectively overcome the forum-shopping problem that existed previously. All multilateral agreements, including GATT 1994, the GATS, as well as the TRIPs Agreements, are now subject to the Dispute Settlement Understanding (DSU). The Dispute Settlement Body (DSB) administers the day-to-day operation of the dispute settlement system provided under the DSU. Thus, by bringing all multilateral agreements under an integrated dispute settlement mechanism, the former situation whereby a Panel composed under one agreement had no competence for the interpretation of another agreement has ceased to exist.

Secondly, in order to reflect the peculiarities inherent in some agreements, the DSU has included what are known as "special or additional rules and procedures of dispute settlement" in several of the constituent instruments. An exhaustive

[44] See, *e.g.* R.A. Brand, "Private parties and GATT dispute resolution" (1990/3) J.W.T. 5.
[45] For a list of the various cases under the GATT dispute resolution procedure see M. Hilf, F.G. Jacobs and E.U. Petersmann, *op.cit.* pp. 353–392; P. Pescatore, W. Davey and A. Lowenfeld, *Handbook of GATT Dispute Settlement* (loose-leaf, Kluwer, Deventer, 1990).
[46] See M. Bronckers and N. McNelis, "The EU Trade Barriers Regulation Comes of Age", (2001) W.T. 427. For a summary and periodic updates on the day-to-day operation of the Trade Barriers Regulation in the E.U., see http://europa.eu.int/comm/trade/policy/traderegul/index_en.htm.

list of these special or additional rules has been provided in Annex 1 to the DSU.

3.109 **Consultation** Under the DSU, when a state is of the opinion (as a result of its own initiative, or after having been addressed by an enterprise) that another contracting state has breached the provision of a covered agreement, it is required to enter into bilateral or multilateral consultations with that state to come to an amicable settlement. Once consultation request have been made, any bilateral settlement must be consistent with WTO rules. Relevant WTO bodies must also be notified of such an amicable settlement.

Under the DSU, a Member State is generally required to enter into consultations within 30 days of a request for consultations from another Member State. If after 60 days from such request there is no settlement, the complaining state may request the establishment of a Panel (see paragraph 3.110). Where consultations are denied, the complaining state may move directly to request a Panel.

3.110 **Report by a Panel** The most common procedure after this stage is the composition of a Panel at the request of a complaining state. This complaining state must give a summary of the disputed facts and legal issues in its complaint. There are elaborate rules for instituting a Panel in order to safeguard against its establishment being prevented. Indeed, unlike pre-WTO days, the establishment of a panel is nearly automatic and can be denied only in the unlikely event of a consensus not to do so, including the requesting party itself. This is what is know as the rule of "negative consensus".

A Panel is composed of three (exceptionally five) members, who must be completely independent from the parties in dispute. Panel members are usually expert officials from contracting states or from non-governmental organisations, or senior academics in international trade law. Panel members are nominated by the Secretariat, from an indicative list which it maintains, and given to the parties for approval. Parties have a duty to accept the nominations, unless there are "compelling reasons". If no agreement can be reached on the choice of panellists within 20 days from the Panel's establishment, the Panel members are appointed by the Director General of the WTO.

The terms of reference of the Panel usually run as follows:

> "To examine, in the light of the relevant provisions in [name of the covered agreement(s) cited by the parties to the dispute], the matter referred to the DSB by [name of party] in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

The other Member States must be notified about the establishment and composition of panels. Any Member State with an interest in any dispute has the right to be heard by the Panel as a third-party participant.

Panels are required to make an objective assessment of the matter before them, including an objective assessment of the facts of the case and the applicability of

and conformity with the relevant covered agreements.[47] In practice, a form of "jurisdiction" has developed, since the panels often refer to decisions of earlier Panels and to rules of international law regarding the observance of treaties.[48]

Under the new rules a Panel should normally complete its work within six months or, in cases of urgency, within three months of its establishment.

Appellate review The Uruguay Round, moreover, has introduced an appel- 3.111
late review of Panel reports by a standing Appellate Body.[49] The Appellate Body is mandated to decide on issues of law or on legal interpretations developed by the Panel. The Appellate Body has no remand authority. Appellate proceedings may not exceed 60 days from the date a party formally notifies its decision to appeal.

Adoption of report Panel and/or Appellate Body reports become binding 3.112
instruments only after they have been adopted by the WTO Dispute Settlement Body (DSB). The negative consensus principle also applies to decisions of the DSB. As such, Panel reports may be considered by the DSB for adoption 20 days after they are issued. Within 60 days of their issuance they will be deemed to have been adopted unless the DSB decides by consensus not to adopt the report, or one of the parties notifies the DSB of its intention to appeal. Decisions of the Appellate Body are deemed to be adopted by the DSB within 30 days unless the DSB decides by consensus against its adoption. Thanks to this approach, the former practice of blocking adoption of Panel reports at the initiative of a losing party has been abolished.

Monitoring and follow-up of implementation The DSB has supervision 3.113
over the implementation of the accepted report by the losing state, which has a duty to report back on this implementation to the DSB. When immediate implementation is not practicable, the losing Member State is allowed a reasonable period for implementation. If the state does not give effect, then other states can take reprisal measures by suspending equivalent concessions, obligations or advantages. These reprisals can, however, only be taken when negotiations between the parties to agree upon adequate compensation have failed, and when

[47] If one or more of the litigating parties are developing countries, the Panel report must mention expressly to what extent account is taken of the preferential treatment of developing countries (see para. 3.73). On the practical effect of a Panel see R. Plank, "An unofficial description on how a GATT Panel works and does not" (1987) J.I.A. 53.

[48] For an interesting reflection on this issue, see D. Palmeter, and P. C. Mavroidis, "The WTO legal system: sources of law" (1998) 92 Am.J.Int'l.L., 400; see also P.J. Kuiper, "Het GATT en het Volkenrecht" (1993) 107 Med.Ned.Ver.Int.R. 15–24; A. Chua, "The precedential effect of WTO Panel and Appellate Body reports" (1998), 11 Lei.J.I.L., pp. 45–61; T. P. Stewart and A. A. Karpel, "Review of the dispute settlement understanding: operation of Panels" (2000) 31 LawP.I.B. 593–656.

[49] A. W. Shoyer and E. M. Solovny, "The process and procedures of litigating at the World Trade Organization: a review of the work of the Appellate Body" (2000) 31 LawP.I.B. 677–698; P.C. Marmoidis, "Remedies in the WTO legal system: between a risk and a hard place" (2000) 11 E.J.I.L. 763–814.

the authorisation of the DSB has been secured. The DSB keeps the implementation of its rulings under regular surveillance until the issue is resolved definitively.

3.114 **Other means of dispute settlement** Parties to a dispute may also opt for a conciliation or mediation, if necessary with the assistance of another Member State or of the Director General of the WTO. They may also ask for dispute settlement by way of arbitration within the WTO. In such cases, parties which consent to arbitration also undertake to observe the arbitral award. The purpose of arbitration is to come to a compromise rather than to a judgment based on legal rules. It should, therefore, not be confused with traditional commercial arbitration (see paragraph 11.01). Arbitration under the GATT/WTO system is seldom used.

CHAPTER 4

INTERNATIONAL SALES

Importance The contract of sale is one of the oldest and most used contracts in international trade. It is also an essential part of other transactions such as franchising (see paragraph 5.09–5.11), distribution agreements (see paragraph 5.02), building contracts and licence agreements (see paragraph 6.09–6.11). Both buyer and seller should have a clear perception of their respective rights and obligations. When entering into a transnational sales contract, parties should thus know which national law is applicable to the contract. This is not always obvious, since it is often impossible to predict which court will be seized in the event of a dispute and since each court has to rely on its own conflict of law rules to establish the applicable law (see paragraph 1.24). Of course, the competent court (see paragraph 10.01) and the proper law (see paragraph 1.31) can be indicated in the sales contract. However, even in the absence of a choice of law or choice of forum clause, the criteria to find the law applicable to the contract are fairly universal. **4.01**

PART I: NATIONAL LAW APPLICABLE TO SALES

Hague Convention The Convention on the Law Applicable to the International Sale of Goods—the "Hague Convention"—is applicable in eight countries.[1] These states have incorporated into their national law the conflict of law rules of the Hague Convention, which apply irrespective of the legal system to which they refer. **4.02**

The Hague Convention applies to the international sale of goods, without specifying when a sale is "international". However, one thing at least is certain: the mere choice of a foreign law or a foreign forum does not make a contract "international" (Article 1). A number of transactions are excluded from the scope of the Convention: the sale of securities, the sale of registered aircraft or any sale upon judicial order or by way of execution (Article 1). First of all, the law chosen by the contracting parties governs the sales contract. This choice must be expressed or implied with reasonable certainty by the terms of the contract (Article 2). If the parties have not made an express or implied choice of law, then, alternatively, the following conflict of law rules apply:

[1] Hague Convention of June 15, 1995 (www.hcch.net). This convention is in force in Denmark, Finland, France, Italy, Niger, Norway, Sweden and Switzerland.