The concept of 'economic globalization'

'Economic globalization' has been a popular buzzword for more than two decades now. Politicians, government officials, businesspeople, trade unionists, environmentalists, church leaders, public health experts, third-world activists, economists and lawyers all speak of '***economic globalization'***. The concepts of '***globalization***' and '***economic globalization***' in particular, have been used by many to describe the defining feature of the post-Cold War world in which we live. But what do these terms mean?

Joseph Stieglitz, former Chief Economist of the World Bank and winner of the Nobel Prize for Economics in 2001, described the concept of globalization, in his 2002 book, Globalization and Its Discontents, as:

> *the **closer integration** of the countries and peoples of the world which has been brought about by the enormous **reduction of costs of transportation and communication**, and the breaking down of **artificial barriers** to the flow of goods, services, capital, knowledge, and (to a lesser extent) people across borders.*

In The Lexus and the Olive Tree: Understanding Globalization, Thomas Friedman defined 'globalization' as follows:

> *it is the inexorable **integration of markets, nation-states and technologies** to a degree never witnessed before- in a way that is enabling individuals, corporations and nation states **to reach around the world farther, faster, deeper and cheaper** than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation-states farther, faster, deeper and cheaper than ever before.*

Economic globalization is a multifaceted phenomenon, which undoubtedly is not yet fully understood. In essence, however, economic globalization is the ***gradual integration of national economies into one borderless global economy.*** It encompasses both ***(free) international trade*** and ***(unrestricted) foreign direct investment***. Economic globalization affects people everywhere and in many aspects of

their daily lives. It affects their jobs, their food, their health, their education and their leisure time. It affects the price people pay for gasoline, bananas and cars, and the health services accessible to them.

While the trend towards globalization is clear, the extent of today's global economic integration can be, and frequently is, exaggerated. *International trade should normally force high-cost, domestic producers to lower their prices and bring the prices of products and services between different countries closer together.* However, large divergences in prices persist. Even within the European Union, price differences from one country to another remain significant for a number of products and services. This is partly due to differences in transport costs, taxes and the efficiency of distribution networks, but it is also due, at least outside the European Union, to the continued existence of important barriers to trade. Furthermore, while goods, services and capital move across borders with greater ease, restrictions on the free movement of workers, i.e. restrictions on economic migration, remain multiple and rigorous.

International rules for international trade

Need for international rules

Former GATT and WTO Director-General, Peter Sutherland, wrote in 1997:

> *The greatest economic challenge facing the world is **the need to create an international system** that not only maximizes **global growth** but also achieves a greater measure of **equity**, a system that both integrates emerging powers and assists currently marginalized countries in their efforts to participate in worldwide economic expansion ...*

The most important means available to secure peace and prosperity into the future is to develop effective ***multilateral approaches*** and ***institutions***. These multilateral approaches and institutions, to which Sutherland referred, embrace many structures and take many forms but it is very clear that ***law*** and ***legal norms*** play the most important part of

the institutions which are essential to make markets work. The notion that ***'rule of law'*** (ambiguous as that phrase is) or a rule-based or rule-oriented system of human institutions is essential to a beneficial operation of markets, is a constantly recurring theme in many writings.

In this regard, Ronald Coase, Nobel Prize Winner for Economics, wrote:

> *It is evident that, for their operation, markets require the establishment of legal rules governing the rights and duties of those carrying out transactions. To realize all the gains of trade, there has to be a legal system and political order.*

But what exactly is the role of legal rules and, in particular, international legal rules in international trade? How do international trade rules allow countries to realize the gains of international trade?

There are basically four related reasons why there is a need for international trade rules.

First, countries must be restrained from adopting ***trade-restrictive measures*** both in their own interest and in that of the world economy. International trade rules restrain countries from taking trade-restrictive measures. For instance, national policy-makers may come under considerable pressure from influential interest groups to adopt trade-restrictive measures in order to protect domestic industries from import competition. Such measures may benefit the specific, short-term interests of the groups advocating them but they very seldom benefit the general economic interests of the country adopting them.[1]

A second and closely related reason why international trade rules are necessary is the need of traders and investors for a degree of ***security and predictability***. International trade rules offer a degree of security and predictability. Traders and investors operating, or intending to operate, in a country that is bound by such legal rules will be able to predict better how that country will act in the future on matters affecting

[1] Countries also realize that, if they take trade-restrictive measures, other countries will do so too. This may lead to an escalation of trade-restrictive measures, a disastrous move for international trade and for global economic welfare. International trade rules help to avoid such escalation.

their operations in that country. The predictability and security resulting from international trade rules will encourage investments and trade and will thus contribute to global economic welfare.

A third reason why international trade rules are necessary is that national governments alone simply cannot cope with the challenges presented by economic globalization. The protection of important societal values such as public health, a clean environment, consumer safety, cultural identity and minimum labor standards is, as a result of the greatly increased levels of trade in goods and services, no longer ***a purely national matter*** but ever more a matter with significant international ramifications. Attempts to ensure the protection of these values at the national level alone are doomed to be ineffective and futile.

Worse, domestic regulatory measures regarding, for example, ***product safety, health, environmental protection and labor conditions*** may constitute important barriers to trade. These measures are often not directly or expressly related to the regulation of trade but the fact that they differ from country to country acts as a significant constraint on trade. International trade rules serve to ensure that countries only maintain national regulatory measures that are necessary for the protection of the key societal values referred to above.

Furthermore, international trade rules may introduce a degree of harmonization of domestic regulatory measures and thus ensure an effective, international protection of these societal values.

A fourth and final reason why international trade rules are necessary is the need to achieve a ***greater measure of equity in international economic relations.*** Without international trade rules, binding and enforceable on the rich as well as the poor, and rules recognizing the special needs of developing countries, many of these countries would not be able to integrate fully in the world trading system and derive an equitable share of the gains of international trade.

However, for international legal rules to play these multiple roles, such rules have, of course, to be observed. It is clear that international trade

rules are not always adhered to. Yet, while most attention, of both the media and academia, is inevitably paid to instances of breach, it should be stressed that international trade rules are generally well observed. Countries realize that they cannot expect other countries to observe the rules if they do not do so themselves. The desire to be able to depend on other countries' compliance with the rules leads many countries to observe the rules even though this might be politically inconvenient in a given situation.

All countries and their people benefit from the existence of rules on international trade making the trading environment more predictable and stable. However, provided the rules take into account their specific interests and needs, developing countries, with generally limited economic, political and military power, should benefit even more from the existence of rules on international trade. The weaker countries are likely to suffer most where the law of the jungle reigns. They are more likely to thrive in a rules-based, rather than a power-based, international trading system.

International Economic law

The legal rules, discussed above, governing trade relations between countries are part of international economic law. International economic law is a very broad field of international law. ***John Jackson*** once suggested that,

> *90 per cent of international law work relates in fact to international economic law in some form or another. However, international economic law does not enjoy as much glamour or media attention as work on armed conflicts and human rights do.*

International economic law can be defined, broadly, as covering all those international rules pertaining to *economic transactions* and *relations*, as well as those pertaining to *governmental regulation of economic matters*. As such, international economic law includes *international rules on trade in goods* and *services*, *economic development*, *intellectual property*

rights, *foreign direct investment*, *international finance* and *monetary matters*, *commodities*, *food*, *health*, *transport*, *communications*, *natural resources*, *private commercial transactions*, *nuclear energy*, etc.

However, international rules on international trade in goods and services, i.e. ***international trade law***, constitute the 'hard core' of *international economic law*.

International trade law consists of, on the one hand, numerous ***bilateral or regional trade agreements*** and, on the other hand, ***multilateral trade agreements***. Examples of bilateral and regional trade agreements are manifold. The ***North American Free Trade Agreement (NAFTA)*** and the ***Mercosur Agreement*** are typical examples of regional trade agreements. The Trade Agreement between the United States and Israel or the Agreement ***on Trade on Wine*** between the European Community and Australia are examples of bilateral trade agreements.

The number of multilateral trade agreements is more limited. This group includes, for example, the 1983 International Convention on the Harmonized Commodity Description and Coding System (the '***Brussels Convention'***) and the 1973 International Convention on the Simplification and Harmonization of Customs Procedures, as revised in 2000 (the ***'Kyoto Convention'***). The most important and broadest of all multilateral trade agreements is the ***Marrakesh Agreement Establishing the World Trade Organization*** concluded on 15 April 1994. It is the law of this Agreement – the law of the WTO–which is the subject-matter of this course.

The Laws of Absolute v. Comparative advantage

David Ricardo who, in his 1817 book, "The Principles of Political Economy and Taxation," developed the theory of 'comparative advantage'. This theory is still the predominant explanation for why countries, even the poorest, can and do benefit from international trade.

What did the classical economist David Ricardo (1772–1823) mean when he coined the term comparative advantage?

> *Suppose country **A** is better than country **B** at making automobiles, and country **B** is better than country **A** at making bread. It is obvious the academics would say 'trivial') that both would benefit if **A** specialized in auto-mobiles, B specialized in bread and they traded their products. That is a case of **absolute advantage.***

But what if a country is bad at making everything? Will trade drive all producers out of business? The answer, according to Ricardo, is no. The reason is the principle of comparative advantage, arguably the single most powerful insight in economics. According to the principle of comparative advantage,

> *Countries **A** and **B** still stand to benefit from **trading with each other** even if **A** is better than **B** at making everything, both automobiles and bread. If **A** is much more superior at making automobiles and only slightly superior at making bread, then **A** should still invest resources in what it does best – producing automobiles – and export the product to **B**. **B** should still invest in what it does best –making bread – and export that product to **A**, even if it is not as efficient as **A**. Both would still benefit from the trade. **A** country does not have to be best at anything to gain from trade. That is **comparative advantage**.*

The theory is one of the most widely accepted among economists. It is also one of the most misunderstood among non-economists because it is

confused with absolute advantage. It is often claimed, for example, that some countries have no comparative advantage in anything. That is virtually impossible. Think about it!!

The Ricardo model is of course a vast simplification, in that it is built on ***two products*** and ***two countries*** only and assumes ***constant costs*** and ***constant prices***. Many of the complexities of the modern economy are not taken into account in this model. Economists in the twentieth century have endeavored to refine and build on the classic Ricardo model.

The Theory of Competitive Advantage

This theory on "competitive advantage" deals about the effects of international free trade on trade regimes within industries at local as well as outside the local market; i.e. specialization of manufacturing or processing plants on the basis of their skilled human and other resources, etc .., which, in turn would result in creating segmented markets in the import, export sectors.

Developed by Professor Michael Porter, the theory attempts to move beyond comparative advantage based on relative cost differentials toward a rich conception of competition that includes segmented markets, differentiated products, technology differences, and economies of scale. Quality, features, and new product innovation are central in advanced industries and segments. Moreover, cost advantage grows as much out of efficient-to-manufacture product designs and leading process technology as it does out of factor costs or even economies of scale.

Professor Michael Porter argues that nations better-off than others at creating an environment that allows its firms and industries to obtain and maintain a competitive advantage remain more successful in international trade.

This process is 'highly localized,' and differences in national economic structures, values, cultures, institutions, and histories contribute

profoundly to competitive successes. No single strategy accounted for competitive advantage in a particular industry, and only strategies tailored to the particular industry and to the skills and assets of a particular firm succeed. Rather, the structure of an industry, and the competitive positions of firms within an industry, determined what strategies would generate a competitive advantage.

The International Economic Institutions

- In the absence of a single government, the need for international cooperation sprang from the need to develop and create international customary law- enforce treaties, prevent monopolies and discourage protectionism.
- After the end of World War I, the world economy embarked upon very difficult times.
- The previously longstanding hegemonic power, Britain, could no longer maintain a position at the centre of the international economy.
- At times of crisis, States went about practicing *'beggar thy neighbour'* policies- protectionist policies persisted, irrespective of the side effects on other countries.
-The cataclysmic effects of these protectionist policies of the 1930's (the Great Depression) made policy makers realise that sustained cooperation among states without international institutions was difficult.
- On the other hand, the notion of 'prisoners' dilemma'- a condition where every country imposes restrictions and the outcome of such unilateralist behaviour was, more often than not found ineffective and inefficient.
- The trading states ended up in a situation where they would have gained more had they been upheld and bound by free trade policies.

- Moreover, multilateral liberalisation is believed to ensure greater access to foreign markets and in so doing ensures that domestic firms even out the protectionist firms.
- This renders trade liberalisation not only economically feasible but also politically wise and politically achievable as well.
- In addition, 'communism', was proving to be immune to the problems that were plaguing the western world and had begun to be seen as a practicable alternative by the working class. -- Soon, fascism and Nazism coming to the world arena presented another alternative.
- So, the western world was faced with two obstacles (i) lessening the effects of the Depression and; (ii) to protect the capitalist system from the external threats presented by communism, fascism, and Nazism.
- After the Great Depression, in the Bretton Woods Conference, western countries wanted to create a stable economic order that would prevent a return to the destructive economic nationalism of 1930s.
- The Bretton Woods Conference was launched in 1944 to create a stable world economic order. It was a product of American-British cooperation that led to the creation of

(i) The International Monetary Fund (IMF), so as to supervise the operation of the monetary system and provide "medium term lending" to countries experiencing temporary balance of payment deficits;

(ii) The International Bank for Reconstruction and Development (IBRD), which later became the World Bank, was initially designed to provide loans for Europe's Post-war Reconstruction Programmes. During the 1950's, however, its purpose was expanded to fund various industrial projects in developing countries around the world, and;

(iii) The International Trade Organisation (ITO) that would regulate trade, while complementing the other two organisations.

- The important outcome of this conference was the conclusion of the ***Havana Charter***, a draft agreement for the formation of the ITO, signed by 53 countries out of the 56 that had taken part.
- ITO never materialised due to the fact that the US Congress, despite its support for the Charter, was unwilling to ratify it. Richard Gardner had this to say about the *"ignominious fate"* of the ITO: *"It didn't have a chance to die; it was simply stillborn"*.

-Finally, in 1945, the US proposed that a multilateral commercial treaty on tariff reductions be negotiated among the participating countries.
-That is because the US believed that a trade agreement could easily be negotiated and implemented.
- Finally, As a result of the Geneva Conference of 1947, the General Agreement on Tariffs and Trade (GATT) was concluded.
- This was an interim agreement until ITO was realised. It was signed by 23 countries out of which 11 were developing ones and it was to provide

a provisional basis for multilateral cooperation until an international organisation entrusted with trade affairs came into existence.

The Transition from GATT to WTO

-The GATT, established in 1948, had the fundamental purpose of promoting free trade through the reduction of tariffs and elimination of other trade barriers.
- From 1947-1994, the GATT Secretariat was known as the Interim Commission for the International Trade Organisation (ICITO) created during the ITO negotiations. It was technically a UN body, as ITO negotiations took place under UN auspices. Over the years, it expanded to include more members and *"gradually evolved to a de facto WTO"*.
- Under the auspices of GATT Secretariat, a succession of rounds of multilateral trade negotiations started to take place.
- The first five rounds concentrated on reform of ***import tariffs*** and ***quotas***. The participation was limited only to 25 countries and sensitive areas of trade like ***agriculture*** and ***textiles*** were excluded from the agenda of the negotiations.
- Then, the ***Kennedy Round*** (1964-67) dealt with ***anti-dumping*** codes.
- The ***Tokyo Round*** (1975-79) covered a much wider range of issues, including ***non tariff measures*** **(NTMs)** such as subsidies and countervailing measures, technical barriers to trade, import licensing, customs valuation, government procurement and trade in civil aircraft. Since not all the members formally subscribed to these agreements, they were informally called 'codes'.
- The ***Uruguay Round*** (1986-94), the most important round was the first 'comprehensive' round of multilateral trade negotiations, covering agreements on "tariffs, non trade barriers, textiles and clothing, agriculture, trade in services, TRIPS, TRIMS, the GATT system, GATT articles, subsidies, dispute settlement, anti dumping and the Tokyo Round codes."
- But most importantly it created the WTO. At ***Marrakech, Morocco***, **124** state and government representatives met in April **1994** to sign the agreements that were concluded as a result of the Uruguay Round.
- Consequently, the Marrakech agreement established the **WTO** formally which came into force on 1st January, 1995.

Brief Remark on the Uruguay Round

The Uruguay Round began with one set of concerns and ended with another. It started with the fear that the world economy was slowing

while at the same time trade was becoming more important, and that trade problems such as ***agriculture, services and textiles***- as well as ***relations between developed and developing countries***- were long past the point where they needed urgent attention. It concluded with the recognition that the world economy was becoming globalized, and that the GATT trade regime needed a fundamental overhaul for it to be relevant to a changed international environment.

In this negotiation, national decision makers appeared to appreciate ***the importance of the international economy for national economies***. Presumably there was a link between problems in the international economy and the policies designed to address them. On the other hand, there is an argument that in analyzing government actions, one often assumes that more order exists in policy-making than was the case when the decisions were made.

In this context, Paul Krugman has observed that: "Policy is rarely a coherent response to perceived problems; more often it represents the outcome of bargains and struggles between groups"

The Uruguay Round could well have been an example of Krugman's observation. It was a hard fought multilateral negotiation with an enormous agenda: surely it would be plausible to expect the outcome would be simply a vast collection of expedient exchanges, with little if any reference to the broader forces at work in the world economy. And as for being a coherent response to policy problems, no one associated with negotiations in GATT would claim that coherence was the strong suit of the process.

And yet the Uruguay Round did produce a result that was relevant to the perceived problems of the day. Decision makers appeared to make the right choices at the Uruguay Round, which have been confirmed in the passage of time since the completion of the Uruguay Round. Despite the problems, the WTO has had in its brief history, including the aborted Seattle Ministerial Meeting and the continuing difficulties of the Doha Round; there has been no serious movement to renounce the rules-based

multilateral trading system created by the Uruguay Round Agreements. The WTO owes its success to the fact that it was a largely appropriate response to the problems thrown up by the world economy at the end of the Twentieth Century.

The World Trade Organization

Functions of the WTO

In the broadest of terms, the primary function of the WTO is to: provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement.

More specifically, the WTO has been assigned six widely defined functions.

Article III of the WTO Agreement states:

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the ''Dispute Settlement Understanding'' or ''DSU'') in Annex 2 to this Agreement.

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

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

In addition to the functions of the WTO explicitly referred to in Article III of the WTO Agreement, technical assistance to developing-country Members, to allow the latter to integrate into the world trading system is, undisputedly, also an important function of the WTO.

Basic Principles of the WTO

1. Non-Discrimination

-This principle has two components, namely the ***Most-Favoured-Nation (MFN)***[2] ***rule*** and ***national treatment***, where their precise nature and scope differ across different agreements of the organisation.

- **MFN** requires that a product made in one member country be treated no less favourably than a like or similar good that has originated from any other country. In other words, a concession made by one party to another must be applicable or 'multilateralised' to all other parties.
- The MFN rule is unconditionally applicable save from certain exceptions.
- The exceptions are applicable in case of ***formation of Free Trade Areas*** or ***Customs Union*** or in circumstance of other ***preferential trading arrangements*** undertaken by the signatories which in most cases comprises of ***developing countries***.
- **National treatment**[3] requires that foreign goods that have fulfilled the necessary border measures should not be treated less favourably than domestically produced like or directly comparative

[2] The enclosure of MFN clauses could be traced back to the Havana Charter which was supposed to establish the ITO. This same clause was adopted in GATT in the first paragraph of Article I

[3] NT is provided in Article III paragraph 2 of the GATT.

goods. This means, foreign goods must be subject to internal taxes, charges and non-tax policies of the country that apply to the like or similar goods produced domestically and that it would give greater certainty to foreign suppliers with regards to the environment in which they operate.[4] The sole exception concerning national treatment is ***trade in services***.

2. Reciprocity

- Almost all agreements concluded before or after the WTO agreements, international or otherwise, have reciprocity as one of their vital features.[5] It requires that if one country made tariff concessions, then the other country should do the same.
- The principle that each country should offer concessions on its own tariffs so that it could get tariff reductions from its trading partners.[6]
- This principle has important political economy implications, i.e. when bargaining is reciprocal then it will suit the interests of exporters of a given country and their support will make it politically acceptable, which would not have been the case if the country had undertaken unilateral tariff reductions.

3. Enforceable Commitments

-Liberalisation commitments and agreements will not be practical if they are not enforced.
- The MFN rule and NT are quite important in ensuring that market access commitments are implemented and maintained. These tariff commitments made by the WTO members are listed in schedules and established ceilings. In the case of goods, these binding commitments amount to ceilings on customs tariff rates.
- Once these tariff commitments are bound and ceilings are established, they could not be nullified nor impaired unless the trading partners first negotiate to this effect.
- The result of these enforceable commitments is that traders will be able to secure a higher degree of market access and they would

[4] the GATT Article III paragraph 4
[5] In the organisation's multilateral trade agreements, it was basically put forth to limit the scope for free riding that might have otherwise become abundant due to the MFN rule
[6] This complemented international trade theory which had for long demonstrated that tariffs hurt most of the countries that had imposed them

also contribute in improving the predictability and stability of international trade.[7]

4. Transparency

-Another way to improve the predictability and stability of international trade is through making trade rules as clear and public (transparent) as possible.[8]
- The exchange of information and views must be allowed and the resolution of potential conflicts in an efficient manner must be permitted.
- WTO members must publish their trade policies, establish and maintain institutions that regulate administrative decisions concerning trade, respond to requests of information by others and notify changes in trade policies to WTO.
- The regular inspection of national trade policies through the TPRM provides a further means of encouraging transparency, both domestically and at the multilateral level.

5. Safety Conditions

-Through this principle, one could see that the WTO is not entirely a 'free trade' institution.
- The system, according to this principle, allows tariffs and in extreme circumstances, other forms of protection. Member governments are required to restrict trade in specific conditions presented in these three provisions.
- The first are articles that allow the use of trade measures to attain non-economic objectives. These include policies formulated to *protect public health or national security* and those that protect *industries that could be harmed by competition* from imports.
- The second are articles set forth for ensuring '*fair competition*'. These provisions give the right to impose "countervailing duties on imports that have been dumped". - The objective of fair competition, however, is in direct conflict with market accessibility because governments, in order to attain 'fairness' usually implement trade barriers.
-The third articles are those that allow intervention in trade for economic reasons which are considered serious like balance of payment deficits or government desire to support infant industries.

[7] Article X of the GATT
[8] Article X of the GATT.

Objectives of the WTO

The reasons for establishing the WTO and the policy objectives of this international organization are set out in the Preamble to the WTO Agreement. According to the Preamble, the Parties to the WTO Agreement agreed to the terms of this agreement and the establishment of the WTO:

> *Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to* ***raising standards of living****,* ***ensuring full employment*** *and a large and steadily* ***growing volume of real income*** *and effective demand, and* ***expanding the production*** *of and trade in goods and services, while allowing for the* ***optimal use of the world's resources*** *in accordance with the objective* ***of sustainable development****, seeking both to* ***protect and preserve the environment*** *and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ...Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development ...*

Accordingly, The ultimate objectives of the WTO are thus:

* the increase of standards of living;

* the attainment of full employment;

* the growth of real income and effective demand; and

* the expansion of production of, and trade in, goods and services.

However, it is clear from the Preamble that in pursuing these objectives the WTO must take into account the need for preservation of the environment and the needs of developing countries. The Preamble stresses the importance of sustainable economic development and of the integration of developing countries, and in particular least-developed countries, in the world trading system. Both of these aspects were absent from the Preamble to the GATT 1947.

According to the Preamble to the WTO Agreement, the two main instruments, or means, to achieve the objectives of the WTO are reciprocal and mutually advantageous arrangements on:

* the reduction of trade barriers; and

* the elimination of discrimination.

International Trade Law
Conceptual Analysis

The Major Principles of the WTO

The Non-Discrimination Principle of the WTO

There are two basic principles of the WTO, which helped a lot in curbing discrimination in trade among its member states. These are:

a. Most Favored Nation Treatment

Article I of the GATT 1994, entitled 'General Most-Favored-Nation Treatment', states in paragraph 1:

> *With respect to **customs duties** and **charges of any kind** imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to **the method of levying** such duties and charges, and with respect to **all rules and formalities** in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any **advantage**, **favor**, **privilege** or **immunity** granted by any [Member] to any product originating in or destined for any other country shall be accorded **immediately** and **unconditionally** to the **like product** originating in or destined for the territories of all other [Members].*

The GATT 1994 contains a number of other provisions requiring MFN or MFN-like treatment: Article III: 7 (regarding internal quantitative regulations); Article V (regarding freedom of transit); Article IX: 1 (regarding marking requirements); Article XIII (regarding the non-discriminatory administration of quantitative restrictions); and Article XVII (regarding State trading enterprises).

Article XX of the GATT 1994, the 'general exceptions provision', also contains an MFN-like obligation. The very existence of these MFN-type clauses demonstrates the pervasive character of the MFN principle of non-discrimination.

Other multilateral agreements on trade in goods such as the TBT Agreement, the SPS Agreement and the Agreement on Import Licensing Procedures likewise require MFN treatment. However, this section is only concerned with the MFN treatment obligation set out in Article I: 1 of the GATT 1994.

Article I of the GATT 1994 prohibits discrimination between like products originating in, or destined for, different countries. The principal purpose

of the MFN treatment obligation is to ensure equality of opportunity to import from, or to export to, all WTO Members.

In EC – Bananas III, the Appellate Body stated, with respect to WTO non-discrimination obligations (such as the obligation set out in Article I: 1):

> *The essence of the non-discrimination obligations is that **like products should be treated equally, irrespective of their origin.** As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons.*

In EC – Bananas III, the measure at issue was the import regime for bananas of the European Communities under which ***bananas from Latin American countries*** ('dollar bananas'), were treated less favorably than bananas from, broadly speaking, **former European colonies** ('ACP bananas').

-Article I: 1 covers not only 'in law', or *de jure*, discrimination but also 'in fact', or *de facto*, discrimination.

In Canada – Autos, the Appellate Body rejected, as the Panel had done, Canada's argument that Article I: 1 does not apply to measures which appear, on their face, to be 'origin-neutral'.

Also, measures which appear, on their face, to be 'origin-neutral' can give certain countries more opportunity to trade than others and can, therefore, be in violation of the non-discrimination obligation of Article I:1. The measure at issue in Canada – Autos was an import duty exemption accorded by Canada to imports of motor vehicles by certain manufacturers. Formally speaking, there were no restrictions on the origin of themotor vehicles that were eligible for this exemption.

In practice, however, the manufacturers imported only their own make of motor vehicle and those of related companies. As a result, only motor vehicles originating in a small number of countries benefited de facto from the exemption.

Previously, the GATT Panel in EEC – Imports of Beef found that EC regulations making the suspension of an import levy conditional on the production of a certificate of authenticity were inconsistent with the MFN obligation of Article I:1 after it was established that the only certifying agency authorized to produce a certificate of authenticity was an agency in the United States.

Article I: 1 of the GATT 1994 sets out a three-tier test of consistency. There are three questions which must be answered to determine whether

there is a violation of the MFN treatment obligation of Article I: 1, namely:

1. **'Any advantage with respect to … '**

The MFN treatment obligation concerns 'any advantage, favor, privilege or immunity' granted by any Member to any product originating in, or destined for, any other country with respect to: (1) ***customs duties***; (2) ***charges of any kind imposed on importation or exportation*** (e.g. import surcharges or consular taxes); (3) charges of any kind imposed in connection with importation or exportation (e.g. customs fees or quality inspection fees); (4) ***charges imposed on the international transfer of payments for imports or exports***; (5) the ***method of levying such duties and charges***, such as the method of assessing the base value on which the duty or charge is levied; (6) all rules and formalities in connection with importation and exportation; (7) internal taxes or other internal charges; and (8) laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of any product.

In brief, the MFN treatment obligation concerns any advantage granted by any Member with respect to:

* Customs duties, other charges on imports and exports and other customs matters;

* Internal taxes; and

* Internal regulation affecting the sale, distribution and use of products.

Note that the MFN treatment obligation not only concerns advantages granted to other WTO Members, but advantages granted to all other countries (including non-WTO Members). If a Member grants an advantage to a non-Member, Article I: 1 obliges the Member to grant that advantage also to all WTO Members.

2. **'Like products'**

Article I: 1 concerns any product originating in or destined for any other country and requires that an advantage granted to such products shall be accorded to 'like products' originating in or destined for the territories of all other Members. It is only between 'like products' that the MFN treatment obligation applies and that discrimination is prohibited. Products that are not 'like' may be treated differently.

Nevertheless, the concept of 'like products' is not defined in the GATT 1994.

The dictionary meaning of 'like' suggests that 'like products' are products ***that share a number of identical or similar characteristics.*** The

reference to 'similar' as a synonym of 'like' also echoes the language of the French version of Article III: 4, 'produits similaire', and the Spanish version, 'productos similares'.

With regard to the concept of 'like products', there are three questions of interpretation that need to be resolved: (1) which characteristics or qualities are important in assessing 'likeness'; (2) to what degree or extent must products share qualities or characteristics in order to be 'like products'; and (3) from whose perspective should 'likeness' be judged.

It is generally accepted that the concept of 'like products' has different meanings in the different contexts in which it is used. In Japan – Alcoholic Beverages II, the Appellate Body illustrated the possible differences in the scope of the concept of 'like products' between different provisions of the WTO Agreement by evoking 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.*

In general, however, in examining whether the various types of products are 'like products' to which the MFN treatment obligation applied, the following shall be considered:

* The characteristics of the products;

* Their end-use; and

* Tariff regimes of other Members.

3. Advantage granted 'immediately and unconditionally'

Article I: 1 requires that any advantage granted by a WTO Member to imports from any country must be granted 'immediately and unconditionally' to imports from all other WTO Members. Once a WTO Member has granted an advantage to imports from a country, it cannot make the granting of that advantage to imports of other WTO Members conditional upon those other WTO Members 'giving something in return' or 'paying' for the advantage.

The granting of an advantage within the meaning of Article I: 1 may not be conditional on whether a Member has certain characteristics, has certain legislation or undertakes certain action.

The MFN treatment is also applicable in the GATS. The four modes of supply of services are commonly referred to as:

* The '***cross border***' mode of supply (for example, legal advice given by a lawyer established in country A to a client in country B);

* The '***consumption abroad***' mode of supply (for example, medical treatment given by a doctor established in country A to a patient from country B who comes to country A for medical treatment);

* The '***commercial presence***' mode of supply (for example, financial services supplied in country B by a bank from country A through a branch office established in country B); and

* The '***presence of natural persons***' mode of supply (for example, the services supplied in country B by a computer programmer from country A, who travels to country B to supply his services).[9]

As is the case with Article I: 1 of the GATT 1994, Article II: 1 of the GATS sets out a three-tier test of consistency. There are three questions which need to be answered to determine whether or not a measure violates the MFN treatment obligation of Article II: 1. these three questions are whether:

* The measure is a measure covered by the GATS;

* The services or service suppliers concerned are 'like' services or service suppliers; and

* Less favorable treatment is accorded to the services or service suppliers of a Member.

b. National Treatment

Article III of the GATT 1994, entitled 'National Treatment on Internal Taxation and Regulation', states, in relevant part:

> *The [Members] recognize that **internal taxes** and other **internal charges**, and **laws**, **regulations** and **requirements** affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and **internal quantitative***

[9] While the GATS does not define 'services', Article I: 2 thereof defines 'trade in services' as 'the supply of a service' within one of four defined 'modes of supply'. Article I: 2 states: For the purpose of this Agreement, trade in services is defined as the supply of a service: **a**. from the territory of one Member into the territory of any other Member; **b.** in the territory of one Member to the service consumer of any other Member; **c.** by a service supplier of one Member, through commercial presence in the territory of any other Member; **d.** by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

> ***regulations*** *requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
>
> *The products of the territory of any [Member] imported into the territory of any other [Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no [Member] shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*
>
> *The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*

Article III of the GATT 1994 prohibits discrimination against imported products. Generally speaking, it prohibits Members from treating imported products less favorably than like domestic products once the imported product has entered the domestic market.

In other words, the three-tier test of consistency of internal regulation with Article III: 4 thus require the examination of whether:

* The measure at issue is a law, regulation or requirement covered by Article III:4;

* The imported and domestic products are like products; and

* The imported products are accorded less favourable treatment.

National Treatment in GATS

The national treatment obligation of Article XVII of the GATS is different from the national treatment obligation of Article III of the GATT 1994. As discussed above, for trade in goods, the national treatment obligation has general application to all trade. On the contrary, the national treatment obligation for trade in services does not have such general application; it does not apply generally to all measures affecting trade in services. The national treatment obligation applies only to the extent that WTO Members have explicitly committed themselves to grant 'national treatment' in respect of specific service sectors.

Members set out such commitments in the national treatment column of their 'Schedule of Specific Commitments'. These specific commitments to grant national treatment are often made subject to certain conditions,

qualifications and limitations, which are also set out in the Schedules. Members can, for example, grant national treatment in a specific service sector only with respect to certain modes of supply (such as cross-border supply) and not others (such as commercial presence). Typical national treatment limitations included in Schedules relate to:

* Nationality or residence requirements for executives;

* Requirements to invest a certain amount of assets in local currency;

* Restrictions on the purchase of land by Foreign Service suppliers;

* Special subsidy or tax privileges granted to domestic suppliers; and

* Differential capital requirements and special operational limits applying only to operations of foreign suppliers.

The Market Access Rules of the WTO

a. Tariff and Non-Tariff Barriers

1. Tariff Barriers to Trade in Goods

The most common and widely used barrier to market access for goods is ***customs duties***, also referred to as ***tariffs***. Furthermore, market access for goods is impeded by other duties and charges. Since tariffs are normally not imposed on trade in services, this section will only address tariffs on trade in goods.

A customs duty, or tariff, is a financial charge, in the form of a tax, imposed on products at the time of, and/or because of, their importation. Market access is conditional upon the payment of the customs duty. Customs duties may be ***specific***, ***ad valorem*** or ***mixed,*** in their types.

A **specific customs** duty on a product is an amount based on the ***weight, volume or quantity*** of that product, for example a duty of ETB 100 per hector liter of vegetable oil or a duty of ETB 3,000 on each car.

An **ad valorem customs** duty on a good is an amount based on the ***value*** of that good. It is a percentage of the value of the imported product, for example a 15 per cent ***ad valorem*** duty on computers. In that case, the duty on a computer worth ETB 1,000 will be ETB 150.

A **mixed, or compound**, duty is a customs duty comprising of an ad valorem duty to which a specific duty is added or, less frequently, subtracted, for example a customs duty on wool of 10 per cent ad valorem and ETB 50 per ton. In that case, the duty on three tons of wool worth ETB 1,000 per ton will be ETB 450.

Ad valorem customs duties are by far the most common type of customs duties. They are preferable to specific and mixed duties for several reasons. First, ad valorem duties are more transparent than specific duties. The protectionist impact and the negative effect on prices for consumers are easier to assess for ad valorem duties than for specific duties. The lack of transparency of specific duties makes it easier for special interest groups to obtain governmental support for high levels of protection.

Secondly, by definition, ad valorem customs duties are indexed. In times of inflation, the government's tariff revenue will keep up with price increases and the level of protection will remain the same. By contrast, specific duties will constantly have to be increased to maintain the same real tariff revenue ormaintain the same level of protection. Overall, with respect to industrial products, specific duties as well as mixed duties are unusual. With respect to agricultural products, however, non-ad valorem duties, and in particular mixed duties, are still quite common.

Ad valorem, specific or mixed customs duties can be MFN duties, preferential duties or neither of the two. MFN duties are the 'standard' customs duties applicable to all other WTO Members in compliance with the non-discrimination MFN treatment obligation of Article I:1 of the GATT 1994.

Preferential duties are customs duties applied to specific countries pursuant to conventional or autonomous arrangements under which products from these countries are subject to duties lower than MFN duties. For example, the customs duties applied by the European Communities on products from ACP countries under the terms of the Cotonou Agreement are conventional preferential duties.

The customs duties applied by the European Communities on products from all developing countries under the EC's Generalized System of Preferences (GSP) are autonomous preferential duties. Finally, there are customs duties that are neither MFN duties nor preferential duties. These are the duties applicable on goods from countries which are not WTO Members and do not benefit from MFN treatment.

The number of such countries is small and the latter category of customs duties is therefore of limited importance.

Purpose of customs duties or tariffs

Customs duties or tariffs serve three different purposes. First, customs duties are a source of revenue for governments. This purpose is less important for industrialized countries with a well-developed system of direct and indirect taxation. For many developing countries, however, customs duties are an important source of government revenue. In comparison with income taxes and sales taxes, customs duties are easy to collect. Imports are relatively easy to monitor and the collection of customs duties can be concentrated in a few ports of entry.

Secondly, customs duties are used to protect domestic industries. The customs duties imposed on imported products make the like domestic products relatively cheaper, giving them a price advantage and thus some degree of protection from import competition. Thirdly, customs duties can be used to promote a rational allocation of scarce foreign exchange. To promote the use of foreign exchange for the importation of capital goods (e.g. industrial machinery) and discourage its use for the importation of luxury goods (e.g. perfume), a country can impose high customs duties on the latter and lower customs duties on the former. Customs duties can thus be an instrument of an economic development policy.

National tariff

As stated above, the terms ‘customs duties’ and ‘tariffs’ are synonyms. However, the term ‘tariff’ has a second meaning. A ‘tariff’ is also a structured list of product descriptions and their corresponding customs duty. The customs duties or tariffs, which are due on importation, are set out in a country’s tariff. Most national tariffs now follow or reflect the structure set out in the Harmonized Commodity Description and Coding System, usually referred to as the Harmonized System or HS, discussed in detail later in this chapter.

The national tariff of the European Communities is referred to as the Common Customs Tariff. Its structure follows the HS, but is more detailed, as is the case for the tariffs of many industrialized countries. Every year the European Commission adopts a Regulation reproducing a complete version of the Common Customs Tariff, taking into account Council and Commission amendments of that year. The Regulation is published in the Official Journal no later than 31 October. It applies from 1 January of the following year.

Tariff concessions or tariff bindings

The results of tariff negotiations are referred to as 'tariff concessions' or 'tariff bindings'. A tariff concession, or a tariff binding, is a commitment not to raise the customs duty on a certain product above an agreed level. As a result of the Uruguay Round tariff negotiations, all, or almost all, customs duties imposed by developed-country Members are now'bound', i.e. are subject to a maximum level.

Most Latin American developing-country Members have bound all customs duties; however, for Asian and African developing-country Members the situation is more varied. While Members such as Indonesia and South Africa have bound more than 90 per cent of the customs duties on industrial products, India and Thailand have bound about 60 per cent, Hong Kong, China, per cent, Zimbabwe, 9 per cent and Cameroon, 0.1 per cent. Cameroon has made tariff concessions with regard to only three products.

Schedules of Concessions

The tariff concessions or bindings of a Member are set out in that Member's Schedule of Concessions. Each Member of the WTO has a schedule, except when the Member is part of a customs union in which case the Member has a common schedule with the other members of the customs union. The Schedules resulting from the Uruguay Round negotiations are all annexed to the Marrakesh Protocol to the GATT 1994. Pursuant to Article II:7 of the GATT 1994, the Schedules of Members are an integral part of the GATT 1994. Each Schedule of Concessions contains four parts.

The most important part, Part I, sets out the MFN concessions with respect to agricultural products (tariffs (Section 1A) and tariff quotas (Section 1B)) and with respect to non-agricultural products (tariffs only (Section 2)). Furthermore, a schedule sets out preferential concessions (Part II), concessions on non-tariff measures (Part III) and specific commitments on domestic support and export subsidies on agricultural products (Part IV). It is not possible for Members to agree in their Schedules to treatment which is inconsistent with the basic GATT obligations.

All schedules are structured according to the Harmonized Commodity Description and Coding System ('Harmonized System' or 'HS'), discussed below, and contain the following information for each product subject to tariff concessions:

* HS tariff item number;

* Description of the product;

* Rate of duty;

* Present concession established;

* Initial negotiating rights (INR);

* Other duties and charges; and for agricultural products only, special safeguards

Consider by way of example Figures 5.13 to 5.17, which reproduce excerpts from the Uruguay Round Schedules of Concessions of the European Communities (Schedule LXXX), the United States (Schedule XX), India (Schedule XII) and Brazil (Schedule III), annexed to the Marrakesh Protocol to the GATT 1994. Consider also the Schedule of Concessions of China (Schedule CLII), annexed to the Accession Protocol of China.

Note that the Schedules of the major trading entities such as the European Communities and the United States, which have made tariff concessions on virtually all products, are lengthy and detailed. The file containing the Schedule of the European Communities on the WTO's website is 759KB in size. By contrast, the Schedules of many developing-country Members are short. The files containing the Schedules of Botswana and the Dominican Republic are only 12 and 13KB respectively.

Non Tariff Barriers

Trade in goods is not only restricted by customs duties and other duties and charges, but also by non-tariff barriers. This section deals with both main categories of non-tariff barriers, i.e. quantitative restrictions and other non-tariff barriers. It discusses:

* Quantitative restrictions;

* Rules on quantitative restrictions;

* The administration of quantitative restrictions; and

* Other non-tariff barriers.

Quantitative restrictions: Definition and types

A quantitative restriction, also referred to as a 'QR', is a measure which limits the quantity of a product that may be imported or exported. There are different types of quantitative restriction:

* A prohibition, or ban, of a product; such a prohibition may be absolute or conditional, i.e. only applicable when certain defined conditions are not fulfilled;

* A quota, i.e. a measure indicating the quantity that may be imported or exported; a quota can be a global quota, a global quota allocated among countries, or a bilateral quota;

* Automatic and non-automatic licensing; and other quantitative restrictions, such as a quantitative restriction made effective through State trading operations; a mixing regulation; a minimum price, triggering a quantitative restriction; and a voluntary export restraint.

A typical example of a quantitative restriction, and in particular a quota, is a measure allowing the importation of a maximum of 1,000 tons of cocoa powder a year or a measure allowing the importation of a maximum of 450 tractors. While usually based on the number of units, weight or volume, quantitative restrictions can also be based on value, for example a limit on the importation of flowers to e12 million per year.

WTO Members are required to notify the WTO Secretariat of any quantitative restrictions which they maintain and of any changes in these restrictions, as and when they occur. The notifications must indicate: the products affected by the QR; the type of QR (prohibition, quota, licensing, etc.); an indication of the grounds and WTO justification for the QR; and a statement on the trade effects of the QR. With this information, the WTO Secretariat maintains a QR database, which Members may consult.

Customs duties versus quantitative restrictions

The WTO has a clear preference for customs duties over quantitative restrictions and this preference is reflected in the relevant provisions of the GATT 1994, discussed below. In comparing customs duties with quantitative restrictions, the Panel in Turkey – Textiles noted: A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection ... The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection ''of choice''.

The reasons for this preference are both economic and political in nature. First, customs duties are more transparent. The economic impact of customs duties on imported products, i.e. how much more expensive

imported products are as a result of customs duties is immediately clear. Quantitative restrictions also increase the price of the imported products. As supply of the imported product is limited, the price increases. However, it is not immediately clear by how much quantitative restrictions increase the price of imported products. Secondly, while the price increase resulting from customs duties goes to the government, the price increase resulting from quantitative restrictions ordinarily benefits the importers. The importers will be able to sell at higher prices because of the limits on the supply of the product. The 'extra profit' is commonly referred to as the 'quota rent' and, unless a quota is auctioned (which is seldom done), no part of this quota rent goes to the government.

Thirdly, the administration of quantitative restrictions is more open to corruption than the administration of customs duties. This is because quantitative restrictions, and, in particular, quotas, are usually administered through an import licensing system and decisions by government officials to award an import license are not necessarily based on the general interest.

Fourthly, and arguably most importantly, quantitative restrictions impose absolute limits on imports, while customs duties do not. While customs duties are surmountable (at least, if they are not set at prohibitively high levels), quantitative restrictions cannot be surmounted. If a foreign producer is sufficiently more efficient than a domestic producer, the customs duty will not prevent imported products from competing with domestic products. By contrast, once the limit of a quantitative restriction is reached, no more products can be imported. Even the most efficient foreign producer cannot 'overcome' the quantitative restriction. Above the quota, domestic products have no competition from imported products.

Tariff quotas

A tariff (rate) quota, or 'TRQ', is not a quota; it is not a quantitative restriction. A tariff quota is a quantity which can be imported at a certain duty. Any quantity above that amount is subject to a higher tariff. For example, a Member may allow the importation of 5,000 tractors at 10 per cent ad valorem and any tractor imported above this quantity at 30 percent ad valorem. Tariff quotas are not quantitative restrictions since they do not directly prohibit or restrict the quantity of imports. They only

subject the imports to varying duties. The European Communities' intricate import regime for bananas, at issue in EC – Bananas III, provided for tariff quotas. Under this regime, the European Communities granted, for example, duty-free access to 90,000 tonnes of non-traditional ACP bananas; the out-of-quota tariff rate for these same bananas was 693 ECU per tonne.

Rules on quantitative restrictions

General prohibition on quantitative restrictions

Article XI: 1 of the GATT 1994 entitled 'General Elimination of Quantitative Restrictions' sets out a general prohibition on quantitative restrictions, whether on imports or exports. As the Panel in Turkey-Textiles stated, the prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system.

Article XI: 1 provides, in relevant part: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product destined for the territory of any other [Member]. Finally, note that restrictions of a de facto nature are also prohibited under Article XI: 1 of the GATT 1994.

Other non-tariff barriers

In addition to customs duties and other duties and charges (i.e. tariff barriers) and quantitative restrictions (i.e. the first subcategory of non-tariff barriers), trade in goods is also impeded by 'other non-tariff barriers'. As the term indicates, this is a residual category of measures and actions that restrict, to various degrees, market access of goods.

The category of 'other non-tariff barriers' covers numerous rather different measures and actions, such as technical barriers to trade, customs formalities and procedures, and government procurement practices. With regard to technical barriers to trade, one must distinguish between:

* The general category of technical barriers to trade, for which rules have been set out in the TBT Agreement; and

* A special category of technical barriers to trade, namely, sanitary and *phyto*sanitary measures, for which rules are provided in the SPS Agreement.

Note, however, that not only action but also the absence of action, and in particular the failure to inform about the applicable trade laws, regulations, procedures and practices, timely and accurately, may constitute a formidable barrier to trade. This section addresses the following other 'non-tariff barriers' to trade in goods:

* Technical regulations, standards and conformity assessment procedures;

* Sanitary and *phytos*anitary measures;

* Lack of transparency;

* Unfair and arbitrary application of trade measures;

* Customs formalities and procedures; and

* Other measures or actions, such as pre shipment inspection; marks of origin; government procurement practices; and measures relating to transit shipments.

The WTO Rules on Unfair Trade

DUMPING AND ANTI -DUMPING MEASURES

'Dumping' is the bringing of a product onto the market of another country (or customs territory) at a price less than the normal value of that product.

In WTO law, dumping is not prohibited. However, dumping is to be 'condemned' if it causes injury to the domestic industry of the importing country. The essence of the WTO rules on dumping is that Members are allowed to take certain measures, which are otherwise WTO-inconsistent, to protect their domestic industry from the injurious effects of dumping.

During the first six months of 2004, eighteen WTO Members imposed a total of fifty-two new definitive anti-dumping measures against exports from twenty four countries or customs territories. This represents a significant decline from the 114 measures imposed during the corresponding period of 2003.

From 1995 to 2004, India was the most frequent user of anti-dumping measures, with a total of 279. The United States was second, with 211 measures and the European Communities was third with 193. China has been by far the biggest target of anti-dumping measures, with 272such measures having been taken against it between 1995 and 2004. Also, in the first semester of 2004, exports from China were once more the subject of the largest number of anti-dumping measures (sixteen).

However, this represents a slight decrease from the eighteen measures imposed against Chinese exports during the first semester of 2003. Korea, Malaysia, Russia and Thailand were distant seconds, with three measures each on their exports.

Concept of 'dumping'

'Dumping' is a situation of international price discrimination involving the price and cost of a product in the exporting country in relation to its price in the importing country. Article VI of the GATT 1994 and Article 2.1 of the Anti Dumping Agreement define dumping as the introduction of a product into the commerce of another country at less than its 'normal value'. Thus, a product can be considered 'dumped' where the export price of that product is less than its normal value, that is, the comparable price in the ordinary course of trade for the 'like product' destined for consumption in the exporting country.

WTO treatment of dumping

WTO law does not prohibit dumping. In fact, since prices of products are ordinarily set by private companies, 'dumping' in and of it is not regulated by WTO law. As discussed above, WTO law in general only imposes obligations on and regulates the measures and actions of WTO Members. It does not directly regulate the actions of private companies. Therefore, WTO law does not prohibit dumping. However, as dumping

may cause injury to the domestic industry of the importing country, Article VI of the GATT 1994 states, in relevant part, that:

The [Members] recognize that dumping ... is to be condemned if it causes or threatens material injury to an established industry in the territory of a [Member] or materially retards the establishment of a domestic industry. Consequently, Article VI of the GATT 1994 and the Anti-Dumping Agreement provide a framework of substantive and procedural rules to govern how a Member may counteract or 'remedy' dumping, through the imposition of 'anti-dumping' measures.

It is not mandatory for a WTO Member to enact anti-dumping legislation or to have in place a system for conducting anti-dumping investigations and for imposing anti-dumping measures. However, if the government of a Member makes the policy choice to have the option of imposing anti-dumping measures, Article 1 of the Anti-Dumping Agreement specifies that:

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. Pursuant to Article VI of the GATT 1994 and the Anti-Dumping Agreement, WTO Members are entitled to impose anti-dumping measures if, after an investigation initiated and conducted in accordance with the Agreement, on the basis of pre-existing legislation that has been properly notified to the WTO, a determination is made that:

* There is dumping;

* The domestic industry producing the like product in the importing country is suffering injury; and

* There is a causal link between the dumping and the injury.

Response to injurious dumping

In response to injurious dumping, Members may take anti-dumping measures. However, Article VI, and in particular Article VI:2, read in conjunction with the Anti-Dumping Agreement, limits the permissible responses to dumping to:

* Definitive anti-dumping duties;

* Provisional measures; and

* Price undertakings.

Article 18.1 of the Anti-Dumping Agreement provides:

No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the Anti-Dumping Agreement. Article VI of the GATT 1994 is thus applicable to any:

''specific action against dumping'' of exports, i.e. action that is taken in response to situations presenting the constituent elements of ''dumping''.

In US – 1916 Act, the Appellate Body upheld the Panel's findings that the United States legislation at issue – which provided for civil and criminal proceedings and penalties for conduct which presented the constituent elements of dumping – fell within the scope of application of Article VI of the GATT 1994 and the Anti-Dumping Agreement was inconsistent with Article VI:2 and the Anti-Dumping Agreement to the extent that it provided for 'specific action against dumping' in the form of civil and criminal proceedings and penalties.

In US – Offset Act (Byrd Amendment), the measure at issue was the United States Continued Dumping and Subsidy Offset Act of 2000 (CDSOA).

This Act provided, in relevant part, that the United States Customs shall distribute duties assessed pursuant to an anti-dumping duty order to 'affected domestic producers' for 'qualifying expenditures'.

Recalling its ruling in US – 1916 Act that Article VI:2, read in conjunction with the Anti-Dumping Agreement, limits the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings, the Appellate Body concluded in US – Offset Act (Byrd Amendment):

As CDSOA offset payments are not definitive anti-dumping duties, provisional measures or price undertakings, we conclude, in the light of our finding in US – 1916 Act, that the CDSOA is not ''in accordance with the provisions of the GATT 1994, as interpreted by'' the Anti-Dumping Agreement. It follows that the CDSOA is inconsistent with Article 18.1 of that Agreement.

Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement define 'dumping' as the introduction of a product into the commerce of another country at less than its 'normal value'. In other words, 'dumping' exists where the 'normal value' of the product exceeds the 'export price'. This section explains:

* How the 'normal value' of the product concerned is determined; and * how the relevant 'export price' is determined.

Ordinarily, dumping is discerned through a price-to-price comparison of the 'normal value' with the 'export price'. However, the Anti-Dumping Agreement envisages circumstances in which such a straightforward price-to-price comparison may not be possible or appropriate, and provides for alternative methods of calculation.

Before engaging in this discussion of how to determine the existence of dumping, it is important to recall that only dumping causing injury is condemned and potentially subject to anti-dumping measures under Article VI of the GATT 1994 and the Anti-Dumping Agreement. However, in determining whether dumping exists, the injurious effect that 'dumping' may have on a Member's domestic industry is not a constituent element of 'dumping'.

In addition, the intent of the persons engaging in 'dumping' is irrelevant in the determination of whether dumping exists. Determination of the 'normal value'

Article 2.1 of the Anti-Dumping Agreement defines the 'normal value' of a product as: the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

In other words, the 'normal value' is the price of the like product in the home market of the exporter or producer. According to the Appellate Body in US – Hot-Rolled Steel, the text of Article 2.1 expressly imposes four conditions on domestic sales transactions so that they may be used to determine 'normal value':

* First, the sale must be 'in the ordinary course of trade';

* Secondly, it must be of the 'like product';

* Thirdly, the product must be 'destined for consumption in the exporting country'; and

* Fourthly, the price must be 'comparable'.

The first of the four conditions imposed on sales transactions so that they may be used to determine the 'normal value' is that the sale must be 'in the ordinary course of trade'. The decision as to whether sales in the domestic market of the exporting Member are made 'in the ordinary course of trade' can be a complex one. One basis onwhich investigating authoritiesmay determine that sales are not in the ordinary course of trade – and thus disregard them in determining normal value – is if sales are at prices below the cost of production, in the specific circumstances identified in the Anti-Dumping Agreement.

Sales not made in the ordinary course of trade, including sales below cost meeting these criteria,may be disregarded in determining normal value, which would then be determined on the basis of the remaining sales.

As the Appellate Body stated in US – Hot-Rolled Steel: Article 2.1 requires investigating authorities to exclude sales not made ''in the ordinary course of trade'', from the calculation of normal value, precisely to ensure that normal value is, indeed, the ''normal'' price of the like product, in the home market of the exporter.

There could be many situations that may form a reason to determine that transactions were not made 'in the ordinary course of trade', such as:

* Sales to affiliated parties;

* Aberrational high priced sales, or abnormally low priced sales; or

* Sales below cost.

As the Appellate Body found in US – Hot-Rolled Steel, the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade'. However, the Appellate Body noted at the same time that this discretion is not without limits.

The second of the four conditions imposed on sales transactions so that they may be used to determine the 'normal value' is that the sale must be of the 'like product'. The determination of what constitutes a 'like product' involves:

* First examining the imported product or products that is or are alleged to be dumped; and

* Then establishing the product that is 'like'.

A 'like product' is thus an identical product or a product with a close resemblance.

Recall that the third and fourth condition imposed on sales transactions, so that they may be used to determine the 'normal value', is that the product must be 'destined for consumption in the exporting country' and that the price must be 'comparable'. With respect to the latter condition, note that Article 2.4 of the Anti-Dumping Agreement requires that a 'fair comparison' be made between export price and normal value. This comparison 'shall be made at the same level of trade, normally at the ex-factory level'. In making a 'fair comparison', Article 2.4 mandates that due account be taken of 'differences which affect price comparability', such as differences in the 'levels of trade' at which normal value and the export price are calculated'.

Determination of the 'export price'

The export price is ordinarily based on the transaction price at which the producer in the exporting country sells the product to an importer in the importing country. However, the Anti-Dumping Agreement recognizes that the transaction price may not be an appropriate export price. For example, there may be no export price where the transaction involves an internal transfer or barter.

Additionally, an association or a compensatory arrangement between the exporter and the importer or a third party may affect the transaction price. Article 2.3 of the Anti-Dumping Agreement therefore provides for an alternative method to calculate, or 'construct', an appropriate export price. The 'constructed export price' is based on the price at which the product is first sold to an independent buyer. Where it is not possible to construct the export price on this basis, the investigating authorities may determine a reasonable basis on which to calculate the export price.

Comparison between the export price and the 'normal value' to determine whether dumping, as defined above, exists, the export price is compared with the normal value. Article 2.4 of the Anti-Dumping Agreement provides in relevant part:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.

In order to ensure a fair comparison between the export price and normal value, Article 2.4 of the Anti-Dumping Agreement requires that adjustments be made to the normal value, the export price, or both. Thus, Article 2.4 requires that: Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade,

quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

Calculation of the margin of dumping

The margin of dumping is the difference between the export price and the 'normal value'. This would appear simple enough. However, the methodology to be appliedwhen calculating the difference between the export price and the 'normal value' may raise difficult and controversial issues.

As provided in Article 2.4.2 of the Anti-Dumping Agreement, the calculation of the dumping margin generally requires:

* Either the comparison of the weighted average 'normal value' to the weighted average of prices of all comparable export transactions; or

* A transaction-to-transaction comparison of 'normal value' and export price.

However, a comparison of the weighted average normal value to export prices in individual transactions may occur if:

* There is 'targeted dumping' (i.e., a pattern of export prices differing significantly among different purchasers, regions or time periods); and

* The investigating authorities provide an explanation as to why such differences cannot be taken into account appropriately in weighted-average-to-weighted-average or transaction-to-transaction comparisons.

It is important to note that, where a weighted-average-to-weighted-average comparison is conducted, the entirety of the prices for all comparable transactions involving the product that is the subject of the investigation must be included in the calculation of the dumping margin.

Determination of injury

As noted above, only dumping that causes, or threatens to cause, injury to the domestic industry is condemned and potentially subject to anti-dumping measures under Article VI of the GATT 1994 and the Anti-Dumping Agreement. Therefore, after having determined the existence of dumping, the competent authorities must establish:

* The existence, or threat, of injury to the domestic industry; and

* The causal link between the dumping and the injury.

Concept of 'domestic industry'

The concept of 'domestic industry' flows from the definition of the 'like product'. It establishes who may file a petition requesting the initiation of an anti-dumping investigation.

It also delineates the scope of the data to be taken into account in the injury determination, in that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1. Article 4.1 of the Anti-Dumping the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. The domestic industry may presumably consist of one or multiple producers.

The Panel in EC – Bed-Linen stated: Article 4.1 of the [Anti-Dumping] Agreement defines the domestic industry in terms of ''domestic producers'' in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the [Anti-Dumping] Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation Agreement defines the 'domestic industry' generally as: The Anti-Dumping Agreement recognizes that it may not be appropriate to include all producers of the like product in the domestic industry when producers are 'related' to the exporters or importers or are themselves importers of the allegedly dumped product.

Related producers may not entirely share the interests of purely domestic producers. A producer is deemed to be 'related' to exporters or importers only if:

* One of them directly or indirectly controls the other; or

* Both of them are directly or indirectly controlled by a third person; or

* Together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.

Note that, in limited circumstances, a regional industry, instead of the total domestic industry, may be defined as the basis for the injury analysis Determination of injury An affirmative determination of injury to the domestic industry is a fundamental pre-condition for the imposition of

anti-dumping measures, along with a determination of the causal link between the dumped imports and the injury.

The Anti-Dumping Agreement defines 'injury' to mean one of three things:

* Material injury to a domestic industry;

* Threat of material injury to a domestic industry; or

* Material retardation of the establishment of a domestic industry.

The Anti-Dumping Agreement provides further details and guidance relating to the consideration of material injury and threat of material injury, but provides no further specific guidance on the consideration of material retardation of the establishment of a domestic industry.

Article 3.1 of the Anti-Dumping Agreement requires that a determination of injury to the domestic industry: be based on positive evidence and involve an objective examination of both: (a) the volume of dumped imports and the effect of the dumped imports on prices in the Domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products. As noted above, Article 3.1 requires that a determination of injury to the domestic market must involve an examination of both:

* The volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products (first requirement); and

* The consequent impact of these imports on domestic producers of such products (second requirement).

Demonstration of a causal link

Article 3.5 of the Anti-Dumping Agreement requires the demonstration of a causal link between:

* The dumped imports; and

* The injury to the domestic industry.

As with the determinations of dumping and injury to the domestic industry, the demonstration of a causal link between these two elements shall be based on an examination of all relevant evidence before the investigating authorities.

Article 3.5 also contains a 'non-attribution' requirement. According to this requirement, investigating authorities must examine any known

factors other than the dumped imports that are injuring the domestic industry at the same time and they must not attribute the injury caused by these other factors to the dumped imports. It is important to note that the Anti-Dumping Agreement does not require that the dumped imports are the principal cause of the injury to the domestic injury.

The Anti-Dumping Agreement only requires that the dumped imports be a cause of the injury and that other causes of injury not be attributed to the dumping.

Anti-dumping investigation

The Anti-Dumping Agreement sets out, in considerable detail, how investigating authorities of WTO Members have to initiate and conduct an anti-dumping investigation. This section addresses:

* The initiation of an anti-dumping investigation;

* The period of an investigation; and

* The conduct of an investigation.

Anti-dumping measures

The Anti-Dumping Agreement provides for three kinds of anti-dumping measures:

* Provisional measures;

* Price undertakings; and

* Definitive anti-dumping duties.

This section will discuss the rules on the imposition of each of these measures. It will also address the issues of the duration, termination and review of anti-dumping measures.

Imposition of provisional anti-dumping measures; Price undertakings

Responding to the concern of some Members that some countries were leaving anti-dumping measures in place indefinitely, Article 11 of the Anti-Dumping Agreement establishes rules governing the duration of anti-dumping measures and a requirement for the periodic review of any continuing necessity for the imposition of anti-dumping measures.

With respect to the duration of anti-dumping duties, Article 11.1 of the Anti-Dumping Agreement provides: An anti-dumping duty shall remain in

force only as long as and to the extent necessary to counteract dumping which is causing injury. The need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.

With respect to the periodic review of anti-dumping duties applied, Article 11.2, first sentence, requires the competent authorities to: review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.

2. SUBSIDIES AND COUNTERVAILING MEASURES

In addition to rules on dumping and anti-dumping duties, WTO law also includes rules on another so-called 'unfair' trade practice, subsidization. Subsidies are a very sensitive matter in international trade relations. On the one hand, subsidies are evidently used by governments to pursue and promote important and fully legitimate objectives of economic and social policy. On the other hand, however, subsidies may have adverse effects on the interests of trading partners whose industry may suffer, in its domestic or export markets, from the unfair competition from subsidized products.

Subsidies are subject to an intricate set of rules. Some subsidies, such as export subsidies, are, as a rule, prohibited, while other subsidies are not prohibited but must be withdrawn (or their adverse effects removed) when they cause adverse effects to the interests of other Members. Furthermore, if a subsidy causes or threatens to cause material injury to the domestic industry of a Member, that Member is authorized to impose countervailing duties on the subsidized products to offset the subsidization.

In the period from 1 July 2002 to 30 June 2003, fourteen definitive countervailing duties were imposed, of which nine were imposed by the United States. South Africa and Peru imposed one countervailing duty each, and the European Communities three.

On 30 June 2003, a total of 103 definitive countervailing measures were in force, of which 57 were taken by the United States and 20 by the European Communities. The concept of 'subsidy' The SCM Agreement contains, for the first time in the GATT/WTO context, a detailed and comprehensive definition of the concept of 'subsidy'. As the Panel in US – FSC stated: the inclusion of this detailed and comprehensive definition of

the term ‘‘subsidy’’ is generally considered to represent one of the most important achievements of the Uruguay Round in the area of subsidy disciplines.

Broadly speaking, Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution by a government or public body, which confers a benefit. Furthermore, Article 2 of the SCM Agreement provides that the WTO rules on subsidies and subsidized trade only apply to ‘specific’ subsidies, i.e. subsidies granted to an enterprise or industry, or a group of enterprises or industries. The concepts of ‘subsidy’ and ‘specificity’ are examined in detail below.

WTO treatment of subsidies

Article XVI of the GATT 1994 and Articles 3 to 9 of the SCM Agreement deal with the WTO treatment of subsidies. As discussed above, dumping is not prohibited. It is merely condemned if it causes injury. The WTO treatment of subsidies is different. Certain subsidies are prohibited, and many other subsidies, at least when they are specific rather than general, may be challenged when they cause adverse effects to the interests of other Members.WTO law distinguishes between prohibited subsidies, actionable subsidies and non-actionable subsidies.

Each of these kinds of subsidy has its own substantive and procedural rules. Moreover, subsidies on agricultural products are subject to certain rules set out in the Agreement on Agriculture.

Response to injurious subsidized trade

Article VI of the GATT 1994 and Articles 10 to 23 of the SCM Agreement concern the manner in which WTO Members may respond to subsidized trade which causes injury to the domestic industry. Members may, in these situations, impose countervailing duties on the subsidized imports to offset, i.e. cancel out, the subsidization. However, like the anti-dumping measures discussed above, countervailing duties may only be imposed when it is properly established that there are subsidized imports, that there is injury to a domestic industry and that there is a causal link between the subsidization and the injury. As with the conduct of anti-dumping investigations, the conduct of countervailing investigations is also subject to relatively strict procedural requirements. Note that the substantive and procedural rules on the imposition and maintenance of countervailing measures are similar to (albeit somewhat less detailed than) the rules on anti-dumping measures.

Determination of subsidization

Article 1.1 of the SCM Agreement provides, in relevant part: For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) There is a financial contribution by a government or any public body within the territory of a Member ...or

(a)(2) There is any form of income or price support in the sense of Article XVI of GATT 1994 and

(b) A benefit is thereby conferred.

Article 1.2 of the SCM Agreement furthermore provides: A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

This section first examines the three constituent elements of the concept of 'subsidy':

* A financial contribution;

* A financial contribution by a government or any public body; and

* A financial contribution conferring a benefit.

Financial contribution

For a measure to be a subsidy within the meaning of Article 1.1 of the SCM Agreement, that measure must constitute a 'financial contribution' or take the form of income or price support in the sense of Article XVI of the GATT 1994. Article 1.1 provides for an exhaustive list of types of financial contributions.

This list includes:

* Direct transfers of funds, such as grants, loans and equity infusions (Article 1.1(a)(1)(i));

* Potential direct transfers of funds or liabilities, such as loan guarantees (Article 1.1(a)(1)(i));

* Government revenue, otherwise due, that is foregone or not collected (Article 1.1(a)(1)(ii));

* The provision by a government of goods or services other than general infrastructure (Article 1.1(a) (1)(iii));

* The purchase by a government of goods (Article 1.1(a)(1)(i)); and

* Government payments to a funding mechanism or entrustment or direction of a private body (Article 1.1(a)(1)(iv)).

A financial contribution exists not only when a direct transfer of funds or a potential direct transfer of funds has actually been effectuated. Pursuant to Article 1.1(a) (1) (i), it is sufficient that there is a 'government practice' involving the transfer of funds. The Panel in Brazil – Aircraft noted in this respect: If subsidies were deemed to exist only once a direct or potential direct transfer of funds had actually been effectuated, the Agreement would be rendered totally ineffective and even the typical WTO remedy (i.e. the cessation of the violation) would not be possible.

A financial contribution by a government

For a financial contribution to be a subsidy within the meaning of Article 1.1 of the SCM Agreement, the financial contribution must be made by a government or a public body, including regional and local authorities as well as State-owned companies. Pursuant to Article 1.1 (a) (1) (iv), a financial contribution made by a private body is considered to be a 'financial contribution by a government' when the government entrusts or directs the private body to carry out one or more of the type of functions illustrated in Article 1.1(a)(1)(i) to (iii).

Requirement of 'specificity' of the subsidy

The WTO rules on subsidies do not apply to all 'financial contributions by the government that confers a benefit'. In other words, these rules do not apply to all subsidies. They apply only to specific subsidies. Article 1.2 of the SCM Agreement, already quoted above, states:

A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2. According to Article 2, a subsidy is specific when it has been specifically provided to an enterprise, an industry or a group of enterprises or industries. A subsidy that is widely available within an economy is presumed not to distort the allocation of resources within that economy and, therefore, does not require or justify any action.

The SCM Agreement distinguishes between four types of specificity:

* Enterprise specificity, i.e. a situation in which a government targets a particular company or companies for subsidization;

Industry specificity, i.e. a situation in which a government targets a particular sector or sectors for subsidization;

* Regional specificity, i.e. a situation in which a government targets producers in specified parts of its territory for subsidization; and

* prohibited subsidies, i.e. a situation in which a government targets export goods or goods using domestic inputs for subsidization.

Exceptions to the GATT 1994

General exception under the GATT

Article XX of the GATT 1994, entitled '***General Exceptions***', states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary** or **unjustifiable discrimination** between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures:

- Necessary to protect **public morals**;

- Necessary to protect **human**, **animal** or **plant life** or **health**;

- necessary to secure compliance with **laws or regulations** which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

- relating to the products of **prison labour**;

- imposed for the protection of **national treasures** of **artistic**, **historic** or **archaeological value**; and

- relating to the conservation of **exhaustible natural resources** if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Thus, Article XX allows for inter alia, the protection of some important ***non-economic societal values***, such as **public health** and the **environment**. Note that paragraphs (c), (h), (i) and (j) are not included above. These paragraphs relate to trade in gold and silver; obligations under international commodities agreements; efforts to ensure essential quantities of materials to a domestic processing industry; and products in general or local short supply. These paragraphs have been, and still are, of less importance in international trade law and practice than the other paragraphs of Article XX. Therefore, they are not discussed in this chapter.

Security Exceptions

In addition to the 'general exceptions' contained in Article XX of the GATT 1994 and Article XIV of the GATS, WTO law also provides for exceptions relating to national and international security. XIV bis of the GATS.

Article XXI of the GATT 1994, entitled 'Security Exceptions', states that members may take measures:

a. to require any [Member] to furnish any information the disclosure of which it considers contrary to its essential security interests; or

b. to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests:

- relating to fissionable materials or the materials from which they are derived;

- relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

- taken in time of war or other emergency in international relations; or

c. to prevent any [Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Economic Emergency Exceptions

These exceptions allow Members to adopt measures, otherwise WTO-inconsistent, in situations where a surge in imports causes, or threatens to cause, serious injury to the domestic industry. The possibility to restrict trade in such situations is a 'safety valve' which has always been, and still is, provided for in most trade agreements, including the WTO Agreement.

It reflects the political reality that trade liberalization may be difficult to sustain if and when it creates unexpected and severe economic hardship for certain sectors of a country's economy. The otherwise WTO-inconsistent measures taken in economic emergency situations are referred to as '**safeguard measures**'.

Safeguard measures temporarily restrict import competition to allow the domestic industry time to adjust to new economic realities. Its application does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures.

As safeguard measures are applied to 'fair trade', i.e. trade occurring under normal competitive conditions and in accordance with WTO law, the Appellate Body noted in Argentina – Footwear (EC):

> Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen … as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.

Regional Integration Exceptions

WTO law also provides for 'regional integration exceptions'. These exceptions allow Members to adopt measures, otherwise WTO – inconsistent, taken in the context of the pursuit of regional economic integration. The regional integration exceptions are set out in Article XXIV of the GATT 1994 and Article V of the GATS.

The regional integration exception for trade in goods is elaborated on further in the Understanding on the Interpretation of Article XXIV of the GATT 1994 (the 'Understanding on Article XXIV'), which forms part of the GATT 1994. Since the early 1990s, there has been a proliferation of regional trade agreements. Currently over 250 regional trade agreements are in force, and this number is likely to increase further in the near future.

Well-known examples of regional integration efforts are:

- The European Communities (EC),

- The North American Free Trade Agreement (NAFTA),

- The ASEAN (Association of South East Asian Nations) Free Trade Area (AFTA),

- The Common Market of Eastern and Southern Africa (COMESA),

- The Common Market of the South (MERCOSUR), the Common Market of the Caribbean (CARICOM) and

- The Australia–New Zealand Closer Economic Relations Agreement.

Thirty-four countries of North, Central and South America are currently negotiating the establishment of a Free Trade Area of the Americas (FTAA). In 2004, all but two WTO Members were parties to one or more regional trade agreements.

A significant part of world trade takes place under the terms of regional trade agreements.

Balance of Payment Exceptions

WTO law also provides for 'balance-of-payments exceptions'. These exceptions allow Members to adopt measures, otherwise GATT- or GATS-inconsistent, taken to safeguard their external financial position and to protect their balance of payments. The outflow of money from a country can indeed be limited, in a fairly easy and effective manner, by imposing trade restrictive measures on imports into the country. In the past, the balance-of-payments exceptions have been quite important.

In today's world of floating exchange rates, balance-of-payments problems may be resolved by other means than through trade restrictions. Nevertheless, the balance-of-payments exceptions are still of some importance: developing country Members, in particular, continue to use these exceptions. In times of rapid economic development, countries often experience severe pressure on their monetary reserves.

The balance-of-payments exceptions are set out in Articles XII and XVIII: B of the GATT 1994 and Article XII of the GATS. The balance-of-payments exception for trade in goods is further elaborated in the Understanding on Balance of Payments Provisions of the GATT 1994 (the 'Understanding on BoP Provisions'), which is part of the GATT 1994.

Economic Development Exceptions

As explicitly stated in the Preamble to the WTO Agreement, there is:

> a need for positive efforts designed to ensure that developing countries ... secure a share in the growth in international trade commensurate with the needs of their economic development.

The 'positive efforts' in favor of developing countries currently undertaken by the WTO take many forms. Almost all WTO

agreements provide for special and differential treatment provisions for developing-country Members to facilitate their integration into the world trading system and to promote their economic development. These provisions also referred to as 'S&D treatment' provisions, can be subdivided into six categories:

* Provisions aimed at increasing the trade opportunities of developing country Members;

* Provisions under which WTO Members should safeguard the interests of developing-country Members;

* Flexibility of commitments, of action, and use of policy instruments;

* Transitional time periods;

* Technical assistance; and

* Provisions relating to least-developed-country Members.

Some of these provisions have been dealt with, or at least referred to, above. As discussed in Chapter 2, the WTO Agreement establishes a Committee on Trade and Development, and the WTO provides technical assistance to developing country Members to allow these Members to exercise fully their rights and obligations under the WTO Agreement and to participate effectively in trade negotiations.

MEMBERSHIP OF THE WTO

On 1 September 2004, the WTO had 147 Members andmore than 25 countries were negotiating their accession to the WTO. This section will examine:

Current membership

The membership of the WTO is quasi-universal. It includes all major trading powers and most developing countries. The Members of the WTO represent 92 per cent of the global population and 95 per cent of world trade.

15 October 2004, the 148 Members of the WTO included:

Albania, 8 September 2000; Angola, 23 November 1996; Antigua and Barbuda, 1 January 1995; Argentina, 1 January 1995; Armenia, 5 February 2003; Australia, 1 January 1995; Austria, 1 January 1995; Bahrain, 1 January 1995; Bangladesh, 1 January 1995; Barbados, 1 January 1995; Belgium, 1 January 1995; Belize, 1 January 1995; Benin, 22 February 1996; Bolivia, 12 September 1995; Botswana, 31May 1995; Brazil, 1 January 1995; Brunei Darussalam, 1 January 1995; Bulgaria, 1 December 1996; Burkina Faso, 3 June 1995; Burundi, 23 July 1995; Cambodia, 13 October 2004; Cameroon, 13 December 1995; Canada, 1 January 1995; Central African Republic, 31 May 1995; Chad, 19 October 1996; Chile, 1 January 1995; China, 11 December 2001; Colombia, 30 April 1995; Congo, 27 March 1997; Costa Rica, 1 January 1995; Co ˆ te d'Ivoire, 1 January 1995; Croatia, 30 November 2000; Cuba, 20 April 1995; Cyprus, 30 July 1995; Czech Republic, 1 January 1995; Democratic Republic of the Congo, 1 January 1997; Denmark, 1 January 1995; Djibouti, 31 May 1995; Dominica, 1 January 1995; Dominican Republic, 9March 1995; Ecuador, 21 January 1996; Egypt, 30 June 1995; El Salvador, 7 May 1995; Estonia, 13 November 1999; European Communities, 1 January 1995; Fiji, 14 January 1996; Finland, 1 January 1995; Former Yugoslav Republic of Macedonia, 4 April 2003; France, 1 January 1995; Gabon, 1

January 1995; The Gambia, 23 October 1996; Georgia, 14 June 2000; Germany, 1 January 1995; Ghana, 1 January 1995; Greece, 1 January 1995; Grenada, 22 February 1996; Guatemala, 21 July 1995; Guinea, 25 October 1995; Guinea Bissau, 31 May 1995; Guyana, 1 January 1995; Haiti, 30 January 1996; Honduras, 1 January 1995; Hong Kong, China, 1 January 1995; Hungary, 1 January 1995; Iceland, 1 January 1995; India, 1 January 1995; Indonesia, 1 January 1995; Ireland, 1 January 1995; Israel, 21 April 1995; Italy, 1 January 1995; Jamaica, 9 March 1995; Japan, 1 January 1995; Jordan, 11 April 2000; Kenya, 1 January 1995; Korea, Republic of, 1 January 1995; Kuwait, 1 January 1995; Kyrgyz Republic, 20 December 1998; Latvia, 10 February 1999; Lesotho, 31 May 1995; Liechtenstein, 1 September 1995; Lithuania, 31 May 2001; Luxembourg, 1 January 1995; Macao, China, 1 January 1995; Madagascar, 17 November 1995; Malawi, 31 May 1995; Malaysia, 1 January 1995; Maldives, 31 May 1995; Mali, 31 May 1995; Malta, 1 January 1995; Mauritania, 31 May 1995; Mauritius, 1 January 1995; Mexico, 1 January 1995; Moldova, 26 July 2001; Mongolia, 29 January 1997; Morocco, 1 January 1995; Mozambique, 26 August 1995; Myanmar, 1 January 1995; Namibia, 1 January 1995; Nepal, 23 April 2004, Netherlands (including the Netherlands Antilles), 1 January 1995; New Zealand, 1 January 1995; Nicaragua, 3 September 1995; Niger, 13 December 1996; Nigeria, 1 January 1995; Norway, 1 January 1995; Oman, 9 November 2000; Pakistan, 1 January 1995; Panama, 6 September 1997; Papua New Guinea, 9 June 1996; Paraguay, 1 January 1995; Peru, 1 January 1995; Philippines, 1 January 1995; Poland, 1 July 1995; Portugal, 1 January 1995; Qatar, 13 January 1996; Romania, 1 January 1995; Rwanda, 104 The Law and Policy of the WTO22 May 1996; Saint Kitts and Nevis, 21 February 1996; Saint Lucia, 1 January 1995; Saint Vincent and the Grenadines, 1 January 1995; Senegal, 1 January 1995; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, 1 January 2002; Sierra Leone, 23 July 1995; Singapore, 1 January 1995; Slovak Republic, 1 January 1995; Slovenia, 30 July 1995; Solomon Islands, 26 July 1996; South Africa, 1 January 1995; Spain, 1 January 1995; Sri Lanka, 1 January 1995; Suriname, 1 January 1995; Swaziland, 1 January 1995; Sweden, 1 January 1995; Switzerland, 1 July 1995; Tanzania, 1 January 1995; Thailand, 1 January 1995; Togo, 31 May 1995; Trinidad and Tobago, 1 March 1995; Tunisia, 29 March 1995; Turkey, 26March 1995; Uganda, 1 January 1995; United Arab Emirates, 10 April 1996; United Kingdom, 1 January 1995; United States of America, 1 January 1995; Uruguay, 1 January 1995; Venezuela, 1 January 1995; Zambia, 1 January 1995; Zimbabwe, 5 March 1995.

States and customs territories Members

The WTO membership does not include only States. Separate customs territories possessing full autonomy in the conduct of their external commercial relations and in the other matters covered by the WTO Agreement can also be WTO Members.

Two examples of such WTO Members, which are not States but separate customs territories, are Hong Kong, China (commonly referred to as Hong Kong), and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (commonly referred to as Chinese Taipei).

The European Communities

The European Communities is also a WTO Member but this is a case apart, specifically provided for in the WTO Agreement. Both the European Communities and all the Member States of the European Union are Members of the WTO. This reflects the division of competence between the European Communities and the Member States in the various areas covered by the WTO Agreement (trade in goods; trade in services; and the protection of intellectual property rights). As is clear fromArticles IX, XI and XIV of the WTO Agreement, it is the European Communities, and not the European Community or the European Union, which is a Member of the WTO. The reason for this also lies in EU constitutional law. The European Communities, and not the European Community, is a WTO Member because at the time of the negotiations it was unclear whether the European Community, one of the then three Communities, had the necessary competence to conclude the WTO Agreement.

In Opinion 1/94, the European Court of Justice established that, of the then three European Communities (EC, ECSC and Euratom), only the European Community needed to be involved in the WTO. However, the ECJ's clarification of the legal situation came after the WTO Agreement had been signed. The European Communities, and not the European Union, is a WTO Member, because in 1994 – the time of the conclusion of the WTO Agreement – the European Union did not yet have any competence to conclude international agreements.

Note that both the European Communities and all Member States of the European Union are full Members of theWTO and that all obligations of the WTO Agreement apply equally to all of them. Irrespective of the internal division of competence between the European Communities and the Member States of the European Union, they can all be held responsible for compliance with all the obligations under the WTO Agreement.

Developing-country Members

Three-quarters of the 148 Members of the WTO are developing countries. There is no WTO definition of a 'developing country'. The status of 'developing country Member' is based, to a large extent, on self-selection. Members announce whether they are 'developed' or 'developing' countries. In recent years, and in particular since the failure of the Seattle Session of the Ministerial Conference at the end of 1999, developing-country Members have played an increasingly important role in the WTO, not only because of their numbers but also because of their increasing importance in the global economy.

Because of the size of their economies and the fact that they often act as spokespersons for other developing countries, China, Brazil, India and South Africa are today undoubtedly the most influential and 'activist' Members among the developing-country Members. While their interests do not always converge, these countries are formidable champions of the cause of the developing-country Members within the WTO. Developing country Members benefit from special and differential treatment under many of the WTO agreements and receive WTO technical assistance.

Other Members can, and occasionally do, challenge the decision of a Member to make use of special and differential treatment provisions available to developing countries. On 1 June 2004, there were thirty-one least-developed countries among the developing country Members. The WTO recognises as least-developed countries those countries which have been designated as such by the United Nations.

Least-developed countries benefit from additional special and differential treatment. The least-developed countries among the WTO Members are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda and Zambia.

Groups and alliances within the WTO

The developing-country Members and the least-developed-country Members are not the only distinguishable groups within the WTO membership. Other formal or informal groups and alliances exist in the WTO. Some of these groups have been formed to defend common interests and advance common positions; they coordinate (or try to coordinate) positions and, when appropriate, speak in unison. This category of groups includes the Association of South East Asian Nations (ASEAN);

the Caribbean Community (CARICOM) and the African, Caribbean and Pacific Group (ACP). However, the North American Free Trade Agreement (NAFTA) and the Southern Common Market (MERCOSUR), while constituting significant efforts at regional economic integration, have not, or have hardly ever, spoken with one voice within the WTO. A well-known and quite effective alliance of a different kind is the Cairns group of seventeen agricultural-produce-exporting developed and developing countries.

This group was set up in the mid-1980s to campaign for agricultural trade liberalisation and is an important force in negotiations on trade in agricultural products. However, at the Cancun Session of the Ministerial Conference in September 2003, the Cairns group seemed to have all but disappeared. In the run-up to, and at, the Cancu ´ n Session, a new influential group of developing countries, including China, India, Brazil, Egypt, Argentina and South Africa, emerged. This group, commonly referred to as the 'G-20', forcefully demanded the dismantling of the trade distorting and protectionist agricultural policies of the European Communities, the United States and other industrialised countries. Also in Cancun, a new group known as the ACP/LDC/AU alliance (an alliance made up of the ACP countries, the least-developed countries and the countries of the African Union), emerged as the 'representative' of the interests of the poorest countries.

Other groups have been formed to allow for discussion in small(er) groups of Members, to agree on new initiatives, to break deadlocks and to achieve compromises. The best-known example of such a group is the Quad, the group of the four largest trading entities, i.e. Canada, the European Communities, Japan and the United States. The Quad plays a central role in any negotiation in the context of the WTO. In the summer of 2004, a new key grouping, referred to as the 'Five Interested Parties', consisting of Australia, Brazil, the European Communities, India and the United States, played a crucial role in breaking the Dead lock in the Doha Development Round negotiations and reaching an agreement on the new Doha Work Programme.

Observers

The WTO also has thirty Observer Governments. With the exception of the Holy See, these Observer Governments must start accession negotiations within five years of becoming an Observer. Occasionally, the decision on granting Observer status leads to controversy. For example, in January 2004, the European Communities agreed to back a US-sponsored request by Iraq's Governing Council for Observer status. However, the European

Communities stressed that it also wanted to extend this status to Iran and Syria, an initiative opposed by the United States.

At its meeting on 11 February 2004, the General Council granted Iraq Observer status. At the same meeting, the General Council also considered Iran's request to begin accession negotiations. The European Communities, China, India, Indonesia and other Members supported this request. However, as the United States was opposed, the General Council decided to postpone a decision on Iran's request.

In 1997, the General Council granted permanent Observer status to the UN, UNCTAD, the FAO, WIPO and the OECD. The IMF and the World Bank have permanent Observer status under their respective agreements with the WTO. Other international organisations have Observer status in the WTO bodies that deal in particular with the matters within their mandate. As such, the WHO/FAO Joint Codex Alimentarius Commission has Observer status in the WTO SPS Committee; and the Convention on International Trade in Endangered Species (CITES) in the WTO Committee on Trade and Environment.

Representation in Geneva

Most Members have a permanent diplomatic mission in Geneva. This is often a mission to all Geneva-based international organisations; however, some Members have a separate mission to the WTO. This is the case, for example, for the United States, the European Communities, India, Honduras, Hungary and Malaysia. The meetings ofWTO bodies are attended by diplomats from the mission, but, increasingly, government officials specialising in a specific matter are flown in to attend meetings in Geneva and present their governments' views.

Accession

Becoming a Member of the WTO is not an easy matter. This section discusses the accession process and looks at some recent and future accessions.

The accession process

The WTO Agreement initially provided for two ways of becoming a WTO Member. The first, 'original membership', was provided for in Article XI of theWTO Agreement, and allowed Contracting Parties to the GATT 1947 (and the European Communities) to join the WTO by:

- accepting the terms of the WTO Agreement and the Multilateral Trade Agreements; and

- making concessions and commitments for both trade in goods and services (embodied in national schedules annexed to the GATT 1994 and the GATS respectively). This way of becoming a WTO Member was only available until March 1997. All but one of the GATT Contracting Parties became WTO Members in this way.

Of the 148 WTO Members, 123 are ‘original Members’ in that they became Members pursuant to Article XI. It should be stressed, however, that ‘original Members’ have exactly the same member ship rights as other Members. The second way of becoming aWTO Member is through accession, and this way is open indefinitely.The procedure for accession is set out in Article XII of the WTO Agreement. This provision states:

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

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

To become a WTO Member through accession, a country or customs territory has to negotiate the terms of accession with those countries and customs territories that are already Members. The candidate for membership must always accept the terms of the WTO Agreement and all Multilateral Trade Agreements. This is not up for negotiation. The subject of the accession negotiations are themarket access commitments and concessions the candidate for membership has tomake. A ‘ticket of admission’ is negotiated.When a State or customs territory accedes to the WTO, it instantly benefits from all the efforts that WTO Members have undertaken to date to reduce barriers to trade and increase market access. In return for the access to the markets of current Members that a new Member will obtain, that new Member will itself have to open up itsmarket for the current Members. The extent of the market access commitments and concessions that a candidate for membership will be expected to make will depend to a large extent on its economic development.

Generally speaking, there are four phases in the accession process. In the first phase - the ‘tell us about yourself ’ phase – the country or customs territory applying for membership has to report on all aspects of its trade and economic policies that are relevant to the obligations under the WTO agreements, and to submit a memorandum on these policies to the WTO. A WTO working party established especially to deal with the request for accession, will examine this memorandum.

When the working party has made satisfactory progress with its examination of the trade and economic policies, the second phase is initiated. In this phase – the 'work out with us individually what you have to offer' phase - parallel bilateral negotiations on market access begin between the candidate for membership and individual Members. These negotiations are bilateral because different Members have different trading interests, but it should be recalled that the new Member's market access commitments and concessions will eventually apply equally to all WTO Members as a result of the MFN treatment obligation. These bilateral market access negotiations can be very difficult.

Once the working party has fully completed its examination of the trade and economic policies of the candidate, and the parallel bilateral market access negotiations are successfully concluded, the third phase of the accession process can start. In this phase – the 'let's draftmembership terms' phase – the working party finalises the terms of accessionwhich are set out in a report, a draft membership treaty ('protocol of accession') and lists ('schedules') of the market access commitments and concessions of the candidate for membership. This package is submitted to the Ministerial Conference or the General Council.

In the fourth and final phase of the accession process – the 'decision' phase - the Ministerial Conference or the General Council decides by consensus or, if consensus cannot be achieved, by a two-thirdsmajority ofWTOMembers on the application for membership. In case of a positive decision, the candidate for membership accedes to theWTOthirty days after it has deposited its instrument of ratification of the membership treaty (i.e. the protocol of accession). Even when no major problems are encountered, accession negotiations are typically long. The shortest accession process to date took just under three years. The accession negotiations with Algeria have now been going on since 1987. The delays in completing accession negotiations have been severely criticised.

However, this situation is not only the result of hard bargaining on the part of WTO Members or political facts. It is also a result of the tardy supply of information and making the necessary policy adjustments on the part of the candidate for membership. Adapting toWTO rules usually requires significant changes in national legislation and practices. It can take years to draft, approve and apply new legislation required for accession to the WTO. Least-developed countries, in particular, often lack the administrative capacity to conduct the complex negotiations and to develop and apply the necessary changes in national legislation and practices. In December 2002, the General Council agreed on guidelines to facilitate the accession of least-developed countries to the WTO, in accordance with a mandate given at the Doha Session of the

Ministerial Conference in November 2001. These guidelines concern, inter alia, technical assistance and capacity-building.

Obligations of membership

Article XVI: 4 of the WTO Agreement provides that:

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

Article XIV: 5 of the WTO Agreement provides that:

> No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements.

Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. One should note, however, the possibility of obtaining a waiver of obligations under the WTO agreements (Article IX:3 and 4 of the WTO Agreement) and the 'non-application' clause, both discussed below.

Waiver of WTO obligations

When a Member finds it difficult, if not impossible, to meet an obligation under one of theWTO agreements, thatMember can request theWTO towaive the 'problematic' obligation. Pursuant to Article IX:3 of the WTO Agreement, 'exceptional circumstances' may justify such a waiver. The decision of the Ministerial Conference (or the General Council) granting the waiver shall state the exceptional circumstances, the terms and conditions governing the application of the waiver and the date on which the waiver shall be terminated.

Withdrawal and expulsion

Article XV of the WTO Agreement states:

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and theMultilateral TradeAgreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

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

Any Member may, at any time, unilaterally withdraw from the WTO. A withdrawal only takes effect, however, upon the expiration of six months from the notification of the decision to withdraw. It should be noted that, when a Member withdraws fromtheWTO, it cannot remain a party to theMultilateral Trade Agreements. To date, no Member has ever withdrawn from the WTO.

A group of Caribbean banana-producing countries, very disappointed with the outcome of the EC – Bananas III dispute, 'threatened' at one point to withdraw from the WTO but did not do so.

The WTO Agreement does not provide for a general procedure for the expulsion of a Member. There is no procedure to exclude States from the WTO that systematically breach their obligations under theWTO agreements. There are also no rules or procedures for the expulsion of Members that are guilty of gross violations of human rights or acts of aggression.

The expulsion of a Member is, however, provided for as a possibility in the specific case of the non-acceptance of an amendment.

INSTITUTIONAL STRUCTURE OF THE WTO

To carry out the functions and tasks entrusted to theWTO, the WTO Agreement provides for a manifold of bodies. The following are the main elements of the structure of the WTO:

- The basic institutional structure;

* The Ministerial Conference;

* The General Council, the DSB and the TPRB;

* specialised councils, committees and working parties;

* The Trade Negotiating Committee;

* Political bodies lacking in the WTO structure;

* Quasi-judicial and other non-political bodies of the WTO; and

* The WTO Secretariat.

DECISION-MAKING IN THE WTO

NORMAL PROCEDURE

The normal decision-making procedure for WTO bodies is set out in Article IX: 1 of the WTO Agreement, which states:

> The WTO shall continue the practice of decision-making by ***consensus*** followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by ***voting***. At meetings of the Ministerial Conference and the General Council, ***each Member of the WTO shall have one vote*** ... Decisions of the Ministerial Conference and the General Council shall be taken by a ***majority*** of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

SPECIAL PROCEDURES

The WTO Agreement sets out a number of decision-making procedures which deviate from the normal procedure discussed above. These procedures deal with decisions on the following issues:

* Decision-making by the DSB (Dispute Settelement Body);

* Authoritative interpretations;

* Accessions;

* Waivers;

* Amendments; and

* The annual budget and financial regulations.