REGULATION OF INTERNATIONAL TRADE WITHIN THE FRAMEWORK OF THE WORLD TRADE ORGANIZATION

Tashkent 2011

Foreword

This textbook on the course “Regulation of International Trade within the framework of the WTO” is designed for students of higher education institutions, specializing in International Economics and Foreign Trade.

The textbook includes basic notions of lectures, questions for self-control and class discussions, case-studies, illustrations, and reference books on relevant topics.

The aim of the course is to introduce students to basics of WTO regulation on trade in goods and services, intellectual property rights and investments.

The objectives of the course are:

1. - to familiarize students with the basic institutional mechanisms regulating International Trade;
2. - to introduce students to basic principles and concepts of the World Trade Organization;
3. - to develop students’ analytical abilities on issues of foreign trade regulation;
4. - to enable students to evaluate compatibility foreign trade regime of Uzbekistan with WTO rules.

Throughout the classes students will be required to engage in classroom and group discussions, prepare an individual research paper on particular issues of WTO, and pass computer based test.

Classes will be taught using advanced teaching methods such as interactive education, class and small group discussions, case studies, role playing, presentations with usage of up-to-date IT technologies.

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# Lecture 1. Introduction to the course “Regulation of International Trade within the framework of the WTO”

## Reasons for imposing trade restriction – individual country perspective

Within the course of International Economics you have learnt that free trade maximizes world output and benefits all nations. In theory, international trade can result in full utilization of natural and social resources and increase the welfare of all nations in trade.

International trade is a bridge for a nation towards prosperity, advancement and civilization. Today, no civilized nation can isolate itself from the rest of the world. Processes of globalization and economic integration have made the world a global village, and international trade plays an irreplaceable role in this process. In this respect, the WTO constitutes international trade policy, including general trade policies, trade rules and regulations of individual nations. International trade policy examines the reasons for and effects of trade restrictions because nations usually impose some restrictions on the flow of goods, services, and factors across their borders.

Despite the theory of international trade explains free trade to be the paretto optima, practically all nations (except for some free trade harbors like Hong Kong , Panama) do impose some restrictions on the free flow of international trade. In order to explain this phenomenon, it is necessary to understand effects of trade restrictions on production, consumption, trade and welfare.

Trade restrictions include tariffs and non-tariff measures. The most important type of trade restriction has historically been the tariff. The WTO/GATT has predominantly been devoted to the tariff reduction negotiations. The only issue discussed in the first 6 rounds of negotiations of the GATT is how to reduce tariff rates.

A tariff is a tax or duty levied on the traded commodity as it crosses a national boundary. An import tariff is a duty on the imported commodity, while an export tariff is a duty on the exported commodity. Import tariffs are more important than export tariffs. Export tariffs are usually applied by developing countries on their traditional exports (such as Ghana on its cocoa and Brazil on its coffee) to get better prices and raise revenues. The main objectives of an import tariff are to protect domestic market or domestic infant industries such as auto industry in Uzbekistan against foreign competition and to raise revenues of the central government of a country.

Tariffs can be ad valorem, specific, or compound. The ad valorem tariff is expressed as a fixed percentage of the value of the traded commodity. The specific tariff is expressed as a fixed sum per physical unit of the traded commodity. A compound tariff is a combination of an ad valorem and a specific tariff.

Tariffs, though generally declined in industrial nations since World War II (with an average nominal tariff rate of 3.8%), are still rendering tremendous effects on production, consumption, trade and welfare in the nation imposing the tariff and on its trade partners. While tariffs are invariably rationalized in terms of national welfare (such as the protection of infant industry or national industries), in reality they are usually advocated by those special groups in the nation that stand to benefit from such restrictions.

In short, consumers pay a higher price for the commodity and producers receive a higher price as a result of the tariff. A tariff leads to inefficiencies, which are referred to as protection cost, because some domestic resources are transferred from the more efficient production of exportable commodities to the less efficient production of importable commodities. Consumers’ welfare has been sacrificed for jobs or employment saved in less efficient industries. Improper tariff rates can only hamper the growth and development of so called infant industry. Auto industry in Uzbekistan is a typical example. It is something beyond economics. If you want to know more about the effects of tariffs, you can refer to partial and general equilibrium analysis of a tariff in International Economics written by Dominick Salvatore.

Nevertheless, tariffs are legal and the only preferred trade restriction in the WTO. This will be discussed in detail later.

Non-tariff trade barriers refer to all the other trade restriction measures other than tariffs, including import quota or licensing (automatic and non-automatic import licensing), voluntary export restraints, technical barriers to trade, sanitary and phytosanitary measures, anti-dumping, subsidies and countervailing measures, customs valuation, pre-shipment inspection, rules of origin, fees and formalities, etc.

Case - effects of non-tariff trade barriers: Voluntary Export Restraints on Japanese Automobiles to the US.

From 1977 to 1981, US automobile production fell by about one-third, the share of imports rose from 18 to 29 percent, and nearly 300,000 autoworkers in the US lost their jobs. In 1980, the Big Three US automakers suffered combined losses of 4 billion $US. As a result, the US negotiated an agreement with Japan that limited Japanese automobile exports to the US to 1.68 million units per year from 1981 to 1983 and to 1.85 million units for 1984 and 1985. Japan “agreed” to restrict its automobile exports out of fear of still more stringent import restrictions by the US. As a result of this agreement, US automakers reaped profits of about 6 billion $US in 1983, 10 billion $US in 1984, and 8 billion $US in 1985. Japan gained by exporting higher-priced autos and earning higher profits. The big loser was the American public, who had to pay substantially higher prices for domestic and foreign automobiles. It was estimated that the agreement resulted in a price 660 $US higher for US made automobiles and 1300 $US higher for Japanese cars in 1984, and the total cost of the agreement to US consumers was 15.7 billion $US from 1981 through 1984, and that 44,000 US automaker’s jobs were saved at the cost of more than 100,000 $US each, 2 or 3 times the yearly earnings of a US autoworker.

As the example above shows, neither tariffs nor non-tariff measures are reasonable or justified to be imposed on because of the high cost of trade protection practice. There are, however, still some fallacious or questionable arguments for trade protection.

Trade restrictions are needed to protect domestic labor against cheap foreign labor.

* Scientific tariff rates could make the price of imports equal to domestic prices and allow domestic producer to meet foreign competition.
* Protection is needed to reduce domestic unemployment and to cure a deficit in the nation’s Balance of Payments or trade deficit.
* Trade restrictions are needed to protect infant industries in developing countries and to acquire a comparative advantage in crucial high-technology industries in developed countries (Strategic Trade Policy).

The first three arguments are to be questions for students. Below, the fourth argument is conferred.

Infant-industry argument: A nation may have a potential comparative advantage in a commodity, but because of lack of know-how and the initial small level of output, the industry will not be set up or, if already started, cannot compete successfully with more established foreign firms. Temporary trade protection is then justified to establish and protect the domestic industry during its “infancy” until it can meet foreign competition, achieve economies of scale, and reflect the nation’s long-run comparative advantage. At that time, protection is to be removed. However, for this argument to be valid,

1) the return in the grown-up industry must be sufficiently high to offset the higher prices paid by domestic consumers of the commodity during the infancy period;

2) there is an objective standard to identify which industry or potential industry qualifies for this treatment;

3) there is a schedule to remove the protection.

Strategic trade policy: A nation can create a comparative advantage (through temporary trade protection, subsidies, tax benefits, and cooperative government-industry programs) in such fields as semiconductors, computers, telecommunications, and other industries that are deemed crucial to future growth in the nation. These high-technology industries are subject to high risks, require large-scale production to achieve economies of scale, and give rise to extensive external economies (a benefit to society at large, say, by training workers who then leave to work in other industries) when successful. Strategic trade policy suggests that by encouraging such industries, the nation can reap the large external economies that result from them and enhance its future growth prospects. Semiconductors (such as computer chips) and steel industry in Japan are a good example. Other examples are the Concorde supersonic aircraft and the Airbus in Europe. However, there are serious difficulties in carrying out this argument: 1) It is extremely difficult to choose the industries that will provide large external economies in the future and devise appropriate policies to successfully nurture them; 2) Since most leading countries undertake strategic trade policies at the same time, their efforts are largely neutralized, so that the potential benefits to each may be small; 3) When a country does achieve substantial success with strategic trade policy, this comes at the expense of other countries and so other countries are likely to retaliate.

All in all, trade production usually increases the commodity price, benefits producers and harms consumers and usually the nation as a whole. For example, it is estimated that removing all quantitative restrictions (QRs) on textile and apparel exports to the US would result in a gain of 11.92 billion $US for the US at 1984 prices. Removing QRs also leads to employment losses in the industry losing the QRs, but these employment losses are matched or more than matched by economy-wide employment gains. Removing QRs on exports of textile, automobiles, and steel to the US leads to a total welfare gain of 20.28 billion $US for the US. Also eliminating all tariffs on industrial products after the above QRs have been removed results in a further gain of 0.6 billion $US for the US. However, since producers are few and stand to gain a great deal from protection, they have a strong incentive to lobby the government to adopt protectionist measures. On the other hand, since the losses are diffused among many consumers, each of whom loses very little from the protection, they are not likely to effectively organize to resist protectionist measures. Thus, there is a bias in favor of protectionism. For example, the sugar quota raises individual expenditures on sugar by only a few dollars per person per year in the US. But with about 250 million people in the US, the quota generates more than 600 million $US in rents to the few thousand sugar producers in the US.

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## 2. Historical background of the WTO

The World Trade Organization, established on 1 January 1995, is the umbrella organization governing the international trading system. It oversees international trade agreements and provides the secretariat for GATT, based in Geneva.

The members of the WTO now account for well over 90% of the world’s trade and virtually all of its investment; by the end of 2005, the organization’s membership had increased to 149, from the 76 founding members of 1995. Nearly all the developed, and most of the developing countries, have joined.

The multilateral framework of international trade originated from the end of the World War II. The earlier experience with the Great Depression of the late twenties and early thirties, followed in its wake by the trade protection imposed by major trading nations, made governments aware of the need for a multilateral discipline in the field of international trade. This awareness assumed a new urgency with the devastation caused by the World War II and with the need for the expansion of international trade as an important tool for development and growth. The WTO’s origins can be traced back to the Atlantic Charter of 1941, developed by then US President Franklin Roosevelt and British Prime Minister Winston Churchill. In order to counter US isolationism, the principle of the Atlantic Charter was for an international trading system with equal access to trade for all nations. This was seen as a complement to an effective world political forum, the United Nations, established in 1946 with its permanent headquarters in New York City. The United States organized an international conference on trade and employment which resulted in the Havana Charter of 1948, in which it was proposed to establish the International Trade Organization (ITO). Twenty-three countries agreed to a set of tariff cuts and these were ratified by the GATT, which was set up as a transitory arrangement to be subsumed under the ITO. However, the ITO was never ratified because the US government announced in 1950 that it would not seek Congressional ratification of the Charter, and the GATT, though never intended to be an “organization”, continued for 47 years, until the WTO finally emerged in the last stages of the Uruguay Round to take on the role originally designed for the ITO. The WTO now stands with the World Bank and the International Monetary Fund as the third leg of the global economic system.

### The Bretton Woods conference and the GATT.

In July 1944, a meeting of Allied ministers was held in Bretton Woods, New Hampshire, the US. The institutions created there remain at the core of the global economy today: IMF, World Bank. In December 1945, the US invited 14 countries to begin negotiations on liberalizing international trade. The negotiations were intended to create an International Trade Organization that would facilitate trading relations as Bretton Woods facilitated monetary relations and to implement quickly an agreement to reduce tariff levels. In March 1948, the draft charter for the ITO, known as the Havana Charter, was drawn up. This charter contained sections on employment and economic activity, economic development and reconstruction, restrictive business practices, inter-governmental commodity arrangements and subsidies. It was more wide ranging than the GATT, which focused on tariffs in manufactured goods. In negotiating the Havana Charter the US push for a pure free trade system was limited by its own internal commitment to agricultural protection. With echoes of the Senate’s refusal to endorse Woodrow Wilson’s effort to have the US join the League of Nations following the First World War, the US Congress refused to give its agreement to the ITO. More influential than isolationists in rejecting the agreements were liberal forces which heartily condemned concessions the US negotiators made to other countries. The GATT was actually created two years later to replace the abortive ITO. The original 23 GATT countries were among over 50 which agreed a draft Charter for an ITO - a new specialized agency of the UN. The Charter was intended to provide not only world trade disciplines but also contained rules relating to employment, commodity agreements, restrictive business practices, international investment and services.

The disastrous state of the global economy - especially the collapse of trade markets - contributed to the belief that the international system required greater management along liberal lines. It also convinced policymakers everywhere that a prosperous national economy was impossible without a well-designed international system. In an effort to give an early boost to trade liberalization after the World War II, and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s because of the Great Depression, tariff negotiations were opened among the 23 founding GATT contracting parties in 1946. The tariff concessions and rules together became known as the GATT and entered into force in January 1948.

Throughout its 48-year history, the GATT provided the structure for a global process of steady trade liberalization through eight “rounds” of multilateral trade negotiations sponsored by its Contracting Parties. In the first six Rounds, the focus was on the reduction of tariffs. The last two Rounds have covered wider areas (see table below).

### The Uruguay Round Negotiations and establishment of the WTO.

The seeds of the Uruguay were sown in November 1982 at a Ministerial meeting of GATT members in Geneva. Though the meeting stalled on the issue of agriculture, the work program formed the basis of the Uruguay negotiation agenda. With four more years of exploring and clarifying issues and painstaking consensus-building, Ministers met again in September 1986, in Punta del Este, Uruguay. The negotiation was expected to be completed in four years. In December 1990, however, disagreement on the nature of commitments to future agricultural trade reform led to a decision to extend the round. For the following three years, the negotiations lurched continuously from impending failure to predictions of imminent success. Several deadlines came and went; farm trade was joined by services, market access, anti-dumping rules and the proposed creation of a new institution as the major points of conflict. It took until 15 December 1993 for every issue to be finally resolved. On 15 April 1994, the deal was signed by Ministers from most of the 125 participating governments at a meeting in Marrakesh, Morocco. The agreements of the Uruguay came into force on 1 January 1995.

## 3. Reasons for replacing the GATT by the WTO

There is popular belief, that the WTO replaces the GATT. In fact, the WTO did not replace the GATT. An amended GATT remains as one of the legal pillars of the world’s trade and, to a lesser extent, investment systems. The other pillars, set up in the Uruguay Round’s Marrakesh agreement of 1994, include the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). So, what has been replaced is not the GATT as an international agreement but the GATT as an international organization. In other words, GATT as an international agency no longer exists. It has been replaced by the WTO. But, GATT as an agreement still exist, and has been updated. The updated GATT is called GATT 1994, and the replaced GATT is called GATT 1947. The GATT always dealt with trade in goods, and it still does. It has been incorporated into the new WTO agreements, living alongside the GATS and the TRIPs.

As a matter of fact, the 1986 Ministerial declaration of Punta del Este, containing the agenda and objectives for the Uruguay negotiation, did not include any explicit call for a new charter or organization. Despite this hesitancy, however, by 1990 there was considerable discussion of the need for an improved organizational structure for effective implementation of the Uruguay results. The first public call for a world trade organization to be established was a proposal by the Canadian Government in early 1990. The Canadian proposal built on the work of Professor John Jackson (Hessel E. Yntema Professor of Law at the University of Michigan) and others at an informal meeting in Geneva in 1989. It was then incorporated into the “Dunkel Text” of 1991 (Arthur Dunkel was then the GATT Director General), which eventually became the final text of the Uruguay Round adopted at Marrakesh in April 1994. In approving the Uruguay Round on its “fast track” system, the United States insisted on the name World Trade Organization, rather than the European Community’s preference for Multinational Trade Organization.

The GATT has undertaken eight “rounds” of multilateral trade negotiations, which have achieved major cuts in tariffs and, since the 1970s, some reductions in related non-tariff barriers to trade. The latest round, the Uruguay Round, lasted seven years, as its agenda broadened to include trade in services and intellectual property, and a revised system of dispute settlement mechanisms.

In spite of the remarkable success during its nearly five decades of history, the GATT system was being increasingly challenged by the changing conditions of international economic activity, including the greater ‘interdependence’ of national economies, and the growth in trade in services. Anxiety developed that the GATT was too handicapped to play the needed role of complementing the Bretton Woods system as the “third leg”, alongside the IMF and World Bank. Problems and ‘birth defects’ included.

Provisional application and Grandfather rights exceptions embraced by the Protocol of Provisional Application. The GATT was designed to be a multilateral trade and tariff agreement and would depend on the ITO for its organizational context and secretariat services. The GATT never definitively came into force; instead it was legally applied by a Protocol of Provisional Application originally designed to last until the ITO came into force. Grandfather clause provided that the rules in Part III of the GATT 1947, which essentially dealt with non-tariff trade measures, need be applied only to the extent that they were not inconsistent with legislation in effect when a country acceded to the GATT.

There were exceptions from GATT rules for textiles, agriculture, regional trading groups, developing countries and safeguards to prevent serious injury to domestic producers.

Another reason for the need to reform GATT was ambiguity about the powers of the Contracting Parties to make certain decisions. The GATT dispute settlement process had two major weaknesses. The first was the ability of a Contacting Party to veto the process at numerous stages. A dissatisfied party could block the creation of a panel, block adoption of the report by the Council or fail to undertake the obligations outlined in the report. The second problem was that even if the country accepted a panel report in question, it could choose to keep the offending policy, leaving the injure party to suspend benefits in kind. The dispute then fell back on to unilateral action by the aggrieved party. The party which had its complaint supported by a panel would have to undertake retaliation through its own domestic legislation. This could take the form of tariffs or suspension of trade benefits to the offender. Offenders were not sanctioned; they just had benefits of equal value withdrawn by the complaint. The unilateral nature of the process raised serious problems for the whole system. The countries able to take unilateral measures tended to be the economically powerful such as the US, Japan and the EU. Smaller states were less likely to take action against the giants because they feared a trade war that would cost them dearly. One of the purposes of having an international legal framework for trade is to facilitate relations based on rules rather than power. Law should restrain powerful states from abusing their economic power to the cost of smaller states. Since the GATT process relied so heavily on unanimity, this goal was difficult to achieve.

Also, murky legal status leading to misunderstanding by the public, media, and even government officials lead to negotiating a new solution – establishment of an international institution. As described above, there were certain serious defects in the dispute settlement procedures, there was lack of institutional provisions generally, so constant improvisation was necessary. All these contributed to the reform of GATT system and creation of the WTO.

## Questions

1. Explain the reasons for trade restrictions. What are trade restrictions and what do you think about them?

2. Why are the following three arguments fallacious or questionable?

a) Trade restrictions are needed to protect domestic labour against cheap foreign labour.

b) Scientific tariff rates could make the price of imports equal to domestic prices and allow domestic producer to meet foreign competition.

c) Protection is needed to reduce domestic unemployment and to cure a deficit in the nation’s Balance of Payments or trade deficit.

3. Outline the major results of the Uruguay Round. Why should the GATT and the WTO be established?

4. What is the relationship between GATT 1947 and GATT 1994?

5. What happened to the ITO?

6. Was the GATT/Is the WTO an international organization?

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3. John H. Jackson, The World Trading System: Law and Policy of International Economic Relations (2nd ed., Cambridge, MA: MIT Press, 1997). p.. 32-36, 82-84, 103-105.
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# Lecture 2. WTO – structure, aims and principles

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## 1. Objectives, main functions, principles

### Objectives.

The objectives of the WTO include the followings:

* To raise standards of living
* To ensure full employment of members’ economies
* To promote the steady growth of real incomes and effective demand in their markets
* To expand the production of and trade in goods and services
* Sustainable development and environmental protection
* To ensure developing countries, and especially the least developed to secure a share in the growth in international trade commensurate with the needs of their economic development

### Main functions.

There are five main functions of the WTO:

To facilitate formulation, implementation, administration and operation of the covered Agreements

Modern market economy must rely on international regulations or standardized global economic operations. Who should be the one to formulate these regulations? Should it be the US simply because of its strong economy? No single country is appropriate to make the rules. Only an international organization, like the GATT in the past and now in the form of the WTO, should formulate rules through many rounds of negotiations. Once the regulations and rules are set, there must be an organization to supervise and facilitate the implementation, administration and operation of these regulations and rules.

To provide the forum for negotiations on multilateral trade

The WTO provides the forum for negotiations on multilateral trade relations in matters covered by its various agreements. It may also, on decision by the Ministerial Conference, provide a forum for further negotiations, and a framework for the implementation of their results, on other issues arising in the multilateral trade relations among its Members. To put it simply, this is a matter of opening up the market. The founding of GATT in 1948 was based on the historical lessons of World War I and II, with the purpose of avoiding fighting for resources and market shares as a result of countries being divided up by different groups and because of closed markets. It was believed that opening market to each other could avoid the breakout of new wars. So far, this opening process has been extended from trade in Goods to trade in Services (finance, banking, insurance, securities, telecommunications, air shipment, accounting, law, and tourism), trade-related aspects of intellectual property rights, and trade-related investment measures or mutual opening of the investment market. The WTO is the direct result of multilateral negotiations, and will provide the forum for further negotiations on multilateral trade.

To administer the integrated dispute settlement system.

Along with increasing international exchanges, countries cannot avoid frictions in their trade business, and disputes will also become more frequent. For a long time, the situation was that big countries bullied the small ones that had no means to go to court to win their cases. This is why the US often used the “special clause 301”and “super-301”(introduced in 1988, under which the US could unilaterally find other countries’ trade practices as ‘unfair’ and impose trade sanctions if the offending country did not reach a satisfactory settlement with the US Trade Representative) to solve disputes. Now, the WTO has provided a more effective dispute settlement system.

To review national trade policies (see p.14. TPRM).

To achieve greater coherence in global economic policy-making by cooperating with the IMF and with the World Bank

The World Bank is the world’s biggest development bank, providing finance, research and policy advice to developing countries, with an annual turnover in new loan commitments to developing nations of over 20 billion $US. The Bank loans are primarily for specific development projects. Like the World Bank, the IMF emerged from the United Nations Monetary and Financial Conference, held at Bretton Woods, New Hampshire, in July 1944. According to its constitutional instrument, the Fund exists:

(a) to promote international monetary cooperation;

(b) to facilitate the expansion and balanced growth of international trade;

(c) to promote foreign exchange stability;

(d) to create a multilateral system of payments between members;

(e) to assist in the correction of maladjustments in members’ balance of payments; and

(f) to reduce the duration and severity of disequilibria in members’ balance of payments.

During the first quarter-century after it started operations in 1945, the Fund was mainly concerned to establish and manage the international regime of fixed (but adjustable) exchange rates. Its interventions were mainly restricted to monetary and trade policy measures. The IMF lost much of its old role with the end of the dollar-centered fixed-rate system in 1971; however, the rapid globalization of money and finance since the 1960s has prompted the Fund to reinvent itself with an expanded agenda: First, the Fund has since the late 1970s exercised comprehensive and detailed surveillance, both of the economic performance of individual member states and of the world economy as a whole. Second, the Fund has since the 1970s intervened more intensely in many countries by designing for them not only traditional stabilization measures for short-term corrections of the balance of payments, but also structural adjustment packages for medium- and long-term economic reconstruction. Third, the ‘second-generation’ IMF has undertaken major training and technical assistance activities, largely in order to provide poorly equipped states with staff and tools that can better handle the policy challenges of contemporary globalization. Fourth, the IMF has pursued various initiatives to restore stability to global financial markets. The IMF has its membership risen from 62 states in 1960 to 182 states in 1998.

### Principles.

WTO establishes the following key principles, which occur in all agreements under the umbrella of WTO. These are:

* Trade without discrimination: 1) Most-favored-nation treatment, 2) National treatment;
* Transparency
* Predictable and growing access to markets
* Single undertaking

## 2. Organization structure

Highest Authority: the Ministerial Conference

Ministerial Conference is the supreme body of the WTO, composed of representatives of all Members. The Ministerial Conference is authorized to carry out the functions of the WTO, take the actions necessary to this effect, and take decisions on matters under any of the Multilateral Trade Agreements if so requested by a Member. The Ministerial Conference is to meet at least once every two years. The first WTO Ministerial Conference was held in Singapore in December, 1996 (the Ministerial Declaration on Trade in Information Technology Products), the second in Geneva in May, 1998 (Declaration on Global Electronic Commerce), the Third in Seattle, Washington State, US between 30 November and 3 December 1999, and the Fourth in Doha, Qatar from 9 to 13 November 2001.

Second Level: General Council

General Council, also composed of representatives of all WTO members, is in charge of the daily business of the WTO and normally meets once every two months. General Council acts on behalf of the Ministerial Conference in the periods between its meetings, and reports directly to it. The General Council convenes also as the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB).

Third Level: Councils for each broad area of trade, namely, the Council for Trade in Goods (Goods Council), the Council for Trade in Services (Services Council), the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPs Council). The three councils, consisting of all WTO members, deal with their respective areas of trade.

Six committees, also consisting of all WTO members, report to the General Council for different issues such as trade and development, the environment, regional trading arrangements, and administrative issues.

Fourth Level: Committees and working party dealing with specific subjects

The Goods Council has 11 committees. They consist of all WTO members. The Textiles Monitoring Body also reports to the Goods Council.

It should be noted that important breakthroughs are rarely made in any of these formal bodies. With consensus and without voting, informal consultations play a vital role in bringing a vastly diverse membership round to an agreement. Occasionally a deadlock can only be broken in a small group of two, three or four countries; sometimes at meetings they have organized themselves in their own countries. A multilateral package of commitments is usually the result of numerous bilateral, informal bargaining sessions. These informal consultations, however, are not separated from the formal meetings which are necessary for making formal decisions. Nor are the formal meetings unimportant. They are the forums for exchanging views, putting countries’ positions on the record, and ultimately for confirming decisions. The art of achieving Agreement among all WTO Members is to strike an appropriate balance, so that a breakthrough achieved among only a few countries can be acceptable to the rest of the membership.

The WTO Secretariat: In Article VI of the WTO Agreement, provision is made for the establishment of a Secretariat and the appointment of its Director-General. At present it has approximately five hundred staff members. The Secretariat, based in Geneva, Switzerland, has no decision-making powers. Its main duties are to supply technical and professional support for the various councils and committees, to provide technical assistance for developing countries, to monitor and analyze developments in world trade, to provide information to the public and the media and to organize the ministerial conferences. It also provides some forms of legal assistance in the dispute settlement process and advises governments wishing to become Members of the WTO. The WTO Secretariat is organized into 24 Divisions with functional, information and liaison, and support roles. Divisions are normally headed by a Director who reports to a Deputy-Director General or directly to the Director General. The professional staff is composed mostly of economists, lawyers and others with a specialization in international trade policy. The working languages of the WTO are English, French and Spanish.

## 3. Accession and Decision-Making procedure

### The accession.

Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters related with its trade policies is eligible to accede to the WTO on terms agreed between it and WTO Members. Accession to the WTO is essentially a process of negotiation—quite different from the process of accession to other international entities, like the IMF, which is largely an automatic process.

The accession procedure:

Commencement of the Accession Process: An applicant submits a communication to the Director-General of the WTO, expressing its desire to accede to the WTO under Article XII. The General Council then considers the application and establishes a working party. Any member of the WTO can join the working party. The working party is chaired by a Chairperson selected after consultation with WTO Members and the applicant.

The fact-finding process: The applicant provides a Memorandum describing in detail its foreign trade regime, together with information on the currently applicable tariff schedule and copies of relevant laws and regulations in one of the WTO official languages. Members of the working party then ask questions about the Memorandum, examine the Memorandum and the questions and answers to study the conformity of the regime with the requirements of the WTO Agreements. Technical assistance at each stage of the accession process can be obtained from the Secretariat.

Bilateral negotiations: Bilateral market access negotiations between the applicant and Members of the working party on goods and services, as well as on the other specific terms of accession constitute the most critical element of the accession process. The phase commences either by the applying government tabling its initial offer on goods or services or interested WTO Members submitting their request lists to the applicant. The resulting market-access commitments of acceding governments can be considered to be the payment for the entry ticket into the WTO.

Report, Protocol of Accession and Entry into Force: Following the conclusion of bilateral negotiations between interesting Members and the Applicant, the working party prepares a Report and a draft Decision and Protocol of Accession, containing the terms of accession agreed by the Applicant and members of the working party. As part of the draft Protocol of Accession, the Schedule of Concessions and Commitments on Goods and the Schedule of Specific Commitments on Services are prepared. When the Draft Report, Draft Protocol and Schedule on Goods and Services have been finalized, the working party submits the package to the WTO General Council/ Ministerial Conference for approval. Following the decision of the General Council/ Ministerial Conference to adopt the package, the Protocol of Accession enters into force. Thirty days after acceptance by the applicant, it becomes a WTO member.

Now, the WTO has around 30 applicants negotiating membership. They are WTO observers. Besides, the WTO has 7 international organizations observers: UN,UNCTAD (United Nations Conference on Trade and Development), IMF, World Bank, Food and Agricultural Organization, World Intellectual Property Organization, Organization for Economic Co-operation and Development.

### Decision-making

Unlike other international organizations, the WTO normally makes decisions by consensus. Consensus is defined as the situation where no member, present at a meeting where a decision is taken, formally objects to the proposed decision. It should be noted that this is not the same as unanimity, since consensus is defeated only by a formal objection by a member present at the meeting. Thus, those absent do not prevent a consensus, nor does an abstention prevent a consensus. The main advantage is that decisions made this way are more acceptable to all Members. In case of trade sanctions, the sanctions are imposed by Members, not by the organization.

The WTO Agreement envisages four specific situations involving voting:

1) An interpretation of any of the multilateral trade Agreements can be adopted by a majority of three-quarters of WTO Members.

2) The Ministerial Conference can waive an obligation imposed on a particular member by a multilateral Agreement through a three-quarters majority.

3) Decisions to amend provisions of the multilateral Agreements can be adopted through approval either by all Members or by a two-thirds majority depending on the nature of the provision concerned. But the amendments only take effect for those WTO Members which accept them.

4) A decision to admit a new Member is taken by a two-thirds majority in the Ministerial Conference, or the General Council in between conferences.

## 4. Trade policy review mechanism (TPRM) of the WTO

TPRM was introduced into GATT in 1989 following the Mid-term Review of the Uruguay. The review covers the full range of individual Members’ trade policies and practices and their impact on the functioning of the multilateral trading system in order to encourage governments to follow closely the WTO rules and disciplines and to fulfill their commitments.

The TPRB is formally the General Council. The frequency of reviews of a Member is related to its weight in the multilateral trading system, as defined by the Member’s share of world trade in goods and services. On this principle, the frequency of review for individual Members, based on trade flows in October 1995, is as follows:

* every four years for the four largest trading entities, counting the European Communities (as one trading entity), the US, Japan and Canada;
* every four years for the next sixteen Members;
* every six years for other Members, with provision for a longer interval for least-developed countries.

Variations in trade in goods and services flows may alter the ranking of Members and thus their review cycles. The accession of new Members to the WTO could also affect the position of existing Members in all the three review cycles.

### Procedures for Review:

A TPRM review consists of several steps whose timing is agreed between the Secretariat and the country under review.

Collection of information: The Secretariat prepares and sends a detailed country questionnaire to the Member under review and the Member has four weeks to prepare and provide replies.

Visit to the capital: A Secretariat team consisting of 2 or 3 staff members of the Trade Policy Review Division undertakes a visit of one week or ten days to the country under review for discussion with government ministers and agencies, as well as private enterprise (Chamber of Commerce) and research institutes.

The TPRB meeting: Preparation and publication of documents. For each review, two documents are prepared: a detailed report written independently by the WTO Secretariat and a policy statement by the government under review. The Secretariat report focuses on the trade policies and practices of the Member under review in the context of the evolution of overall macro-economic and structural policies in a representative period up to the present date. The government’s policy statement by Members aims to outline the objectives and main directions of trade policies, as well as a succinct presentation of recent trends and problems, including those encountered in foreign markets.

## 5. Plurilateral trade agreements of the WTO

For the most part, all WTO members subscribe to all WTO agreements. There remain, however, two agreements, originally negotiated in the Tokyo Round, which have a narrower group of signatories and are known as “plurilateral agreements”. All other Tokyo Round agreements became multilateral obligations when the WTO was established in 1995. The two are:

1) Agreement on Trade in Civil Aircraft

2) Agreement on Government Procurement

The other two plurilateral agreements, namely, International Dairy Agreement and International Bovine Meat Agreement, were scrapped at the end of 1997 and incorporated into the Agriculture and Sanitary and Phytosanitary agreements.

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## 6. Main difference between the WTO and GATT

Nature: The GATT was ad hoc and provisional. The WTO and its agreements are permanent. The WTO has a legal man status.

Scope: The GATT rules applied to trade in goods. The WTO Agreement covers trade in goods, trade in services and trade-related aspects of intellectual property rights.

Approach: Though the GATT was a multilateral instrument, a series of new agreements were adopted during the Tokyo Round on a plurilateral - that is, selective-basis, causing a fragmentation of the multilateral trading system. The WTO has been adopted and accepted by its members, as a single undertaking: the agreements are all multilateral.

Dispute Settlement: The WTO dispute settlement procedure reversed the unanimity principle which had hindered acceptance of reports. The WTO dispute settlement mechanism has specific time limits and is therefore faster than the GATT system; it operates more automatically, thus ensuring less blockages than in the GATT; for example, panel reports are now automatically adopted sixty days after being issued unless there is a consensus that it be rejected (Since the side benefiting from the report would be unlikely to agree to reject, it seems most probable that a consensus to reject would very rarely be achieved.); and it has a permanent appellate body to review findings by dispute settlement panels. There are also more detailed rules on the process of the implementation of findings.

## Questions

1. Describe the basic structure and tasks of the WTO.

2. Discuss the major principles of the WTO.

3. Who may become a member of GATT/WTO?

4. What are the main differences of WTO from the GATT system?

5. Explain decision-making rules of the WTO.

## References

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# Lecture 3. Regulation of Trade in Goods (GATT system)

The WTO agreement contains some 29 individual legal texts covering everything from agriculture to textiles and clothing, and from services to government procurement, rules of origin and intellectual property. Added to these are more than 25 additional Ministerial declarations, decisions and understandings which spell out further obligations and commitments for WTO members. However, a number of simple and fundamental principles run throughout all of these instruments which, together, make up the multilateral trading system.

## 1. Trade without Discrimination

For almost fifty years, key provisions of GATT outlawed discrimination among members and between imported and domestically-produced merchandise. This basic principle of the multilateral trading system is embodied in the WTO Agreement, deriving mostly from the principles that constituted the foundations of the GATT. This principle is guaranteed through the operation of various clauses included in the multilateral agreements on the trade in goods, in the GATS, and in the TRIPs Agreement.

The principle of non-discrimination consists of three aspects:

The first is the most-favored-nation status, the cornerstone of multilateral trade. It emphasizes that no matter which country or region a product, service or provider of the service comes from, the items should be treated equally upon entering customs. The most-favored-nation status oversees equality and fairness, but not the depth of trade.

The second is national status, which means a product, service or provider of the service is treated as its own national by the government of the country upon whose customs house the items reach, or into which they enter, according to the foreign investment policy of that given country.

The third is mutual benefit, which means an equal degree of opening to each other, and equal rates of tariff duties.

There are four important exceptions to the key GATT principle of non-discrimination.

1. Developed countries can give tariff preference to developing countries.
2. Countries entering into regional free trade agreements do not need to extend the preferences negotiated in this context on an MFN basis.
3. A country can invoke temporary «safeguard» protection to one of its industries suffering serious injury due to a surge of imports.
4. Temporary quantitative restrictions can be invoked by a country with serious balance of payment problems.

In the latter two cases, these measures are temporary exceptions to the member’s commitment to the GATT, and a public investigation has to be undertaken to allow for limited relief from GATT obligations.

### Most-Favored-Nation (MFN) Treatment.

The most-favored-nation clause has been the pillar of the system since the inception of the GATT in 1947 and is equally the cornerstone of the new WTO multilateral trading system. The provision of MFN treatment essentially means non-discriminatory treatment among the Members. Article I of GATT 1994 states that “any advantage, favor, privilege or immunity granted by any contracting party (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 contracting parties (Members)”.

This commitment is the starting-point of the WTO system of rights and obligations. It is fundamental to all the multilateral trade agreements annexed to the WTO Agreements. Quite contrary to its name, this provision does not mean any special favor to any country; in fact, it prohibits special favors even to the friendliest country. What this principle actually means is that any benefit in connection with exporting or importing given to a product of a most favored nation (whether a member or not) has to be given to the like product of all Members without discrimination. According to Article I of both GATT1947 and GATT1994, the famous “most-favored-nation” clause, members (or the Contracting Parties to the GATT 1947) are bound to grant to the products of other members (Contracting Parties) treatment no less favorable than that accorded to the products of any other country. Besides, members of the WTO have entered into this commitment under the GATS (Article II) in relation to treatment of service suppliers and trade in services, and under the TRIPs (Article 4) in regard to the protection of intellectual property. No reason whatsoever is sufficient to justify any deviation from MFN treatment. Thus, no country is to give special trading advantages to another or to discriminate against it. All are on an equal basis and all share the benefits of any moves towards lower trade barriers.

The principle of MFN treatment applies to both imports and exports, i.e., when a Member:

* imports like products originating in the territories of other Members, and
* exports like products destined for the territories of other Members.

For example, if Member country A has been imposing a customs duty of 10% on steel bars, and if it now starts charging only 6% duty on the steel bars of any particular country (whether a Member or not), it has to reduce the duty to 6% for the steel bars of all Member countries. Similarly, if a Member had earlier banned the export of coal, and now allows its export to a particular country (whether a Member or not), it has to allow export to all Member countries.

Of course, a Member is not bound to give MFN treatment to a country which is not a Member of the WTO. The treatment given to non-Member countries depends on the Member’s bilateral agreements with each one of them. However, if a Member gives a certain trade benefit to a non-Member, then that benefit has to be extended to all Members in accordance with the principle of MFN treatment.

#### Forms of Benefit.

The benefits covered by MFN treatment may be in the form of advantages, favors, privileges or immunities granted by a Member in respect of a product. For example, an advantage may be in the form of a reduced tariff level; a favor may be extended by allowing the export of a raw material which was not allowed earlier; a privilege may be in the form of exemption from a tax; and immunity may be given by exemption from a health hazard test. The obligation on a Member is to give these benefits immediately and unconditionally to the like products of all Members once these have been given to a product of any country.

#### Coverage of Benefit

The benefits which have to be extended to all Members may be with respect to the following items:

* Customs duties, i.e., the tariff imposed at the time of importation;
* Charges of any kind imposed on importation or exportation, e.g., import surcharge, variable levy, excise duty or export tax;
* Charges of any kind imposed in connection with importation or exportation, e.g., customs fee, consular fee, quality inspection fee;
* Charges imposed on the international transfer of payments for imports or exports, e.g., some tax or fee charged by governments at the time of these transfers;
* The method of levying such duties and charges, e.g., the method of assessing the base value on which the duty or charge is calculated, or the type of forms seeking information which will help in calculating the amount to be charged;
* All rules and formalities in connection with importation and exportation, e.g., requirement of giving specific information or declarations at the time of import or export;
* Internal taxes or other internal charges, e.g., sales tax, charges imposed by local bodies;
* Laws, regulations and requirements affection internal sale, offering for sale, purchase, transportation, distribution or use of any product, e.g., requirement of quality certificates, restrictions relating to movement, transport, storage or retailing channels, need for particular type of packaging, restriction on use.

The simplest implication of MFN treatment is that a Member cannot apply different rates of customs duty on a product imported from different Member countries. Similarly, in any of the matters mentioned above, a Member cannot give different treatment to different Member countries, nor can it give better treatment to a non-Member country.

For example, if a Member charges a 10% import duty on a product, say textile machinery, imported from Member countries, it will not be permissible to charge only a 5% duty on the textile machinery coming from a Member country which has allowed aid to buy this product. Similarly, if a Member charges a 3% customs duty on a product coming from Member countries in general and now wishes to raise it to 5% for an unfriendly Member, it is not permitted to do so. Similar discipline applies to the other matters listed above.

#### Some Important Concepts.

Two important concepts have emerged in defining the scope of obligation of MFN treatment. As described above, the obligation of a Member is to give this treatment to the “like product” of all Members ‘unconditionally’. It is important to understand the implication of these terms.

Like Product: This phrase has not been specifically defined, thus has different meanings in different contexts. On several occasions, serious consideration has been given to this phrase as it has presented problems of interpretation. Some of the broad points which have been considered while determining whether two products are like products are:

* listing of products in the tariff schedule
* duties applied to the products
* process of production
* composition and content
* chemical and synthetic origin.

For example, Spain had divided unroasted coffee into five tariff classifications: Colombian mild, other mild, unwashed Arabica, Robusta and other. The first two were duty-free and the other three were subject to a 7% duty. Brazil claimed that all these were like products and that different rates of duty were inconsistent with Article I. The Panel on Spain’s Tariff Treatment of Unroasted Coffee (June 1981) noted that the arguments given for differentiation were based on geographical factors, cultivation methods, the processing of the beans and genetic factors. The Panel did not consider such grounds as sufficient for differentiation and noted that no other Member made such a classification. It concluded that these should be considered like products within the meaning of Article I.

Unconditional Application of Benefits: MFN treatment has to be extended to Members immediately and unconditionally. If a Member formulates an improved set of rules on the trade of goods within the framework of GATT 1994, it cannot limit the application of these rules to only those Members that fulfill some conditions. For example, it cannot say that the improved rules will be applicable only to those that undertake to adopt similar rules. Such a limited application will be treated as a conditional application, and will not be allowed.

For example, the Working Party on the accession of Hungary examined in 1973 the practice of providing certain benefits of tariff treatment only to countries which had a cooperation contract with Hungary. During the course of examination of this matter, the GATT Secretariat gave, on request, a legal opinion that the prerequisite of having a cooperative contract in order to get beneficial tariff treatment appeared to imply conditional MFN treatment and would not appear to be compatible with Article I.

Another example is the US. Before China’s accession to the WTO, the US Congress reviewed annually the MFN treatment to China. This treatment was always connected with non-business issues such as the Taiwan Question, the Tibetan minority nationality, the Tiananmen Square Incident, and human rights. After China’s WTO accession, these practices are not allowed any longer.

#### Some Considerations.

Coverage of unbound duty. If a Member is committed not to raise the customs duty on a product beyond a particular level, the duty is said to be bound, otherwise, the duty is unbound. The MFN treatment obligation applies equally to bound and unbound customs duties.

Balancing of treatment not permissible. Each relevant measure or step has to satisfy the condition of MFN treatment by itself. A Member is not allowed to give less favorable treatment in one case to balance more favorable treatment in another case.

Goods transited through several countries. The benefits apply to products “originating in” the territories of Members. This phrase signifies that even if the product might have passed through some other countries on the way, it has to be given the particular benefit in the importing Member country based on its country of origin.

Possibility of circumvention. There may be cases where the rules and procedures appear non-discriminatory and yet the application of these rules and procedures causes discrimination in actual practice. For example, the Panel report on EEC’ Imports of Beef from Canada (March 1981) examined an EEC regulation imposing a levy-free tariff quota on high-quality grain-fed beef. The suspension of import levy was conditional on the production of a certificate of authenticity. The Panel found that the only authorized certifying agency was a US agency authorized to certify only meat from the US. The Panel concluded that the regulation had the effect of preventing access of like products from other countries and was thus inconsistent with Article I.

#### Exceptions.

Some provisions of GATT 1994 and some decisions of Members have provided for exceptions to MFN treatment.

Enabling clause: A measure agreed at the end of the Tokyo Round in 1979 and normally referred to as the «enabling clause», provides a permanent legal basis for the market access concession made by developed to developing countries under the generalized system of preferences (GSP). GSP is a system of tariff preferences accorded by developed countries to developing countries. It allows developed Members to accord differential and more favorable treatment to developing countries without according such treatment to other Members and, to that extent, it is a relaxation of the MFN clause.

The treatment covered by this exception is specified as follows: Differential and more favorable treatment in respect of non-tariff measures governed by the provisions of instruments multilaterally negotiated earlier under the auspices of the GATT and now within the framework of the WTO. Through this exception, special treatment was given to developing countries in various Codes which emerged after the Tokyo Round and in various agreements resulting from the Uruguay Round. Arrangements among developing countries as a whole or among a few of them on tariff preferences. Special treatment of the least developed countries in the context of general or special measures in favor of developing countries.

Free-Trade Area, Customs Union: A group of Members may constitute themselves into a customs union or a free-trade area, and have totally free trade or reduced levels of duties and of other trade-restrictive regulations among themselves without the obligation of extending such treatment to other Members.

A free-trade area is a group of two or more countries in which duties and other trade-restrictive regulations are eliminated on substantially all the trade between these countries. A customs union is a group of countries forming themselves into one customs territory in which duties and other trade-restrictive regulations are eliminated with respect to substantially all the trade between the countries or, at least, with respect to substantially all the trade in products originating in these countries. Further, the Members constituting the customs union should apply substantially the same duties and other trade regulations to the products of countries outside the union.

Disciplines followed while forming a free-trade area or a customs union:

1) At the time of the formation of a customs union, the duties and other trade regulations applied to Members outside the union must not be, on the whole, higher or more restrictive than what were applicable in these countries prior to the formation of the union.

2) In respect of a free-trade area, the duties and other trade regulations in the countries forming the area should not be higher or more restrictive at the time of formation of the area than what they were in these countries prior to the formation of the area.

Frontier Trade: Advantages accorded by a Member to adjacent countries in order to facilitate frontier traffic are permitted (Article XXIV.3 of GATT 1994).

Government Procurement: The MFN obligation of Article I does not apply to the import of products for immediate or ultimate consumption in government use and not otherwise for resale or use in the production of goods for sale. There is a special plurilateral agreement governing such purchases.

General Exceptions: Article XX of GATT1994 allows Members to restrict imports or export from/to specific sources. Such measures can be taken for some specified purposes, for example, for the protection of public morals, protection of human, animal or plant life or health, etc.

Security Exception: Restrictions on imports and exports from/to specific countries can be imposed for security reasons in accordance with Article XXI of GATT1994.

The basic objective of the MFN treatment principle is to strengthen the multilateral process in international trade policy. When two countries exchanging tariff concessions between themselves extend these new tariff levels to all Members, the principle that gets emphasized is that all Members have an expectation of sharing the benefits of the system. In the same way, when a Member gets into some difficulty, for example, because of a balance-of-payments problem or increased imports, all Members get prepared to share the burden of reduced export opportunities into the territory of that Member.

The multilateral process is further eroded by the formation of large regional trading blocs. If the world is divided into a few very large trading blocs, the relevance of the multilateral system will be very much reduced. Another risk to the multilateral process comes from unilateral action or the threat of such action from economically strong Members of the system. It reduces the confidence of the weaker Members in the efficacy and effectiveness of the system.

### National Treatment.

National treatment is also an important basic principle in the WTO agreements. MFN essentially means non-discrimination as among Members, while NT means non-discrimination as between domestic products or services and imported products or services. Basically, the principle of NT prescribes the obligation that an imported product, after entering the country of import, should be treated as a national product. The national treatment principle condemns discrimination between foreign and national goods or services and service suppliers or between foreign and national holders of intellectual property rights. Imported goods, once duties have been paid, must be given the same treatment as like domestic products in relation to any charges, taxes, or administrative or other regulations. With regard to the protection of intellectual property rights, and subject to exceptions in existing international conventions, Members of WTO are committed to grant to nationals or other Members treatment no less favorable than that accorded to their own nationals. GATS, however, due to the special nature of trade in services, deals with national treatment under its Part III, Specific Commitments, where national treatment becomes a negotiated concession and may be subject to conditions or qualifications that Members have inscribed in their schedules on specific commitments in trade in services.

The main objective of this principle is to ensure that the effects of tariff concessions are not frustrated by providing indirect protection to domestic products. These disciplines aim at establishing competitive conditions for imported products in relation to domestic products and at providing equal opportunities to imported products and domestic products in the domestic market.

#### Basic Discipline of NT.

Imported products must not be subject to internal taxes or other internal charges in excess of those applied to like domestic products. For example, an exercise tax which is applicable to a domestic product cannot be applied to an imported product at a rate higher than that applicable to the domestic product. Similarly, an imported product cannot be subject to a charge which, for example, is in the nature of a contribution to a fund meant for facilitating imports, if such a charge is not levied on the like domestic product.

Imported products must not be accorded treatment less favorable than that accorded to like domestic products with respect to laws, regulations and requirements affecting their sale, purchase, transportation, distribution or use. For example, it is not permissible to lay down a condition that an imported product must be stored in particular types of warehouses or must be transported by particular types of vehicles, when no such conditions apply to a like domestic product.

A Member cannot have any quantitative regulation requiring compulsory utilization of a product from a domestic source in preference to using a like imported product. For example, it cannot be prescribed that in the manufacture of a chemical, a certain quantity or proportion of a constituent must be obtained from domestic sources.

A Member cannot apply internal taxes or other internal charges or internal quantitative regulations in a manner so as to afford protection to domestic production. Here, “domestic production” does not mean only the production of that particular product; it also means the production of directly competitive or substitutable products. This means that even if the taxes or charges are applied at the same rate on the imported and like domestic products, the manner of application should not afford protection to domestic production. Clearly, a distinction is to be drawn between a ‘like product’ and a ‘directly competitive or substitutable product’. For example, a country may apply a very high internal tax rate on oranges which is applicable to both imported and domestic products, but if this country does not produce oranges, this tax, in effect, goes to raise the price of only imported oranges. And in this manner, this country may be affording protection to its own production of apples, in so far as oranges are directly competitive or substitutable with apples.

#### Important Concepts.

Two concepts need elaboration, that is, what constitutes the “like product”, and what are the determinants for concluding that “discrimination’ against an imported product has taken place or that the domestic product has been “protected”.

Like Product: product with similar qualities, not necessarily an identical or equal product. Some of the factors to be considered are: properties, nature, quality and end use. While deciding whether an imported product is a like product in relation to a domestic product, one has to be guided by the basic objective that imported products should not be exposed to more rigorous competitive conditions, and domestic products should not enjoy a more favorable situation of competition.

Sample cases on “like products”

1) The Panel on US-Taxes on Petroleum and Certain Imported Substances (June 1987) examined the differential internal taxation on domestic and imported petroleum and some petroleum products. It found that the domestic products were crude oil, crude oil condensates and natural gasoline, and the imported products were crude oil, crude oil condensates, natural gasoline, refined and residual oil, and certain other liquid hydrocarbon products. It concluded that either the domestic products and imported products were identical or they served substantially identical end uses. The Panel considered them like products.

2) The Panel on US-Measures Affecting Alcoholic and Malt Beverages (June 1992) considered the exercise tax exemption on wine made from a particular type of grape, i.e., scuppernong grapes. On the complaint of Canada that this practice was inconsistent with Article III, the US argued that the tax provision was uniformly applicable to all wines produced from this particular variety of grape. The Panel examined this question based on the usual criteria of end use, consumer tastes and habits, and the properties, nature and quality of the products, and also on the objective of Article III. The Panel found it relevant to consider whether the differentiation of the products was being made so as to afford protection to domestic production. It observed that tariff classification and tax laws in the US did not claim any public policy purpose for this tax provision except the purpose of subsidizing the small local producers. The Panel concluded that unsweetened still wines were like products and that the differentiation in the tax regulation was affording protection to local products and was therefore inconsistent with Article III.

Discrimination against Imported Products, Protection of Domestic Products:

Discrimination against imported products or protection of domestic products can often be easily detected if done through differential internal taxes or differential internal charges. However, it is not easy if the discrimination or protection is alleged in respect of laws, regulations and requirements affecting sale, purchase, transportation, distribution and use. This matter has been the subject of a large number of disputes in the past. Certain principles have evolved in the course of the consideration of this issue by the various panels. Some of these important principles are given below.

Any requirement on the imported product going beyond the obligation to indicate the origin of the product would be considered inconsistent with Article III 1994 if it dose not also apply to the domestic product. For example, there was a Hawaiian regulation that firms which sold imported eggs had to display a placard stating “we sell foreign eggs”. Australia complained that this requirement affecting sale was inconsistent with Article III.4. The regulation was later withdrawn.

Granting financial facilities, e.g., special credit facilities, tax refunds or tax remission or exemption, for the purchase of domestic products would be considered discriminatory against imported products and as protection of domestic products. For example, the Panel on US Measures Affecting Alcoholic and Malt Beverages (June 1992) examined the US tax measure providing excise tax exemption for domestic producers of beer and wine, which was not available for imported products. The Panel found that the tax law operated to create a lower tax rate on domestic beer and wine than on like imported products and that thus it was discriminatory.

If investors or local industry or importers are obliged to purchase domestic products, there is a denial of opportunity to the like imported products for competing in this particular market. Hence, it would be considered discriminatory against the imported products. For example, the Panel on Canada-Administration of Foreign Investment Review Act (June 1983) examined the Canadian system of written undertakings on purchase and export. Investors were required to give an undertaking to purchase goods of domestic origin. The Panel held that such a requirement clearly meant that imported goods were less favorably treated than domestic goods and that hence, this provision was not consistent with Article III. Further, even if the undertaking was conditional on the goods being competitively available in Canada, the less favorable treatment still held as it resulted in giving preference to domestic products when imported and domestic products were available on equivalent terms.

Imported products cannot be subjected to any special processing requirement which is not obligatory for the domestic product. For example, the UK had a regulation that domestic poultry, after slaughter, could be chilled by any method, whereas imported poultry was to be cooled by only the spin-chill method. The US complained about it and a panel was formed, but the matter got settled in the meantime.

If imported products are required to pass through certain specified wholesale or retail channels or some specified means of transport and if this requirement is not applicable to domestic products, such a requirement will be held to be discriminatory against the imported products. For example, the Panel on US Measures Affecting Alcoholic and Malt Beverages (June 1992) considered a requirement in some states of the US that imported beer and wine be sold only through in-state wholesalers or other middlemen, while some in-state like products were permitted to be sold directly to retailers. The US argued that in-state breweries and wineries bore the same costs as did the wholesalers in respect of record-keeping, auditing, inspection and tax collection. It also said that most in-state beer and wine producers preferred to use wholesalers rather than to market their products directly to retailers. The Panel held that Article III requires relative competition opportunities in the market, irrespective of the actual choices made by enterprises, and that denial of such opportunities creates less favorable treatment to the imported products. This Panel also examined the requirement of some states in the US that alcoholic beverages imported into the state be transported by common carriers authorized to operate as such within the state, whereas in-state producers of alcoholic beverages could deliver their products to customers in their own vehicles. The Panel concluded that such a requirement resulted in less favorable treatment to imported products.

A regulation that domestic products and imported products should both adhere to a minimum-price requirement is not consistent with Article III of GATT 1994, even though the regulation is equally applicable to both domestic and imported products. For example, the Panel on Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (February 1992). The Panel was of the opinion that this practice did not necessarily accord equal conditions of competition to imported and domestic products in the sense that the imported product was prevented from being supplied at a price below that of the domestic product.

#### Important Considerations.

Products with unbound duty: A Member cannot justify a higher internal tax rate on an imported product on the grounds that it could, in any case, apply a higher tariff on the product not subject to tariff binding.

Balancing not allowed: The obligation of national treatment has to be undertaken as applicable to each individual case of imported products. Thus less favorable treatment accorded to an imported product cannot be justified on the grounds that it has received more favorable treatment in another way, or that another product from the exporting country has received more favorable treatment.

Different regional treatment: When a domestic product is given different treatment in different regions of a country, the treatment which is the most favorable among these is to be accorded to the like imported product.

Measure having negligible effect: Some countries, while defending measures which seemingly violate the obligations of national treatment, have argued that the measures had only a negligible effect on trade and that, therefore, they cannot be causing adverse effects on the imported products. In the course of consideration of this issue in the past, the position which is well established by now is that the actual trade effect is not an important point to be considered; what is crucial to the issue is whether competitive conditions for the imported products in relation to domestic products have been adversely affected. A measure is considered inconsistent with Article III of GATT 1994 if it disturbs the competitive conditions of the imported products getting more favorable treatment compared to the imported products may be negligible in quantity or even if the domestic products might not have effectively received any advantage from the measure. Thus, even in the absence of a trade effect, a case of violation could occur.

For example, the Panel on US-Measures Affecting Alcoholic and Malt Beverages (June 1992) examined a complaint regarding the reduction of excise duty for some domestic products. In the Panel hearing, the US argued that only 1.5% of domestic beer was eligible for the reduction in the excise tax on beer and less than 1% benefited from the reduction, hence, the tax neither discriminated against imported beer nor provided protection to domestic production. The Panel was of the opinion that Article III protects competitive conditions between imported and domestic products and that this protection is not conditional on trade effects.

#### Exceptions.

The obligation of national treatment does not apply to laws, regulations or requirements governing government procurement where products are purchased for the use of the government and not for commercial resale nor for use in production of goods for commercial resale.

The obligation of national treatment does not prevent payment of subsidies exclusively to domestic producers. In this connection, a US tax measure providing credit against excise taxes to domestic producers of beer and wine came up for consideration in the Panel on US-Measures Affecting Alcoholic and Malt Beverages (June 1992). The US argued for exemption from the obligation of national treatment on the grounds that the measure in question was in the nature of a subsidy. The Panel noted that the word “payment” of subsidies in Article III refers only to direct subsidies involving payments and not to other measures like tax credits or tax reduction.

A new exception appears in the Uruguay Round Agreement on Subsidies and Countervailing Measures. Subsidies contingent on the use of domestic goods over imported goods are allowed, in the case of developing countries, for five years from the date of the coming into force of the WTO Agreement. For the least developed countries, they are allowed for eight years from that date.

The local content requirement (requirement that permission for investment will be conditional on the use of domestic products to some extent) and the limitation on the use of imported products (related to the value or volume of the domestic products that the firm exports) have been declared to be inconsistent with the obligations of Article III of GATT 1994 in the Agreement on TRIMs. Developed country Members have, however, been given two years from the coming into force of the WTO Agreement to eliminate these measures if they have them. For developing Members, this period is five years and for least developed country Members, it is seven years.

#### Emerging Problems.

So far, the criteria of determining like products have been based on the characteristics of the products; attempts have been initiated to broaden the scope so as to include in the criteria even the method of production of the products. This is the emerging problem. For example, suppose the imported product is produced in factories which pollute the environment by discharging harmful fluids into the neighboring river. At present, this aspect of the production will be totally irrelevant in comparing this imported product with the domestic product having similar composition, use and other characteristics. The domestic product and the imported product will be considered like products, and, as such, the imported product will have the benefit of national treatment.

Now, attempts are being made to distinguish the imported product from the domestic product on the grounds of whether the production process of the former causes pollution to the environment. If this is accepted as a criterion for determining the like product, the imported product will be declared as not being a like product, and thus will not have the benefit of national treatment.

## 2. Progressive trade liberalization and Transparency

### Increased market access.

The multilateral trading system is an attempt by governments to provide investors, employers, employees and consumers with a business environment which encourages trade, investment and job creation as well as choice and low-prices in the market place. Such an environment needs to be stable and predictable, particularly if businesses are to invest and thrive. Predictable and growing access to markets for goods and services is an essential principle of the WTO.

#### Binding of tariffs:

The existence of secure and predictable market access is largely determined by the use of tariffs, or customs duties. While quotas are generally outlawed, tariffs are legal in WTO and are commonly used by governments to protect domestic industries and to raise revenues. However, they are subject to disciplines - for instance, that they are not discriminatory among imports - and are largely “bound”. Binding means that a tariff level for a particular product becomes a commitment by a WTO member and cannot be increased or raised beyond the bound level without compensation negotiations with its main trading partners. Thus, it can be the case that the extension of a customs union can lead to higher tariffs in some areas for which compensation negotiations are necessary. The bound tariff on a product can be higher than the tariff actually applied. The developed countries have normally bound their tariffs at the applied levels. Developing countries, however, have adopted commitments on “ceiling bindings”, that is, bindings at levels higher than the applied rates. This has allowed developing countries to substantially increase their bound commitments, thus underpinning their open markets policies, while keeping a certain margin for protection in case of need.

#### Prohibition of quantitative restrictions:

While tariffs are legal in WTO and are commonly used by governments to protect domestic industries and to raise revenues, quotas are generally outlawed. Article XI of GATT 1994 sets out a general prohibition of quantitative restrictions, whether on imports or exports. In some special cases and for specific reasons, such as safeguard action, balance-of-payment, protection of public health or national security, quantitative restrictions can be introduced under strictly defined criteria.

Article XIII of GATT 1994 stipulates that prohibitions and quantitative restrictions, when applied, should be administered on a non-discriminatory basis, i.e. to all trading partners equally. In applying import restrictions, Members should aim at a distribution of trade approaching as closely as possible the shares various supplying countries would have obtained in the absence of the restrictions. Furthermore, quotas should be allocated among supplying countries based upon the proportions supplied by the various supplying countries during a previous representative period.

The “tariffication” of all non-tariff import restrictions for agricultural products provided a substantial increase in the level of market predictability for agricultural products. More than 30% of agricultural produce had been subject to quotas or import restrictions. Virtually all such measures have now been converted to tariffs which, while initially providing substantially the same level of protection as previous non-tariff measures, are being reduced during the six years of implementation of the Uruguay Round agricultural agreement. The market access commitments on agriculture will also eliminate previous import bans on certain products.

#### Tariff negotiations and progressive reduction in protection:

Following the establishment of the GATT in 1948, average tariff levels fell progressively and dramatically through a series of seven trade rounds. The Uruguay Round added to that success, cutting tariffs substantially, sometimes to zero, while raising the overall level of bound tariffs significantly. The commitments on market access through tariff reductions made by over 120 countries in the Uruguay Round are contained in some 22,500 pages of national tariff schedules.

Tariff reduction, for the most part phased in over five years, will result in a 40% cut in developed countries’ tariffs on industrial products, form an average of 6.3% to 3.8%, and a jump from 20 to 44% in the value of imported industrial products that receive duty-free treatment in developed countries. At the higher end of the tariff structure, the proportion of imports into developed countries from all sources that encounter tariffs above 15% will decline from 7 to 5% and from 9 to 5% for imports from developing countries.

The Uruguay Round increased the percentage of bound product lines from 78 to 99% for developed countries, 21 to 73% for developing economies and from 73 to 98% for economies in transition results which are providing a substantially higher degree of market security for traders and investors.

#### Tariff renegotiations and compensation:

The contractual nature of a bound tariff concession lies in the fact that the tariff rate cannot be increased beyond the bound level. However, countries would not enter into this kind of commitment without the possibility of revision when the situation of a domestic industry so requires. The GATT 1994 allows for the possibility of renegotiations. A Member desiring to withdraw or modify tariff bindings has to renegotiate them with other interested Members and provide compensation, that is, substantially equivalent tariff concessions on other products.

### Transparency.

The principle of transparency is realized through four schemes:

1) The obligation of notification: A WTO Member should notify the relevant WTO committees and explain any changes in trade policy, legislation and judicial decisions so long as they fall within the administration of the WTO.

2) Consultation: When a Member brings a charge against another over a trade dispute, the dispute should first be solved through consultation, political decision and mediation and then be handled by expert groups. For example, if the commodity trading council of the WTO discovers a change in the rise of tariff duties of car imports to Japan or more difficulties in auto importing by its sale networks, the council will conduct consultation among its members so as to demand that the Japanese government make changes within a rational time limit.

3) Transparency in domestic law making: Transparency should be reflected in domestic law making. Whenever a domestic law or regulation is created, opinions of the relevant departments should be solicited extensively. In addition, the opinions and suggestions concerning the same trades and industries abroad should also be considered. The Chinese government, for example, has begun housecleaning of rules, regulations, administrative documents, and internal documents of every department in line with the requirements of the basic rules of the WTO.

4) Unified implementation: Laws and regulations affecting trade are to be implemented uniformly in every region of the Member-state. Treatment has to be nondiscriminatory, enabling equal conditions for market participants to engage in fair competition.

## 3. Rules on Fair Competition

The WTO is not the “free-trade” institution as it is sometimes described - if only because it permits tariffs and, in limited circumstances, other forms of protection. It is more accurate to say it is a system of rules dedicated to open, fair and undistorted competition. Rules on non-discrimination are designed to secure fair conditions of trade and so too are those on dumping and subsidies.

Dumping refers to such a trade practice that enterprises export products at very low prices in order to capture markets abroad and to eliminate competition. Article VI of GATT 1994 defines dumping as the introduction of a product into the commerce of an importing country at less than its normal value, that is, less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting Member.

Subsidies are benefits provided by governments to producers and exporters of products which improve their competitiveness in international trade and thereby distort competition.

Both dumping and subsidies are considered to be unfair practices; the difference is that the former is adopted by firms and enterprises, whereas the latter, by Member governments. Anti-dumping duties may be applied in order to offset or prevent dumping, and countervailing duties for the purpose of offsetting any subsidy on the manufacture, production or export of any merchandise. In both cases, such duties may only be imposed if imports of dumped or subsidized products cause or threaten to cause material injury to an established industry in the importing country or materially retard the establishment of a domestic industry.

## 4. Encouraging Development and Economic Reform

Over three-quarters of the WTO Members are developing countries and countries in the process of economic reform from non-market systems. During the seven-year course of the Uruguay—between 1986 and 1993 - over 60 such countries implemented trade liberalization programs. Some did so as part of their accession negotiations to the GATT while others acted on an autonomous basis. At the same time, developing countries and transition economies took a much more active and influential role in the Uruguay negotiations than in any previous round.

This trend effectively killed the notion that the trading system existed only for industrialized countries. It also changed the previous emphasis on exempting developing countries from certain GATT provisions and agreements. With the end of Uruguay, developing countries showed themselves prepared to take on most of the obligations that are required of developed countries. They were, however, given transition periods to adjust to the more unfamiliar and, perhaps, difficult WTO provisions particularly so for the poorest, «least-developed» countries. In addition, a Ministerial decision on measures in favor of least-developed countries gives extra flexibility to those countries in implementing WTO agreements; calls for an acceleration in the implementation of market access concessions affecting goods of export interest to those countries; and seeks increased technical assistance for them. Thus, the value to development of pursuing, as far as is reasonable, open market-oriented policies, based on WTO principles, is widely recognized. But so is the need for some flexibility with respect to the speed at which those policies are pursued.

Nevertheless, the provisions of the GATT intended to favor developing countries remain in place in the WTO. In particular, Part IV of GATT 1994 contains three articles, introduced in 1965, encouraging industrial countries to assist developing nation members “as a matter of conscious and purposeful effort” in their trading conditions and not to expect reciprocity for concessions made to developing countries in negotiations. A second measure, agreed at the end of the Tokyo Round in 1979 and normally referred to as the “enabling clause”, provides a permanent legal basis for the market access concession made by developed to developing countries under the generalized system of preferences (GSP).

## 5. Single undertaking

Single undertaking implies that WTO members must accept all of the obligations of the GATT, GATS, TRIPs and any other corollary agreements. This ends the «free ride» of some developing countries which under the old GATT could receive the benefits of some trade concessions without having to join in and undertake their full obligations.

## Questions

1. Which techniques may be employed by states to lower imports?

2. Are export controls compatible with GATT?

3. What are like products for MFN purposes?

4. Discuss the major exceptions to the GATT’s MFN obligation.

5. Describe the national treatment obligation under the GATT.

## References

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# Lecture 4. Issues on market access

WTO envisages regulates instruments countries may use under strict conditions to regulate access to their markets. These instruments can be in form tariff and nontariff restrictions. In this respect WTO sets up rules on usage of tariffs, safeguards, measures under balance of payment provisions, technical barriers to trade, sanitary and phytosanitary measures, trade-related investment measures.

## 1. Tariffs

A tariff is a tax or duty levied on the traded commodity as it crosses a national boundary. Purpose of tariff is, that governments get revenue through tariffs, and an important source of income for developing countries in particular.

Tariffs provide protection to local industry, for domestic products become relatively cheaper than like imported products after the imposition of tariffs. Differential tariffs can be used to bring about a rational allocation of foreign exchange if it is scarce, for example, high tariffs on luxury goods and low tariffs on industrial machinery.

There are three basic types of tariff:

* Ad valorem, levied as a percentage of the value of the imported product
* Specific, levied on the basis of the quantity of an imported product
* Combined

For example, the ad valorem tariff on a bicycle is 6% and, in addition, $30 specific tariff per bicycle. If the imported value of 5 bicycles is $1,000, the cost of importing the five bicycles will be $1,210.

Earlier, various Members had different systems of tariff classification, which made it difficult for a country to assess the impact of the tariffs of another country on its own export prospects. Now, Members are required to convert their customs tariff to the Harmonized Commodity Description and Coding System (HS). In HS classification, broad categories of products are assigned numbers going from one to two digits. Thereafter, further divisions and subdivisions are made on the basis of the decimal system. For example:

85 Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles

8501 Electrical motors and generators (excluding generating sets)

8501.10 Motors of an output not exceeding 37.5W

8501.10 10 Synchronous motors of an output not exceeding 18W

8501.10 93 AC (alternating current) Motors

8501.20 Universal AC/DC motors of an output exceeding 37.5 W

Through the addition of numbers on the right, more and more subdivisions can be made, and the products can be further differentiated. In this way, comparison of tariffs among different countries becomes easy.

### Binding of tariffs.

The GATT agreement establishes the rule for countries to bind their tariff rates. Implications of tariff binding are that, countries can bind tariffs on some products at particular levels through multilateral or bilateral trade negotiations. A Member normally cannot raise the levels of tariffs beyond the bound levels, but is free to apply the tariff on a product at a level lower than the bound level.

There are two major of approaches of tariff binding – ‘formula approach’ and ‘request-offer approach’:

Formula approach: In the Multilateral Trade Negotiations, this approach is preferred.

* reducing tariffs by a certain percentage over a period of time;
* laying down a peak level beyond which a Member would not apply tariffs on the bound items;
* prescribing an overall reduction of the average tariff level by a certain percentage, with a minimum percentage reduction in each tariff line;
* laying down a minimum percentage of the tariff lines to be covered by binding.

Once the formula is decided, Members work out their charts of reductions, which are examined by other Members and then recorded in the “schedule”.

Request-offer approach: Two countries sit down and each gives its own request list and offer list to the other for tariff reduction. An attempt will be made to achieve reciprocity as far as possible, that is, equalizing the reduction of total customs duty on each side. For example, if the average value of the export of product P from country A to B is US$200,000 and the tariff is proposed to be reduced by 3%, the loss of revenue to B is US$6,000. This would be the measure of the concession which A should made for B. The final results will be applied to all Members of the WTO.

If country A has to decide on the product to be included in the request list to be presented to country B, A would normally choose a product on the following considerations:

* the existing and potential production prospects for this product in A should be good;
* there should be a good demand or high potential of demand for this product in B;
* the tariff on this product in B should be high, adversely affecting the export of A at present.

Similarly, while choosing a product for inclusion in the offer list, A will take the following points into consideration:

* the product should be needed in A;
* the product should be of export interest to B;
* the reduction of the tariff on this item should not have the possibility of damaging the prospects of the firms producing the product in A.

Increase in tariff beyond binding:

If a Member wishes to raise the tariff on a product above the bound level, it has to offer compensatory concession on some other items.

The Member informs the Council for Trade in Goods about its proposal, and the Council authorizes a negotiation for this purpose;

The negotiation will take place specifically with the following members:

* the member with which the tariff binding concession was initially negotiated, that is initial negotiating rights (INR)
* the member having principal supply interest
* the member having the highest ratio of export of the product in question into the modifying Member country compared to its total export of that product
* other members having a significant share in the market of the modifying Member

Negotiation will take place to decide on the products which will be subjected to tariff reduction and the depth of the reduction in order to offer an almost equivalent concession to the proposed withdrawal or modification of the concession in question, and the final results will apply to all Members;

If agreement is not reached, the modifying Member will be free to take the action as proposed by it, and other Members will be free to withdraw substantially equivalent concessions. The withdrawal has to take place within six months of the action of the modifying Member. A notice of withdrawal has to be given and withdrawal can be effected after 30 days of the notice.

Tariff quota:

The quantity of import up to which a lower level of tariff is applied, and beyond that limit of quantity, the normal tariff in the schedule applies. The tariff quotas included in the schedule are binding. For example, the EC provided for an annual tariff quota of 1.5 million tons of duty-free import of newsprint; beyond that quantity, a duty of 7% was applicable.

Preferential tariff: Concessional rates of tariff applied by developed Members to developing countries under GSP and those applied in a free-trade area.

Tariff escalation: The rate of tariff in a country is higher on a product with a higher level of processing than on one with a lower level of processing or on the basic raw material in a product chain.

|  |  |  |  |
| --- | --- | --- | --- |
| Countries/Products | Raw material | Leather | Leather products |
| Canada | 0.0 | 6.6 | 12.6 |
| EU | 0.0 | 3.7 | 4.3 |
| Japan | 0.0 | 7.0 | 9.4 |
| US | 0.0 | 3.1 | 9.0 |

Tariff escalation has an important implication for the development of industrialization of developing countries. If major developed countries do not apply higher tariffs on products with a higher level of processing, the processing of raw materials in developing countries can be encouraged.

## 2. Safeguards

Article XIX of GATT 1994 provides for emergency action on imports of particular products, and contains the basic principles upon which the WTO Agreement on Safeguards was negotiated during the Uruguay.

Safeguard measures or escape clause are emergency trade measures taken temporarily by a Member to provide relief to its domestic industry in the situation of its getting hurt from an increase in imports. It is an important exception to the general prohibition of quantitative restraints on imports.

Purpose of safeguard measures is to lighten the burden on the country whose domestic industry is facing acute problems due to imports. Safeguards’ objective is to disperse the burden over all the Members to enable the affected Member to adjust smoothly to the new situation of international competition in that particular product line.

MFN treatment results in the sharing of the benefits of multilateralism, while a Safeguard measure is about sharing the burdens. Taking safeguard measures means withdrawal of concession by raising the tariff on a product above the bound level, or modification of the concession by raising the tariff level for imports beyond a particular value or volume, or the imposition of quantitative restrictions to limit the import of a product.

If the tariff is not bound, or if the applicable tariff is lower than the bound level, a Member is free to raise the tariff (up to the bound in the latter case).

### Preconditions:

* Imports of the product should have increased either absolutely or relatively.
* The imports should be to cause or threaten to cause serious injury to domestic producers of like or directly competitive products.
* The increased imports should be the result of unforeseen developments.
* The increased imports should be the effect of the obligations of the Member in GATT 1994, such as the result of a tariff concession given by the Member in respect of that product.

Relative increase: Suppose that the domestic production and import of a product in the past were, respectively 9,000 and 1,000 units, and now, these are, respectively 4,000 and 800 units. Therefore, earlier, the import was 11% of domestic production, and now, it has risen to 20%. This is a case of relative increase, because the actual volume of import has decreased.

Serious injury: There is no specific criteria for serious injury, thus a case-by-case exam is needed. Some guidelines have, however, been provided:

* the rate and amount of the increase in imports of the product, in absolute terms or relative to domestic production;
* the share of the domestic market taken by increased imports;
* changes in the levels of sales, production, productivity, capacity utilization, profits and losses, and employment.

The threat of serious injury means serious injury being clearly imminent on the basis of facts and not merely on allegation, conjecture or remote possibility.

Domestic industry: means all the producers of like or directly competitive products in the country, or at least, those whose collective production of like or directly competitive products forms a major proportion of the total domestic production of those products. Thus, if only a small number of producers having a small share in domestic production have suffered serious injury, the cause of action would not arise.

### Procedure for taking safeguard measures:

A competent authority has to be designated to hold investigations on the existence of the preconditions for taking safeguard measures.

Investigation:

A Member has to notify the Committee on Safeguards, and give public notice to all interested parties, that is importers, exporters and others. Public hearings will be conducted so that interested parties are able to present evidence, views and response accordingly.

The competent authority determines whether there has been an increase in the import of the product, whether serious injury or threat of such injury to a domestic industry has been caused, or whether there is a causal linkage between the increased imports and the serious injury or its threat.

Application of safeguard measures:

Once there is a finding of serious injury or threat of serious injury caused by increased imports, the Member has to notify the Committee on Safeguards about it. Before applying or extending a safeguard measure, a Member has to give notice to all those Members that have a substantial export interest in the product and invite them for consultation, such as reviewing the information provided by the Member proposing safeguard action, exchanging views on the proposed measure.

Types of safeguard measures:

* a tariff measure: increase in import duty beyond the bound level, imposition of surcharges or surtaxes, compensatory taxes on the product
* a non-tariff measure: fixing global quotas for import, introducing discretionary licensing, etc
* Provisional measure: When there is a sudden surge of imports, or when the domestic industry needs immediate relief because of a rapidly emerging adverse situation as a result of the increased imports, a Member can take urgently provisional safeguard measures in the form of a tariff increase for a maximum duration of 200 days. The provisional measures should be withdrawn if further investigation finds no evidence of serious injury or there is no link between the imports and such injury.

### Special disciplines regarding quantitative restrictions:

When taking quantitative restrictions, a Member has to enter into consultations with the Members having substantial interest in the export of the product and decide on the global quota as well as on the shares of individual Members having substantial interest.

Members having substantial interest: Members having 10% share in the market of the importing Member, or having the highest ratio of exports of the product in question to its total exports.

General discipline in fixing quota and shares: The quantity of imports is not reduced below the average level of imports in the last three representative years for which statistics are available.

The previous representative years exclude from the average the imports of a year which is abnormal for some reason or another. For example, the Panel on EEC-Restrictions on Imports of Apples from Chile (November 1980) considered representative years prior to 1979, left out 1976 as there were some restrictions in that year. Hence, the Panel chose the years 1975, 1977 and 1978.

One effective way of applying quantitative restrictions is to decide on a global quota for imports and then allocate this quota among supplying countries based on their proportions of the total quantity or value of imports of that product in the country during a previous representative period.

### Duration of safeguard measure.

General provision: safeguard measure will apply only for the period which is necessary to remedy or prevent serious injury, and to facilitate adjustment of the domestic industry. Moreover, the safeguard measure should be reviewed during the period of application and be liberalized at regular intervals.

Specific limitations: The duration of a provisional measure must not exceed 200 days;

In other cases, the duration will initially be up to four years, but it can be extended to eight years if the competent authority of the Member country has determined that the safeguard measure continues to be necessary and that there is evidence that the domestic industry is adjusting.

The total period of the measure, including the duration of the provisional measure, must not exceed 8 years. A developing country Member can extend the measure for 2 more years, beyond the general limit of 8 years.

### Repeated application of measures:

A safeguard measure cannot be applied again to the import of a product for a period of time equal to that during which the measure had previously been applied or half of the earlier duration for developing country Members. But the period of non-application will be at least 2 years. For example, if a Member had applied a safeguard measure on certain basic chemicals and had continued it for 5 years, it cannot again take safeguard measure against these products for at least five years from the date of discontinuance of the initial measure.

A safeguard measure up to 180 days can be applied again if such a measure has not been applied on the product more than twice in the five years immediately preceding the introduction of the measure.

### Compensation and retaliation:

When a Member introduces a safeguard measure on a product, it has to enter into consultation with the Members having substantial interest in the export of the product for the purpose of equivalent tariff reduction on some other products in which these Members may have an export interest. If the safeguard measure is in the nature of a quantitative restriction, equivalence may be calculated based on an approximate estimate of the imports foregone as a result of the restriction. The selection of products and the extent of the tariff reduction on each of these products will have to be worked out in detailed consultations with the affected Members in order to meet their specific interest.

If the affected Members are not satisfied with the measures taken or the compensation given, they have the option to suspend substantially equivalent concessions or other obligations. But, the right to such suspension cannot be exercised for the first three years of the safeguard measure, provided that:

* the safeguard measure had been taken as a result of an absolute increase in imports;
* the safeguard measure conforms to the provisions of the Agreement on Safeguard;

In other cases, the stipulation of deferment for three years does not apply. In such cases, suspension can be effected on the expiry of 30 days after the notice of suspension has been received by the Committee on Safeguards.

### Termination of pre-existing measures:

A Member must terminate a pre-existing measure, i.e. Grey-Area Measures, within 8 years of the date on which it was first applied or within 5 years of 1 January 1995, whichever comes later.

Grey-Area Measures refer to voluntary export restraints (VER) and orderly marketing arrangement (OMA). VER means an affected country consults with the exporting developing countries and persuades them to limit their export of a product to a specified quantity or value so as to avoid the normal procedure and compensation negotiation. The exporting countries would generally agree to restrain their exports of the particular product in order to avoid more severe unilateral import restraint by the importing country. In fact, there is nothing voluntary about it.

OMA means several importing and exporting countries would arrive at arrangements of the same nature together, under almost similar situations, such as the Multi-Fibre Arrangement (MFA). Sometimes, enterprises of two countries enter into their own agreements resulting in restrictions on exports or imports. Members are required not to encourage or support the adoption or continuance of such non-governmental measures.

### Non-discrimination or selectivity:

The raising of tariffs or the use of other tariff-type charges as a safeguard measure has to be applied to all Members. While applying quantitative restrictions, the safeguard measures shall be applied to a product being imported “irrespective of its source”, that is, safeguard measures cannot target only a few selected Members supplying the product. Though a quantitative restriction has to be applied globally, that is, to all exporting countries, under certain conditions, the shares of the quota may be reduced in the case of some countries and increased in the case of others.

In the past, restraints have been applied as a safeguard measure to the import of products below a particular price level. Though apparently the measures were applied on a non-discriminatory basis, in actual practice, these measures might have had a selective impact on low-cost suppliers. So far, there is no decisive view as to whether or not measures linked to prices are in conformity with Article XIX of GATT 1994.

### Notification:

A Member has to notify its laws, regulations and administrative procedures as well as their modification regarding safeguard measures. A Member may send a notification if it finds that another Member has not fulfilled its obligations.

Notifications have to be sent when:

* an investigation is started;
* existence of serious injury or its threat is determined;
* a decision is taken to apply or extend a safeguard measure
* before taking a provisional safeguard measure

All in all, everything a Member has done in the process of taking safeguard measures should be notified to the Council for Trade in Goods.

Provisions for developing countries:

No safeguard action will be taken against a product originating in a developing country Member as long as its share of imports of the product in the importing country concerned does not exceed 3%.

If several developing country Members are exporting the product to this particular Member country and their individual shares are less than 3% each, safeguard measures will not be taken against the product concerned from these developing country Members so long as their shares collectively account for not more than 9% of the total import of the product in the importing Member country proposing to take safeguard measures.

Special safeguard provisions: There are special safeguard measures in the Agreement on Agriculture and Textiles.

Summary: A safeguard measure is an import restriction which can be adopted in emergency circumstances, when imports have increased in such quantities and conditions that they are the cause of serious injury or threat of such injury to a domestic industry producing a like or directly competing product. An agreement on safeguards, setting out conditions and criteria for these actions, is one of the multilateral trade Agreements. Measures affecting prices, i.e., tariffs, are preferable to quantitative restrictions. However, quantitative restrictions can be applied as safeguard measures in specific cases.

In case of emergency, the importing Member will be free to suspend the obligation or withdraw or modify the concession provided it fulfills certain requirements, i.e.

The suspension of the obligation, or the withdrawal or modification of the concession, shall be temporary, that is, “…to the extent and for such time as may be necessary to prevent or remedy such injury…”.

Action can only be taken after written notification and opportunity for consultation with the WTO (in practice, with its Committee on Safeguards) and with the countries having a substantial interest as exporters of the product concerned. In critical circumstances, where delay would cause damage difficult to repair, action can be taken provisionally without prior consultation, on condition that consultation take place immediately afterwards.

If no agreement is reached during consultations, the Member proposing the action shall be free to do so, and the affected Member or Members shall also be free to suspend the application of substantially equivalent concessions or other obligations under the Agreement to the trade of the party taking the action. The suspension of substantially equivalent concessions or other obligations has to be notified previously to the WTO, and not be disapproved by it.

## 3. Balance-of-Payments Provisions

The Balance of Payment is a summary statement in which, in principle, all the transactions of the residents of a nation with the residents of all other nations are recorded during a particular period of time, usually a calendar year. Obviously, the millions of transactions of the residents of a nation with the rest of the world cannot appear individually in the balance of payments. As a summary statement, the balance of payments aggregates all merchandise trade into a few major categories. The balance of payments includes some transactions in which the residents of foreign nations are not directly involved, for example, when a nation’s central bank sells a portion of its foreign currency holdings to the nation’s commercial banks. Gifts are also included in a nation’s balance of payments. Diplomats, military personnel, tourists, and workers who temporarily migrate are residents of the nation in which they hold citizenship. International institutions such as the United Nations, IMF, the World Bank, and the WTO are not residents of the nation in which they are located.

Article XII of GATT 1994 allows a Member to restrict the quantity or value of merchandise permitted to be imported in order to safeguard its external financial position and its balance of payments. Article XVIII sets out a separate provision on restrictions for balance-of-payments purposes in relation to developing countries.

In the 1979 Tokyo Round Declaration on Trade Measures Taken for Balance-of-Payment Purposes, it was recognized that restrictive trade measures are in general an inefficient means to maintain or restore the balance-of-payments equilibrium. It was also provided that in applying restrictive import measures preference should be given to the measure which has the least disruptive effect on trade.

Article XVIII:B of GATT 1994 permits the use by developing countries of measures to control the general level of imports by restricting the quantity or value of merchandise permitted to be imported in order to safeguard their external financial position and to ensure a level of reserves adequate for the implementation of their programs of economic development. The Uruguay Understanding on Balance-of-Payments Provisions of GATT 1994 encourages all Members, including developing countries, to give preference to “price-based measures” such as import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods.

Members adopting, maintaining or intensifying such measures have the obligation to notify and to consult with the Committee on Balance-of-Payments Restrictions. Consultations with Members maintaining balance-of-payments restrictions under Article XII have to be held annually; for those maintained under Article XVIII: B, they are held every two years. The IMF also participates in these consultations and presents findings of statistical and other facts relating to foreign exchange, monetary reserves and balance of payments.

Purpose: To provide developing countries with some relief and flexibility when they face problems of low inflow and small reserves of foreign exchange.

Provisions: Article XVIIIB permits limiting the quantity or value of imports in order to:

* safeguard the country’s external financial position, and
* ensure a level of reserves needed for economic development programs.

Permissible actions:

Price-based measures: The Uruguay Understanding on Balance-of-Payments Provisions of GATT 1994 encourages all Members, including developing countries, to give preference to “price-based measures” such as import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. If the duty on a product is not bound, a Member is free to raise the duty.

Quantitative restrictions: A Member may totally stop the import of a product or limit the import of a product to a specified volume or value. While applying quantitative restrictions on imports, Members have to justify why price-based measures are not adequate to deal with the problem.

Choice of products: A Member has to justify which products should be covered by the measures. Essential products such as basic consumption goods, capital goods should normally be out of the coverage.

Limitations on BOP:

* Not more than one type of restrictive measure may be applied on the same product.
* The restrictions should not be excessive.
* The measure for BOP reasons should not be taken to protect domestic production.
* Unnecessary damage to the commercial or economic interests of any other Member should be avoided.
* The restriction should not be applied to prevent the import of commercial samples or the import of any product in minimum commercial quantities.
* A member must progressively relax the restrictions as conditions improve and must eliminate the measures when conditions no longer justify their existence.

Notification: A Member applying measures because of BOP difficulties has to send notifications to the WTO Secretariat every year to indicate the types of measure applied, the criteria used for their application, the product coverage of the measures and the trade flows affected by the measures. Besides, a Member must notify the General Council when a new measure is introduced or any change is made in the application of existing measures or any modification is made in the time schedule for the elimination of the measures taken to address BOP difficulties. Significant changes must be notified prior to or not later than 30 days after their announcement.

Consultation: The Member explains the details of the measures and the justification for taking these measures. Other Members ask questions, seek clarifications and make comments.

Simplified consultation: this process may be applied when

* least developed country Members are involved;
* other developing country Members are pursuing liberalization efforts in conformity with the schedule presented in previous consultations;
* the trade policy review of a developing country Member is scheduled for the same calendar year in which the consultation is fixed.

Full consultation: more detailed Plan of Consultations is needed, including BOP position and prospects, alternative methods to restore equilibrium, system and methods of restriction and effects of the restrictions.

## 4. Technical Barriers to Trade

Definition: Governments lay down mandatory technical regulations on products or formulate or encourage the formulation of non-mandatory standards for products for reasons of security, health, environment or easy utilization. However, these regulations and standards may sometimes operate as barriers to imports, and thereby distort international trade.

Objectives: national security, prevention of deceptive practices, protection of human, animal and plant life or health or safety and protection of environment

Technical regulations: a set of rules which lay down:

* the characteristics of a product
* related processes and production methods
* applicable administrative provisions

Standards: formulations approved by a recognized body, providing for rules and guidelines on characteristics of products and related processes and production methods.

Disciplines on technical regulations and standards:

* use of international standards for technical regulations: If there are international standards for regulations in a specific field, Members are obliged to use them as a basis for their own technical regulations. Exceptions are provided when the international standards will be ineffective or inappropriate.
* National treatment and MFN treatment must be applied
* The regulations must not create unnecessary obstacles to international trade

Procedure for formulation of regulations:

* send notice to the WTO Secretariat
* publish a notice indicating its proposal
* other Members make comments

There is, however, an exception for situations where urgent problems of safety, health, environment or national security might arise.

Obligations:

* A reasonable interval between the publication of the regulation and its actual entry into force must be allowed so that the producers in exporting countries will have time to adapt themselves to the new requirements.
* Regulation specifications should be based on product performance rather than design or descriptive characteristics.
* The technical regulations of other Members should be accepted as equivalent if they fulfill the desired objectives.
* Regulations of local government bodies and non-government bodies must be in conformity with the WTO disciplines.
* A Member must establish an enquiry point which is able to respond to enquiries from other Members and interested parties and provide relevant documents relating to central government bodies, local government bodies and non-government bodies.

## 5. Sanitary and Phytosanitary Measures

SPS means trade-restrictive measures for the protection of human life or health and for the protection of plant or animal life or health. Sanitary measures are related to human or animal health, and phytosanitary measures deal with plant health.

Nature and coverage of SPS measures:

SPS measures may be in the form of laws, regulations, requirements, procedures or decrees and may cover products, processes and production methods (PPMs), testing, inspection, certification and approval procedures, requirements for transport of animals or plants, sampling procedures, packaging and labeling requirements directly related to food safety. Some of these measures, like processing requirements or certification, may take place in the exporting country and not upon arrival in the importing country. However, although the measure may be imposed outside the territory of the importing country, its purpose must be to protect health within the territory of the importing country.

Situations: Sanitary and phytosanitary (SPS) measures are those which are applied in order to:

* protect human life or health, or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

For example, restrictions on imports of oranges containing a certain level of pesticide residues, or regulations applied to imports of poultry products containing salmonella (rod-shaped bacteria causing food poisoning, typhoid, and paratyphoid fever in human beings and other infectious diseases in domestic animals) are typical SPS measures. Veterinary drugs given to farm animals are also covered in so far as they may pose a threat to humans later consuming the meat.

* protect animal life or health, or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

For example, an import ban on live cattle originating from herds infected by Bovine tuberculosis would be one example of an SPS measure taken with the objective of avoiding the introduction and spread of the disease to domestic cattle. Another example might be restrictions on certain fruit from areas plagued by the fruit fly.

* protect human life or health from the risks arising from diseases carried by animals, plants or their products, or the entry, establishment or spread of pests;

For example, the spread of rabies (an acute, infectious, often fatal viral disease of most warm-blooded animals, especially wolves, cats, and dogs, that attacks the central nervous system and is transmitted by the bite of infected animals) will be prevented or the banning of imports of meat and meat products originating from foot-and-mouth disease regions will be imposed.

* prevent or limit other damage from the entry, establishment or spread of pests.

For example, the undesired importation of certain weeds can cause major damage in terms of crowding out domestic animal and plant species without necessarily causing a disease.

Purpose: to reduce the possible arbitrariness of governments’ decisions in the field of sanitary and phytosanitary measures by clarifying which factors should be taken into account when imposing health protection measures. The SPS Agreement also encourages consistent and transparent decision-making in determining an appropriate level of health protection, and should not result in unjustified barriers to trade.

Consideration: SPS Agreement should be applied without unjustified discrimination, or be in line with MFN principles and National Treatment principle. SPS Agreement recognizes, however, that the animal and plant disease status may differ among supplying countries, and this must be taken into consideration in the trade measures applied.

### The three standard-setting international organizations:

1) FAO/WHO Codex Alimentarius Commission: based in Rome, is a subsidiary organ of the Food and Agriculture Organization of the UN (FAO) and the World Health Organization (WHO). The SPS Agreement designates Codex as the authority for all matters related to international food safety evaluation and harmonization (Harmonization means the establishment of national sanitary and phytosanitary regulations must be consistent with international standards, guidelines and recommendations). Codex develops scientific methodologies, concepts and standards to be used worldwide for food additives, microbiological contaminants, veterinary drug and pesticide residues to be used worldwide.

2) Office International des Epizooites (OIE): based in Paris, is the world animal health organization. The OIE develops manuals on animal diseases, standards for diagnosis, vaccination, epidemiological surveillance, disease control and eradication, etc.

3) International Plant Protection Convention (IPPC): based in Rome, is a subsidiary body of the FAO. The IPPC develops international plant import health standards, basic principles governing phytosanitary laws and regulations, and harmonized plant quarantine procedures.

Conformity with international standards: Generally, Members must base their SPS measures on international standards, guidelines and recommendations if there exist. A Higher level of protections is permitted if a Member has conducted an examination and evaluation of available scientific information and determined that the international standards are not sufficient to achieve an appropriate level of protection.

Equivalence: Ways of ensuring food safety or animal and plant health protection in different countries may be varied, but Members should accept each other’s regulations as equivalent whenever the same level of protection is achieved. For this purpose, bilateral consultations and negotiations are essential. For example, if Country A is concerned with food-and-mouth disease in Country B, the latter must cooperate by letting experts from Country A visit its farm operations and inspect its meat processing facilities.

Risk assessment: Members must establish SPS measures on the basis of an evaluation of the actual risks involved.

Risk assessments may be qualitative or quantitative, and quantitative risk assessment can be very costly. WTO Members have the right to determine what they consider to be an appropriate level of health protection, so long as this level does not protect domestic producers from competition.

Selection of an SPS Measure: Once the government has determined its appropriate level of sanitary and phytosanitary protection, it should not choose a measure that is more stringent and trade-restrictive than necessary. For example, a complete ban on imports of wheat may be one way to limit pesticide residue levels causing certain health risks to consumers, but random testing for maximum residue levels at the port of entry may be a less trade-restrictive measure, and wheat complying with the relevant residue requirements could safely be distributed on the domestic market.

Disease-free areas: Governments should recognize disease- or pest-free areas. These areas may be only part of a country or may cover parts of several countries. In the past, importing countries often required the whole exporting country to be free from a disease before it could be granted access. Today, products from disease-free areas within a given country should be grantee market access. The burden rests on the exporting Member to demonstrate that given areas within an exporting country are free from a disease.

Transparency: SPS measures must be published by Members so that interested Members can become acquainted with them. A Member must establish an enquiry point which will be responsible for providing answers to various questions. A national central government authority will be designated in each Member to notify the WTO Secretariat any new SPS regulations or modification to existing laws.

## 6. Trade-Related Investment Measures (TRIMs)

The Agreement on TRIMs covers conditions on investment which are related to trade in goods. Sometimes, governments impose conditions on investment, some of which are trade-related, others are not. For example, a government may prescribe that investment can only be made in a firm owned by resident nationals, or it may impose restrictions on the import of raw materials or the export of products. The restrictions on import and export relate to trade in goods, whereas the restrictions in respect of firm ownership relate to non-trade matters.

Background: Prior to the Uruguay negotiations, the linkage between trade and investment received little attention in the framework of the GATT. The Punta del Este Ministerial Declaration included this subject, stating that further provisions are necessary to avoid the trade-restrictive and trade-distorting effects of investment measures. The Uruguay negotiations on TRIMs were marked by strong disagreement among participants over the coverage and nature of possible new disciplines. The compromise that eventually emerged from the negotiations is essentially limited to an interpretation and clarification of the application to trade-related investment measures of GATT provisions on national treatment for imported goods (Article III) and on quantitative restrictions on imports or exports (Article XI).

Objectives: To promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members.

Coverage: The Agreement applies to investment measures related to trade in goods only. Moreover, the Agreement is not concerned with the regulation of foreign investment. The disciplines of the TRIMs Agreement focus on discriminatory treatment of imported and exported products and do not govern the issue of entry and treatment of foreign investment. For example, a local content requirement imposed in a non-discriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement because it involves discriminatory treatment of imported products in favor of domestic products. But the fact that there is no discrimination between domestic and foreign investors in the imposition of the requirement is irrelevant under the TRIMs Agreement.

Measures inconsistent with Article III.4 of GATT 1994

* specifying that particular products of domestic origin must be purchased or used by an enterprise,
* specifying that a particular volume or value of some products of domestic origin must be purchased or used by an enterprise,
* specifying that an enterprise must purchase or use domestic products at least up to a particular proportion of the volume or value of the local production of the enterprise,
* restricting the purchase or use of an imported product by and enterprise to an amount related to the export of its (the enterprise’s) local production.

The first three are local-content requirements and the fourth is an indirect requirement of partial balancing of foreign exchange outflows and inflows.

Measures inconsistent with Article XI.1 of GATT 1994

* imposing a general restriction on the import of inputs by an enterprise or restricting the import of inputs to an amount related to the export of its local production,
* restricting the foreign exchange for the import of inputs by an enterprise to an amount related to the foreign exchange inflow attributable to the enterprise,
* restricting export by an enterprise by specifying the products so restricted, the volume or value of products so restricted, or the proportion of its local production so restricted.

The first two are requirements of a partial balancing of foreign exchange, and the third is an export-restraint requirement for ensuring the domestic availability of the product.

Exception: A developing country Member is allowed temporary deviation from this obligation in so far as it is covered by the flexibility provided under the provision of Balance-of-Payment.

Notification and transparency: Members have to notify all TRIMs not in conformity with the Agreement to the Council for Trade in Goods within 90 days of 1 January 1995.

Elimination of existing measures: 2 years of 1 January 1995 by a developed country Member, 5 years of 1 January 1995 by a developing country Member, 7 years of 1 January 1995 by a least developed country Member, and the time for developing and least developed country Members can be extended if necessary.

## Questions

1. What are VERs and OMAs? What economic interests of participating and third countries are involved in connection to VERs? Why were they seldom challenged in the GATT dispute settlement system?

2. What are safeguards and escape clauses?

3. Describe balance of payment provisions of WTO system.

4. Discuss the problem of technical standards in International Trade.

5. Explain the aims and procedure of imposing sanitary and phytosanitary measures.

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Lecture 5. Measures against Unfair Trade

WTO establishes rules of competition for countries, which can be described as rules on ‘fair trade’. Mainly, WTO targets two types of measures affecting competitiveness of companies – subsidies and dumping. In cases of dumping and subsidies WTO allows countries to restrict their trade under strict set of rules.

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## 1. Subsidies

Subsidies are benefits provided by governments to producers and exporters of products which improve their competitiveness in international trade and thereby distort competition. Hence, a subsidy is generally considered to be an unfair practice.

For example, all major industrial nations give foreign buyers of the nation’s exports low-interest loans to finance the purchase through agencies such as the US export-import bank. These low-interest credits finance about 5% of US exports but as much as 30 to 40% of the exports of Japan and France. The amount of the subsidy can be measured by the difference between the interest that would have been paid on a commercial loan and what is in fact paid at the subsidized rate.

### Definition

A subsidy is a financial contribution or income or price support by the government or any public body or a funding mechanism or a private party directed or trusted by the government within the territory of a Member, which confers a benefit to production/producers or export/exporters.

Financial contribution

* Direct transfer of funds, e.g., direct payments, granting of tax relief, subsidized loans, and equity infusion, low-interest loans to foreign buyers
* Potential direct transfer of funds or liabilities, e.g., loan guarantees
* Revenue foregone or not collected, e.g., tax credits
* Provision of goods and services other than general infrastructure, or purchase of goods
* Subsidies for exports: an outright cash payment based on the volume or value of the export of a product, payment of a part of the freight charges
* Subsidies for domestic production: provision of raw materials at subsidized prices for the production of a particular product, exemption from the payment of some tax, provision of cheap loans

Examples of non-subsidy

* A government temporarily exempts a paper mill in financial difficulties from the obligation to observe anti-pollution laws. (Regulatory but not financial privileges)
* A private NGO - non-governmental organization - gives technical and financial assistance to coffee growers in Africa. (Private aid)
* A government makes a loan to an automobile manufacturer on conditions equivalent to those that the manufacturer could obtain from private banks. (Financial contribution with no benefit)
* Differing effects of subsidies in importing countries
* Domestic producer industry: harm - more competitive foreign products
* Consumers and user industries: benefit - possibility of buying the product at lower prices and a wider choice of sources from which to buy

### Categories of Subsidies

Prohibited subsidies (red): subsidies for export performance or for the use of domestic over imported goods, namely export subsidies and import substitution subsidies.

Export subsidies: direct payment of subsidy to a firm or an industry based on export performance, a bonus on exports through currency retention schemes, favorable internal transport and freight charges on export shipments, favorable provision of goods or services for the production of exported goods, export-related exemption, remission or deferral of indirect taxes or import duties, favorable export credits at rates lower than those in international capital markets, export credit guarantee or insurance programs at premium rates inadequate to cover the operating costs and losses of the programs, full or partial payment of the costs incurred by exporters

Prohibited subsidies are designed to affect trade and are most likely to cause adverse effects to the interests of other Members, thus are subject to dispute settlement procedures which include an expedited timetable for action by the Dispute Settlement Body. If it is found that the subsidy is indeed prohibited, it must be immediately withdrawn. If this is not done within the specified time period, the complaining member is authorized to take counter-measures.

Actionable subsidies (yellow): specific subsidies allowed under some conditions up to certain limits, but subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of other Members

There are three possible types of adverse effects that can be challenged multilaterally:

* one country’s subsidies can hurt a domestic industry in an importing country;
* one country’s subsidies can harm a Member’s exporting interests because of serious prejudice;
* there is nullification or impairment of benefits accruing under GATT 1994 because the improved access to a market that is presumed to flow from a bound tariff reduction is undercut by subsidization in that market.

Non-actionable (permissible) subsidies (green): Four types of subsidy are permitted in the sense that no counteraction against them is normally allowed.

1. general subsidies: subsidies not specific to particular enterprises or industries
2. subsidies for research activities conducted by firms or by higher education or research establishments on a contract basis with firms
3. The subsidy should not exceed 75% of the cost of industrial research or 50% of the cost of pre-competitive development activity like the preparation of blueprints and designs for new or improved products.
4. subsidies for development of disadvantaged regions within the territory of a Member.

Criteria for these regions are: a) per capita income, per capita household income or per capita GDP must not be above 85% of the average for the Member territory, b) the unemployment rate must be at least 110% of the average of the Member territory, c) subsidies for environmental purposes by promoting adaptation of existing facilities to new environmental requirements by law or regulations which result in greater constraints and financial burden on firms, provided that the assistance is a one-time non-recurring measure and is limited to 20% of the cost of adaptation, directly linked to the firm’s own planned reduction of pollution and available to all firms which have to adapt to the new environmental requirements.

Non-actionable subsidies are challenged if the implementation of these measures has resulted in “serious adverse effects” to the domestic industry of another Member, such as to cause damage that is difficult to repair. Members initiating action for countermeasures will first have consultations with the subsidizing Member, and if a mutually acceptable solution is not found in 60 days, the matter will be referred to the Committee on Subsidies. If the Committee determines that serious adverse effects do exist and that these cause damage which is difficult to repair, it will recommend the subsidizing Member to modify its program to remove these effects. If the recommendation is not implemented within six months, the Committee will authorize the complaining Member to take appropriate countermeasures normally in the form of the withdrawal of some concessions to the Member or the reduction of obligations benefiting the Member.

### Specificity.

Assuming that a measure is a subsidy within the meaning of the SCM Agreement, it nevertheless is not subject to SCM Agreement disciplines unless it has been specifically provided to an enterprise or industry or group of enterprises or industries within the jurisdiction of the authority granting the subsidy. In other words, only subsidy distorting the allocation of resources within an economy should be subject to SCM disciplines.

#### Types of specificity.

Enterprise-specificity: for a particular enterprise

Industry-specificity: for a particular sector or sectors

Regional-specificity: for producers in specified parts of a territory

Elements for adverse effect:

* material injury or threat of material injury (clearly foreseeable and imminent injury)
* nullification or impairment of benefits under GATT 1994 when the improved access to a market is undercut by subsidization in that market (see relevant sections concerning DSM)
* serious prejudice to the interests of another Member, or the threat of serious prejudice

Any one of the above three elements will be enough to get the action initiated.

Factors relevant to injury:

* volume of the subsidized imports: whether there has been a significant increase either in absolute terms or relative to production or consumption in the importing country
* the effect of the subsidized imports on the prices of like products in the domestic market: whether there has been significant price undercutting, depression or suppression, i.e., prevention of price increase which would have occurred in the absence of the subsidized imports
* the consequent impact of the imports on the domestic producers of these products, such as decline in output, sales or market share, profits, productivity, return on investments, cash flow, inventories, employment, wages, etc..

#### Criteria for serious prejudice.

Serious prejudice is considered to exist if at least one of the following conditions is fulfilled.

The subsidy displaces or impedes the import of a like product of another Member into the market of the subsidizing Member. In this case, the subsidy is given by an importing Member, and the adverse effect is on an exporting Member.

The subsidy displaces or impedes the export of a like product of another exporting Member in a third country market. In this case, the subsidy is given by an exporting Member, and the adverse effect is on another exporting Member sharing a common export market.

The subsidy results in significant price undercutting, significant price suppression (a situation in which prices are prevented from rising though normally they would have risen) or price depression (lowering of prices), or lost sales in a market. In this case, the subsidy is given by an exporting Member, and the adverse effect is on the importing Member in its market; or the subsidy is given by an importing Member, and the adverse effect is on an exporting Member in the market of the importing Member; or the subsidy is given by an exporting Member, and the adverse effect is on another exporting Member in a third country market.

The subsidy on a particular primary product or commodity results in an increase in the world market share of the subsidizing Member in that product or commodity as compared to the average share it had during the previous three years, and the increase follows a consistent trend over the period in which the subsidy has been granted.

#### Example of serious prejudice.

The Panel on European Community-Refunds on Exports of Sugar-Complaint by Brazil (Nov. 1980) considered the quantity of European Community sugar made available for export with maximum refunds and also the fact that the funds for export refunds did not have a limit. It concluded that the manner of application of the system of granting export refunds contributed to depress sugar prices in the world market, and this constituted a serious prejudice to Brazil.

#### Clarification of some terms.

Domestic industry: the whole of the domestic producers of the like products, or at least those of them whose collective output of the products constitutes a major proportion (normally more than half) of the total domestic production of those products, excluding related producers

If there are isolated markets for products in question in a country, the examination of injury can be conducted in relation to only the industry located in a specific isolated region, i.e., regional industry, not to the total or majority of the domestic producers.

Industry in a unified market of a customs union must be taken to be the domestic industry.

Like products: products identical, i.e., alike in all respects, to the product under consideration, or in the absence of such products, products which have characteristics closely resembling those of the product under consideration, even though they are not totally alike in all respects

The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

For example: The Panel on US-Definition of Industry Concerning Wine and Grape Products (April 1992), examined whether wines and grapes were like products. It concluded that they were not because these two products had different physical characteristics and the production of grapes and the production of wine were two separate groups of industries in the US.

### Remedies.

For prohibited and actionable subsidies, two types of remedy are possible, i.e., remedy through the dispute settlement mechanism at a multilateral level and remedy by imposing countervailing duty at a unilateral level. The route of countervailing duty can be taken only if material injury or a threat of material injury exists.

Countervailing Measures are usually duties imposed by the importing country to offset the effect of the subsidy on the product in question. They are a unilateral remedy, but may only be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the SCM Agreement are satisfied.

Criteria: subsidized imports or the existence of a prohibited or actionable subsidy, injury to a domestic industry, a causal link between the subsidized imports and the injury

### Countervailing duty process.

Application by domestic industry: If an application is supported by more than half of the total domestic producers of the like product, or if those supporting an application account for a higher level of production of the product than those opposing it, the application will be considered to be made by or on behalf of the domestic industry. For this purpose, those supporting an application should not account for less than 25% of the total domestic production of the product.

Preliminary examination by designated authorities of a Member: to determine whether the evidence given in the application is sufficient to justify the initiation of an investigation.

The application must be rejected and investigation terminated if the amount of subsidy is de minimis, or the volume of the subsidized import or the injury is negligible, i.e., less than 1% in general cases, or less than 3% for developing countries in Annex VI, or less than 2% for other developing countries, or less than 4% of the total import of the like product in the importing country in the case of a developing country under investigation ( but no more than 9% collectively for all developing countries).

Consultation: to be held between governments of importing and exporting countries after an application is accepted and before initiating the investigation so as to clarify facts in the application and arrive at a mutually agreed solution.

Investigation: If no agreement is reached in the consultation, the investigation may start. The time will normally be one year, but in no case should it exceed 18 months, and then a final determination will be made by the investigating authorities.

Interested Members and parties, i.e., foreign producers, exporters, importers and domestic producers whose products are the subject of investigation, as well as industrial users and consumers, will be informed of the investigation in order to provide relevant information and arguments.

The investigation is to determine whether the measure in question is a subsidy, the extent of the subsidy, whether material injury to the domestic industry has been caused and whether there is a causal link between the subsidy and the injury, i.e., whether the injury or the threat of it has been caused by the subsidy.

Provisional measures may be taken by the Member after the expiry of 60 days from the initiation of the investigation to prevent injury being caused during the investigation, but the period of application must not exceed 4 months.

Satisfactory Undertakings from the subsidizing Member or from the exporters in the course of the investigation to remove or limit the subsidy or to raise the price of the product may suspend or terminate the investigation.

Imposition of countervailing duty: If there has been a positive finding in relation to the subsidy, injury or linkage, countervailing duty may be imposed. But before the imposition, domestic consumers and industrial users should be given an opportunity to demonstrate the possible adverse effects of such duty on them.

The countervailing duty cannot be higher than or in excess of the subsidy found to exist. The Agreement provides a guideline that the duty should be less if such a smaller duty will be adequate to remove the injury to the domestic industry, i.e., the duty should be just enough to compensate for the injury margin.

The countervailing duty has to be applied on a non-discriminatory basis to the products of all countries satisfying the conditions of subsidy, injury and causal linkage.

Review and duration: A review may be undertaken by the authorities either on their own initiative or at the request of an interested party as to whether the continuance of the duty is necessary to offset subsidization or it is likely that injury will continue or recur if the duty is removed. A countervailing duty can be continued as long as is necessary to counteract injury-causing subsidization, i.e., less or more than the 5-year period.

### Provisions for developing country Members.

#### Export Subsidy.

Least developed country (LCD) Members and other developing country Members having gross national product (GNP) per capita less than US$1,000 per annum are permitted to provide export subsidies.

Country list: Bolivia, Cameroon, Congo, Egypt, Ghana, Guatemala, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, Zimbabwe.

Other developing country Members are exempted from the prohibition of export subsidies for a period of eight years from 1 January 1995.

If a developing country Member has attained export competitiveness in a product, i.e., a share of at least 3.25% of world trade in that product and such share continues for two consecutive years, this Member will have to phase out export subsidies on this product over a period of eight years if it is included in the above list (Annex VII to Article 3.1 a), or two years otherwise.

#### Import Substitution Subsidy

LDC Members will be exempted from the prohibition of import substitution subsidies for 8 years from 1 January 1995. For other developing country Members, the prohibition will not apply for five years from 1 January 1995.

Absence of presumption of serious prejudice

For developed country Members, there is a presumption of the existence of serious prejudice if any of the following four situations exists:

* the subsidy on a product exceeds 5% of the value of production;
* the subsidy is given to cover the operating losses of an industry
* repeating subsidy is given to cover the operating losses of an enterprise;
* direct forgiveness of debt, including grants to cover debt repayment.

The burden of proof lies on the subsidizing Member to demonstrate that in spite of the existence of these situations, the elements of serious prejudice do not exist. In the case of developing country Members, however, there is no presumption of serious prejudice in these circumstances. Thus, there is a shift of the burden of proof, i.e., the burden of proof is on the complaining Member to demonstrate that serious prejudice exists. Furthermore, adverse effect in a third country market caused by the subsidized exports from developing countries will be exempted from any countermeasures.

Besides, subsidies linked to and granted within a privatization program of a developing country Member will be free from any remedial action.

### Special provisions for Member countries in transition.

For Member countries in transition from a centrally planned economy to a market, free-enterprise economy, the following flexibilities have been laid down in the Agreement:

* such Members have seven years to phase out the prohibited subsidies, i.e., export subsidies and import-substitution subsidies;
* remedies through the dispute settlement process cannot be taken against direct forgiveness of debt for seven years;
* regarding remedies through the dispute settlement process against other actionable subsidies, such Members have the same seven-year flexibility as the developing country Members in general.

## 2. Dumping and Anti-dumping

Definition: Dumping is a situation of international price discrimination, where the price of a product, when sold in the importing country, i.e., the export price, is less than the price of that product in the market of the exporting country, i.e., the normal value.

### Dumping vs Subsidy.

Dumping is adopted by firms and enterprises, whereas subsidy by Member governments;

The remedial action in respect of subsidies is targeted at the subsidizing Member, i.e., is taken against the subsidized product exported by the various enterprises of the subsidizing country, whereas the action in respect of dumping is taken only against the enterprises that resort to the practice. Those enterprises which do not dump the product are not covered by the anti-dumping action.

### Effects of Dumping.

The low prices of the imported products may harm the domestic industry which is producing like products;

The consumers and industrial users of the product in the importing country may benefit from such low prices.

Impact on trade.

Generally, the very initiation of an investigation on dumping gives rise to uncertainty in the exports from the country under investigation to the investigating importing country. Importers may start shifting their sources of supply. Usually, the investigation takes a long time, and even if finally there is a negative determination of injury of dumping, some damage would already have been done, with some loss of market for the exporting country.

Developing countries are exposed to a considerable degree of uncertainty about their export prospects as they have been facing a large number of anti-dumping investigations.

### Classification.

Persistent dumping or international price discrimination, is the continuous tendency of a domestic monopolist to maximize total profits by selling the commodity at a higher price in the domestic market than internationally.

Predatory dumping is the temporary sale of a commodity at below cost or at a lower price abroad in order to drive foreign producers out of business, after which prices are raised to take advantage of the newly acquired monopoly power abroad.

Sporadic dumping is the occasional sale of a commodity at below cost or at a lower price abroad than domestically in order to unload an unforeseen and temporary surplus of the commodity without having to reduce domestic prices.

Cases in history

In the late twentieth century, Japan was accused of dumping steel and television sets in the US, and European nations of dumping cars, steel, and agricultural products. With the development of international trade, however, more and more developing countries are exposed to charges of dumping by developed countries.

### Disciplines regarding anti-dumping measures.

#### Existence of dumping

* Existence of material injury or threat of material injury to domestic industry producing like products
* Causal link between dumping and injury
* Margin of dumping

If an enterprise is found to be dumping its products and if such dumping is causing injury to the domestic industry in the importing country, the importing Members can impose a countervailing duty on the imports up to the maximum extent of the margin of dumping, i.e., the quantum of dumping.

Three steps in determining the existence of dumping

1. determination of the export price
2. determination of the normal value
3. comparison of the export price and the normal value

The major importing countries have enacted very complex procedures to adjust the available data for the export price and the normal value so as to make them reasonably comparable.

Export Price

Generally, the export price will be based on the transaction price at which the foreign producers sells the product to an importer in the importing country. In some cases, however, this price may not be available or reliable:

* the export transaction is an internal transfer
* the product is exchanged in a barter transaction
* the exporter and the importer may be associated
* the exporter and the importer may have some mutual compensatory arrangement between them or a third party.

In such cases, an alternative method of determining an appropriate export price or calculating a constructed export price for comparison is needed.

Constructed export price: The basis for calculating the constructed export price is the price at which the imported product is first sold to an independent buyer. If the product is not resold to an independent buyer or is not resold in its original imported condition, the authorities in the importing country may determine the constructed export price on some reasonable alternative basis.

Normal Value.

General rule for the determination of normal value:

The normal value is generally the price of the product at issue or the price of the like product, in the ordinary course of trade, when destined for consumption in the exporting country market.

Sometimes, it may not be possible to consider the sale price in the exporting country because:

* there is no sale of the like product in the exporting country
* the sale is made in a particular market situation
* sales volume in the domestic market of the exporting country is less than 5% of the sale of the product to the importing country
* sales in the domestic market of the exporter are made below cost

Ordinary course of trade

This concept has been clarified by citing negative situations:

* the exporters and importers are related
* the sale price is consistently below the cost price
* the product is made for a single and specific purpose according to exclusive specifications

Particular market situation:

* there may be strict government control on prices and prices may not be determined based on market conditions, but on several other social and political considerations
* there may be different patterns of demand for the product in the exporting and importing countries

#### Sales below cost.

Prices consist of fixed costs, variable costs, plus the amounts for administrative, selling and general costs/expenses and amounts for profits. This issue has particular significance as it has a bearing on the calculation of the dumping margin. If prices below cost in the exporting countries are left out while calculating the normal value, there will be a bias towards arriving at a higher normal value and therefore a higher dumping margin. Generally, prices below cost will be included in calculating the normal value. When there is evidence of persistent sales at lower prices and when large quantities are involved, sales below cost will be excluded from the calculation of normal value.

Conditions for exclusion of sales below cost from calculation

* such sales are made within one year, and in no case less than six months
* the volume of such sales is 20% or more of the volume under consideration in determining normal value
* the weighted average selling price of the transaction under consideration is below the weighted average per unit cost, and therefore cannot provide for the recovery of all costs within a reasonable period of time

#### Cost of production

Normally, the cost will be calculated based on the records kept by the exporter or producers under investigation if:

* such records have been kept in accordance with the generally accepted accounting principles of the exporting country, and
* the records reflect reasonably the costs associated with the production and sale of the product.

Some adjustments in the cost will be required as there may be some items of cost which are spread over products beyond those which have been exported, such as R&D costs, costs relating to start-up operations.

#### Alternative Methods for Calculating Normal Value

If the recorded sale price for the product in the exporting country cannot be taken for the purpose o of calculating the normal value, the normal value will be determined as:

a comparable price of the like product when exported to an appropriate third country

a constructed normal value based on the cost of production in the country of origin plus administrative, selling and general costs/expenses and profits

Which of the two alternatives should be adopted will depend on the discretion of the importing country.

According to GATT 1994 and the Agreement, importing countries have exercised significant discretion in the calculation of normal value of products exported from non-market economies where the governments have a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by states.

#### Comparison of Export Price and Normal Value (Calculation of Dumping Margins)

##### General disciplines

The comparison must be made at the same level of trade, normally the ex-factory level, and the comparison must be of sales made at as nearly as possible the same time. Due adjustments should be made for differences which affect price comparability, such as differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, etc.

In cases where the export price is constructed on the basis of sale to the first independent buyer, adjustments should be made for costs incurred between importation and resale, such as duties and taxes, and also for profits. In most cases, the comparison of the export price and the normal value will involve conversion of currencies. The rate of exchange on the date of sale (i.e., the date of the instrument which establishes the material terms of sale) will be considered.

Level of trade refers to the stage of transaction, e.g., whether the sale is to retailers, to local distributors, or to regional distributors. If levels other than ex-factory level have entered into the calculations, they will have to be reduced to ex-factory level by making suitable adjustments.

Normal method for comparison of prices

After having made all the relevant calculations, the actual comparison will normally be made according to the following methods:

* a weighted average normal value will be compared with a weighted average of the prices of all export transactions
* the normal value will be compared with the export price on a transaction-to-transaction basis

This parity in comparison is important as it ensures a degree of fairness. If the average normal value were to be compared with the export prices in individual transactions, it will generally result in a higher dumping margin. In averaging the export prices of various transactions, the higher export prices get balanced with the lower prices and, the margin becomes smaller.

##### Exceptions-Targeted Dumping

A weighted average normal value may be compared with the export prices of individual transactions when there is a pattern of export prices differing significantly among purchasers, regions or time periods. To prove a pattern in respect of regions, for example, it will be necessary to show that the prices of products exported to a particular region in the importing country are usually different from the prices for other regions.

Determination of Injury

In order to impose anti-dumping duties, the investigating authorities of the importing Member must make a determination of injury.

Coverage of injury: Injury covers material injury to a domestic industry, or threat of material injury to a domestic industry, or material retardation of the establishment of a domestic industry.

Elements of analysis: To confirm the determination of injury, a Member must examine the volume of dumped imports either in absolute terms or relative to production or consumption in the domestic industry, and price effects of dumped imports on the domestic market such as significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member or price depression or prevention of price increase of domestic like products evaluate the impact of dumped imports on the domestic industry, such as actual or potential declines in sales, profits, output, market share, productivity, return on investment, utilization of capacity, actual or potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment

##### Demonstration of Causal Link.

A demonstration based on an examination of all relevant evidence must be given to show that there is a causal relationship between the dumped imports and the injury to the domestic industry. Apart from dumping, other factors such as changes in the pattern of demand or developments in technology may cause injury to domestic producers. Injury caused by such factors must not be attributed to dumped imports.

Procedures for Imposition of Anti-dumping Duties

Initiation of investigations: Generally, investigations should be initiated on the basis of written request submitted by or on behalf of a domestic industry, stating evidence of dumping, injury, and causality, as well as information regarding the product, industry, importers, exporters, and other matters.

Investigation: collection of evidence, use of sampling techniques, confidentiality of sensitive information, transparency of proceedings, on-the-spot investigations, use of best information available, etc. Investigations should be completed within one year, and in no case more than 18 months after initiation.

All interested parties should be given an opportunity to present evidence and to comment.

Anti-dumping investigations are to end immediately in cases where the authorities determine that the margin of dumping is de minimis, i.e., less than 2% of the export price, or that the volume of dumped imports is negligible, i.e., less than 3% of the imports of the like product in the importing country individually and no more than 7% collectively.

Provisional measures: Provisional measures preferably in the form of a security through cash deposit of bond may be applied if there is a preliminary affirmative determination of dumping, injury and causality 60 days after initiation of an investigation. The time limit is usually 4 months, with a possible extension to 6 months. The period of provisional measures for a Member imposing anti-dumping duties lower than the margin of dumping is 6 and 9 months respectively.

Price undertaking: In the case of preliminary affirmative determination of dumping, injury and causality, undertaking from exporters may be acceptable by revising prices to remove the effects of dumping or by ceasing exports at dumped prices to the area in question.

Imposition of anti-dumping duties: Members should collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount.

Retroactive duty: Anti-dumping duty can be imposed on products imported up to 90 days prior to the date of application of provisional measures in the following cases:

* there is a history of dumping causing injury
* the importer was, or should have been, aware that the exporter practices dumping which would cause injury
* the injury is caused by a massive volume of dumped imports in a relatively short time, which is likely to seriously undermine the remedial effect of the prospective final anti-dumping duty.

Duration and termination: The ‘sunset’ requirement establishes that dumping duties shall normally terminate no later than 5 years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This 5-year ‘sunset’ provision also applies to price undertakings.

##### Public Notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers.

### Dispute Settlement.

Members may challenge the imposition of anti-dumping measures, in some cases may challenge the imposition of preliminary anti-dumping measures, and can raise all issues of compliance with the requirements of the Anti-dumping Agreement, before a panel established under the Dispute Settlement Understanding.

But, the role of the panel is very much restricted in the field of anti-dumping. It will only determine whether the authorities of the importing Member established the facts properly and whether they evaluated the facts in an unbiased and objective manner.

### Third Country Action

When the domestic industry of a third country (also an exporting country) suffers injury because of the dumping practices of the enterprises of a Member in an importing Member country, the third country Member has to request the importing country Member to conduct an investigation and to take further action for anti-dumping measures. The decision whether to initiate and proceed with an investigation rests with the importing country.

## Questions

1. What is Dumping and how is it countered by countries?
2. Outline the Procedure of Imposing Anti-Dumping Duties.
3. Which measures may count as subsidies?
4. How are subsidies treated in WTO system?
5. Give examples of “unfair trade practices”.
6. Does the GATT allow unilateral action against “unfair trade practices”?

## References

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# Lecture 6. Trade in Services

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## 1. Significance of Liberalization of Trade in Services

Trade liberalization, and even economic growth, are not ends in themselves. The ultimate aim of Government is to promote human welfare in the broadest sense, and trade policy is only one of many instruments Governments use in pursuing this goal. But trade policy is nevertheless very important, both in promoting growth and in preventing conflict. The building of the multilateral trading system over the past 50 years has been one of the most remarkable achievements of international cooperation in history. The system is certainly imperfect—that is one of the reasons why periodic negotiations are necessary—but the world would be a far poorer and more dangerous place without it.

In January 2000, WTO Member Governments started a new round of negotiations to promote the progressive liberalization of trade in services. The GATS agreement specifically states that the negotiations “shall take place with a view to promoting the interests of all participants on a mutually advantageous basis” and “with due respect for national policy objectives and the level of development of individual Members”. The pace and extent of these negotiations are set by the WTO’s 149 Member Governments themselves according to their different national policy priorities.

It is impossible for any country to prosper today under the burden of an inefficient and expensive services infrastructure. Producers and exporters of textiles, tomatoes or any other product will not be competitive without access to efficient banking, insurance, accountancy, telecoms and transport systems. In markets where supply is inadequate, imports of essential services can be as vital as imports of basic commodities. The benefits of services liberalization extend far beyond the service industries themselves; they are felt through their effects on all other economic activities.

The production and distribution of services, like any other economic activity, is ultimately destined to satisfy individual demand and social needs. The latter element—social needs—is particularly relevant in sectors like health or education which in many, if not all, countries are viewed as a core governmental responsibility. They are subject to close regulation, supervision and control. Although social policy concepts—including equity and universal access—do not necessarily imply that Governments also act as producers, public facilities have traditionally been, and continue to be, the main suppliers of services such as health and education in most countries.

In 1999, the value of cross-border trade in services amounted to US$1350 billion, or about 20% of total cross-border trade. This understates the true size of international trade in services, much of which takes place through establishment in the export market, and is not recorded in balance-of-payments statistics. For the past two decades trade in services has grown faster than merchandise trade. Developing countries have a keen interest in many services areas including tourism, health and construction. According to the World Travel and Tourism Council, tourism is the world’s largest employer accounting for one in ten workers worldwide. According to IMF data for 1999, tourism exports, estimated at US$443 billion, were 33% of global services exports and 6.5% of total exports.

The liberalization of trade in goods, which has been promoted through negotiations in the GATT over the past 50 years, has been one of the greatest contributors to economic growth and the relief of poverty in mankind's history. Following the catastrophic experience of the first half of the 20th century, Governments deliberately turned away from the policies of economic nationalism and protectionism which had helped to produce disaster, and towards economic cooperation based on international law. Growth in this period was not uniformly shared, but there is no doubt that those countries which chose deeper involvement in the multilateral trading system through liberalization benefited greatly from doing so.

There was no parallel movement of multilateral liberalization of services trade until the negotiation of the GATS and its entry into force in 1995. Since the services sector is the largest and fastest-growing sector of the world economy, providing more than 60% of global output and in many countries an even larger share of employment, the lack of a legal framework for international services trade was anomalous and dangerous—anomalous because the potential benefits of services liberalization are at least as great as in the goods sector, and dangerous because there was no legal basis on which to resolve conflicting national interests.

### Benefits of Service Liberalization.

1. Economic performance

An efficient services infrastructure is a precondition for economic success. Services such as telecommunications, banking, insurance and transport supply strategically important inputs for all sectors, goods and services. Without the spur of competition they are unlikely to excel in this role – to the detriment of overall economic efficiency and growth. An increasing number of Governments thus rely on an open and transparent environment for the provision of services.

2. Development

Access to world-class services helps exporters and producers in developing countries to capitalize on their competitive strength, whatever the goods and services they are selling. A number of developing countries have also been able, building on foreign investment and expertise, to advance in international services markets – from tourism and construction to software development and health care. Services liberalization has thus become a key element of many development strategies.

3. Consumer savings

There is strong evidence in many services, not least telecoms that liberalization leads to lower prices, better quality and wider choice for consumers. Such benefits, in turn, work their way through the economic system and help to improve supply conditions for many other products. Thus, even if some prices rise during liberalization, for example the cost of local calls, this tends to be outweighed by price reductions and quality gains elsewhere. Moreover, governments remain perfectly able under the GATS, even in a fully liberalized environment, to apply universal-service obligations and similar measures on social policy grounds.

4. Faster innovation

Countries with liberalized services markets have seen greater product and process innovation. The explosive growth of the Internet in the US is in marked contrast to its slower take-off in many Continental European countries which have been more hesitant to embrace telecom reform. Similar contrasts can be drawn in financial services and information technology.

5. Greater transparency and predictability

A country's commitments in its WTO services schedule amount to a legally binding guarantee that foreign firms will be allowed to supply their services under stable conditions. This gives everyone with a stake in the sector—producers, investors, workers and users—a clear idea of the rules of the game. They are able to plan for the future with greater certainty, which encourages long-term investment.

6. Technology transfer

Services commitments at the WTO help to encourage foreign direct investment (FDI). Such FDI typically brings with it new skills and technologies that spill over into the wider economy in various ways. Domestic employees learn the new skills (and spread them when they leave the firm). Domestic firms adopt the new techniques. And firms in other sectors that use services-sector inputs such as telecoms and finance benefit too.

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## 2. Main Purpose of the GATS

The creation of the GATS was one of the landmark achievements of the Uruguay Round. The GATS was inspired by essentially the same objectives as its counterpart in merchandise trade (GATT):

* creating a credible and reliable system of international trade rules;
* ensuring fair and equitable treatment of all participants;
* stimulating economic activity through guaranteed policy bindings;
* promoting trade and development through progressive liberalization.

While services currently account for over 60 percent of global production and employment, they represent no more than 20% of total trade (BOP basis). This seemingly modest share should not be underestimated, however. Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend is likely to continue, owing to the introduction of new transmission technologies (e.g. electronic banking, tele-health or tele-education services), the opening up in many countries of long-entrenched monopolies (e.g. voice telephony and postal services), and regulatory reforms in hitherto tightly regulated sectors such as transport. Combined with changing consumer preferences, such technical and regulatory innovations have enhanced the “tradability” of services and, thus, created a need for multilateral disciplines.

## 3. Frame of Commitments of GATS

GATS establishes a framework within which liberalization commitments in the area of services are to be undertaken and implemented. GATS provides a frame for initial commitments, and also for progressively increasing commitments through successive rounds of negotiations. There are broadly two types of obligations and commitments, i.e., general obligations and specific commitments. The general commitments are applicable to all Members and all sectors of services trade. The specific commitments in services sectors are those undertaken by individual Members in particular sectors. Some specific commitments had been negotiated by Members before 1 January 1995 when the Agreement went into effect; further specific commitments will be added through negotiations in the future.

### Scope of Application of GATS

GATS applies to any measures by a Member, which affects trade in services. “Measure” covers any actions taken by any level of government as well as by authorized non-governmental bodies, and could take any form: a law, regulation, administrative decision or guideline. “Affect” means that the scope of GATS encompasses not only measures designed to regulate trade in services directly, but also any other measures that might be designed to regulate other matters but incidentally affect the supply of a service.

Modes of Service Supply

The mode of supply refers to the manner in which the service is supplied. Four modes of supply of service have been specified in the Agreement.

Box A: Examples of the four Modes of Supply (from the perspective of an "importing" country A)

Mode 1: Cross‑border

A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.

Mode 2: Consumption abroad

Nationals of A have moved abroad as tourists, students, or patients to consume the respective services.

Mode 3: Commercial presence

The service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and – controlled company (bank, hotel group, construction company, etc.)

Mode 4: Movement of natural persons

A foreign national provides a service within A as an independent supplier (e.g., consultant, health worker) or employee of a service supplier (e.g. consultancy firm, hospital, construction company).

## 4. Specific Commitments of GATS

Specific commitments in services sectors are those undertaken by individual Members in particular sectors of services. Individual countries’ commitments to open markets in specific sectors — and how open those markets will be — are the outcome of negotiations. Each Member of the WTO is required to have a schedule. The commitments appear in the “schedules” that list the sectors being opened (i.e., market access), the extent of market access being given in those sectors (i.e., market access limitation, e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies.)

As an example, if a government commits itself to allow foreign banks to operate in its domestic market, that is a market access commitment. And if the government limits the number of licenses it will issue, then that is a market access limitation. If it also says foreign banks are only allowed one branch while domestic banks are allowed numerous branches, it is an exception to the national treatment principle.

These commitments are “bound”: like bound tariffs, they can only be modified or withdrawn after negotiations with affected countries — which would probably lead to compensation. However, new commitments and improvements to existing ones can be added at any time. Because “unbinding” is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business. In each of the selected sectors of services, a Member will have taken commitments in three areas, i.e., market access, national treatment, and other commitments.

### Market access

Market access is a negotiated commitment in specified sectors. In the frame of the Agreement, a Member has to select the sector in which it makes commitments and grants free market access. The sectors left out by the Member will not be granted any market access. Market access may be made subject to some terms, conditions and various types of limitations. Limitations may be imposed on:

* the number of services suppliers (e.g. annual quota on the establishment of branches of banks and licenses for new restaurants based on an economic needs test),
* the total value of transactions or the total assets of service transactions (e.g., limitation of the transactions or assets of branches of banks to a specified percentage of the total domestic transactions or assets of all banks),
* total number of service operations or the total quantity of service output (e.g., prescribing the maximum weekly duration of the telecast of films),
* total number of employees in the sector (e.g., in computer software service, only a prescribed maximum number of workers can be employed in a year),
* requirement regarding the type of the legal form of the service supplier (e.g., in a particular sector, commercial presence can only be in the form of a company in which the citizens of the country must have a majority shareholding),
* the participation of foreign capital.

The lists of market access commitments (along with any limitations and exemptions from national treatment) are negotiated as multilateral packages, although bilateral bargaining sessions are needed to develop the packages. The commitments therefore contain the negotiated and guaranteed conditions for conducting international trade in services. If a recorded condition is to be changed for the worse, then the government has to give at least three months’ notice and it has to negotiate compensation with affected countries. But the commitments can be improved at any time. They will be subject to further liberalization through the future negotiations already committed under GATS.

### National treatment

National treatment means treating one’s own nationals and foreigners equally. In services, it means that once a foreign company has been allowed to supply a service in one’s country there should be no discrimination between the foreign and local companies. In this context, the treatment accorded by a Member to the services and service suppliers of any other Member must not be less favorable than what the Member accords to its own services and service suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favor of the Member's own service industry.

National treatment is treated differently for services. For goods (GATT) and intellectual property (TRIPS) it is a general principle. In that case, once a product has crossed a border and been cleared by customs it has to be given national treatment even if the importing country has not made any commitment under the WTO to bind the tariff rate. Under GATS, a country only has to apply this principle when it has made a specific commitment to provide foreigners access to its services market. It does not have to apply national treatment in sectors where it has made no commitment.

GATS allows some limits on national treatment. Again, the extension of national treatment in any particular sector may be made subject to conditions and qualifications. Members are free to tailor the sector coverage and substantive content of such commitments as they see fit. The commitments thus tend to reflect national policy objectives and constraints, overall and in individual sectors.

While some Members have scheduled less than a handful of services, others have assumed market access and national treatment disciplines in over 120 out of a total of 160-odd services. The existence of specific commitments triggers further obligations concerning, inter alia, the notification of new measures that have a significant impact on trade and the avoidance of restrictions on international payments and transfers.

Other/additional commitments: commitments relating measures other than those subject to scheduling under market access or national treatment, involving competition policy, or qualifications, technical standards or licensing in respect of trade in services.

Schedules of specific commitments

Normally, a Member offers low levels of commitments, expands its commitments through a series of bilateral and plurilateral (involving a limited number of Members) negotiations, and finally reaches a balance of costs and benefits and have an overall reciprocity among the Members as a whole.

Illustration

Box B: Sample Schedule of Commitments: Arcadia

Modes of supply: (1) Cross-border supply; (2) Consumption supply; (3) Commercial presence; (4) Presence of natural persons

|  |  |  |  |
| --- | --- | --- | --- |
| Sector or sub-sector | Limitations on market access | Limitations on national treatment | Additional commitments |
| I. HORIZONTAL COMMITMENTS | | | |
| ALL SECTORS INCLUDED  IN THIS SCHEDULE | (4) Unbound, other than for  (a) temporary presence, as intra-corporate transferees, of essential senior executives and specialists and  (b) presence for up to 90 days of representatives of a service provider to negotiate sales of services. | (3) Authorization is required for acquisition of land by foreigners. |  |
| II. SECTOR-SPECIFIC COMMITMENTS | | | |
| 4. DISTRIBUTION SERVICES  C. Retailing services  (CPC 631, 632) | (1) Unbound (except for mail order: none).  (2) None.  (3) Foreign equity participation limited to 51%.  (4) Unbound, except as indicated in horizontal section. | (1) Unbound (except for mail order: none).  (2) None.  (3) Investment grants are available only to companies controlled by Arcadian nationals.  (4) Unbound. |  |

“Unbound” means the Member has taken no commitment in respect of that mode of supply in this sector. In other words, the Member is free to impose any restriction on market access or national treatment in respect of that mode in this sector.

“None” means the Member will not put any limitation on market access or national treatment relating to this mode in this sector.

Special treatment of developing countries

* Due respect for national policy objectives and the level of development of developing Members
* Opening up fewer sectors and liberalizing fewer types of transactions
* Extend market access progressively in line with their development situation
* Strengthening domestic service capacity, access to technology and access to information channels and networks while allowing market access to foreign service suppliers

Modification of schedules

A Member may modify its schedule of specific commitments by offering alternative equivalent concessions three years after the application of the particular commitment. The modifying Member and the affected Member or Members may get into negotiations to reach an agreed compensatory adjustment which will be applicable to all Members. If no agreement is reached, the affected Members may refer the matter to arbitration and abide by its decision. Without compensatory adjustment in accordance with the findings of the arbitration, the affected Members may modify or withdraw substantially equivalent benefits from the modifying Member. With no agreement and no arbitration, the modifying Member is free to modify or eliminate its commitments as was proposed in its notice to the Council for Trade in Services.

## 5. General Obligations and Disciplines

### Most-favored-nation (MFN) treatment

Under Article II of the GATS, Members are held to extend immediately and unconditionally to services or services suppliers of all other Members “treatment no less favorable than that accorded to like services and services suppliers of any other country” (whether a Member or not). It is permissible to accord more favorable treatment to Members than to a non-Member. This amounts to a prohibition, in principle, of preferential arrangements among groups of Members in individual sectors or of reciprocity provisions which confine access benefits to trading partners granting similar treatment.

Favor one, favor all. MFN means treating one’s trading partners equally. Under GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO members. (This applies even if the country has made no specific commitment to provide foreign companies access to its markets under the WTO.)

MFN applies to all services, but some special temporary exemptions have been allowed. Derogations are possible in the form of so-called Article II-Exemptions.

* initial exemptions: Members were allowed to seek initial exemptions before the Agreement entered into force. Individual Members have listed their initial exemptions in their schedules after consultation with interested Members.
* New/ Later exemptions: New/ Later exemptions can only be granted to new Members at the time of accession or, in the case of current Members, by way of a waiver under Article IX:3 of the WTO Agreement. In the latter case, a request for such a waiver will be made to the Council for Trade in Services. The Ministerial Conference will decide on this issue. A waiver can be allowed only by a decision of three-fourths of the Members.

All exemptions are subject to review; they should in principle not last longer than 10 years. The obligation to apply MFN treatment does not prevent adjacent countries from exchanging advantages in order to facilitate exchanges of services limited to contiguous frontier zones where such services are locally produced and consumed. Further, the GATS allows groups of Members to enter into economic integration agreements or to mutually recognize regulatory standards, certificates and the like if certain conditions are met.

Illustration of a schedule of exemption

LIST OF ARTICLE II MFN EXEMPTIONS Switzerland (GATS/EL/83)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Sector or  Sub-Sector | Description of measure indicating its inconsistency with Article II | Countries to which the measure applies | Intended duration | Conditions creating the need for the exemption |
| Audiovisual services | To confer national treatment to audiovisual works covered by bilateral or plurilateral agreements on coproduction in the field of audiovisual works, in particular in relation to access to funding and to distribution | All countries with whom cultural cooperation may be desirable (at present agreements exist with member countries of the Council of Europe and with Canada) | Indefinite | Promotion of common cultural objectives |
| Measures granting the benefit of support  programmes, such as MEDIA and EUruguayI-  MAGES, and measures relating to the allocation of screentime which implement arrangements such as the Council of Europe Convention on Transfrontier Television and confer national treatment,  to audiovisual works and/or to suppliers of audiovisual services meeting specific  European origin criteria | European countries | Indefinite | Promotion of cultural objectives based on long-standing cultural links |
| Concessions for the operation of radio or television broadcast stations may be granted, normally on the basis of bilateral agreements, to persons of countries other than Switzerland | All countries with whom cultural cooperation may be desirable | Indefinite | Promotion of common cultural objectives, and to regulate access to a market limited in scale (given the size of Switzerland) in order to preserve diversity of supply |

Source: Damien Géradin/David Luff (eds.), The WTO and Global Convergence in Telecommunications and Audiovisual Services, Oxford University Press 2003.

Transparency

Services activities are typically subject to heavy domestic regulation, which makes transparency even more important than in any other Agreements. GATS says governments must publish all relevant laws and regulations. If publication is not practicable, such information must be made available publicly. Within two years (by the end of 1997) they have to set up inquiry points within their bureaucracies to provide information on laws and regulations affecting trade in services. Foreign companies and governments can then use these inquiry points to obtain information about regulations in any service sector. And they have to notify the Service Council of the WTO, at least annually, of any changes in regulations that apply to the services that come under specific commitments.

#### Domestic regulations

Since domestic regulations are the most significant means of exercising influence or control over services trade, the agreement says governments should regulate services reasonably, objectively and impartially. Disciplines are prescribed in respect of the following aspects:

Review of decisions: A Member must establish an administrative or judicial procedure for the review of administrative decisions affecting trade in services. If a service supplier is dissatisfied with an administrative decision, recourse to such a review should be possible for an objective and impartial consideration of the issues.

Authorization for supply of service: In case any authorization is needed for the supply of a service for which specific commitments have been made, the decision of the authorities has to be conveyed within a reasonable period of time to avoid trade barriers caused by unnecessary delays.

Qualification, standards and licensing: Members are required, in sectors where they have scheduled specific commitments, to ensure that measures relating to qualification requirements (necessary qualifications of the service supplier), technical standards ( of the service) and licensing requirements and procedures (for providing the service in a Member country) do not constitute unnecessary barriers to trade in services. For this purpose, a Member must ensure that:

* qualification requirements are based on objective and transparent criteria;
* technical standards are not more burdensome than necessary to ensure the quality of the service;
* licensing procedures are not in themselves a restriction on the supply of service.

Recognition process: Members are expected to adopt criteria or standards for the authorization, licensing or certification of service suppliers. Such recognition may be granted through harmonization, may be based on a mutual recognition agreement or an arrangement with other countries, or may be accorded autonomously. Different level of qualifications means different treatment granted to service suppliers, wherever the suppliers come from. When two (or more) governments have agreements recognizing each other’s qualifications (for example, the licensing or certification of service suppliers), GATS says other members must also be given a chance to negotiate comparable pacts, or to join such harmonization agreements. The recognition of other countries’ qualifications must not be discriminatory, and it must not amount to protectionism in disguise.

In order that there be at least some degree of harmonization among these standards and criteria, GATS provides that a Member may recognize:

* the education or experience obtained in another country,
* the requirement met in another country,
* the licenses or certifications granted in another country.
* Balance-of-payment provision

If there is a situation of serious BOP difficulties and external financial difficulties, or if there is a threat of such difficulties, a Member may adopt or maintain restrictions on trade in service on which it has undertaken specific commitments and adopt or maintain restrictions on payments or transfers for transactions related to such commitments. Such measures have to be non-discriminatory, temporary, avoid unnecessary damage to the commercial, economic and financial interests of other Members and must be phased out progressively.

Monopoly suppliers of service

In some cases, governments regulate certain service activities (usually services constituting inputs to other service activities) by granting monopoly or exclusive rights to certain entities to supply the service. Or sometimes a government establishes or provides authority to a small number of service suppliers, and substantially prevents competition among those suppliers in the country. GATS does not prohibit the maintenance of such monopoly right, but the behavior of such service suppliers must be consistent with the general obligations and specific commitments of the Member concerned.

Requirements in respect of monopoly suppliers of service:

* A Member has to ensure that a monopoly supplier of service of its territory does not act in a manner inconsistent with the obligations of the Member regarding MFN treatment and specific commitments;
* When such a supplier competes for the supply of a service outside the scope of the monopoly and yet in a sector covered by the obligations of the Member, the Member has to ensure that the supplier does not abuse it monopoly position to act in a manner inconsistent with the commitments of the Member.
* A new monopoly right in the area of trade in service granted after 1 January 1995 has to follow the procedure for modification of a Member’s commitments.

Cases of monopoly: telecommunications, financial services, insurance, railway transport service

For example, if a telecommunications monopoly allows interconnection to suppliers of value-added telecommunications, it should do so without discrimination between suppliers of other Members. If the Member concerned has undertaken a national treatment commitment in value-added services, it must ensure that its telecommunications monopoly provides interconnection to service suppliers of other Members on a national treatment basis.

Competition-restrictive practices

If a Member considers that the business practices of a service supplier are restraining competition and are thereby restricting trade in services, it may request consultation with the Member concerned. The other Member has to enter into consultation with a view to eliminating these practices.

Economic integration

A Member may enter into an agreement of integration for liberalizing trade in services among parties to the agreement, whether the parties are Members or not. Such an agreement must have substantial sectoral coverage. A Member may also enter into an agreement providing for full integration of labor markets among parties to the agreement, such as free entry into the employment markets of the parties.

International payments and transfers

Capital transaction and international transfers and payments for current transactions relating to services activities covered by specific commitments should not be restricted by Members.

If a Member has undertaken a commitment of market access through the cross-border mode of supply of service and if cross-border movement of capital is an essential part of the service itself, the Member, in such a case, is committed to allowing such movement of capital. Further, in the case of a commitment of market access through the mode of commercial presence, a Member is committed to allowing related transfers of capital into its territory.

Once a government has made a commitment to open a service sector to foreign competition, it must not normally restrict money being transferred out of the country as payment for services supplied (“current transactions”) in that sector. The only exception is when there are balance-of-payments difficulties, and even then the restrictions must be temporary and subject to other limits and conditions.

#### Exceptions

General exceptions: The GATS permits Members in specified circumstances to introduce or maintain measures in contravention of their obligations under the Agreement, including the MFN requirement or specific commitments. The relevant Article provides for measures necessary to:

* protect public morals or maintain public order;
* protect human, animal or plant life or health; or
* secure compliance with laws or regulations not inconsistent with the measures necessary to prevent deceptive or fraudulent practices or to protect privacy of individuals and safety.

Security exceptions: A Member has the flexibility to take measures which it considers necessary for the protection of its essential security interests and those which it takes in pursuance of its obligations under the UN Charter for the maintenance of international peace and security.

Government procurement: The obligations of MFN treatment, specific market access commitments and specific national treatment commitments will not apply to laws, regulations or requirements governing procurement by government agencies for governmental purposes. This exception does not extend to government procurement for commercial resale or for use in the supply of services for commercial sale.

Moreover, the Annex on Financial Services entitles Members, regardless of other provisions of the GATS, to take measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.

Finally, in the event of serious balance-of-payments difficulties Members are allowed to temporarily restrict trade, on a non-discriminatory basis, despite the existence of specific commitments.

### Progressive Liberalization

In services, the Uruguay Round was only a first step in a longer-term process of multilateral rule-making and trade liberalization. Observers tend to agree that, while the negotiations succeeded in setting up the principle structure of the Agreement, the liberalizing effects have been relatively modest. Barring exceptions in financial and telecommunication services, most schedules have remained confined to confirming status quo market conditions in a relatively limited number of sectors. This may be explained in part by the novelty of the Agreement and the perceived need of Members to gather experience before considering wider and deeper commitments. Moreover, many administrations needed time to develop the necessary regulation — including quality standards, licensing and qualification requirements — that ensures that external liberalization is compatible with, and conducive to, core policy objectives (quality, equity, etc.) in socially or infrastructurally important services.

More than six years have passed since the Agreement's inception, and the economic importance of services — in terms of production, income, employment and trade — has continued to rise. There thus appears ample scope for new and/or improved commitments in new negotiations.

## 6. The Annexes: Services Are Not All The Same

International trade in goods is a relatively simple idea to grasp: a product is transported from one country to another. Trade in services is much more diverse. Telephone companies, banks, airlines and accountancy firms provide their services in quite different ways. The GATS annexes reflect some of the diversity.

### Movement of natural persons

This annex deals with negotiations on individuals’ rights to stay temporarily in a country for the purpose of providing a service. It specifies that the agreement does not apply to people seeking permanent employment or to conditions for obtaining citizenship, permanent residence or permanent employment.

Financial services

Instability in the banking system affects the whole economy. The financial services annex says governments have the right to take prudential measures, such as those for the protection of investors, depositors and insurance policy holders, and to ensure the integrity and stability of the financial system. It also excludes from the agreement services provided when a government exercising its authority over the financial system, for example central banks’ services. Negotiations on specific commitments in financial services continued after the end of the Uruguay Round, ended in late 1997 and entered into force 1 March 1999.

Telecommunications

The telecommunications sector has a dual role: it is a distinct sector of economic activity; and it is an underlying means of supplying other economic activities (for example electronic money transfers). During the Uruguay Round, many governments made commitments in value-added telecommunication services, however very few offered commitments on basic telecommunications. The annex says governments must ensure that foreign service suppliers are given access to the public telecommunications networks without discrimination. Negotiations on specific commitments in telecommunications resumed after the end of the Uruguay Round. This led to a new liberalization package agreed in February 1997.

### Air transport services

Under this annex, traffic rights and directly related activities such as the carriage of passengers or freight are excluded from GATS’s coverage. They are handled by other bilateral agreements. However, the annex establishes that the GATS will apply to aircraft repair and maintenance services, marketing of air transport services and computer-reservation services.

### Maritime transport

Maritime transport negotiations were originally scheduled to end in June 1996, but participants failed to agree on a package of commitments. The talks have resumed with the new services round which started in 2000. Some commitments are already included in some countries’ schedules covering the three main areas in this sector: access to and use of port facilities; auxiliary services; and ocean transport.

## Questions

1. Does the GATS define "service" as a legal term?

2. When is e-commerce a service, when is it trade in goods?

3. Consider the economic role of services in developed and developing countries as it evolved since the end of World War II. Why has the liberalization of trade in services not surfaced earlier?

4. What kind of services are tradables and non-tradables?

5. Why do you think there have never been tariffs levied on the cross-border provision of services? Consider reasons of historical coincidence, but also aspects of practicability.

6. Consider the nature of regulatory restrictions which impede the cross-border provision of services. Think of typical examples in professions you know where specific licenses, diplomas etc. are required for the lawful exercise of a professional activity

7. Look up those provisions of the GATS which relate to competition and investment. Are such rules more important in the context of services than in connection to goods?

8. Why does the GATS highlight the importance of “domestic regulation” so much?

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# Lecture 7. TRIPS

World trade organization

Ideas and knowledge are an increasingly important part of trade. Most of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value — for example brand-named clothing or new varieties of plants. Creators can be given the right to prevent others from using their inventions, designs or other creations. These rights are known as “intellectual property rights” (IPRs).

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## 1. Intellectual property rights – basic concepts

### Definition of IPRs

Intellectual property rights are the rights given to persons over the creations of their minds: inventions, literary and artistic works, symbols, names, images, and designs used in commerce. They usually encourage and reward creative work, and give the creator an exclusive right over the use of his/her creation for a certain period of time.

### Types of intellectual property rights

Intellectual property rights play an important role in an increasingly broad range of areas, ranging from the Internet to health care to nearly all aspects of science and technology and literature and the arts. They take a number of forms. For example books, paintings and films come under copyright; inventions can be patented; brand names and product logos can be registered as trademarks. These forms can be classified as follows:

1. Copyright and related rights
2. Trademarks, including service marks
3. Geographical indications, including appellations of origin
4. Industrial designs
5. Patents, including the protection of new varieties of plants
6. Layout-designs (topographies) of integrated circuits
7. Undisclosed information, including trade secrets and test data

Intellectual property rights listed above are customarily divided into two main areas: 1) copyrights and related rights, 2) industrial property rights.

#### 1) Copyright and rights related to copyright.

The rights of authors of literary and artistic works (such as books and other writings, novels, poems and plays, films, musical works, musical compositions, computer programs and films, drawings, paintings, photographs and sculptures, and architectural designs) are protected by copyright, for a minimum period of 50 years after the death of the author.

Also protected through copyright and related (sometimes referred to as “neighbouring”) rights are the rights of performers (e.g. actors, singers and musicians), producers of phonograms (sound recordings) and broadcasting organizations.

#### 2) Industrial property, inventions (patents), trademarks, industrial designs, and geographic indications of source

Industrial property can usefully be divided into two main areas:

One area can be characterized as the protection of distinctive signs, in particular trademarks (which distinguish the goods or services of one undertaking from those of other undertakings) and geographical indications (which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin).

Other types of industrial property are protected primarily to stimulate innovation, design and the creation of technology. In this category fall inventions (protected by patents), industrial designs and trade secrets.

### Objectives of IPRs

IPRs are intended to give the creators adequate returns so that there are enough incentives for creativity. For example, the social purpose of industrial property rights of the second area is to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development (R&D) activities.

IPRs can further ensure fair competition and protect consumers, by enabling them to make informed choices between various goods and services and to differentiate counterfeit commodities. This objective is particularly attributable to the protection of industrial property rights of the first area (distinctive signs). The protection may last indefinitely, provided the sign in question continues to be distinctive.

A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment, joint ventures and licensing.

To sum up, the protection and enforcement of intellectual property rights should contribute

* to the promotion of technological innovation,
* to the transfer and dissemination of technology,
* to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare, and
* to a balance of rights and obligations.

## 2. Trade related aspects of IPRs

### Background for the Negotiation of the TRIPs Agreement.

So far, we have understood that creations should be accorded protection. However, the general public that benefits from such creations should not be expected to pay unreasonably high prices. The balance between the remuneration to the innovator and artist on the one hand, and the genuine interests of the public on the other, has been a subject of debate for a long time. Various countries tried to have their own balance. The extent of protection and enforcement of intellectual property rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations. Although the World Intellectual Property Organization (WIPO) has laid down some rules for the protection of intellectual property, many developed countries feel that the protection of IPRs needs much more strengthening than what is possible through the WIPO agreements. In the wake of rapid technological development, reaping the full benefits of their technological innovations is important for them. In the emerging world economic and trade scene, their prospects lie mainly in knowledge-intensive, high technology sectors of industrial production and services. It is vital for them to provide strengthened and assured protection to their innovations, particularly in the sectors of pharmaceuticals and electronics where copy is much easier. New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically.

The 1986-94 Uruguay Round achieved this goal in spite of the initial objection from a large number of countries participating in the negotiations to the inclusion of IPRs in GATT negotiations on the grounds that the subject was covered by another organization, i.e., the World Intellectual Property Organization, and that the GATT had jurisdiction only in the field of trade (As a compromise, the subject of the negotiations was termed trade-related intellectual property rights, and it was thought that it would cover only the matters related to trade. But finally, it was agreed that all issue relating to IPRs, including the standards of protection, would be negotiated, and the link with trade has almost vanished.). The TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights), which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

### Issues Covered by the TRIPs Agreement.

The agreement covers five broad issues:

* how basic principles of the trading system and other international intellectual property agreements should be applied
* how to give adequate protection to intellectual property rights
* how countries should enforce those rights adequately in their own territories
* how to settle disputes on intellectual property between members of the WTO
* special transitional arrangements during the period when the new system is being introduced.

### Objectives of the TRIPs Agreement.

The TRIPS is an attempt (i) to narrow the gaps in the way these rights are protected around the world, (ii) to bring them under common international rules, and (iii) When there are trade disputes over intellectual property rights, the WTO’s dispute settlement system is available.

The general goals of the TRIPS Agreement are contained in the Preamble of the Agreement, which reproduces the basic Uruguay Round negotiating objectives established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. These objectives include:

* the reduction of distortions and impediments to international trade,
* promotion of effective and adequate protection of intellectual property rights, and
* ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

### Main Features of the TRIPs Agreement.

The three main features of the Agreement are:

1) Standards. In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.

The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, i.e., the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries.

Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

2) Enforcement. The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify in detail the procedures and remedies that must be available so that right holders can effectively enforce their rights.

3) Dispute settlement. The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition the Agreement provides for certain basic principles, such as national and most-favored-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all Member countries, but developing countries will have a longer period to phase them in. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals.

The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

### Basic principles of the TRIPs Agreement: national treatment, MFN, and technological progress.

As in GATT and GATS, the starting point of the intellectual property agreement is basic principles. And as in the two other agreements, non-discrimination features prominently: national treatment (treating one’s own nationals and foreigners equally), and most-favored-nation treatment (equal treatment for nationals of all trading partners in the WTO).

##### National treatment.

National treatment is a key principle in other intellectual property agreements outside the WTO. As in the main pre-existing intellectual property conventions, the basic obligation on each Member country is to accord the treatment in regard to the protection of intellectual property provided for under the Agreement to the persons of other Members. These persons are referred to as “nationals” but include persons, natural or legal, who have a close attachment to other Members without necessarily being nationals. The criteria for determining which persons must thus benefit from the treatment provided for under the Agreement are those laid down for this purpose in the main pre-existing intellectual property conventions of WIPO, applied to all WTO Members whether or not they are party to those conventions. These conventions are the Paris Convention, the Berne Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty). These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement.

##### Most-favored-nation treatment.

While the national treatment clause forbids discrimination between a Member's own nationals and the nationals of other Members, the most-favored-nation treatment clause forbids discrimination between the nationals of other Members. In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under TRIPS. Where these exceptions allow material reciprocity, a consequential exception to MFN treatment is also permitted (e.g. comparison of terms for copyright protection in excess of the minimum term required by the TRIPS Agreement as provided under Article 7(8) of the Berne Convention as incorporated into the TRIPS Agreement). Certain other limited exceptions to the MFN obligation are also provided for.

##### Technological progress.

When an inventor or creator is granted patent or copyright protection, he obtains the right to stop other people making unauthorized copies. Society at large sees this temporary intellectual property protection as an incentive to encourage the development of new technology and creations which will eventually be available to all. The TRIPS Agreement recognizes the need to strike a balance. It says intellectual property protection should contribute to technical innovation and the transfer of technology. The agreement says both producers and users should benefit, and economic and social welfare should be enhanced.

##### Exhaustion.

Exhaustion has an implication for the limitation on the exclusive rights of the IPR-holder. According to the principle of exhaustion of IPRs, once the IPR-holder has sold the product covered by the IPR, the IPR-holder cannot thereafter have any control on the later stages of the marketing of the product. The IPR is deemed to have been exhausted after the first sale.

For example, when a patent-holder sells the patented product, the buyer is free to use it in any way he/she likes, including selling it and exporting it to another country. Suppose that a product is patented in a country C and it is sold to a buyer in that country. A person in another country D imports it for sale in country D where this product is also patented. Since the patent right has been exhausted in country C after the first sale in that country, the patent-holder cannot stop the export of the product to country D. This process has been called “parallel import”, to distinguish it from the normal import of the product with the authorization of the patent-holder. If the patented product normally sells at higher prices in country D, the parallel import from country C may push the prices down, thus the consumers will benefit.

A Member is free to have its own provisions regarding the exhaustion of IPRs in their domestic laws and practices. In fact, it may be an important tool to protect the interest of consumers and to ensure the availability of industrial and agricultural inputs as well as essential drugs at competitive prices.

### How to protect intellectual property.

The second part of the TRIPS agreement looks at different kinds of intellectual property rights and how to protect them. The purpose is to ensure that adequate standards of protection exist in all member countries. Here the starting point is the obligations of the main international agreements of the World Intellectual Property Organization (WIPO) that already existed before the WTO was created:

* the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc).
* the Berne Convention for the Protection of Literary and Artistic Works (copyright).

Some areas are not covered by these conventions. In some cases, the standards of protection prescribed were thought inadequate. So the TRIPS agreement adds a significant number of new or higher standards.

## 3. Copyright and related rights

Copyright includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

### Copyright.

During the Uruguay Round negotiations, it was recognized that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection. Thus it was agreed that the point of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i.e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto (Article 9.1). However, Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6bis of that Convention, i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honor or reputation), or of the rights derived thereof.

The provisions of the Berne Convention referred to deal with questions such as subject-matter to be protected, minimum term of protection, and rights to be conferred and permissible limitations to those rights. The Appendix allows developing countries, under certain conditions, to make some limitations to the right of translation and the right of reproduction.

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies and adds certain specific points.

Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such (Article 9.2).

#### Coverage of copyright

* Literary and artistic works, including computer programs and databases
* Cinematographic works
* Works of architecture

The TRIPS agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases should be protected. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971) (Article 10.1). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. It confirms further, that the form in which a program is, whether in source or object code, does not affect the protection. The obligation to protect computer programs as literary works means that only those limitations that are applicable to literary works may be applied to computer programs. It also confirms that the general term of protection of 50 years applies to computer programs. Possible shorter terms applicable to photographic works and works of applied art may not be applied to computer programs.

Databases are eligible for copyright protection provided that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are in, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

#### Rental right.

It also expands international copyright rules to cover rental rights. Authors of computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners’ potential earnings from their films. Authors shall have in respect of at least computer programs and, in certain circumstances, of cinematographic works the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

#### Term of protection to copyright.

According to the general rule of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. TRIPS Agreement provides that whenever the term of protection of a work, other than a photographic work or a work of applied art (in this case, the term will be at least 25 years from the making of the work), is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

### Related (neighboring) rights.

The agreement says performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years.

#### Coverage.

* unauthorized fixation and reproduction of such fixations
* unauthorized broadcasting by wireless means of their live performance
* the communication to the public of their live performance

According to the provisions on protection of performers, producers of phonograms and broadcasting organizations, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means of their live performance and the communication to the public of their live performance. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member, which on 15 April 1994, i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

#### Term of protection to related right.

The term of protection is at least 50 years from the end of the year of fixation or performance for performers and producers of phonograms, and 20 years from the end of the year of broadcast for broadcasting organizations.

### Exception.

Any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention (Article 14.6). The Convention provides fro exceptions for private use, short excerpts, teaching and scientific research, etc.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This is a horizontal provision that applies to all limitations and exceptions permitted under the provisions of the Berne Convention and the Appendix thereto as incorporated into the TRIPS Agreement. The application of these limitations is permitted also under the TRIPS Agreement, but the provision makes it clear that they must be applied in a manner that does not prejudice the legitimate interests of the right holder.

Copyright vs. patent.

No registration in an individual country is necessary to enjoy the protection of copyright, as is the case with patents. No disclosure is required for copyright, as is the case with patent; hence, the secret of the programming can be retained with the author.

The conditions to be satisfied for copyright are less stringent than those for patents. The protection through copyright is weak compared to that through patents. Copyright prohibits the copying of the creative expression, but permits independent creations even though based on the same ideas. Thus, such independent creations can be easily defended against charges of copying.

## 4. Industrial property

Industrial property includes inventions (patents), trademarks, industrial designs, and geographic indications of source.

### Trademarks.

The agreement defines what types of signs must be eligible for protection as trademarks, and what the minimum rights conferred on their owners must be. It says that service marks must be protected in the same way as trademarks used for goods. Marks that have become well-known in a particular country enjoy additional protection.

Definition: A trademark is defined as any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings. Such signs include personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs.

#### Conditions for the registration of trademarks

The basic rule is that such signs must be visually perceptible. Members are free to determine whether to allow the registration of signs that are not visually perceptible (e.g. sound or smell marks).

Where signs are not inherently capable of distinguishing the relevant goods or services, Member countries are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness be acquired through use.

Members may make registrability depend on use. However, actual use of a trademark shall not be permitted as a condition for filing an application for registration, and at least three years must have passed after that filing date before failure to realize an intent to use is allowed as the ground for refusing the application.

#### Rights conferred to a trademark.

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion must be presumed (Article 16.1).

##### Well-known trademarks.

The TRIPS Agreement contains certain provisions on well-known marks, which supplement the protection required by the Paris Convention, obliges Members to refuse or cancel the registration, and to prohibit the use of a mark conflicting with a mark which is well known.

First, the provisions must be applied also to services.

Second, it is required that knowledge in the relevant sector of the public be taken into account. The knowledge can be acquired not only as a result of the use of the mark but also by other means, including as a result of its promotion.

Furthermore, the protection of registered well-known marks must extend to goods or services which are not similar to those in respect of which the trademark has been registered, provided that its use would indicate a connection between those goods or services and the owner of the registered trademark, and the interests of the owner are likely to be damaged by such use.

##### Exception.

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

#### Term.

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely. In other words, there will be no limit to the number of times the trademark is renewed.

##### Requirement of use.

Cancellation of a mark on the grounds of non-use cannot take place before three years of uninterrupted non-use has elapsed unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner, such as import restrictions or other government restrictions arising independently of the will of the owner of the trademark. Use of a trademark by another person, when is subject to the control of its owner, must be recognized as use of the trademark for the purpose of maintaining the registration.

It is further required that use of the trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services.

### Geographical indications.

Place names are sometimes used to identify a product. Well-known examples include “Champagne”, “Scotch” whisky, “Tequila” alcoholic liquor, and “Roquefort” cheese. Wine and spirits makers are particularly concerned about the use of place-names to identify products, and the TRIPS agreement contains special provisions for these products. But the issue is also important for other types of goods.

#### Definition.

Geographical indications are defined in TRIPs as indications which identify a good as originating in the territory of a Member, or a region or particular place in that territory to which a given quality, reputation or other characteristic of the good are essentially attributable.

#### Conditions for geographical indication.

The quality, reputation or other characteristics of a good can each be a sufficient basis for eligibility as a geographical indication, where they are essentially attributable to the geographical origin of the good.

#### Use of geographical indication.

The use of a place name to describe a product in this way — a “geographical indication” — usually identifies both its geographical origin and its characteristics. Therefore, using the place name when the product was made elsewhere or when it does not have the usual characteristics can mislead consumers, and it can lead to unfair competition. The TRIPS agreement says countries have to prevent the misuse of place names.

In respect of all geographical indications, interested parties must have legal means to prevent use of indications which mislead the public as to the geographical origin of the good, and to prevent any use which constitutes an act of unfair competition.

The registration of a trademark which uses a geographical indication in a way that misleads the public as to the true place of origin must be refused or invalidated if the legislation so permits or at the request of an interested party.

##### Geographical indications of wines and spirits.

For wines and spirits, the agreement provides higher levels of protection, i.e. even where there is no danger of the public being misled. An Article in the TRIPs provides that interested parties must have the legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication. This applies even where the public is not being misled, there is no unfair competition and the true origin of the good is indicated or the true origin is indicated in translations or the geographical indication is accompanied be expressions such as “kind”, “type”, “style”, “imitation” or the like (e.g., champagne-type wine, imitation scotch whisky). Similar protection must be given to geographical indications identifying spirits when used on spirits. Protection against registration of a trademark must be provided accordingly.

#### Exceptions.

Trips contain a number of exceptions to the protection of geographical indications. These exceptions are of particular relevance in respect of the additional protection for geographical indications for wines and spirits. For example, Members are not obliged to bring a geographical indication under protection, where the name is already protected as a trademark or it has become a generic term for describing the product in question. For example, “cheddar” now refers to a particular type of cheese not necessarily made in Cheddar (a place in Britain).

But any country wanting to make an exception for these reasons must be willing to negotiate with the country which wants to protect the individual geographical indication in question. Measures to implement these provisions shall not prejudice prior trademark rights that have been acquired in good faith. Under certain circumstances, continued use of a geographical indication for wines or spirits may be allowed on a scale and nature as before. The agreement provides for further negotiations in the WTO to establish a multilateral system of notification and registration of geographical indications for wines. The exceptions cannot be used to diminish the protection of geographical indications that existed prior to the entry into force of the TRIPS Agreement. The TRIPS Council shall keep under review the application of the provisions on the protection of geographical indications.

### Industrial designs.

Definition: Industrial design refers to the features concerning the look of an article, such as the shape, ornamentation, pattern, configuration, etc.

TRIPs cover only industrial designs, and not utility models, i.e., minor functional modifications.

#### Coverage.

TRIPS Agreement obliges Members to provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

TRIPs contain a special provision aimed at taking into account the short life cycle and sheer number of new designs in the textile sector: requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through industrial design law or through copyright law.

#### Right of industrial design holder.

Members are required to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

#### Exception.

Members are allowed to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

#### Term.

Under the TRIPS agreement, the duration of protection available of industrial designs shall amount to at least 10 years. The wording “amount to” allows the term to be divided into, for example, two periods of five years.

### Patents.

Patents relate to scientific and technological innovations in various industrial and service sectors and confer certain exclusive rights on the patent-holder regarding the subject of the patent.

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability.

#### Conditions for patentability.

Novelty: it should not have been invented by somebody earlier, or at least, should not have been publicly disclosed;

Inventiveness: it should be non-obvious, or that it should be the result of a serious exercise of mind;

Industrial applicability: it should be useful, or that it should not be limited to the thought process, but should be applicable in having a new product or process, or in improving the functioning of an existing product or process.

It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced. The agreement says patent protection must be available for inventions for at least 20 years. Patent protection must be available for both products and processes, in almost all fields of technology.

#### Rights of patent-holder.

The exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained directly by the process. Other persons must be prevented from getting these rights. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts. Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent-holder, taking account of the legitimate interests of third parties.

Product patent vs process patent: If a patent is issued for a production process, then the rights must extend to the product directly obtained from the process. Under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process. It is possible for another innovator to develop the same final product through an alternative process.

In a case of the patent covering a product, another innovator is debarred from producing that product even through any alternative method which this innovator might have developed. Thus, the whole process of further scientific and technological research on obtaining the particular product by various alternative methods is stopped by allowing the patent of the product.

#### Countrywide patent.

A patent is applicable to each jurisdiction, i.e., the registration for the patent is done in each country and validity is limited to the jurisdiction of that country. Thus, if an innovator wants to have the patent rights in different countries, registrations will have to be obtained in all of them.

#### Obligation of patent-holder: full disclosure of patentable matter.

Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application. This obligation is meant to ensure that the subject of the patent comes within the public domain of knowledge, and does not remain a secret.

Advantages of a disclosure of a patent.

* All interested persons come to know the source of a particular technology;
* Other innovators may be in a position to carry forward further scientific and technological development, and come up with new processes and products based on the existing patented matter, particularly for those in countries that do not have much domestic innovation and wish to encourage it;
* At the expiry of the patent period, it may be possible for all interested persons to use the patented subject freely.

#### Process patent.

If the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating a likelihood that the protected process was used are met.

#### Patent of plant varieties.

Plant varieties, however, must be protected by patents or by a special system (such as the breeder’s rights provided in the conventions of UPOV — the International Union for the Protection of New Varieties of Plants).

The agreement describes the minimum rights that a patent owner must enjoy.

#### Exceptions.

TRIPs agreement also allows certain exceptions. Governments can refuse to issue a patent for an invention if its commercial exploitation is prohibited for reasons of public order or morality. They can also exclude diagnostic, therapeutic and surgical methods, plants and animals (other than microorganisms), and biological processes for the production of plants or animals (other than microbiological processes).

There are three permissible exceptions to the basic rule on patentability.

One is for inventions contrary to ordre public or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of ordre public or morality.

The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals.

The third is that Members may exclude plants and animals other than micro-organisms, e.g., bacteria, viruses, fungi, algae, protozoa, etc., and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective sui generis system of protection.

Furthermore, for countries which wish to encourage domestic innovation, it may be desirable to provide a limited exception that patented matter may be put to experimental use without the authorization of the patent-holder, especially for reverse engineering, i.e., proceeding backwards from the patented product to learn how it has been produced.

Moreover, the whole provision is subject to review four years after entry into force of the Agreement.

#### Compulsory licenses.

A patent-owner could abuse his rights, for example by failing to supply the product on the market. To deal with that possibility, the agreement says governments can issue “compulsory licenses”, allowing a competitor to produce the product or use the process under license. But this can only be done under certain conditions aimed at safeguarding the legitimate interests of the patent-holder.

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions include the obligation, as a general rule, to grant such licenses only if an unsuccessful attempt has been made to acquire a voluntary license on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the license; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions are relaxed where compulsory licenses are employed to remedy practices that have been established as anticompetitive by a legal process. These conditions should be read together with the related provisions (Article 27.1) which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced.

### Integrated circuits layout designs.

TRIPS Agreement requires Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the IPIC Treaty (the Treaty on Intellectual Property in Respect of Integrated Circuits), negotiated under the auspices of WIPO in 1989. These provisions deal with, inter alia, the definitions of “integrated circuit” and “layout-design (topography)”, requirements for protection, exclusive rights, and limitations, as well as exploitation, registration and disclosure. The TRIPS agreement adds a number of provisions: for example, protection must be available for at least 10 years.

#### Definition.

An “integrated circuit” means a product, in its final form or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function.

A “layout-design (topography)” is defined as the three-dimensional disposition of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture.

#### Condition for protection.

The obligation to protect layout-designs applies to such layout-designs that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs and manufacturers of integrated circuits at the time of their creation.

For the purpose of protection, disclosure of the layout design has to be made, such as a copy or a drawing of the layout design, information on the electronic function, etc.

The duration between the first commercial exploitation of the layout design and the date of filing the application cannot be less than two years.

#### Rights of layout design holder.

The exclusive rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes. Certain limitations to these rights are provided for.

#### Exception.

The exceptions to the scope of protection are the following:

* Acts of reproduction for private purpose;
* Acts of reproduction for the purposes of evaluation, analysis, research or teaching;
* Use of an identical but original layout design created independently by a person other than the right-holder;

#### Term.

The term must be at least 10 years from the date of filling the application for registration, or from the first commercial exploitation in the world.

A Member may provide that the term will lapse 15 years after the creation of the layout design.

### Undisclosed information and trade secrets.

Trade secrets and other types of “undisclosed information” which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices. But reasonable steps must have been taken to keep the information secret. Test data submitted to governments in order to obtain marketing approval for new pharmaceutical or agricultural chemicals must also be protected against unfair commercial use.

#### Conditions for protection.

The TRIPS Agreement requires undisclosed information -- trade secrets or know-how -- to benefit from protection. The protection must apply to information that is secret, that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret.

The Agreement does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest commercial practices. “Manner contrary to honest commercial practices” includes breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

The Agreement also contains provisions on undisclosed test data and other data whose submission is required by governments as a condition of approving the marketing of pharmaceutical or agricultural chemical products which use new chemical entities. In such a situation the Member government concerned must protect the data against unfair commercial use. In addition, Members must protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

### Curbing anti-competitive licensing contracts.

The owner of a copyright, patent or other form of intellectual property right can issue a license for someone else to produce or copy the protected trademark, work, invention, design, etc. The agreement recognizes that the terms of a licensing contract could restrict competition or impede technology transfer. It says that under certain conditions, governments have the right to take action to prevent anti-competitive licensing that abuses intellectual property rights. It also says governments must be prepared to consult each other on controlling anti-competitive licensing.

TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Member countries may adopt, consistently with the other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive. The Agreement provides for a mechanism whereby a country seeking to take action against such practices involving the companies of another Member country can enter into consultations with that other Member and exchange publicly available non-confidential information of relevance to the matter in question and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member. Similarly, a country whose companies are subject to such action in another Member can enter into consultations with that Member.

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## 5. Enforcement of IPRs

Having intellectual property laws is not enough. They must be enforceable. WTO Members have to implement the TRIPs agreement through their respective domestic legislation. In the multilateral forum of the WTO, a Member is responsible for the establishment of the necessary administrative and legal framework and for ensuring that the machinery works. The agreement says governments have to ensure that intellectual property rights can be enforced under their laws, and that the penalties for infringement are tough enough to deter further violations. The procedures must be fair and equitable, and not unnecessarily complicated or costly. They must not entail unreasonable time-limits or unwarranted delays. People involved should be able to ask a court to review an administrative decision or to appeal a lower court’s ruling.

The agreement describes in some detail how enforcement have to be handled, including rules for obtaining evidence, provisional measures, injunctions, damages and other penalties. It says courts must have the right, under certain conditions, to order the disposal or destruction of pirated or counterfeit goods. Willful trademark counterfeiting or copyright piracy on a commercial scale must be criminal offences. Governments have to make sure that intellectual property rights owners can receive the assistance of customs authorities to prevent imports of counterfeit and pirated goods.

### Transition arrangements.

When the WTO agreements took effect on 1 January 1995, developed countries were given one year to ensure that their laws and practices conform with the TRIPS agreement. Developing countries and (under certain conditions) transition economies from centrally planned economy to a market economy are given five years, or 4 years after 1 January 1996. Least developed countries have 11 years, or 10 years from 1 January 1996. Thus, it has to apply it, at the least, by 1 January 2006.

If a developing country did not provide product patent protection in a particular area of technology when the TRIPS Agreement came into force (1 January 1995), it has up to 10 years to introduce the protection. But for pharmaceutical and agricultural chemical products, the country must accept the filing of patent applications from the beginning of the transitional period, though the patent need not be granted until the end of this period. If the government allows the relevant pharmaceutical or agricultural chemical to be marketed during the transition period, it must — subject to certain conditions — provide an exclusive marketing right for the product for five years, or until a product patent is granted, whichever is shorter.

Subject to certain exceptions, the general rule is that obligations in the agreement apply to intellectual property rights that exist at the end of a country’s transition period, as well as to new ones.

Annex: Other intellectual property conventions incorporated by reference into the TRIPS Agreement. The TRIPS Agreement contains references to the provisions of certain pre-existing intellectual property conventions.

Below is a list of these agreements.

* Paris Convention for the Protection of Industrial Property (1967) (the Stockholm Act of 14 July 1967 of the Paris Convention for the Protection of Industrial Property)
* Berne Convention for the Protection of Literary and Artistic Works (1971) and the Appendix thereto (the Paris Act of 24 July 1971 of the Berne Convention for the Protection of Literary and Artistic Works)
* The Rome Convention: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted at Rome on 26 October 1961
* Treaty on Intellectual Property in Respect of Integrated Circuits (1989), adopted at Washington on 26 May 1989

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## Questions

1. What is the rationale of protecting intellectual property rights in general? Should IPs be protected under the WTO? Wouldn’t the WIPO be sufficient?

2. Think of other legal (under WTO or beyond WTO) grounds for exempting TRIPs obligations as to pharmaceuticals in order to save human lives in poor countries?

3. What would be demerits of expanding the protection of geographical indication?

4. What is the relationship between the TRIPS Agreement and the pre-existing international conventions that it refers to?

5. Which of the following statements is correct? Support your respond with arguments.

a) intellectual property rights are divided into 2 main categories – industrial property rights, and copyrights and related rights

b) Copyrights and related rights include the protection of distinctive signs such as trademarks and geographical indications

c) TRIPS Agreement requires all member’s rules on protection of intellectual property to be identical

d) the main principles of the TRIPS agreement are free trade, non-discrimination, MFN and tarification

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# Lecture 8. Rules and Procedures Governing the Settlement of Disputes (DSU)

## 1. WTO Dispute settlement system – main definitions

DSU means the Understanding on Rules and Procedures Governing the Settlement of Disputes which is Annex 2 to the WTO Agreement;

DSB means the Dispute Settlement Body established under Article 2 of the DSU, made up of all member governments, usually represented by ambassadors or equivalent. The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings or recommendations of panels or of the Appellate Body and authorize suspension of concessions or other obligations under the covered agreements.

Panels and panelists refer to a team of three or five experts or well-qualified governmental or non-governmental individuals to examine a dispute, giving findings and making recommendations. Panelists are nominated by the Secretariat and agreed by the parties to a dispute or appointed by the Director-General of the WTO where there is no agreement within 20 days after the date of establishment of the panel. Panelists are expected to function in their individual capacities and not as representatives of governments or of any organization.

Standard Terms of Reference refer to the legal responsibilities of the DSB panels, i.e., the examination of the issues raised by the complaining Member, and giving findings which will assist the DSB in making recommendations or in giving its rulings on the issues in question.

Consensus a decision is deemed to be made by consensus if no Member formally objects to it, or there is no consensus against it.

Good offices, conciliation and mediation refer to a procedure of the disputer settlement process in which the Director-General of the WTO assists the parties to settle a dispute in a way satisfactory to both parties of the dispute.

Good offices mean that a third party assists the negotiation or consultation between the two parties to a dispute.

Conciliation means that a dispute is submitted to a committee or an organization who will make findings and recommend solutions satisfactory to both parties.

Mediation means a third party is involved directly in the negotiations of concerned parties of a dispute.

Good offices, conciliation and mediation may be requested by any party to a dispute, but can be effectively undertaken only if both parties to the dispute agree to use this procedure. It may begin and be terminated at any time, and it may even be continued while the panel process is on.

Arbitration refers to an alternative course in the dispute settlement process where the dispute issues are clearly defined by both parties. It will be entered into if the parties to the dispute agree to adopt it. The parties have to agree to abide by the arbitration award, which will be notified to the DSB. The implementation process of the award will be along the same lines as that for the recommendation and ruling of a panel.

Appellate Body refers to the permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly represents the range of WTO membership. Members of the Appellate Body have four-year terms, and can be renewed once. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

Division means the three Members of Appellate Body who are selected to serve on any one appeal;

appellant means any party to the dispute that has filed a Notice of Appeal or has filed a submission;

appellee means any party to the dispute that has filed a submission;

third participant means any third party that has filed a written submission; or any third party that appears at the oral hearing, whether or not it makes an oral statement at that hearing;

third party means any WTO Member who has notified the DSB of its substantial interest in the matter before the panel.

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## 2. Dispute settlement system in the WTO – basic concepts

The dispute settlement system of the GATT is generally considered to be one of the cornerstones of the multilateral trade order. The system has already been strengthened and streamlined as a result of reforms agreed following the Mid-Term Review Ministerial Meeting held in Montreal in December 1988. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) further strengthened the existing system significantly, extending the greater automaticity agreed in the Mid-Term Review to the adoption of the panels' and a new Appellate Body's findings. Disputes currently being dealt with by the Council are subject to these new rules, which include greater automaticity in decisions on the establishment, terms of reference and composition of panels, such that these decisions are no longer dependent upon the consent of the parties to a dispute. Moreover, the DSU will establish an integrated system permitting WTO Members to base their claims on any of the multilateral trade agreements included in the Annexes to the Agreement establishing the WTO. For this purpose, a Dispute Settlement Body (DSB) will exercise the authority of the General Council and the Councils and committees of the covered agreements.

### Description of dispute settlement process.

The DSU emphasizes the importance of consultations in securing dispute resolution, requiring a Member to enter into consultations within 30 days of a request for consultations from another Member.

If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Where consultations are denied, the complaining party may move directly to request a panel.

The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration.

Where a dispute is not settled through consultations, the DSU requires the establishment of a panel, at the latest, at the meeting of the DSB following that at which a request is made, unless the DSB decides by consensus against establishment. The DSU also sets out specific rules and deadlines for deciding the terms of reference and composition of panels. Standard terms of reference will apply unless the parties agree to special terms within 20 days of the panel's establishment. Where the parties do not agree on the composition of the panel within the same 20 days, this can be decided by the Director-General.

Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. The Secretariat will maintain a list of experts satisfying the criteria. Panel procedures are set out in detail in the DSU. It is envisaged that a panel will normally complete its work within six months or, in cases of urgency, within three months. Panel reports may be considered by the DSB for adoption 20 days after they are issued to Members. Within 60 days of their issuance, they will be adopted, unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal.

The concept of appellate review is an important new feature of the DSU. An Appellate Body will be established, composed of seven members, three of whom will serve on any one case. An appeal will be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Appellate proceedings shall not exceed 60 days from the date a party formally notifies its decision to appeal. The resulting report shall be adopted by the DSB and unconditionally accepted by the parties within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.

Once the panel report or the Appellate Body report is adopted, the party concerned will have to notify its intentions with respect to implementation of adopted recommendations. If it is impracticable to comply immediately, the party concerned shall be given a reasonable period of time, the latter to be decided either by agreement of the parties and approval by the DSB within 45 days of adoption of the report or through arbitration within 90 days of adoption. In any event, the DSB will keep the implementation under regular surveillance until the issue is resolved.

Further provisions set out rules for compensation or the suspension of concessions in the event of non-implementation. Within a specified time-frame, parties can enter into negotiations to agree on mutually acceptable compensation. Where this has not been agreed, a party to the dispute may request authorization of the DSB to suspend concessions or other obligations to the other party concerned. The DSB will grant such authorization within 30 days of the expiry of the agreed time-frame for implementation.

Disagreements over the proposed level of suspension may be referred to arbitration within 90 days of the date of adoption of the recommendations and rulings. The arbitration will be done by an arbitrator mutually agreed upon by the parties to the dispute. If there is no agreement on who should be the arbitrator within 10 days of the matter being referred to arbitration, the Director-General of the WTO has to appoint an arbitrator within another period of 10 days of consulting the parties. The guideline to the arbitrator will be that the reasonable period of time to implement the panel or Appellate Body recommendation should not exceed 15 months from the date of adoption of the panel or Appellate Body report. If the panel or the Appellate Body has taken additional time, such time will be added to the 15-month period. But in any case, the time shall not exceed 18 months except if the parties to the dispute agree on a longer period in exceptional circumstances.

In principle, the level of suspension will be equivalent to the level of nullification or impairment, i.e., it cannot be higher, and concessions should be suspended in the same sector as that in issue in the panel case. If this is not practicable or effective, the suspension can be made in a different sector of the same agreement (cross-sector suspension). In turn, if this is not effective or practicable and if the circumstances are serious enough, the suspension of concessions may be made under another agreement (cross-agreement suspension), for example, action can be taken on goods for some actions or for some omission to take action in the area of services or IPRs.

One of the central provisions of the DSU reaffirms that Members shall not themselves make determinations of violations or suspend concessions, but shall make use of the dispute settlement rules and procedures of the DSU (multilateral process in dispute settlement).

The DSU contains a number of provisions taking into account the specific interests of the developing and the least-developed countries. It also provides some special rules for the resolution of disputes which do not involve a violation of obligations under a covered agreement but where a Member believes nevertheless that benefits are being nullified or impaired (non-violation nullification or impairment). Special decisions to be adopted by Ministers in 1994 foresee that the Montreal Dispute Settlement Rules, which would otherwise have expired at the time of the April 1994 meeting, are extended until the entry into force of the WTO. Another decision foresees that the new rules and procedures will be reviewed within four years after the entry into force of the WTO.

### Coverage of DSU.

The dispute settlement process covers the WTO Agreement (i.e., the Agreement on Establishing the World Trade Organization), GATT 1994, GATS, TRIPs.

Preconditions for resorting to dispute settlement process

* Any benefit accruing to the Member under a particular agreement is being nullified or impaired;
* The attainment of any objective of the agreement is being impeded as a result of the failure of another Member to carry out its obligations under the agreement, or as a result of the application by another Member of any measure which conflicts with the provisions of the agreement.

### Nature of cases.

Violation cases: If the nullification or impairment of a benefit is caused by a Member failing to carry out its obligations under the agreement, or applying a measure which conflicts with some provision of the agreement, the situation occurs because of the violation of some provision of the agreement. For example, if a Member impairs the benefit flowing out of its tariff binding by imposing an internal charge on an imported product which it does not apply to the like domestic product, it is violating the provisions of Article III of GATT 1994 (National Treatment).

In these violation cases, the establishment of the following elements is necessary:

* Existence of an obligation in the relevant agreement
* Failure of a Member to carry it out, or
* A Member has taken a measure conflicting with a provision in the relevant agreement.

Particularly, because Members are required to bring their laws and procedures into conformity with the provisions of the WTO agreements, the mere existence of a violating provision in the legislation of a Member would amount to a violation, even when no measure might have been taken in pursuance of the legislation. The market access commitments in the GATT are generally on the conditions of competition for trade and not on the volumes of trade.

Non-violation cases: When a Member applies a measure which does not conflict with the agreement and yet causes the nullification or impairment of benefits, it is doing so without violating the provisions of the agreement. For example, a Member may negotiate tariff concessions with another Member, resulting in the binding of the tariff on a product, but then grant a subsidy to the domestic industry producing a like product within permissible limits, and may thereby affect adversely the prospects of the export of another Member. This may, under certain circumstances, be held to impair the benefit accruing to this Member, though it does not violate the disciplines on subsidies. The reason behind this conclusion is that the exporting Member had no anticipation at the time the negotiation for the tariff concession took place that such a subsidy would be granted.

The main elements in non-violation cases are:

* The existence of a benefit,
* Subsequent action by a Member curtailing the benefit,
* The existence of a reasonable expectation that the competitive conditions would not be upset.

### Principles: equitable, fast, effective, mutually acceptable.

Equitable (multilateral settlement).

WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements.

Fast (time limit).

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), then the case should take three months less.

Effective (enforcement).

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

Mutually acceptable (consultation).

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

## 3. Procedures for dispute settlement process

Settling disputes is the responsibility of the Dispute Settlement Body. The Dispute Settlement Body has the sole authority to establish “panels” of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

First stage: consultation (up to 60 days). Before taking any other actions, the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.

First, the complaining Member must send notice for consultation to the offending Member and to the DSB, stating the reasons, the measures and the legal basis for the request.

Second, the responding Member must reply to the request within 10 days of receiving the request, and enter into consultation within 30 days of receiving the request, or within 10 days in cases of urgency, such as cases concerning perishable goods.

Third, the complaining Member may request the DSB for the formation of a panel within 60 days or 20 days in urgent cases of the receipt of the notice for consultation by the responding Member if the consultation has failed. Any offer made in the consultation is not binding.

Interested Members may give notice to the consulting Members and the DSB within 10 days of the date of circulation of the request for consultation in order to join the consultation, or may initiate a separate consultation.

Second stage: the panel (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country “in the dock” can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel’s report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel’s findings have to be based on the agreements cited.

The panel’s final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

The agreement describes in some detail how the panels are to work. The main stages are:

Before the first hearing: each side in the dispute presents its case in writing to the panel.

First hearing: the case for the complaining country and defense: the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel’s first hearing.

Rebuttals: the countries involved submit written rebuttals and present oral arguments at the panel’s second meeting. The responding Member has the right to make its rebuttal first, and then, the complaining Member will follow.

Experts: if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.

First draft: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

Interim report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.

Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.

Final report: A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform to WTO rules. The panel may suggest how this could be done.

The report becomes a ruling: The report becomes the Dispute Settlement Body’s ruling or recommendation within 60 days of the date of circulation of the report to Members unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

### Appeal process.

Either side or both sides can appeal a panel’s ruling. The third parties which have indicated their interest in the dispute do not have such a right. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new evidence.

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms, and can be renewed once. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel’s legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus.

### Implementation of Recommendation.

If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed.

The priority at this stage is for the losing “defendant” to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that “prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members”. If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report’s adoption. If complying with the recommendation immediately proves impractical, the member will be given a “reasonable period of time” to do so.

If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions (“suspend concessions or obligations”) against the other side. The Dispute Settlement Body should grant this authorization within 30 days of the expiry of the “reasonable period of time” unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

## 4. Case study: the timetable in practice

On 23 January 1995, Venezuela complained to the Dispute Settlement Body that the United States was applying rules that discriminated against gasoline imports, and formally requested consultations with the United States.

The case arose because the United States applied stricter rules on the chemical characteristics of imported gasoline than it did for domestically-refined gasoline. Venezuela (and later Brazil) said this was unfair because US gasoline did not have to meet the same standards — it violated the “national treatment” principle and could not be justified under exceptions to normal WTO rules for health and environmental conservation measures.

Just over a year later (on 29 January 1996) the dispute panel completed its final report. (By then, Brazil had joined the case, lodging its own complaint in April 1996. The same panel considered both complaints.) The dispute panel agreed with Venezuela and Brazil.

The United States appealed. The Appellate Body completed its report (The appeal report upheld the panel’s conclusions, making some changes to the panel’s legal interpretation), and the Dispute Settlement Body adopted the report on 20 May 1996, one year and four months after the complaint was first lodged.

The United States and Venezuela then took six and a half months to agree on what the United States should do (i.e., to determine mutually-acceptable compensation). The agreed period for implementing the solution was 15 months from the date the appeal was concluded (20 May 1996 to 20 August 1997) (i.e., the United States agreed with Venezuela that it would amend its regulations within 15 months).

The Dispute Settlement Body has been monitoring progress — the United States submitted “status reports” on 9 January and 13 February 1997, for example, and on 26 August 1997 it reported to the Dispute Settlement Body that a new regulation had been signed on 19 August.

### Case before the WTO: The tuna-dolphin dispute.

This case was handled under the old GATT dispute settlement procedure but still attracts a lot of attention because of its implications for environmental disputes. Key questions are:

* can one country tell another what its environmental regulations should be?
* and do trade rules permit action to be taken against the method used to produce goods (rather than the quality of the goods themselves)?

In eastern tropical areas of the Pacific Ocean, schools of yellowfin tuna often swim beneath schools of dolphins. When tuna is harvested with purse seine nets, dolphins are trapped in the nets. They often die unless they are released.

The US Marine Mammal Protection Act sets dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellowfin tuna in that part of the Pacific Ocean. If a country exporting tuna to the United States cannot prove to US authorities that it meets the dolphin protection standards set out in US law, the US government must embargo all imports of the fish from that country. In this dispute, Mexico was the exporting country concerned. Its exports of tuna to the US were banned. Mexico complained in 1991 under the GATT dispute settlement procedure.

The embargo also applies to “intermediary” countries handling the tuna en route from Mexico to the United States. Often the tuna is processed and canned in one of these countries. In this dispute, the “intermediary” countries facing the embargo were Costa Rica, Italy, Japan and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. Others, including Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations, were also named as “intermediaries”.

The panel.

Mexico asked for a panel in February 1991. A number of “intermediary” countries also expressed an interest. The panel reported to GATT members in September 1991. It concluded:

* that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported.) This has become known as a “product” versus “process” issue.
* that GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country — even to protect animal health or exhaustible natural resources. The term used here is “extra-territoriality”.

What was the reasoning behind this ruling? If the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally — and to do so not just to enforce its own laws domestically, but also to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system — to achieve predictability through trade rules.

The panel’s task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct or not. It suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse.

The panel was also asked to judge the US policy of requiring tuna products to be labeled “dolphin-safe” (leaving to consumers the choice of whether or not to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.

P.S. The report was never adopted.

Under the present WTO system, if WTO members (meeting as the Dispute Settlement Body) do not by consensus reject a panel report after 60 days, it is automatically accepted (“adopted”). That was not the case under the old GATT. Mexico decided not to pursue the case and the panel report was never adopted even though some of the “intermediary” countries pressed for its adoption. Mexico and the United States held their own bilateral consultations aimed at reaching agreement outside GATT.

In 1992, the European Union lodged its own complaint. This led to a second panel report circulated to GATT members in mid 1994. The report upheld some of the findings of the first panel and modified others. Although the European Union and other countries pressed for the report to be adopted, the United States told a series of meetings of the GATT Council and the final meeting of GATT Contracting Parties (i.e. members) that it had not had time to complete its studies of the report. There was therefore no consensus to adopt the report, a requirement under the old GATT system. On 1 January 1995, GATT made way for the WTO.

### Timetable for settling a dispute.

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days - Consultations, mediation, etc

45 days - Panel set up and panelists appointment

6 months - Final panel report to parties

3 weeks - Final panel report to WTO members

60 days - Dispute Settlement Body adopts report

(if no appeal)

Total = 1 year (without appeal)

60-90 days - Appeals report

30 days - Dispute Settlement Body adopts appeals report

Total = 1y 3m (with appeal)

### Case: Timetable for settling the US-Venezuela gasoline dispute

|  |  |  |  |
| --- | --- | --- | --- |
| Time(0 = start of case) | Target/ actual period | Date | Action |
| -5 years |  | 1990 | US Clean Air Act amended |
| -4 months |  | September 1994 | US restricts gasoline imports under Clean Air Act |
| 0 | “60 days” | 23 January 1995 | Venezuela complains to Dispute Settlement Body, asks for consultation with US |
| +1 month | 24 February 1995 | Consultations take place. Fail. |
| +2 months | 25 March 1995 | Venezuela asks Dispute Settlement Body for a panel |
| +2½ months | “30 days” | 10 April 1995 | Dispute Settlement Body agrees to appoint panel. US does not block. (Brazil starts complaint, requests consultation with US.) |
| +3 months |  | 28 April 1995 | Panel appointed. (31 May, panel assigned to Brazilian complaint as well) |
| +6 months | 9 months (target is 6-9) | 10-12 July and 13-15 July 1995 | Panel meets |
| +11 months |  | 11 December 1995 | Panel gives interim report to US, Venezuela and Brazil for comment |
| +1 year |  | 29 January 1996 | Panel circulates final report to Dispute Settlement Body |
| +1 year, 1 month |  | 21 February 1996 | US appeals |
| +1 year, 3 months | “60 days” | 29 April 1996 | Appellate Body submits report |
| +1 year, 4 months | “30 days” | 20 May 1996 | Dispute Settlement Body adopts panel and appeal reports |
| +1 year, 10½ months |  | 3 December 1996 | US and Venezuela agree on what US should do (implementation period is 15 months from 20 May) |
| +1 year, 11½ months |  | 9 January 1997 | US makes first of monthly reports to Dispute Settlement Body on status of implementation |
| +2 years, 7 months |  | 19-20 August 1997 | US signs new regulation (19th). End of agreed implementation period (20th) |

## Questions

1. Adjudicating vs. negotiating vs. negotiating international trade disputes – pros and cons?

2. How does the WTO dispute settlement procedure work?

3. Explain the concepts of reverse consensus and of cross-retaliation.

4. Who may participate in WTO dispute settlement procedure?

5. Are WTO Panels bound by earlier GATT/WTO decisions?

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# Lecture 9. Regulation of Agricultural Trade

## 1. Background for the Agreement

The original GATT1947 did apply to agricultural trade, but it contained loopholes. For example, it allowed countries to use some non-tariff measures such as import quotas, and to subsidize. Agricultural trade became highly distorted, especially with the use of export subsidies which would not normally have been allowed for industrial products. During 1997-2001, for example, the US injected export subsidies worth $78.87 billion. In May 2002, the US enacted another law authorizing massive farm subsidies. Farm subsidies account for more than 46% of the EU budget, spending U$7 billion in export subsidies to support 2% of its population involved in agriculture, accounting for 85% of all exports subsidies in the world. In Japan, the level of support is 65 percent (Switzerland 73% and Norway 69%) of gross farm receipts.

The agricultural negotiations of the Uruguay Round were largely dominated by exchanges between the US and the EU. On the eve of the Uruguay negotiations, the US was the world’s biggest exporter of agricultural products and the second biggest importer. In contrast, the EU was the biggest importer and the second biggest exporter at world level. When the Round began, the two major exporting powers had both reached self-sufficiency because of the effectiveness of the CAP, technological progress and improved productivity, and were trying to conquer the export market. Only with a simultaneous and similar modification of farm policies on both sides of the Atlantic could there be a sharing of the cost of agricultural policy reform. The agricultural negotiations that were initially multilateral in the GATT context rapidly turned into bilateral negotiations between the EU and the US. The agriculture negotiations blocked the rest of the multilateral negotiations. The concessions obtained were in fact no more than an international consolidation of internal reforms.

Reasons for the existence of exceptional arrangements for agriculture.

Governments usually give three reasons for supporting and protecting their farmers, even if this distorts agricultural trade to make sure that enough food is produced to meet the country’s needs

In many countries, support for agriculture is primarily strategic in nature. By encouraging agriculture, a country can guarantee its food supplies against fluctuating harvests and protect its population from famines. Self-sufficiency in agricultural products means a country does not have to depend on supplies from third countries, which could one day turn out to be its enemies. It is particularly significant for the developing countries with chronic shortage of foreign exchange. It is not practical for them to depend on imported staple food, even though it may be cheaper to import, because they may not have adequate foreign exchange to import the food products. Considering the uncertain nature of their foreign exchange availability and also, perhaps, the uncertainty in the supply of food grain even if the necessary foreign exchange were available, several countries would like to develop their own production base for their staple food, rather than depend on imports.

To shield farmers from the effects of the weather and swings in world prices.

The objective of ensuring consumers reasonable prices and protecting producers against fluctuations in the price of agricultural products is often put forward to justify the existence of agricultural policies. One of the main characteristics of the agricultural product market is indeed its wide price variations due to the fact that demand for foodstuffs is constantly rising because of world population growth whereas supply can vary enormously because of fluctuating harvests and weather conditions. Variable customs duties, as are given in EU, can correct any variation in world prices and guarantee a fixed price on the domestic market thus ensure a stable income for producers. Loans to farmers or an insurance mechanism that guarantees producers a minimum income, irrespective of fluctuations in world prices, as is the case in the US, can also achieve this goal.

To preserve rural society.

Many Western democracies remain closely attached to the cultural, social, and historical values that agriculture perpetuates. In the US, people still cherish the image of the pioneer farming families who settled the vast expanses of America. Similarly, the Japanese remain very attached to maintaining national agriculture through which they can preserve their ancestral traditions. In the European Community, the existence of the common agricultural policy (CAP) is nowadays justified by the multifunctional aspect of agriculture. Thus regional planning, safeguarding the rural way of life, animal welfare, environmental protection and food security are financed via support for agriculture.

Several developing countries have a more deep-seated concern. Agriculture in these countries is not so much a matter of commerce; it is intimately interwoven with the pattern of rural life. Many farmers cultivate their land not as a commercial venture, but more as a family tradition. The land has been with their families for generations and they have been cultivating it as they have no other source of income to support their families. Such developing countries fear that their small and marginal household farmers will be in great difficulty when they are called upon to face the challenge of world competition.

To win political support.

This is an inexplicit motivation in granting favorable agricultural policies. In many Western democracies, agricultural interests have a political clout that gives them a decisive influence on the political life of their countries. This is the case in the US where the thinly populated states of the farm belt have as many senators as densely populated states like California, and similarly in Japan or Canada where the political systems also encourage over-representation of rural rather than urban areas. This phenomenon also exists in the EU. In Germany the weight of farming interests in the south of the country was decisive in keeping Chancellor Kohl in power; in France the rural electorate still influences a very large share of the vote although farmers account for only some 5% of the working population.

This cultural and sociological dimension of agricultural support, which is very evident in the urban electorate, coupled with the strong political representation enjoyed by the agricultural electorate in the major Western democracies, helps to understand why, apart from reasons of simple economic logic, the major Western democracies remain firmly attached to maintaining agricultural policies.

But the policies have often been expensive, and they have encouraged gluts leading to export subsidy wars. Countries with less money for subsidies have suffered. In negotiations, some countries have argued that trying to meet any of these objectives is counter-productive. Others have attempted to find ways of meeting the objectives without distorting trade too much.

Overriding feature of the agreement: Where there is any conflict between the Agreement and other WTO agreements, the provisions of the Agreement on Agriculture prevail.

The objective of the Agreement is to establish a fair and market-oriented agricultural trading system, thus improve predictability and security for importing and exporting countries alike.

## 2. Areas of Commitments under the Agreement on Agriculture

* market access, i.e., the disciplines on import restraints and import limitations;
* domestic support, i.e., support by government to domestic producers;
* export subsidies, i.e., support by government to exporters.

The agreement does allow governments to support their rural economies, but preferably through policies that cause less distortion to trade. It also allows some flexibility in the way commitments are implemented. Developing countries do not have to cut their subsidies or lower their tariffs as much as developed countries, and they are given extra time to complete their obligations. Special provisions deal with the interests of countries that rely on imports for their food supplies, and the least developed economies. “Peace” provisions within the agreement aim to reduce the likelihood of disputes or challenges on agricultural subsidies over a period of nine years.

## 3. Market Access

### Tariffication.

The new rule for market access in agricultural products is “tariffs only”. Before the Uruguay Round, some agricultural imports, especially for many temperate zone agricultural products, were restricted by quotas and other non-tariff measures. These have been replaced by tariffs that provide more-or-less equivalent levels of protection — if the previous policy meant domestic prices were 75% higher than world prices, then the new tariff could be around 75%. (Converting the quotas and other types of measures to tariffs in this way was called “tariffication”.) The tariffs on virtually all agricultural products traded internationally are bound in the WTO.

Tariffication formula - tariffication referred to the conversion to an ordinary tariff rate of the full extent of protection given to a product through both tariff and NTBs. The Modalities document prescribed the use of the price gap method to measure tariff equivalents, as follows:

T = (Pd - Pw)/ Pw \* 100

Where T = ad valorem tariff equivalent

Pd = domestic price (e.g. wholesale price)

Pw = world reference price (import or export parity price)

Base year - the average of three years, ex.1986, 1987 and 1988.

### Tariff Reduction.

A Member has to reduce its tariff total every year in equal steps over a prescribed span of time.

Developed Members will, from 1995 to 2000, reduce their tariffs on agricultural products by 36% on average, with a minimum cut of 15% in each tariff line. For developing Members, the cuts are 24 and 10% respectively from 1995 to 2004. Least-developed Members were required to bind all agricultural tariffs, but not to undertake tariff reductions.

In practice, major importers of agricultural products have bound the tariffs at very high levels, assuming very high tariff equivalents for non-tariff measures, thus making the entry of imports almost impossible.

Typical High Tariffs

Canada: butter 360%,

cheese 289%,

eggs 236.3%

EU: beef 213%,

wheat 167.7%,

sheep meat 144%

Japan: wheat products 388.1%,

wheat 352.7%,

barley products 361%

US: sugar 244.4%,

peanuts 173.8%,

milk 82.6%.

These tariffs are so high that even in the final year of the implementation period they would still be very high.

### Tariff Reduction formulas.

No method or formula for further reduction of the tariffs has been identified as yet for the next round within the formal WTO process - in fact, this itself would be a subject for negotiations. However, reflecting the importance of this matter, this subject has attracted considerable attention from analysts. What follows is a summary of various ideas, albeit all informal, by which tariffs may be reduced. Given that tariff binding is a matter of strategic concern, it is important for countries to be aware of these possible methods and how these would affect their currently bound tariff rates.

Across-the-board linear reduction. A linear reduction formula is simply Tn = (1-r\*t)\*T0, where Tn and T0 are new and original tariff rates respectively, r is agreed reduction rate and t is the time period for reduction. For example, if r = 0.06 (i.e. 6 percent reduction per year) and t = 6 years, a 100 percent tariff is reduced to 64 percent. This method was applied in the Kennedy Round with the "r\*t" set at 50 percent. As a result of some exceptions negotiated subsequently, the final reduction was 35 percent. The approach is both simple and transparent. While tariffs could be cut significantly if the reduction rate is high (e.g. 50 percent compared to 36 percent on average in the Uruguay), another linear cut would still leave many tariff peaks in agriculture left by the Uruguay formula.

Linear reduction with conditions on minimum cuts. This was the formula used in the Uruguay AoA (36 percent average reduction with a 15 percent minimum per tariff line). Although tariffs were reduced by an average of 36 percent, the method left many tariff peaks, as countries had the freedom to cut tariffs on "sensitive" products by only the minimum 15 percent while reducing by more for others, in order to reach the (un-weighted) average of 36 percent. This formula could be improved, e.g. by raising the minimum to, say 25 percent, or by seeking a balance in the trade volume between those with higher and lower than average cuts, i.e. trade-weighted tariff reductions.

The Uruguay formula with the same base as in the Uruguay. Rather than using the bound rates reached at the end of the implementation period of the Uruguay as the benchmark for further reduction, a further 36 percent cut in the average level of tariffs from the same base as in the Uruguay would imply a 72 percent cut over the two reform periods, a significant reduction over a dozen years or so. This approach has some other advantages, e.g. giving a sense of the continuity of the process of reform by using the same formula; no controversy over the choice of a new base period; and full "credit" for unilateral reductions during the negotiation period.

Successive linear reductions. Compared with the linear method, here the base tariff rate, T0, is adjusted every year to its new level. The formula for this, also known as a radial formula, is

Tn = (1-r)t \* T0. With this, if r = 0.06 and t = 6 years, a tariff level of 100 percent is reduced to 69 percent, compared with 64 percent with the linear formula. As the base itself gets reduced every year, the overall reduction at the end of the period is smaller. However, for a smaller reduction rate and a shorter time period, the difference in reduction rates from the two formulae is not much.

Harmonization of tariff rates - the Swiss Formula. This formula was used in the Tokyo Round to harmonize tariff peaks on industrial products left as a result of the linear formula used in the Kennedy Round. The Swiss formula is Tn = (amax \* T0)/(amax + T0), where amax is the upper bound on all resulting tariffs. With amax = 50, an initial tariff of 40 percent would be reduced to 22 percent while a 100 percent tariff would be reduced to 33 percent. On the other hand, with amax = 25, a 40 percent tariff is reduced to 15 percent and a 100 percent tariff is reduced to 20 percent. The value of amax then becomes the parameter for negotiations. Figure 1 shows how three of these methods discussed here compare in terms of tariff reductions.

Capping all tariffs at some maximum rate. For example, a maximum rate of 60 percent could be agreed to which all higher tariffs would have to be reduced over an agreed period. This rule may be applied in conjunction with other reduction methods.

Using actual protection rates for recent years as the benchmark. In this approach, negotiators agree to eliminate the gap, or a good part of it, between the bound and the applied rates, the so-called "discretionary protection" or "water in the tariff", using some recent period to measure the gap, e.g. 1995-97. This approach, while it makes some economic sense, appears problematic due to problems associated with measuring (or agreeing with the measurement of) the protection rate. This was one of the problems that led to inflated tariff equivalents (and thus bound tariffs) on many commodities in the Uruguay, which came to be known as "dirty tariffication". This method is less helpful for developing countries where domestic prices tend to be lower than or similar to world reference prices, resulting in negative or zero bound rates, which would not be acceptable.

### Tariff Quota.

As the tariffs existing after the tariffication of non-tariff barriers are very high in several cases, there would be no meaningful market access opportunities. Hence, particular provisions were made in the document for market access opportunities. There are three types of such provisions.

Current access opportunity.

Opportunity has to be provided for a level of import equal to the average annual import level during the base period 1986-88 by having very low tariffs for imports up to this extent.

Minimum access opportunity.

Opportunity for a level not less than 3% of the annual consumption in the period 1986-88 has to be provided in 1995. This level would be raised to 5% by the end of 2000 by developed countries and by the end of 2004 by developing countries by having very low tariffs for imports up to this extent.

Special minimum access opportunity.

Members who have opted for non-tariff measures instead of tariffication have to provide such opportunity, i.e., Japan, the Philippines and the Republic of Korea for rice, and Israel for sheepmeat, wholemilk powder and some dairy products. For developed Members, it means import in 1995 to the extent of 4% of the annual average consumption in the base period 1986-88, and an increase of 0.8% of the base period consumption every year thereafter up to the end of 2000. For developing Members, it means import in 1995 to the extent of 1% of the annual average consumption in the base period, rising uniformly to 2% in 1999 and then to 4% in 2004.

These above-mentioned access opportunities are to be provided by tariff quotas, i.e., by having very low tariffs up to the stipulated extent of imports, and above that level, having the normal tariffs which, in the case of agricultural products, are generally very high. Except for cases of bilateral and plurilateral agreements, these quotas should generally be global quotas, i.e., on a non-discriminatory basis, rather than country-specific quotas.

#### A tariff-quota.

This is what a tariff-quota might look like: Imports entering under the tariff-quota (up to 1,000 tons) are charged 10%. Imports entering outside the tariff quota are charged 80%. Under the Uruguay Round agreement, the 1,000 tons would generally be based on actual imports in the base period or an agreed “minimum access” formula.

Tariff quotas are also called “tariff-rate quotas”.

### Special Safeguard Provision (SSP).

Generally, safeguard action can be taken only if there is existence of serious injury or the threat of serious injury to domestic production, whereas the special safeguard action can be taken without the demonstration of any adverse effect on domestic production. A special safeguard action can be taken if the import price falls below a particularly prescribed level (trigger price) or if the import quantity rises above a particularly prescribed level (trigger quantity).

#### Price trigger.

The trigger price is normally to be determined as the average cost, insurance and freight (CIF) import price of the product during the 1986-88 base period. If the trigger price is high, the import price may fall below this level more often, and consequently, it will be easier to take the special safeguard action.

Formula for the calculation of the ceilings of price trigger.

1) if the difference between the trigger price and the import price is 10% of the trigger price or less, no additional duty can be imposed;

2) if the difference is more than 10%, but not more than 40%, the additional duty will be 30% of the amount by which the difference exceeds 10%;

3) if the difference is more than 40%, but not more than 60%, the additional duty will be 50% of the amount by which the difference exceeds 40%, plus the duty in 2);

4) if the difference is more than 60%, but not more than 75%, the additional duty will be 70% of the amount by which the difference exceeds 60%, plus the duty in 3);

5) if the difference is more than 75%, the additional duty will be 90% of the amount by which the difference exceeds 75%, plus the duty in 4).

For example, when the trigger price is $200 per unit, and the current price falls to $80 per unit, the difference is $120.

According to 1), there is no additional duty if the difference is only up to 10% of the trigger price, i.e., $20.

According to 2), up to $80, the duty is 30% of $60 (%80-$20), i.e., $18.

Thereafter, up to a difference of 60%, i.e., $120, the duty is 50% of the difference exceeding 40%, i.e., 50% of $40 ($120-$80), i.e., $20.

Hence, the additional duty may be to the extent of $18+$20, i.e., $38 on each unit.

#### Quantity trigger.

If the volume of imports is higher than a trigger level of 105-125% of the average level of imports during the preceding three years, and the import is above 30% or 10-30% of the domestic consumption, special safeguard measures can be imposed. Higher import penetration will enable a Member to take SSP action at a lower level of increase in imports.

Formula for the calculation of base trigger level, i.e., the increase in the import quantity:

1) if the import is 10% of domestic consumption or less, 125% of the average quantity of imports in the three preceding years for which data are available;

2) if the import is 10-30% of domestic consumption or less, 110% of the average quantity of imports in the three preceding years for which data are available;

3) if the import is above 30% of domestic consumption or less, 105% of the average quantity of imports in the three preceding years for which data are available;

The actual trigger level is the sum of the increase in import quantity and the change in domestic consumption, and must not be less than 105% of the average quantity of imports in the three preceding years for which data are available.

The measure is, under the SSP, an increase in duty, which must not exceed one-third of the ordinary customs duty and will terminate by the end of the imposing year. For example, when domestic consumption is 1000 units and the import quantity is 280 units, i.e., 28% of domestic consumption, the base trigger import quantity level will be 110% of 280 units, i.e., 308 units. Suppose the consumption has grown to 1000 units from 900 units, which means a change in consumption of +100 units, the actual trigger level in this case is 308+100, i.e., 408 units. If the import quantity exceeds 408 units, an additional duty can be imposed. Suppose the ordinary customs duty on this item is 30%, the maximum additional duty that can be imposed is one-third of 30%, i.e., 10%.

### Domestic Support.

Reduction of domestic support.

Domestic support measures are disciplined through reductions in the Total Aggregate Measurement of Support (Total AMS), including product-specific AMS and non-product-specific AMS. The Total AMS is a means of quantifying the aggregate value of domestic support or subsidy given to each category of agricultural products.

Example: Calculation of the current total AMS.

Member X (developed country), year Y

Wheat:

> Intervention price for wheat = $255 per tonne

> Fixed external reference price (world market price) = $110 per tonne

> Domestic production of wheat = 2,000,000 tonnes

> Value of wheat production = $510,000,000

> Wheat AMS (AMS 1) ($255–$110) x 2,000,000 tonnes = $290,000,000

(de minimis level=$25,500,000)

Barley:

> Deficiency payments for barley = $3,000,000> Value of barley production = $100,000,000

> Barley AMS (AMS 2) = $3,000,000

(de minimis level=$5,000,000).

Oilseeds:

> Deficiency payments for oilseeds = $13,000,000> Fertilizer subsidy = $1,000,000

> Value of oilseeds production = $250,000,000

> Oilseeds AMS (AMS 3) = $14,000,000

(de minimis level=$12,500,000)

Support not specific to products.

> Generally available interest rate subsidy = $ 4,000,000

Value of total agricultural production = $860,000,000

> Non-product-specific AMS (AMS 4) = $4,000,000

de minimis level=$43,000,000

Current total AMS (AMS 1 + AMS 3) = $304,000,000.

If a support measure exists but the method of calculation of the AMS cannot be applied to it, the calculation of an equivalent measurement of support (EMS), i.e., budgetary outlays, will be made and included in the Total AMS.

Generally, price support is measured by multiplying the gap between the applied administered price and a specified fixed external reference price, i.e., world market price, by the quantity of production eligible to receive the administered price. The fixed external reference price is the average unit price during the period 1986-88. It is the FOB price for the net exporting country and the CIF price for the net importing country.

The schedule on the reduction in domestic support prescribes that the Base Total AMS must be reduced by 20% for developed Members over 6 years (1995-2000 both inclusive) and 13.3% for developing Members over 10 years (1995-2004 both inclusive), while there is no reduction required of least-developed countries.

Measures of domestic support.

Domestic support measures are the aid granted to agricultural production that are not export subsidies. These aids are classified into three categories of two types: green and blue box measures free of reduction commitments and yellow/amber box measures subject to reduction commitments.

Green box measures: measures having no or at most minimal trade-distorting effects or effects on production, and must be provided through a publicly-funded program (including revenue foregone) not involving transfer from consumers. It implies a preference for agriculture support policies financed in a transparent way by the taxpayer as opposed to price support policies financed by the consumers.

1) Government service programs for agriculture and the rural community, such as pest and disease controls, support for training and information, infrastructure (water, electricity) or research programs, which involve no direct payments.

2) Domestic food aid programs for people in need, provided that products are bought from producers at market prices, and aid for public storage of agricultural products for food security purposes.

3) Direct payment: aid for developing agricultural structures such as resource retirement programs, or investment aid for producers totally and permanently retire from production, or de-coupled income support measures granted to producers suffering an income loss and not related to the quantities produced or the prices charged or factors of production employed.

4) Regional assistance for farmers in disadvantaged regions and environmental aid

5) Payments for relief from natural disasters.

Blue box measures: direct payments under production limiting programs made on fixed areas and yield or a fixed number of livestock, or on 85% or less of production in a defined base period, particularly aids respecting certain criteria precisely met by European direct support (the central pillar of the very recent CAP reforms) for products subject to quantitative production limits and deficiency payments granted by the US.

Blue box measures can be considered to be partially-decoupled, that is, production is still required in order to receive the payments, but the actual payments do not relate directly to the current quantity of that production.

Amber/yellow box measures: any domestic support measures not correspond to the exceptional arrangements of the green and blue boxes are classified as being yellow and must therefore be included in the calculation of reduction commitments. The reduction commitment is a global commitment. In other words, Members have not undertaken to reduce the support granted to each product by 20%. A Member is considered to be in compliance with its domestic support commitments if its domestic support in favor of agricultural producers expressed in terms of current total AMS does not exceed the corresponding annual or final bound commitment level specified in its Schedule.

### Other exempt measures.

1) development measures: measures of assistance, whether direct or indirect, designed to encourage agricultural and rural development and that are an integral part of the development programs of developing countries, including investment subsidies, agricultural input subsidies available to low-income or resource-poor producers in developing countries and domestic support to encourage diversification from growing illicit narcotic crops in developing countries.

2) de minimus levels of support: When the aggregate value of product-specific or non-product-specific support does not exceed 5% (for developed countries) or 10% (for developing countries) of the total value of production of the agricultural product in question, there is o requirement to reduce such trade-distorting domestic support.

### Summary:

The main complaint about policies which support domestic prices, or subsidize production in some other way, is that they encourage over-production. This squeezes out imports or leads to export subsidies and low-priced dumping on world markets. The Agriculture Agreement distinguishes between support programmes that stimulate production directly, and those that are considered to have no direct effect.

Domestic policies that do have a direct effect on production and trade have to be cut back. WTO members have calculated how much support of this kind they were providing (using calculations known as “total aggregate measurement of support” or “Total AMS”) for the agricultural sector per year in the base years of 1986-88. Developed countries have agreed to reduce these figures by 20% over six years starting in 1995. Developing countries are making 13% cuts over 10 years. Least developed countries do not need to make any cuts.

Measures with minimal impact on trade can be used freely — they are in a “green box” (“green” as in traffic lights). They include government services such as research, disease control, infrastructure and food security. They also include payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes.

Also permitted, are certain direct payments to farmers where the farmers are required to limit production (sometimes called “blue box” measures), certain government assistance programmes to encourage agricultural and rural development in developing countries, and other support on a small scale when compared with the total value of the product or products supported (5% or less in the case of developed countries and 10% or less for developing countries).

4. Export Subsidies

Background: Before the WTO, particularly in the 1970s and 1980s, success in international market for agricultural products became increasingly determined by the financial power of national treasuries rather than the efficiency and marketing skills of agricultural producers and exporters. Export subsidies also became a major factor in depressing, or destabilizing, world market prices for many agricultural products. When the Uruguay negotiations began, the common objective of the US and the Cairns Group1 countries was the pure and simple abolition of export subsidies. The possibility of granting export subsidies was finally incorporated in the Agreement on Agriculture at the request of the EU.

Definition: Export subsidies are subsidies contingent on export performance, including:

1) direct export subsidies contingent on export performance

2) sales of non-commercial stocks of agricultural products for export at prices lower than comparable prices for such goods on the domestic market

3) producer-financed subsidies such as a levy on all production is then used to subsidize the export of a certain portion of that production

4) cost reduction measures such as subsidies to reduce the cost of marketing goods for export like handling cost and cost for international freight

5) international transport subsidies applying only to exports

6) subsidies on primary agricultural products incorporated in a processed agricultural product such as wheat contingent on their incorporation in export products of biscuits.

### Rates of Reduction:

The Agriculture Agreement prohibits export subsidies on agricultural products unless the subsidies are specified in a member’s lists of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies and the quantities of exports that receive subsidies. All in all, 25 Members (counting the members of the EU as one) have export subsidy reduction commitments specified in their schedules, with a total of 428 individual reduction commitments.

Taking averages for 1986-90 as the base level, developed countries have agreed to cut the value of export subsidies by 36% over the six years starting in 1995 (24% over 10 years for developing countries). Developed countries have also agreed to reduce the quantities of subsidized exports by 21% over the six years (14% over 10 years for developing countries). Least developed countries do not need to make any cuts.

During the six-year implementation period, developing countries are allowed under certain conditions to use subsidies to reduce the costs of marketing and transporting exports.

### Other provisions.

1) Export restrictions on foodstuffs should not be introduced without giving due consideration to the effects of such restrictions on importing Member’s food security.

2) Due restraint or peace clause should be applied when subsidies in respect of agricultural products are to be subject to other WTO agreements.

3) Net food-importing developing countries should be ensured the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions.

## Questions

1. Why are trade in agricultural products and textiles and clothing subject to special agreements in GATT 1994?

2. Who will benefit more from the Agreement on Agriculture, the developed countries or the developing ones?

3. What are areas of commitments under Agreement on Agriculture?

4. What is AMS and how is it calculated?

5. Explain Special Safeguard Provisions.

6. Discuss the tariff reduction formulas in Agricultural Trade.

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