Trade Laws and Institutions

Good Practices and the World Trade Organization

Bernard M. Hoekman
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(Continued on the inside back cover.)
Trade Laws and Institutions
Good Practices and the World Trade Organization

Bernard M. Hoekman

The World Bank
Washington, D.C.
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>v</td>
</tr>
<tr>
<td>Abstract</td>
<td>vi</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>vii</td>
</tr>
<tr>
<td>Acronyms and Abbreviations</td>
<td>ix</td>
</tr>
<tr>
<td>Executive Summary</td>
<td>xi</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II. Multilateral Rules and Disciplines: GATT 1994</td>
<td>3</td>
</tr>
<tr>
<td>The World Trade Organization: Basic Rules and Principles</td>
<td>3</td>
</tr>
<tr>
<td>Tariffs</td>
<td>9</td>
</tr>
<tr>
<td>Quantitative Restrictions and Import Licensing</td>
<td>12</td>
</tr>
<tr>
<td>Safeguards</td>
<td>13</td>
</tr>
<tr>
<td>Subsidies and Countervailing Measures</td>
<td>19</td>
</tr>
<tr>
<td>Antidumping</td>
<td>25</td>
</tr>
<tr>
<td>Customs Classification, Valuation and Preshipment Inspection</td>
<td>28</td>
</tr>
<tr>
<td>Rules of Origin</td>
<td>32</td>
</tr>
<tr>
<td>Technical Regulations and Standards</td>
<td>34</td>
</tr>
<tr>
<td>Sanitary and Phytosanitary Measures</td>
<td>37</td>
</tr>
<tr>
<td>State Trading</td>
<td>39</td>
</tr>
<tr>
<td>Trade-Related Investment Measures</td>
<td>40</td>
</tr>
<tr>
<td>Government Procurement</td>
<td>41</td>
</tr>
<tr>
<td>Sectoral Agreements</td>
<td>43</td>
</tr>
<tr>
<td>III. Trade in Services and Trade-Related Intellectual Property Rights</td>
<td>46</td>
</tr>
<tr>
<td>The General Agreement on Trade in Services (GATS)</td>
<td>46</td>
</tr>
<tr>
<td>Intellectual Property Rights</td>
<td>50</td>
</tr>
<tr>
<td>IV. Regional Trade Agreements and WTO Rules and Procedures</td>
<td>54</td>
</tr>
<tr>
<td>GATT Article XXIV: Customs Unions and Free Trade Areas</td>
<td>55</td>
</tr>
<tr>
<td>GATS Article V: Economic Integration</td>
<td>58</td>
</tr>
<tr>
<td>V. Summary of Institutional Implications of WTO Membership</td>
<td>60</td>
</tr>
<tr>
<td>VI. Assessment of WTO Policy Disciplines</td>
<td>65</td>
</tr>
</tbody>
</table>
Foreword

The establishment of a World Trade Organization (WTO) during the Uruguay Round of trade negotiations has greatly extended the reach of multilateral rules and disciplines. The WTO administers three multilateral treaties: the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-related Intellectual Property Rights (TRIPs). The GATT’s reach was extended substantially during the round, especially as far as developing countries are concerned. Services and intellectual property are completely new topics to be covered by a multilateral trade agreement.

Many of the countries in both the Europe and Central Asia and the Middle East and North Africa regions were not members of the GATT. However, a significant number initiated the procedures required to accede to the GATT in the last two years, and can expect to accede to the GATT and the WTO in the near future. Accession may have far-reaching implications for the trade laws, policies, and institutions that exist in a particular country. The same conclusion applies to countries that are already GATT members, given the expansion of disciplines that was negotiated. Understanding these implications is not only important for the governments concerned, but also for World Bank staff that are engaged in developing lending or technical assistance programs.

A key question for governments is to determine how to use the WTO, in particular whether adoption of all of the policy options that are in principle allowed under multilateral rules are in the national interest. The GATT and the GATS offer a unique mechanism to enhance the credibility of governments that seek to adopt a liberal, neutral trade policy regime, because policies can be ‘bound’. At the same time, the WTO makes allowance for many policies that are likely to be economically costly and are difficult to control. A premise of this study is that it is not enough to ensure ‘WTO-consistency’ in trade policy. Instead, governments must carefully evaluate the benefits and costs of the various options that are allowed under the WTO.

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Abstract

Implementing all the rules and principles of the WTO will do much to reduce the extent to which the trade policy regime of a country distorts incentives. However, much also remains discretionary, especially for developing countries. Full consistency with WTO requirements is therefore neither necessary nor sufficient to ensure that the trade policy formation process will not be captured by rent-seeking lobbies. A great need remains for careful institutional design, and a deliberate and conscious decision whether to exercise the various options allowed for under the WTO, both the 'good' and the 'bad'.
Acknowledgements

This paper is part of an ongoing effort in the Technical Department to monitor and disseminate information regarding multilateral trade policy developments and good practices in this domain to the ECA/MNA Regions. Thanks are due to Will Martin, Petros C. Mavroidis and Alan Winters for comments on an earlier version. The views expressed are personal and should not be attributed to the World Bank.
### Acronyms and Abbreviations

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BOP</td>
<td>Balance of payments</td>
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<td>BTN</td>
<td>Brussels Tariff Nomenclature</td>
</tr>
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<td>CEEC</td>
<td>Central and Eastern European country</td>
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<tr>
<td>CTH</td>
<td>Change in tariff heading</td>
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<td>CAP</td>
<td>Common Agricultural Policy</td>
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<td>CVD</td>
<td>Countervailing duty</td>
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<td>CCCN</td>
<td>Customs Cooperation Council Nomenclature</td>
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<td>DSB</td>
<td>Dispute Settlement Body (WTO)</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FDI</td>
<td>Foreign direct investment</td>
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<td>FSU</td>
<td>Former Soviet Union</td>
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<td>FTA</td>
<td>Free trade area</td>
</tr>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
</tr>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
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<td>GSP</td>
<td>Generalized System of Preferences</td>
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<tr>
<td>GPA</td>
<td>Government Procurement Agreement</td>
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<tr>
<td>HS</td>
<td>Harmonized Commodity Description and Coding System</td>
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<tr>
<td>IAC</td>
<td>Industries Assistance Commission (Australia)</td>
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<tr>
<td>IEC</td>
<td>International Electrotechnical Commission</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>INR</td>
<td>Initial negotiating right</td>
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<td>IP</td>
<td>Intellectual property</td>
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<tr>
<td>ISO</td>
<td>International Organization for Standardization</td>
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<td>ISONET</td>
<td>ISO Network (linking standards bodies)</td>
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<td>MFA</td>
<td>Multifibre Arrangement</td>
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<td>MFN</td>
<td>Most-favored-nation</td>
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<td>NTB</td>
<td>Nontariff barrier</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
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<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
</tr>
<tr>
<td>QR</td>
<td>Quantitative restriction</td>
</tr>
<tr>
<td>RIA</td>
<td>Regional integration agreement</td>
</tr>
<tr>
<td>SPM</td>
<td>Sanitary and Phytosanitary Measures</td>
</tr>
<tr>
<td>SDR</td>
<td>Special Drawing Right</td>
</tr>
<tr>
<td>STE</td>
<td>State-trading enterprise</td>
</tr>
<tr>
<td>TMB</td>
<td>Textiles Monitoring Body</td>
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<td>TPRB</td>
<td>Trade Policies Review Body</td>
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<tr>
<td>TPRM</td>
<td>Trade Policies Review Mechanism</td>
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<td>Acronym</td>
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</tr>
<tr>
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</tr>
<tr>
<td>TRIM</td>
<td>Trade-related investment measure</td>
</tr>
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<td>TRIPs</td>
<td>Trade-related Intellectual Property Rights</td>
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<tr>
<td>VER</td>
<td>Voluntary export restraint</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
Executive Summary

Trade laws, policies and institutions play an important role in determining the competitive conditions prevailing on domestic markets, the sustainability of trade liberalization, and export performance. It is increasingly recognized by policymakers seeking to enhance competition on domestic markets and promote export-oriented production that a narrow view of trade policy—basically comprising the set of tariffs or quotas that are applied at the frontier—is no longer appropriate. Trade policy can be defined to encompass all policies that imply discrimination against foreign products/producers, or between foreign sources of supply. It pertains to goods (tangible products), services (intangible products), and knowledge (intellectual property). Consequently, trade policy more broadly defined extends also to government procurement practices, the development and enforcement of product standards, or the regulations affecting inward and outward foreign direct investment (FDI). FDI is often the preferred route for foreign firms to contest a market, and is often the most effective way for the host nation to obtain new technologies, enhance the security of access to export markets, or increase the efficiency of the service sector.

A distinction should be made between trade policy and trade laws and institutions. Policy comprises an action taken by a government, presumably to meet a specific objective. Usually, a mix of fiscal and income redistribution considerations underlie the use of trade policy. The trade laws and institutions constitute the framework through which policy is developed and implemented. Careful design of institutions and procedures is very important in order to reduce the scope for capture of the policy formation process is not captured by special interests. Equal care should be taken with respect to implementation of trade policy. The effective level of trade barriers is determined not only by the tariffs and quotas that are formally imposed by means of legislation, decrees and regulations, but also by the administrative procedures used to implement policy. For example, the procedures used to classify, value and process imports in conjunction with discretionary granting of exemptions may be such as to imply that ‘effective’ tariffs are quite different from statutory rates.

A country may participate in international agreements that affect both institutional design and trade policies. The General Agreement on Tariffs and Trade (GATT) imposes a variety of disciplines on trade policies of member countries, the most important being its nondiscrimination rules. With the creation of the World Trade Organization (WTO) as part of the outcome of the Uruguay round of multilateral trade negotiations, multilateral disciplines on a large variety of trade-related policies has been extended to all GATT members. The first part of this paper provides a summary of the relevant disciplines of an institutional nature of the trade agreements administered by the WTO: the new GATT (or ‘GATT-1994’), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). An understanding of the WTO’s rules and disciplines is important for decision makers in any country, but is of particular relevance for countries in Europe and Central Asia, and the Middle East and North Africa. Many of the countries in these regions are currently not GATT members, but a substantial number of them have submitted a request for GATT/WTO membership. Accession working parties have already been established by the GATT for 15 countries in the two regions: Albania, Algeria, Armenia, Belarus, Bulgaria, Croatia,
Estonia, Jordan, Latvia, Lithuania, Moldova, Russia, Saudi Arabia, Slovenia, and Ukraine. These countries account for most of the current ‘accession queue’ (which totaled 21 applicants as of April 1994). Many other countries in the region are already GATT members, and will therefore be directly affected by the substantive obligations implied by the various provisions of the WTO (e.g., on customs valuation, product standards, or intellectual property protection).

The second part of this paper assesses the adequacy of the various WTO rules and obligations from the perspective of economic efficiency and private sector development. The WTO is an attempt in international cooperation between sovereign states. It’s existence reflects the fact that it allows States to overcome political constraints that inhibit unilateral adoption of policies that increase national economic welfare: more liberal trade policies. While the WTO is a far-reaching agreement that goes significantly beyond pre-existing GATT disciplines, full implementation is not sufficient for governments concerned with maximizing economic growth and constraining the incentives for interest groups to invest productive resources in rent-seeking lobbying activities. The objective of the WTO is to limit the potential for governments to impose negative externalities upon other countries when implementing trade policies. The focus of attention is therefore on the effect of policies on other countries; not on the effect of a government’s policies on its own economy. While the agreed set of rules are presumably in each signatory’s interest (otherwise they would not join), it does not follow that the WTO’s rules and disciplines are optimal from the perspective of a government that implements trade policy. The question to be posed then is to what extent the WTO helps a government in adopting policies that are efficiency enhancing.

The WTO

Although the WTO will certainly help, the extent to which it provides support in this connection depends greatly on the decisions that are taken by the Government. Membership of the WTO may help increase both the credibility of trade policy reform, in part by allowing governments to resist demands from politically influential interest groups for altering policies in the future. Both the general principles and much of the specifics of the WTO’s rules are efficiency-enhancing. While adherence to WTO rules and principles can clearly be of great value to a country in terms of increasing the credibility of reform-minded governments, there are blemishes, some of them important. Many of the WTO’s disciplines are optional, either in the sense that members have discretion regarding the extent to which they apply (i.e., their coverage), or have a choice whether to invoke them. A useful distinction can be made between the possibilities that exist to opt out of disciplines that are ‘good’ in that abiding by them is likely to be efficiency and welfare enhancing to a country, and the possibilities that exist for opting to use measures that are permitted, but are likely to be detrimental to efficiency and welfare. Examples of the first category of ‘options’ are the magnitude and restrictiveness of tariff bindings, participation in the procurement agreement, and the specific commitments made under the GATS. Examples of the second set of ‘options’ are use of antidumping, balance-of-payments safeguards, and participation in regional integration. It is also useful to distinguish between a country’s own policies affecting access to its markets and the policies maintained by trading partners. The lower barriers in export markets and the greater is the security
(stability) of that market access, the better it is for export-oriented producers. The extent to which the WTO’s ‘options’ are invoked by its member countries largely determines the incentive structure facing firms and consumers. Limiting the extent to which the ‘bad’ options are exercised and maximizing the extent to which the ‘good’ options are exploited is, however, a matter for which each national government bears the primary responsibility.

Implementing all the rules and principles of the WTO will do much to reduce the extent to which the trade policy regime of a country distorts incentives. Although much is required, much also remains discretionary, especially for developing countries. This is really the key issue as far as the impact of the WTO on trade policy stances and market access conditions are concerned. Tariffs facing developing country exporters in OECD markets were already low before the Uruguay round started. What mattered was the restrictive quota regime applying to textiles and clothing, and enhancing the security of market access. Indeed, the MFA can be considered to be a subset of this issue, reflecting the non-functioning of GATT’s safeguard provision during the 1970s and 1980s. As noted previously, security of market access is not only a matter of external concern, i.e., access to export markets. Equally, if not more, important is the degree of uncertainty confronting importers in a country that must have access to inputs at world market prices if they are to be able to compete on global markets. For many developing countries the issue of contingent protection has not been a priority, given the often high levels of import tariffs and extensive use of quantitative restrictions and associated licensing requirements. But, both aspects of the trade regime are to some extent ‘optional’, in that developing country governments have substantial discretion what and how much to bind, and are consequently relatively free to impose or raise trade restrictions.

Full consistency with WTO requirements is therefore neither necessary nor sufficient to ensure that the trade policy formation process will not be captured by rent-seeking lobbies. A great need remains for careful institutional design, and a deliberate and conscious decision whether to exercise the various options allowed for under the WTO, both the ‘good’ and the ‘bad’. The focus of the WTO is on the multilateral trading system, not on minimizing the domestic welfare cost of trade policies that are pursued by a government. This leaves substantial scope for maintaining a trade policy stance that is much more distorting (inefficient) than is necessary to achieve a given objective. There are no requirements regarding the dispersion of protection across industries (whether in nominal or effective terms); no rules relating to the granting of tariff preferences and exemptions to specific domestic groups or agencies; no disciplines on many kinds of subsidies (and even prohibited subsidies may be maintained, subject of course, to countervail or retaliation by affected trading partners); no endorsement of—or general rules for—the adoption of duty drawback or temporary admission mechanisms for imported inputs; and no rules relating to the use of countertrade. Many of these aspects of the trade regime that is maintained by a government are, of course, of great importance. This study does not discuss the issue of the design of trade reform programs at any length, as these have been summarized in a number of World Bank studies. The focus is rather on a discussion of the holes and loopholes in the WTO and the options available to ‘close’ these holes.
Towards Good Practices

This paper assumes that the fundamental objective of the design of trade policy institutions is simple: tame the rent-seeker (Koford and Colander, 1984). Achieving this is difficult, and will depend in part on the specifics of individual countries. However, some general principles are by now well known. Assuming for purposes of discussion that trade taxes are not the primary revenue generating instrument available to the government, good practices should build upon a recognition that trade policy is an inefficient redistributive instrument. A first requirement then is that the net cost to the economy of a policy is determined (both estimated ex ante and monitored ex post), and the incidence of the implicit tax is identified. The best way this can be done is by an agency that has a statutory mandate to determine the impact of a trade policy on the economy, both in terms of efficiency (resource cost) and equity (income redistribution). One option in this connection is to give this mandate to the competition law enforcement agency; another is to create an independent agency to fulfill this role. The policy formation process should give a voice to all potentially interested parties, whether they stand to gain or to lose, with final decisions should be taken/approved by an entity that has an economy-wide focus (for example, the Prime Minister’s office or the Ministry of Finance).

To reduce pressure for intervention in trade, participation in international agreements that bind a government to a policy stance can be helpful. Agreements such as the WTO both creates pressure for liberalizing access to markets over time in a way that may be both politically more feasible than unilateral action (by providing domestic export-oriented interests with benefits that offset to a greater or lesser extent the losses incurred by protected industries) and locks in the result. As noted previously, this requires that the WTO be implemented to the fullest extent possible by binding tariffs at applied rates and scheduling all service sectors in the GATS, joining the main remaining ‘voluntary’ discipline, i.e., the Government Procurement Agreement, and pursuing mutual recognition agreements relating to conformity assessment and certification (GATT Standards Agreement), and professional qualifications (GATS), and so forth.

Another requirement is to maintain control over the mechanism through which industries may petition and obtain temporary protection against import competition. In most circumstances there will be a political need for such a mechanism, if only to ‘sell’ trade liberalization. It is important that only one safeguard mechanism exist under which temporary protection can be granted with a view to facilitating its restructuring. In practice, the safeguard mechanism foreseen under Article XIX of the GATT should be more than adequate to allow domestic import-competing industries to obtain some temporary relief from foreign competition. If it is politically impossible to abolish instruments such as antidumping (the first best solution), competition policy or appropriately defined national welfare (‘public interest’) criteria should be used in its application, and procedures defined that are neutral (unbiased) with respect to determining if dumping has occurred.

Allowing policies to be challenged before the domestic courts for violation of international (i.e., WTO) commitments is a mechanism that can be used to help enforce international treaty
obligations. While this is quite far-reaching, as it implies that a Member decides that the WTO creates rights (and obligations) for individuals, taking this step would greatly increase the strength of WTO disciplines, inducing greater confidence in the commitment of a government to a liberal trade policy stance. The best illustration of this has been the role of the European Court of Justice in enforcing the provisions of the Treaty of Rome regarding the establishment of the common market.

The best trade policy is free trade. While few countries have achieved this, an increasing number are pursuing it, both unilaterally and in the setting of regional agreement. The WTO can help achieve this goal by ‘ratcheting’ moves to lower tariff rates by binding reductions in barriers through the GATT and the GATS. There is potentially also much to be gained from pursuit of regional integration agreements if these are WTO-consistent (full free trade) and go substantially beyond the WTO as regards their coverage (i.e., include factor mobility and eliminate contingent protection). Recent vintages of the Association Agreements that have been negotiated between the EU and partner countries go some way towards meeting these conditions, although agriculture and contingent protection are important blemishes. Such agreements may help a government more than the WTO in terms of locking-in trade policy reforms and increasing their credibility as this is a requirement, not a choice. An Association Agreement with the EU can be beneficial in terms of ‘upgrading’ the regulatory environment to be more conducive to private sector development. A large component of the Association Agreements agreed between the Central and Eastern European countries (CEECs) concerns the regulatory regime pertaining to capital flows (especially foreign direct investment), contestability of service markets, and the application of competition law. The fact remains that preferential liberalization among a subset of nations is inferior to multilateral liberalization. Free trade agreements with the EU must therefore be accompanied with a trade policy stance vis-a-vis the rest of the world that is broadly similar to that applied to the EU to ensure that costly trade diversion does not eliminate many of the potential welfare gains associated with opening up the domestic market to competition from European firms.
I. Introduction

Trade laws and institutions play an important role in determining the competitive conditions prevailing on domestic markets, the sustainability of trade liberalization, and export performance. They can also play an important role in reducing the likelihood that major trading partners will cut off market access in the future because of claims of dumping, subsidization or other 'unfair' actions. While an ever increasing number of trade-related regulations and institutions are required for countries to integrate themselves into the global economy, great care must be taken with their design. Without the appropriate institutions, a country may find itself adopting trade and related policies that reduce the contestability of domestic markets, and thus have detrimental effects on resource allocation and economic growth.

A liberal trade regime is a crucial input into the creation of a viable, competitive private sector. Reduction of tariffs and the elimination of quantitative restrictions is not enough to ensure that markets become/remain competitive. Other policies, such as government procurement practices, customs valuation and classification procedures, or the development and enforcement of product standards are also of great importance in determining the openness of markets. Similarly, although governments may decide to protect or support a domestic industry, it is important that the means employed and the procedures followed are transparent and minimize the costs of such actions to the economy as a whole. It is increasingly recognized by policymakers seeking to enhance competition on domestic markets and promote export-oriented production that a focus on trade policy per se is too narrow, even if interpreted broadly. Regulations affecting inward and outward foreign direct investment (FDI) are also very important factors determining the extent to which a country will be able to exploit and develop its comparative advantage. FDI is often the best route to obtain new technologies, enhance the security of market access, or increase the efficiency of the service sector. Competition policies are also important in terms of ensuring that markets are and remain contestable.

A distinction should be made between trade policy and trade laws and institutions. Policy comprises an action taken by a government, presumably to meet a specific objective. The trade laws

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1 The policies that should be considered by those evaluating a country's trade regime are numerous. Examples include: (1) government procurement and state trading, (2) customs and related administrative entry procedures (valuation, customs classification, consular formalities and documentation, rules of origin and preshipment inspection requirements, and temporary admission/drawback mechanisms); (3) technical regulations and standards, testing and certification arrangements; (4) quantitative restrictions, including embargoes, screen-time quotas, mixing regulations, discriminatory sourcing, measures to regulate domestic prices, or requirements concerning marking, labelling and packaging, (5) charges in addition to tariffs on imports (such as prior import deposits, surcharges, port taxes, statistical taxes, discriminatory film taxes, use taxes, discriminatory credit restrictions, border tax adjustments); (6) subsidies and related state aids; (7) environmental, health and safety regulations; (8) intellectual property rights; (9) local content and performance requirements; (10) the treatment of FDI; and (11) the regulatory regime applying towards services.
and institutions constitute the framework through which policy is developed and implemented. Careful design of institutions and procedures is very important in order to ensure that the policy formation process is not captured by special interests. Thus, if tariff policy is in the hands of a Minister who can set tariffs by decree, it can be expected that the Minister will be subject to substantial lobbying. Equal care should be taken with respect to implementation of trade policy. The effective level of trade barriers is determined not only by the tariffs and quotas that are formally in effect, but also on the administrative procedures used to classify, value and process goods. A nominal tariff of 20 percent may not be much higher than what importers actually pay if customs valuation and classification procedures are subject to the discretion of customs officials.

This study addresses issues related to the appropriate design of trade laws and institutions from a private sector development perspective. Its goal is to provide a summary of ‘good practices’ in this area. The implicit focus of attention is on the countries in the Europe, Central Asia (ECA) and the Middle East, North Africa (MNA) regions, even though the discussion is quite general. Many of the countries in the ECA/MNA regions are not GATT members, but most are likely to want to become members of the WTO. Indeed, many have already submitted a request for GATT membership, or are contemplating doing so in the near future. Accession working parties have been established for 15 countries in the two regions: Albania, Algeria, Armenia, Belarus, Bulgaria, Croatia, Estonia, Jordan, Latvia, Lithuania, Moldova, Russia, Saudi Arabia, Slovenia, and Ukraine. These countries account for most of the current ‘accession queue’ (which totaled 21 applicants as of April 1994). Many other countries in the region are already GATT members, and will therefore be directly affected by the substantive obligations implied by the various provisions of the WTO (e.g., on customs valuation or product standards, as well as service and intellectual property protection).²

The paper has two major components. The first part consists of a summary of the relevant disciplines of the trade agreements of the World Trade Organization (WTO) that was established in the Uruguay Round. These are the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). Many of the policies mentioned earlier are subject to multilateral disciplines under one of these Agreements. The second part of the study assesses the adequacy of the various WTO rules and obligations from the perspective of economic efficiency and private sector development and explores what could be done by a government to go beyond the WTO. The WTO is a far-reaching agreement that goes significantly beyond pre-existing GATT disciplines. But it is by no means a perfect instrument from the point of view of ensuring the adoption of policies that enhance national welfare. WTO-consistency is not sufficient for governments concerned with maximizing economic growth and constraining the incentives for interest groups to invest productive resources in rent-seeking lobbying activities. Indeed, the WTO makes allowance for certain policy options that can prove to be very costly for the economy. Much depends in this connection on the

² Qatar and the UAE joined the GATT in 1994, and were at the time of writing still in the process of developing their WTO schedules.
design of the relevant trade policy implementing institutions and the specifics of the laws/regulations that are enforced.

The paper is organized as follows. Section II provides a relatively comprehensive overview of post-Uruguay round GATT disciplines relating to trade in goods. Section III summarizes the multilateral agreements that were reached on two non-GATT issues, services and intellectual property. The GATT was already a complex agreement, and the level of complexity has increased substantially with the successful conclusion of the Uruguay round and creation of the WTO. Section IV discusses the WTO’s disciplines on regional trade agreements. Section V provides a summary of the main institutional implications of WTO membership. Sections II-V are largely factual and descriptive. Section VI assesses the policy disciplines that are imposed by the WTO from a national welfare and ‘credibility’ perspective. Section VII turns to the options that exist in terms of adopting (WTO-consistent) trade laws and institutions that go beyond the WTO. Section VIII concludes.

II. Multilateral Rules and Disciplines: GATT 1994

In this Section and the next, the substance of the disciplines imposed by the GATT/WTO is reviewed. The focus is primarily on WTO disciplines that have direct institutional implications. However, for the sake of completeness this Section starts with a short summary of the basic rules and principles of the WTO.

The World Trade Organization: Basic Rules and Principles

The WTO that was established in the Uruguay round is an ‘apex’ institution that is responsible for administering multilateral trade agreements negotiated by its members. It was created in part because the legal foundations of the GATT were weak (GATT was, and remains, a treaty, not an organization), and in part because two issues were on the agenda of the Uruguay round that were not covered by GATT: services and intellectual property rights. Once it is ratified by signatories, the WTO will include three multilateral agreements: the so-called GATT 1994 (including all amendments to GATT made in the round), the GATS, and the TRIPs agreement. It also embodies a number of

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3 It should be emphasized that what follows is a summary, with emphasis on developing countries and economies in transition. Those seeking the complete texts of the GATT, the Uruguay Round agreements, and the GATT ‘case law’ should consult GATT (1986), GATT (1994a) and GATT (1994b). Curzon (1965), Dam (1970) and Jackson (1969) are standard texts on the pre-1970 GATT that remain valuable sources of information. For discussions of more recent developments see Finger and Olechowski (1987), Jackson (1989), and Low (1993). Liberal use has been made of the text of the Uruguay round’s Final Act in describing WTO disciplines. So as to avoid excessive footnotes, extensive references to the relevant texts have been avoided.

4 That is, the GATT contained no institutional provisions.
plurilateral agreements that only bind a subset of its membership (most prominently the Agreement on Government Procurement).\footnote{A distinction must be made between the 'old' 1947-vintage GATT and the 1994 vintage that emerged from the Uruguay Round. The 1994 GATT has a much larger scope than does the 1947 GATT, in large part because many of the codes of conduct that were negotiated in the Tokyo Round (1979) between subsets of GATT contracting parties were multilateralized. In this paper references are to the GATT as of 1994.} As of end-May 1994, there were 124 GATT members.

The WTO can usefully be regarded as both an institution embodying a set of rules and principles concerning the use of policies that affect trade flows, and as a market in which members exchange market access ‘concessions’ and agree on the ‘rules of the game’. The raison d’etre of the WTO, and the GATT before it, is political, in the sense that governments are often disinclined to reduce trade barriers unilaterally. Although recent unilateral liberalization programs illustrate that governments may find it to be politically feasible and beneficial to substantially reduce protection, political economy considerations tend to be such that in general reciprocal liberalization of market access has been a necessary condition for the reduction of barriers.\footnote{Space constraints prohibit a discussion of the political economy underlying the GATT. See Hillman and Moser (1995) for a formalization of the standard political economy justification of the reciprocal exchange of market access, and Rodrik (1994) for a survey of the literature.}

The WTO has sovereign states or customs territories as members. It does not bind individuals or firms. The agreement constrains governments in their ability to take actions that might distort trade flows, either directly or indirectly. Although by far most attention centers on border measures, the GATT has been expanded over time to address ‘internal’ policies that affect trade. The treaty is worded in a way that any policy can be challenged by a Member as ‘nullifying or impairing’ a market access commitment. GATT tariff concessions are expressed in the form of “bindings” of tariff rates. Tariffs are bound by listing the applicable rates in a schedule. The bound rate establishes a maximum. Tariff bindings (schedules) are very important for the functioning of the GATT because they establish a benchmark for the conditions of market access that a country commits itself to. Under GATT rules, any measure taken or supported by a government that has the effect of ‘nullifying or impairing’ the ‘concession’ implied by the tariff binding may give rise to a complaint to the GATT by a country that perceives the measure having this effect. That is, the binding not only restricts the possibility of raising tariffs, but also limits the possibility of using measures that have an equivalent effect. However, this constraint only bites if tariffs are bound at applied rates. In practice, many developing countries have bound their tariffs at levels that are substantially higher than currently applied rates. This greatly reduces the relevance of GATT disciplines for these countries.

The most important principle contained in the agreements under the WTO is non-discrimination in the form of the unconditional most-favored-nation (MFN) rule (Article I). This requires that a trading partner that is a WTO member be treated no less favorably than any other WTO member. Thus, if the best treatment offered to a trading partner from which a specific product
is imported is a tariff of, say, 5 percent, then this rate must be applied to the imports of this product originating in all other members as well. The MFN obligation applies unconditionally under the GATT, the GATS and the TRIPs agreement, the only major exceptions being in the allowance for a subset of GATT/GATS contracting parties to engage in preferential liberalization (free trade area or a customs union), and a provision in the GATS allowing for one-time, time-limited MFN exemptions for countries signing the Agreement.

A complementary nondiscrimination principle is the national treatment rule (Article III). In the GATT context this requires that foreign goods, once they have passed the customs formalities and paid whatever duties are applicable, be treated no less favorably in terms of taxes and measures with equivalent effect than domestic firms. The same rule also applied in the services (GATS) context, but only to services that have been explicitly listed (scheduled) by members. Under GATT and TRIPs, national treatment is a general obligation; under the GATS it is a negotiated commitment (see below).  

Enforcement and dispute settlement

Enforcement procedures in the pre-Uruguay round GATT were relatively weak. In a nutshell, disputes were addressed by a panel of independent experts; the panel's conclusions were submitted to GATT's governing Council (which consists of all GATT members), which had to adopt the report by consensus for it to come into effect. If the country found to be violating its obligations did not implement the panel's findings, the 'plaintiff' could ask the Council to be authorized to retaliate. Such authorization again required consensus. The process could therefore be blocked at two stages by one of the parties involved in a dispute. For most small countries retaliation is of course not a credible threat in any event.

Dispute settlement procedures were strengthened substantially in the Uruguay round. The understanding on dispute settlement makes it impossible for a party to a dispute to object to the establishment of a panel or to its terms of reference and composition. A panel of experts will be appointed unless the Dispute Settlement Body (DSB) established under the WTO decides by consensus not to do so. Standard terms of reference will apply to the panel, unless parties to the dispute agree within 20 days on special terms. If, within these 20 days, no agreement can be reached on the composition of a panel, the Director-General of the WTO can appoint the panel members. Cases must be dealt with within six months, or if urgent, within 3 months. Within 60 days of the issuing of the panels finding these must be adopted by the WTO unless the DSB decides by consensus not to do so. Parties to a dispute may appeal the legal reasoning underlying the panel finding before an Appellate Body. Determinations of the Appellate Body are final, and must be adopted, unless, again, the DSB decides by consensus not to do so. Once adopted, panel findings must be implemented by

7 Nondiscrimination applies to the treatment of foreign products; governments are free to discriminate between domestic entities (e.g., by granting duty exemptions to certain bodies or agencies).
the relevant party, with implementation subject to surveillance of the DSB. If implementation does not occur, the other party may request authorization to retaliate. This is to be granted within 30 days by the DSB. In principle, such retaliation should affect the same sector as that at issue in the panel case, i.e., an increase in tariffs applied to imports of the relevant product. If this is not practical, it may pertain to another sector under the relevant multilateral agreement (i.e., goods under GATT, services under GATS). If in turn this is also not feasible or effective, cross-retaliation may occur (e.g., sanctions against imports of goods in a dispute on services).

The WTO maintains the possibility that existed under the GATT-1947 to argue that although no specific GATT or GATS Articles are violated, a government measure nonetheless nullifies a previously granted concession. Three conditions must be met in order to bring a so-called non-violation complaint: (i) the measure must be applied by a government; (ii) it must alter the competitive conditions established by the agreed tariff bindings; and (iii) the measure must be ‘unexpected’ in that it could not have been reasonably anticipated at the time the concessions were negotiated. Special provisions on remedies in cases of non-violation complaints have been included in the Uruguay round’s Dispute Settlement Understanding. Article 26 of the Understanding stipulates: "where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the member concerned make a mutually satisfactory adjustment ... compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute". Since there is no obligation to withdraw the non-violating measure, any satisfactory adjustment will concern a different subject-matter; this is a case of cross-compensation.

**Accession to the WTO**

Before the entry into force of the WTO, there were basically two ways of joining the GATT. The first avenue applied to countries that were former colonies of GATT contracting parties. Article XXVI allows existing GATT contracting parties to sponsor customs territories for which they had earlier accepted the rights and obligations of the GATT. Such customs territories were often colonies in the 1950s. Upon independence, such new countries could invoke Article XXVI to become a member of the GATT. In this case there is no need to negotiate accession, as the new member simply accepts the obligations initially negotiated by the metropolitan government on its behalf. As most such governments did not establish separate tariff schedules for their colonies, this implied that many of the more than 50 states that acceded to the GATT via this procedure did not have a tariff schedule. Accession under this route was automatic once the GATT Secretariat certified that the country in question met the necessary conditions of Article XXVI. In practice, all that was required was a letter to the Director-General of GATT stating a desire to accede.

The second method of acceding to the GATT applied to any country or customs territory. Article XXXIII of GATT allows for accession of new members. It specifies that any government of a country, or a government acting on behalf of a separate customs territory possessing full autonomy in
the conduct of its external commercial relations and other matters provided for in the General Agreement, may accede to the GATT on its own behalf or on the behalf of that territory, on the terms to be agreed between such government and the existing members acting jointly. Here there is a clear mandate for negotiations. Given that new members obtain all the benefits in terms of market access that have resulted from earlier negotiating rounds (accumulated tariff reductions and bindings), as well as MFN, national treatment and other GATT rules, existing members of the club invariably demand that potential entrants pay an admission fee. In practice this implies that upon joining GATT a country's trade regime must conform as much as possible with GATT principles, and that the government undertake to liberalize access to its market. Accession therefore involves a negotiation process.

Accession normally follows a number of stages, negotiations usually being the final substantive phase. Summarizing, the procedure involved is as follows: the government communicates its desire to join the GATT by writing a letter to this effect to the Director-General of the GATT secretariat. The GATT Council then establishes a Working Party consisting of interested countries to examine the application. The government seeking accession must then submit a Memorandum describing in great detail its trade regime. On the basis of this Memorandum, members of the Working Party will discuss and clarify the functioning of the trade regime with the applicant, usually through specific questions that are based upon the Memorandum, focusing in particular on its consistency with GATT rules. GATT inconsistent measures will have to be removed, or be subject to negotiated special provisions. The country seeking accession will usually also have to liberalize access to its markets. Accession tariff negotiations are held between the acceding government and all GATT members that are interested in enhancing their access to the markets of the country seeking membership. Once tariff negotiations have been concluded, the report of the Working Party is forwarded to the GATT Council. A draft Decision and Protocol of Accession is attached to the report, as is the negotiated tariff schedule. Accession must be approved by two-thirds majority of existing members. Before or concurrently with the formal request to initiate accession negotiations, the country concerned will usually have sought observer status.

These procedures have been carried over to the WTO, the main changes being that the Memorandum and Working Party deliberations are extended to services and TRIPs as well. The WTO states that "any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations ... may accede to the Agreement, on terms to be agreed between it and the WTO" (Article XII). The two-thirds majority approval requirement has been maintained. Following a recommendation of the Preparatory Committee of the WTO, if a country is in the process

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4 The accession commitments of two countries that joined GATT in 1990 provide an idea of what was demanded of new entrants. Tunisia agreed to bind more than 900 tariffs at levels ranging from 17 to 53 per cent. It also undertook to abolish import licenses and other quantitative restrictions on a wide range of products. Venezuela reduced its maximum tariff from 135 per cent to 50 per cent, pledged to bind its entire tariff schedule at a 50 per cent ceiling, and undertook to lower this further to 40 per cent at a later date. The conditions imposed for accession have become more stringent over time. Aspirant Members of the WTO are likely to be requested to bind their whole tariff schedule, and pressure can be expected that such bindings are at, or close to, applied rates.
of negotiating accession to the 'old' GATT—there are many ECA/MNA countries in this category—
established working parties will also focus on the regime relating to services and TRIPs, and negotiate
accession to the WTO. All countries will have to become members of the WTO.

The GATT assumes that its members are market economies, with trade being determined by
the decisions of private parties (firms), and governments intervening in trade through instruments such
as tariffs and quotas. This presumption has required that accession by centrally-planned economies
involve additional commitments on the latter's part. Given that tariff concessions by centrally planned
economies were meaningless, GATT contracting parties negotiated global import commitments with
Poland and Romania when these countries sought to become member of GATT in 1967 and 1971,
respectively. These commitments were included in their protocols of accession. The Polish formula
provided that, in return for MFN and national treatment, Poland would undertake to "increase the
total value of its imports from the territories of contracting parties by not less than 7 per cent per
annum." It noted further that GATT members might seek "agreements on Polish targets for imports
from the territories of the contracting parties as a whole in the following year." The Rumanian
arrangement stated that Romania firmly intended "to increase its imports from GATT contracting
parties as a whole at a rate not smaller than the growth of total Rumanian imports provided for in its
Five-Year Plan". This was equivalent to a promise not to decrease the GATT share of imports in total
imports of Romania. In the case of Hungary, another former centrally planned country that became a
GATT member in 1973, contracting parties concluded that tariff concessions were meaningful, and no
'voluntary import expansion' was negotiated. In all three cases, special safeguard provisions were
included in the Protocols of Accession allowing for discriminatory actions to be taken by existing
members to restrict imports from the acceding country.

Although it has not been necessary to be a full-fledged market economy to become a GATT
member, recent accession negotiations have revealed that non-market economies—or economies that
are perceived to be less than fully market-based—cannot accede on terms similar to those granted to
the East Europeans in the past. This is not beneficial in any event, as a key benefit of membership of
GATT is the application of MFN, which was not granted to the East Europeans (the special safeguard
option). All three countries are in the process of re-negotiating their Protocols. These renegotiations—as
well as accession discussions with economies in transition—reveal that existing GATT members are
seeking assurances that substantial progress will have been achieved towards privatizing production
units and establishing a market-based regulatory environment. Contestability of markets is reportedly
being demanded in the case of China, involving the removal of exclusive privileges or abolition of
monopolies. This is an interesting development, insofar as neither the GATT or the WTO prejudges
market structures or the form of ownership of enterprises.

Existing members of GATT that accept the Agreement establishing the WTO as well as the
GATS and TRIPS agreements will become so-called original members of the WTO. The WTO
agreement, as did the GATT, allows for accession of new members on terms to be negotiated between
the acceding government and the WTO. Accession must pertain to the WTO and the three
multilateral trade agreements annexed to the WTO (GATT, GATS, TRIPs). As of the entry into
force of the WTO (January 1995), accession on the basis of Article XXVI GATT 1947 will no longer
be possible. Not surprisingly, the number of countries that have joined the GATT under Article
XXVI has grown dramatically in the last few years. Over the course of the Uruguay round GATT's membership grew significantly, rising from 93 as of the end of 1986 to 124 as of end June 1994.9

Technical assistance relating to the accession process is in principle available from the GATT Secretariat. However, funding for this is quite limited, and acceding countries are well advised to seek bilateral assistance and/or aid from multilateral institutions. Indeed, it should also be recognized that the institutional requirements of WTO membership impose not only an administrative burden, but also may require investment in equipment and facilities (e.g., to establish and staff so-called enquiry points, see below).

Tariffs

Under the GATT, tariffs are the preferred instrument to restrict imports. Member states are free in principle to impose tariffs, subject to the condition that duties are applied in a non-discriminatory manner. GATT members regularly engage in multilateral negotiations aimed at the reciprocal reduction of applied tariffs. The resulting tariff rates (i.e., those on which commitments are made) are listed by each country in its Schedule of Concessions. As mentioned previously, once listed in the schedule, this implies that the rates are 'bound'. This means that they cannot be raised again subsequently, unless specific conditions that are set out in other parts of the GATT are satisfied.10 If duty rates have been bound (scheduled), and are raised above the bound rate, the country raising its tariff rates will have to engage in compensation negotiations, as set out in Article XXVII. There are no requirements with respect to the structure of tariffs, either in nominal or effective terms. Countries are free to maintain a tariff structure that implies tariff escalation and to raise tariffs that have not been bound. Before the Uruguay round, many GATT contracting parties did not have to schedule their tariffs, because they were able to accede to GATT on the basis of having been colonies of countries that were already GATT signatories and thus did not engage in reciprocal negotiations. With the entry into force of the WTO, all existing GATT members are required to submit a schedule of bindings in order to be original members of the WTO (Art.XI WTO).

The GATT Secretariat has published information regarding tariff bindings for only 26 developing countries (out of a total of 93 that participated in the negotiations). However, these countries account for 80 percent of all imports of merchandise by developing countries. As can be seen from Table 1, the share of tariff lines bound by developing countries rose significantly as a result of the Uruguay round, increasing from 22 to 72 percent. Weighted by imports the increase is somewhat smaller, but still substantial (up from 14 to 59 percent). Most of these bindings relate to 'ceilings' (i.e., maximum rates), not applied tariffs.

9 Leaving 21 countries or customs territories in the queue for accession.

10 Technically speaking, in GATT a positive list approach is used to determine the product coverage of tariff bindings.
Table 1. Pre- and Post-Uruguay Round Tariff Bindings for Industrial Products
(Number of lines, US $ billion and percent)

<table>
<thead>
<tr>
<th>Country group or region</th>
<th>Number of Lines</th>
<th>Import Value</th>
<th>Percentage of tariff lines bound</th>
<th>Percentage of imports under bound rates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Pre-</td>
<td>Post-</td>
</tr>
<tr>
<td>By major country group:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Developed economics</td>
<td>86,968</td>
<td>737.2</td>
<td>78</td>
<td>99</td>
</tr>
<tr>
<td>Developing economies*</td>
<td>157,805</td>
<td>306.2</td>
<td>22</td>
<td>72</td>
</tr>
<tr>
<td>Transition economies</td>
<td>18,962</td>
<td>34.7</td>
<td>73</td>
<td>98</td>
</tr>
<tr>
<td>By Selected region:*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North America</td>
<td>14,138</td>
<td>325.7</td>
<td>99</td>
<td>100</td>
</tr>
<tr>
<td>Latin America</td>
<td>64,136</td>
<td>40.4</td>
<td>38</td>
<td>100</td>
</tr>
<tr>
<td>Western Europe</td>
<td>57,851</td>
<td>239.9</td>
<td>79</td>
<td>82</td>
</tr>
<tr>
<td>Central Europe</td>
<td>23,565</td>
<td>38.1</td>
<td>63</td>
<td>98</td>
</tr>
<tr>
<td>Asia</td>
<td>82,545</td>
<td>415.4</td>
<td>17</td>
<td>67</td>
</tr>
</tbody>
</table>

* The data on developing economies cover 26 countries, accounting for some 80 percent of imports of the 93 developing country participants in the Uruguay Round.


It was agreed in the Uruguay Round that in order to ensure transparency of the legal rights and obligations deriving from Article II:1(b) of GATT (Schedules of Concessions), the nature and level of any "other duties or charges" levied on bound tariff items must also be recorded in each country’s schedule. Import charges other than customs duties vary widely in their form and ad valorem incidence. They include taxes on foreign exchange transactions, internal taxes on imports, "service fees" affecting importers and special import surcharges. Such para-tariffs are particularly important in developing countries. These "other duties or charges" must be bound at the applied level as of the entry into force of the WTO (January 1995).

Article XXVIII: Renegotiating Concessions

The GATT allows governments to renegotiate tariff concessions and schedules (Article XXVIII). Renegotiation concerns the amount of compensation that must be offered as a quid pro quo for raising a bound rate. Modification of schedules takes three basic forms: (i) ‘open season’ renegotiations, which may be conducted every three years following a binding; (ii) ‘specially
authorized renegotiations", which may take place when approved by GATT members; and (iii) 'reserved right renegotiations', which may occur anytime during the three year period following a binding if a notification is made by interested governments to that end. Developing countries may follow a simplified procedure to modify or withdraw concessions (XXVIII:7a). In negotiating the compensation required, account is taken of the interests of the country with which the concession was originally negotiated (which has the so-called initial negotiating rights (INRs)), the interest of the country having a principal supplying interest, as well as that of countries having a substantial interest. Principal supplying or substantial supplying interest requires a major or a sizable share, respectively, in the market concerned, determined on the basis of import statistics for the last three years for which information is available.

Countries having a substantial interest in the concession concerned (the negotiated tariff binding) have consultation rights only, whereas countries that have INRs or are a principal supplier have negotiation rights. In disputed cases it is up to the Contracting Parties to determine whether a given country is a principal supplier or whether it has a substantial interest in the concession withdrawn. The main objective of the principal supplier rule is to provide for the participation in the negotiations, in addition to the country with the INRs, of countries with a larger share in the trade affected by the concession than the country with INRs might have. Exceptionally, when the concession to be withdrawn affects trade which constitutes a major part of the total exports of a given country, the country may also enjoy principal supplier status (Article XXVIII:1). If no agreement is reached on compensation, affected countries may withdraw 'equivalent concessions' (XXVIII:3). An Uruguay round Understanding on the Interpretation of Article XXVIII enhanced the opportunities of affected exporters to participate in tariff renegotiations. The GATT Member for which the relative importance of exports of the product on which a tariff is increased is the highest (defined as exports of the product to the market concerned as a proportion of the country's total exports) will be considered to have a principal supplying interest if it does not already have so (or an INR) under pre-existing GATT-1947 procedures (under Article XXVIII:1)."11

The mechanisms for--and disciplines on--modification of tariff schedules are important. Before the completion of the Uruguay round, on average renegotiation of concessions occurred every year with respect to some 100 items, as compared to some 80,000 tariff lines bound. During the 1953-86 period a total of thirty-four GATT countries utilized the renegotiation option 250 times. This included 74 open season renegotiations, 64 cases of the specially authorized renegotiations and 112 cases of reserved right renegotiations. Use of the last category has been rising over time. During 1958-60 only four countries reserved their right to modify their schedule of concessions. The number had risen to twelve during 1973-75 and twenty-three for the period 1985-87.

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11 This criterion is to be reviewed by the Council for Trade in Goods five years from the establishment of the WTO to determine if it worked satisfactorily in securing a redistribution of negotiating rights in favor of small and medium-sized exporters. If this is not the case, consideration is to be given to further improvements, including the possible adoption of a criterion based on the ratio of exports affected by the tariff increase to exports to all markets of the product in question (GATT, 1994, p. 39).
Quantitative Restrictions and Import Licensing

Articles XI-XIV of the GATT provide the legal framework addressing quantitative restrictions (QRs): Article XI forbids them; Article XII exceptionally permits quotas used for balance-of-payments (BOP) reasons; Article XIII requires that such quotas apply on a nondiscriminatory basis; and Article XIV provides that if quotas are applied for BOP reasons the nondiscrimination requirement may be waived.

The basic obligation imposed on contracting parties in Art.XI:1 is to refrain from introducing or maintaining QRs. Import quotas constitute import restrictions within the meaning of Article XI:1 whether or not they actually impede imports. If a Member seeks to allocate QRs to countries, countries exporting the product are to seek an agreement on the allocation of shares in the quota (Article XII:2d). Such agreement must take commercial considerations into account. If the application of these considerations by government authorities is then found to be impracticable, proportions derived from a previous representative period may furnish a point from which to evaluate "changes in relative productive efficiency as between domestic and foreign producers or as between different foreign products" and some other special factors.

Article XI of the GATT applies to a broader set of measures than QRs per se. Policies that have been found to be inconsistent with Article XI include: (1) a clause in the legislation of the United States which prohibited, with certain exceptions, the importation or public distribution in the U.S. of a copyrighted work consisting preponderantly of non-dramatic literary material in the English language; (2) the provisions of the U.S. Marine Mammal Protection Act that prohibit imports of tuna if harvested in a way that does not respect the standards imposed by the legislation; (3) minimum import price systems (enforced by additional security); and (4) minimum export price systems. A number of 'loopholes' in the GATT allow for the use of QRs in specific situations. The main ones are Articles XVIII and XIX, which pertain to measures taken to safeguard the balance of payments and specific industries, respectively. These Articles are discussed elsewhere.

Import Licenses

An Agreement on Import Licensing Procedures, which applies to all WTO Members, aims to reduce the trade restricting effects of import licensing by simplifying and harmonizing the procedures that importers must follow to obtain licenses. The rules and all information concerning procedures for the submission of applications, including the lists of products subject to licensing are to be published in a source notified to the Committee on Import Licensing. Application and renewal forms

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12 Article XI:1 states: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party". Article XI:2 lists the permissible exceptions.
and procedures must be as simple as possible. An applicant must be allowed a reasonable period for the submission of license applications. Applicants should in principle have to approach only one administrative body in connection with an application, with at most three administrative entities being permitted. No application may be refused for minor documentation errors, nor may licensed imports be refused entry for minor variations in value, quantity or weight from the amount designated on the license. Foreign exchange necessary to pay for licensed imports is to be made available to license holders on the same basis as to importers of non-licensed goods.

Where the possibility of exceptions or derogations from a licensing requirement exists, information on how to make the necessary request must be published. WTO Members must be able to provide, upon request, to any other Member information concerning: (i) the administration of the restrictions; (ii) the import licenses granted over a recent period; (iii) the distribution of such licenses among supplying countries; and (iv) import statistics for products subject to import licensing. The overall quota amount for which licenses are required by quantity and/or value is to be published, as well as the opening and closing dates of quotas. In the case of non-global quotas (i.e., those allocated among supplying countries), WTO Members that export the product concerned must be informed of the current distribution of quota shares across suppliers. This information must also be published.

Any person, firm or institution which fulfills the legal and administrative requirements established by the government is to be allowed to apply and to be considered for a license. An applicant must have the right to demand an explanation for non-approval of a request and should have the right to appeal the decision. The period for processing license applications must not be longer than thirty days if applications are considered on a first-come first-served basis, and should not exceed sixty days if all applications are considered simultaneously. The period of license validity must be long enough to allow imports to occur, including "from distant sources."

**Safeguards**

Virtually all international trade agreements contain safeguard provisions. The GATT is no exception. Broadly defined, the term safeguard protection refers to a provision permitting signatories under specified circumstances to withdraw—or cease to apply—their normal obligations under the
agreement in order to protect (safeguard) certain overriding interests. Safeguard provisions are often critical to the existence and operation of trade liberalizing agreements, as they function as both insurance mechanisms and safety valves. They provide governments with the means to renege on specific liberalization commitments—subject to certain conditions—should the need for this arise. Without them governments may refrain from signing an agreement that substantially liberalizes trade or reduces national sovereignty regarding the use of its regulatory apparatus (Tumlir, 1985).  

The GATT’s safeguard provisions can be separated into two types. The first are those designed to protect certain interests in the event of the occurrence of a pre-defined set of circumstances which legitimize temporary suspensions of obligations or other undertakings. The second are provisions of a continuing nature which constitute exceptions to the general obligations of a multilateral agreement. The safeguard provisions of a temporary nature can be further divided into those dealing with what is agreed under certain circumstances to be an “objectionable” or “unfair” trading practice (such as subsidizing exports or dumping) and those provisions designed for safeguarding interests in circumstances where no such “objectionable” practices are pursued. Various grounds for safeguard provisions in the latter circumstances are contained in the GATT. The primary ones tend to be designed to reduce serious injury of domestic producers pursuant to the implementation of a commitment to liberalize trade, or, a need to protect the external financial position in the context of balance-of-payments difficulties. In this Section, the term safeguards covers all of the possibilities noted above.  

Provisions of a safeguard nature in the GATT that allow for the temporary suspension of obligations include the following:  

- Article VI on dumping, defined as the introduction of products of one country into the commerce of another country ‘at less than normal value’, thereby causing or threatening material injury to an established industry or materially retarding the establishment of a domestic industry. If products are found to be dumped and materially injure a domestic industry, Article VI allows levies to be imposed to offset the difference between normal value and prices charged for the product. Article VI also allows action to be taken if products that are exported by a country have been found to benefit from subsidies that affect trade and materially injure domestic industries. In such cases, Article VI allows countervailing duties to be imposed to offset the effect of the subsidization;  

- Articles XII and XVIII:B permit restrictions on imports to safeguard a country’s external financial position and its balance of payments. The criteria that need to be satisfied include a serious decline in monetary reserves (or the threat thereof), or a very low level of monetary reserves;  

- Article XVIII:A and XVII:C, which allow for governmental assistance for economic development, permitting measures restricting imports with a view to fostering the economic development of developing countries; and  

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Article XIX, which allows the suspension of obligations or the withdrawal/ modification of commitments to liberalize trade, if the implementation of negotiated reductions in trade barriers results in an unforeseen increase in imports of a product in such quantities, and under such conditions, as to cause or threaten serious injury to domestic producers of like or directly competitive products.

All four of these Articles require the existence of injury - actual or threatened - to either producers, industries, or the balance-of-payments. However, injury standards vary. For example, Article VI requires material injury (in practice a relatively weak standard), while Article XIX requires serious injury (in practice a stronger standard). Article VI focuses on the responses to what are considered to be "objectionable" trading practices: dumping and subsidization of exports. Actions taken are focused solely on those products that are dumped or subsidized. There is no requirement to compensate affected parties or to consult, and protection is by definition targeted at specific countries. In contrast to Article VI, the other three provisions may be invoked against any imported goods, without having to show the existence of an objectionable trade practice, but actions must be nondiscriminatory. Under Article XIX there is a need for contracting parties raising tariffs to consult with affected contracting parties. Affected parties have, under certain circumstances, the right to demand compensation or to retaliate (see below).

Mention should also be made of provisions of the GATT allowing for exceptions from the general obligations of the Agreement. Article XX (General Exceptions) allows measures to be imposed to safeguard public morals, health, laws and natural resources, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor may it be a disguised restriction on trade. Article XXI allows intervention on national security grounds. Under both of these Articles there is no requirement to consult, nor a provision permitting retaliation or compensation. General dispute settlement procedures may be invoked if considered necessary.

A final safeguard in the GATT is the already mentioned Article XXVIII (Modification of Schedules), which specifies that contracting parties have the option of seeking to renegotiate the withdrawal of certain tariff concessions (i.e., tariff reductions that were bound).

Summarizing, there are 6 GATT safeguard provisions, with the following objectives: (1) facilitating adjustment of an industry (XIX); (2) establishment of an industry (XVIII:c); (3) combating unfair trade (VI); (4) allowing for a change of mind, i.e., renegotiating a tariff concession (XXVIII); (5) dealing with macroeconomic problems (XII and XVIII:b); and (6) achieving health, safety, or national security objectives (XX and XXI). However, these six objectives can be split into two groups. The first allow for protection of a specific industry (categories 1-4 above), the second focus on economy-wide variables. In practice all the industry-specific instruments are (imperfect) substitutes for each other, as to a large extent they all address the same issue: protection of domestic firms from foreign competitive pressures.
Article XIX: Emergency Protection to Safeguard Specific Industries

The general safeguard clause of the GATT (Article XIX) permits governments to impose trade barriers, on a non-discriminatory basis, subject to specific conditions, in order to protect producers seriously injured by the liberalization of trade. The main intention of GATT's general safeguard clause is to facilitate trade liberalization. The Uruguay round Agreement on Safeguards prohibits voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. All VERs and similar measures in effect as of mid-1995 must be brought into conformity with the substantive requirements of the agreement on safeguards or phased out before mid-1999.

Safeguard measures against an imported product may only be taken if an investigation demonstrates that imports have entered into a country's territory in such increased quantities, absolute or relative to domestic production, so as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Such investigation must include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities must publish a report setting forth their findings and reasoning.

Serious injury is defined as a significant overall impairment in the position of a domestic industry, which in turn is defined as either all producers of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the product constitutes a major proportion of total domestic output. In the investigation to determine whether increased imports have caused or are threatening to cause serious injury, all relevant factors of an objective and quantifiable nature are to be considered. Such factors include the growth rate in imports of the product concerned in absolute and relative terms, the increase in import market share, and changes in the level of sales, production, productivity, capacity utilization, profits, and employment of the domestic industry. A causal link must be established between increased imports and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury may not be attributed to increased imports.

The remedy imposed (the safeguard) is to be limited to what is necessary to prevent or remedy serious injury and facilitate the adjustment of the domestic industry. If a QR is used, it is not to reduce the quantity of imports below the average of the last three representative years for which

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17 Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes.

18 However, one specific measure may be maintained for each Member until December 31, 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards.
statistics are available, unless clear justification is given that a more restrictive stance is necessary to deal with the injury caused by import competition. If a QR is used, agreement may be sought on the allocation of quota shares across all GATT Members having a substantial interest in supplying the product concerned. If this is not feasible, quota shares must be allocated on the basis of import shares during a previous representative period. The agreement allows for quotas to be administered by exporters if this is mutually agreed. Thus, although VERs are prohibited, VER-like actions can be imposed as part of a GATT-conform safeguard action.

While in principle requiring safeguard actions to be nondiscriminatory, the Uruguay round agreement allows for selectivity if imports from some countries are shown to have increased "disproportionately." This is a new provision that allows the requirement of a nondiscriminatory allocation of quota rights to be avoided if it can be demonstrated to the Committee on Safeguards that imports from certain Members have increased disproportionately in comparison to the total increase in imports of the product concerned in the representative period, and the measures imposed are equitable to all suppliers of the product concerned. Such discriminatory measures can only be maintained for four years at the most.

Safeguard actions that are based on absolute increases (as opposed to an increase relative to domestic output) in imports and are consistent with the various provisions of the agreement do not require compensation of affected exporting countries for the first three years. All actions are subject to a sunset clause. The maximum duration is 8 years—four years initially, extendable by another four years if injury persists and the industry can demonstrate it is adjusting—and are to be gradually phased out over this period. If safeguards are extended beyond the initial three year period, affected countries may demand compensation. A de minimis rule is to apply to exports of developing countries (individual shares less than 3 percent of total imports; aggregate share of such countries less than 9 percent of total imports).

Articles XII and XVIII(B): Trade Restrictions for Balance of Payments Purposes

GATT permits the imposition of trade restrictions to safeguard a country’s external financial position (Articles XII and XVI:B). Countries which make use of the GATT’s balance-of-payments provisions are subject to surveillance (consultations) in the Committee on Balance of Payments. These consultations may lead to recommendations by the GATT Council. In the Uruguay round, GATT contracting parties committed themselves to publicly announce time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. They also agreed to give preference to the use of measures which have the least disruptive effect on trade. Such measures (hereafter referred to as "price-based measures") include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods.

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19 The language in this respect is rather circumspect: "safeguard measures shall be applied to a product being imported irrespective of its source."

20 There is no mention of the potential role of the exchange rate and expenditure reducing policies.
Price-based measures taken for balance-of-payments purposes may exceed bound rates. The use of new quantitative restrictions for balance-of-payments purposes is to be avoided unless price-based measures are not able to arrest a sharp deterioration in the external payments position. If QRs are used, reasons must be provided why price-based measures could not be used. A country maintaining QRs for BOP reasons must indicate in successive GATT consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. Only one type of restrictive import measure taken for balance-of-payments reasons may be applied on the same product.

The application of surcharges or other measures applied on an across-the-board basis may provide for an exemption for certain essential products. The term essential products is defined as products which meet basic consumption needs or which are expected to help improve the balance-of-payments situation, such as capital goods or intermediate inputs needed for export production. In administering quantitative restrictions, discretionary licensing is to be used only when unavoidable and be progressively phased out. Appropriate justification must be provided for the criteria used to determine allowable import quantities or values.

A GATT Member applying new BOP-motivated restrictions or raising the general level of its existing restrictions must consult with the GATT's Committee on Balance of Payments Restrictions within four months of the adoption of such measures. All restrictions applied for balance-of-payments purposes must be notified and are subject to periodic review in the Committee. Each year a Member taking BOP actions is to provide the WTO Secretariat with a consolidated notification, including all changes in laws, regulations and policy statements. Notifications should include complete information at the tariff line level on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected. The country applying BOP measures must prepare a report for the consultations which includes: (1) an overview of the balance-of-payments situation and prospects and the domestic policy measures taken to restore equilibrium; (2) a full description of the restrictions applied and steps taken to reduce incidental protective effects; (3) measures taken since the last consultation to liberalize import restrictions; (4) a plan for the elimination and progressive relaxation of remaining restrictions.

Article XVIII(C): Infant Industry Protection

Developing countries may introduce quantitative restrictions or other "specific measures" to restrain imports if this is required to "promote the establishment of a particular industry" if no other form of governmental assistance consistent with the GATT (e.g., subsidies) can be applied (Article XVIII:C). This infant industry exception was widened considerably in 1979 to allow also for measures which are intended to develop, modify or extend production structures generally, in accordance with a government's economic development priorities.21 Although at first glance this provision appears to provide a developing country member of GATT carte blanche to circumvent GATT's rules against the use of QRs, it has been little used. This is because the surveillance that is

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associated with its invocation is relatively stringent (including a careful consideration of the arguments why other forms of intervention cannot be used), and because negatively affected exporters, if not offered compensation, may retaliate. In practice, therefore developing countries have preferred to invoke the BOP justification for imposing QRs (Article XVIII:B).

Subsidies and Countervailing Measures

One of the achievements of the Uruguay round was the agreement on a definition of the term ‘subsidy’. In the GATT-1947, as well as the 1979 Tokyo Round Subsidies Code, subsidies were not defined. This gave rise to many disputes and differences of opinion, as the focus of attention was on the effect of an alleged subsidy policy. Under the provisions of the Agreement on Subsidies and Countervailing Measures, which is binding for all members of the WTO, a subsidy is deemed to exist if there is a financial contribution by a government (or public body). This in turn may involve a direct transfer of funds (e.g., grants, loans, and equity infusion), or potential direct transfers of funds or liabilities (e.g., loan guarantees); government revenue that is otherwise due, is foregone or not collected (i.e., tax concessions or credits); the provision or purchase of goods or services other than general infrastructure; government funding of a private body to carry out a functions which would normally be vested in the government; any form of income or price support in the sense of Article XVI of the GATT; and a benefit is thereby conferred. The agreement applies to non-agricultural products. There are separate disciplines for agricultural production and trade (see below). A major difference between subsidy rules for agriculture and for manufactured goods is that export subsidies are prohibited in the former case (except for certain categories of developing countries). Agricultural export subsidies are only subject to negotiated reduction commitments.

WTO members must notify all subsidy programs to the WTO Secretariat on an annual basis. Notifications should include the following information: (i) the type of subsidy (i.e., grant, loan, tax concession, etc.); (ii) the subsidy per unit (or, if not feasible, the total or annual amount budgeted); (iii) the policy objective of each subsidy and its duration; and (iv) statistics allowing their trade effects to be determined. Any GATT Member may ‘cross-notify’ alleged subsidies of other countries that they have not notified or do not consider to be a subsidy.

Agricultural subsidies

The Uruguay round Agreement on Agriculture requires that industrial countries reduce domestic production support to agriculture, as measured by the Aggregate Measure of Support

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22 The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amount not in excess of those which have accrued, is not considered a subsidy (see below).

22 See Section II.14 for a more detailed discussion of the Agreement on Agriculture, as well as references to the literature.
(AMS), which includes domestic and border support, by 20 percent over a 1986-88 base period (with certain exceptions, including supports that are less than 5 percent). Export subsidies are to be reduced by 36 percent in value terms and 21 percent in volume terms from a 1986-90 base. The export subsidy restrictions apply on a product-by-product basis while the AMS restriction applies only on an industry-wide basis.

Developing countries must reduce production support and export subsidies by two-thirds of the levels mentioned earlier, and have ten years to implement this. Only production support that exceeds 10 percent is subject to reduction. Input subsidies for low-income farmers are permitted, as are generally available investment subsidies and export subsidies related to export marketing and internal distribution. Export subsidies must fall by 24 percent by value, and 14 percent by volume (two-thirds of the levels required for OECD nations). The aggregate measure of support to agricultural production is to fall by 13.3 percent.

Non-agricultural subsidies

Three categories of subsidies are distinguished: non-actionable; prohibited; and actionable. Non-actionable subsidies are 'GATT legal' and may not be countervailed (see below). They include all non-specific subsidies, i.e., those that do not primarily benefit a firm, industry or group of industries. Non-specificity obtains in instances where criteria or conditions governing the eligibility for—and the amount of—a subsidy are neutral, nondiscriminatory, economic in nature, and horizontal in application (such as number of employees or size of enterprise). The criteria must be clearly spelled out in a law, regulation, or other official document. A subsidy which is limited to certain enterprises located within a specified region is considered to be specific. All export subsidies are deemed to be specific, whether they are targeted or not. Certain specific subsidies may be non-actionable. These include research and development subsidies (under certain conditions), aids to regions that are disadvantaged (using the criteria similar to those employed internally by the EU), and subsidies to facilitate the adaptation of plants that have been in existence at least two years to new environmental regulations (again subject to conditions).

The following subsidies are prohibited: (a) subsidies contingent, de jure or de facto, on export performance (i.e., export subsidies); and (b) subsidies contingent upon the use of domestic over imported goods (i.e., local content requirements). An illustrative list of export subsidies is included in an annex to the agreement. Included are currency retention schemes which involve a bonus on exports, internal transport and freight charges on export shipments that are more favorable than for domestic shipments; the provision of products or services for use in the production of exported goods, on a more favorable basis than available to domestically consumed goods; exemptions or allowances for direct taxes or other charges directly related to exports or export performance that exceed those granted for production for domestic consumption; the exemption or remission for exported products of indirect taxes in excess of those levied on the products when sold for domestic consumption; export credit guarantees or insurance at premium rates which are inadequate to cover the long-term operating...
costs and losses of the insurer; and export credits at rates below cost of funds. In all these cases it is the government, or an institution under its control that must provide the subsidy.

Indirect tax rebate and drawback schemes are not considered export subsidies if they do not result in rebates in excess of what was actually levied on inputs that are consumed in the production of the exported product. Normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Substitution drawback systems may constitute an export subsidy if they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

Actionable subsidies are subsidies that are permitted but that may, if they create adverse effects on the trade of a GATT member, lead to consultations followed by the invocation of dispute settlement procedures, or the initiation of countervailing duty (CVD) procedures by the importing country concerned. Adverse effects include injury to a domestic industry, nullification or impairment of tariff concessions, or serious prejudice or threat thereof to the country’s interests. Serious prejudice is deemed to exist if: (a) the total ad valorem subsidization of a product exceeds 5 per cent; (b) subsidies cover operating losses of an industry; (c) subsidies cover operating losses of an enterprise; (d) forgiveness of government-held debt and grants to cover debt repayment. Serious prejudice may arise if the subsidy: (a) displaces/impedes the imports of like products into the subsidizing country; (b) displaces/impedes exports of like products of a GATT Member in a third country market; (c) results in significant price undercutting, suppression, or lost sales in the same market; or (d) increases the world market share of the subsidizing country in a primary product as compared to its average share during the previous 3 year period.

However, if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking (i.e., the OECD agreement on export credits), an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

Indirect tax rebate schemes allow for exemption, remission or deferral of prior stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product. Drawback schemes allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product.

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs.

Other than one-time measures which are non-recurrent, non-repeatable, and are given to allow the development of long-term solutions and to avoid acute social problems.

Specific rules apply for agriculture.
In the case of actionable subsidies that have an adverse effect on a WTO Member, the latter may ask for consultations with the country maintaining the subsidy program. If consultations fail to settle matter within 60 days, the WTO's dispute settlement provisions may be invoked. A Panel can be requested, which has 120 days to report its findings. If adverse effects are deemed to exist, the subsidy program must be revoked, or the affected country otherwise compensated. If the Panel's recommendations have not been implemented within 6 months, the affected country can retaliate by withdrawing 'equivalent concessions'. In the case of prohibited subsidies, the same procedure is to be followed, except that there is no need to establish that adverse effects result.

There are a variety of provisions of a 'special and differential treatment' nature relating to developing and formerly centrally planned countries. WTO Members in the process of transformation from a centrally-planned to a market economy, may apply otherwise prohibited subsidy programs until mid-2002. During the same period subsidy programs involving debt forgiveness will not be actionable. Those developing country Members referred to in an annex (least developed and countries with GNP per capita below US $1,000) are exempted from the prohibition on export subsidies. These countries will 'graduate' when their GNP per capita exceeds $1,000, after which they have 8 years to phase out non-conforming subsidies. Developing country WTO Members that are not listed in the Annex are subjected to a standstill requirement and must phase out their export subsidies over an eight year period, starting from January 1995. The prohibition on subsidies that are contingent on the use of domestic goods (local content) does not apply to developing countries for a period of five years (8 years for least developed countries). Moreover, developing countries may request further temporary extensions. If granted, annual consultations with the GATT Subsidies Committee must be held to determine the necessity of maintaining the subsidies. Developing countries that have become competitive in a product must phase out applicable export subsidies over a two year period. Export competitiveness is defined as attainment of a share in world trade of the product of at least 3.25 percent for two consecutive calendar years.

Countervailing Duties

In the case of both prohibited and actionable subsidies, WTO members may also initiate countervailing duty investigations. Both routes (i.e., dispute settlement and countervailing duty investigations) may be pursued simultaneously. However, only one remedy may be applied.

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Footnotes:
30 Least-developed countries are those that are designated as such by the United Nations. The following developing countries will 'graduate' when their GNP per capita has reached $1,000 per annum (as reported by the World Bank): Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe. Market exchange rates are used, not purchasing power parities.

31 If the country is included in the above mentioned Annex, the phaseout period is 8 years.

32 This will determined either through notification by the country concerned or on the basis of a computation undertaken by the WTO Secretariat at the request of any Member. A product is defined as a section heading of the Harmonized System.
Necessary conditions for countervailing the effect of an actionable subsidy are that the existence of a subsidy is demonstrated, a domestic industry producing similar (like) products is shown to be injured, and a causal link is established between the subsidization and injury. Necessary conditions for injury to be caused are that the volume of subsidized imports has increased; that this has affected price levels or is reflected in price undercutting of domestic firms; and that this in turn had a detrimental effect on the domestic industry. At least 25 percent of the firms in the domestic industry must support the launching of a CVD investigation.

Detailed requirements and deadlines are established regarding the different phases of investigations, including the collection of evidence, the rights of interested parties, the calculation of the extent to which a subsidy benefits the recipient, the determination of injury, possible remedies, and access to judicial review of the decision that is made. In principle, countervailing duties are to be eliminated within five years of their imposition, except if a review determines that the abolition of protection would likely lead to the continuation or recurrence of injury. There are no limits on the number of times protection can be extended following a review.

Countervail and Developing/Transition Economies

When confronted with CVD investigations in export markets, developing countries benefit from de minimis thresholds. If the subsidy is less than 2 percent of the per unit value of products exported, developing countries are exempt from countervail (for least developed countries the threshold is 3 percent). An exemption also applies if the import market share of a developing country

33 In determining the impact of the subsidized imports on the domestic industry all ‘relevant economic factors and indices having a bearing on the state of the industry’ must be investigated. An illustrative list of such variables that is mentioned includes actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increase in government support. It is explicitly stated that this list is not exhaustive, and that no one or several of these factors should necessarily give decisive guidance to investigators.

34 Methods used to calculate the benefit to the recipient must be established in the national legislation or implementing regulations of each country. Government provision of equity capital confers a benefit only if an inconsistency with the “usual investment practice” of private investors in the country concerned can be discerned. Loans (or loan guarantees) by a government only confer a benefit to the extent that there is a difference between the cost to the firm receiving the loan (and/or guarantee) and that of a comparable commercial loan (without guarantee) which the firm could actually obtain on the market. The provision of goods or services or the purchase of goods by a government only confers a benefit if ‘less than adequate remuneration’ is obtained/provided. Adequacy is determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).
is less than 4 percent, and the aggregate share of all developing countries with shares less than 4 percent is below 9 percent of total imports.\(^{35}\)

Member countries that are in the process of transformation from a centrally-planned into a market economy are permitted to maintain subsidy programs that are deemed necessary for such a transformation. Otherwise prohibited subsidies (i.e., export subsidies), if notified to the WTO can be phased out over 7 years starting in January 1995. During this period other member states cannot initiate dispute settlement procedures (but may initiate CVD procedures). The same applies to debt forgiveness or grants to cover debt repayment. With respect to other actionable subsidies, the same burden of proof applies as if the subsidizing country were a developing country. That is, serious prejudice cannot be presumed, but must be demonstrated. Maintained export subsidies are to be notified to the WTO by the earliest practicable date after January 1995. In exceptional circumstances Members may be granted waivers for their notified subsidy programs and the time-frame for their abolition by the Committee if such departures are deemed necessary for the process of transformation.

\textit{Countervail of drawback}

Duty drawback mechanisms are prevalent in many developing countries, and often are an element of structural adjustment programs. It is important, therefore, that they be designed in a GATT-consistent manner in order to avoid the imposition of countervailing duties by trading partners. Upon receipt of a complaint that an indirect tax rebate or drawback scheme acts as a subsidy through over-rebate or excess drawback of charges on inputs consumed in the production of an exported product, the investigating authorities of the importing country must first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure exists, its 'reasonableness', effectiveness, and 'consistency with generally accepted commercial practices' in the exporting country must be determined. Where there is no monitoring system, or if it is found not to be applied effectively, a determination of the actual inputs involved in the production of the exported good can be made. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for

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\(^{35}\) How the amount of a subsidy is calculated is obviously important. The cost to the granting government is required to be the basis of the calculation. In determining whether the overall rate of subsidization exceeds 5 percent of the value of the product, the former includes all subsidies granted by all relevant bodies, and the latter is the total value of the recipient firm's sales (or sales of the relevant product, if the subsidy is tied) in the most recent twelve-month period preceding the period in which the subsidy is granted for which sales data are available. If the firm is in its first year of production, the overall rate of subsidization cannot exceed 15 percent of the total funds invested. In an inflationary context the value of the product is to be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the twelve months preceding the month in which the subsidy is given. Subsidies granted prior to the entry into force of the WTO, the benefits of which are allocated to future production, can be included in the overall rate of subsidization.
The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used nor sold by the same manufacturer.

37 This rule strengthens the incentive to use temporary admission/duty waiver mechanisms, rather than drawback.
and administrative costs).\footnote{Such sales may be disregarded in determining normal value if the authorities determine that they are made over a period of at least 6 months, in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time.} In the absence of sufficient sales on its domestic market, the highest comparable price charged in third markets or the exporting firm’s estimated costs of production plus a ‘reasonable’ amount for profits, administrative, selling and any other expenses is to be used to determine normal value.\footnote{Costs are to be calculated on the basis of records kept by the exporter or producer under investigation, as long as these follow generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. All available evidence on the proper allocation of costs is to be considered, including that made available by the exporter or producer in the course of the investigation, provided that such allocations have been historically utilized, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. The amount for administrative selling and any other costs and for profits is to be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. If these are not available, the amounts may be determined on the basis of: (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products; (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin; or (iii) any other reasonable method, provided that the amount for profit so established is not to exceed the profit normally realized by other exporters or producers of similar products in the domestic market of the country of origin.} In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of a relationship or agreement between the parties involved in a transaction, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if they are not resold to an independent buyer, "on such reasonable basis as the authorities may determine."

The comparison of the export price and the normal value must be made at the same level of trade (normally ex-factory level), and at the same time. Allowance must be made for differences in factors such as the conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, or differences in costs, including duties and taxes, incurred between importation and resale.\footnote{If price comparability has been affected, the normal value is to be established at a level of trade equivalent to the level of trade of the constructed export price, or due allowance is to be made for such factors.} When price comparisons require a conversion of currencies, the rate of exchange on the date of sale must be used. In an investigation, the exporters must be allowed at least 60 days to adjust their export prices to reflect sustained movements in exchange rates during the period of investigation.

The existence of margins of dumping during the investigation phase is to be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be
compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods. The rules are such that the procedures followed by antidumping authorities in investigations can such as to almost 'guarantee' a positive dumping margin as long as prices vary over time. This bias results from the allowance that is made for eliminating low-priced sales in the exporter's home market. Thus, instances where dumping margins are negative may be dropped from the sample.

Actions against dumping may only be taken if it can be shown that the dumping has caused or threatens material injury of domestic import-competing firms. Injury determinations must be based on positive evidence and involve an objective examination of the volume of the dumped imports, the effect of the dumped imports on prices in the domestic market for like products, and the impact of dumped imports on domestic producers of such products. A significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country, is a necessary condition for finding injury. Significant price undercutting of domestic producers, or a significant depressing effect on prices are other indicators that may be used.

De minimis dumping margins are set at 2 percent or a volume of imports/level of injury that is negligible. Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess effects of such imports if the margin of dumping established in relation to the imports from each country is more than de minimis, the volume of imports from each country is not negligible, and a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product.

An illustrative list of indicators is given to determine the impact of dumped imports on the domestic industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive; the agreement states that "no single or combination of factors can give decisive guidance".

Dumped imports must be found to cause injury because of dumping. The necessary causality must be established on the basis of "all relevant evidence before the authorities." Any other factors that are known and that at the same time are injuring the domestic industry must be taken into account and not attributed to the dumped imports. A number of factors that may be relevant in this respect are mentioned, including the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of—and competition between—foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry.

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41 An explanation must be provided why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.
The term "domestic industry" is defined as the domestic producers as a whole of the like products or to those firms whose collective output represents a major share of total domestic production. Producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product may be excluded from the "domestic industry" for purposes of the injury determination.

Rather detailed procedural requirements are specified in the agreement. These relate to the initiation of investigations; the evidence that can be used; transparency of procedure; the need for an appeals option; the duration of antidumping actions; the remedies that may be used; etc. It is too far-reaching to discuss all these aspects of the antidumping agreement. Suffice it to say that this has become a lucrative area of specialization for the legal profession in territories that actively use antidumping.

**Customs Classification, Valuation and Pre-shipment Inspection**

An agreement on tariff binding would be practically meaningless without a set of rules concerning valuation of imported goods. Customs valuation is the process by which customs authorities assign a tariff classification and value to imports. Valuation procedures may become NTBs if officials assign goods to an incorrect classification to which a higher tariff applies or assign goods a value greater than appropriate. It may also be the case that the process of documenting imports is excessively time consuming and expensive. Depending on the valuation method the protective effect of a tariff may be substantially modified. Thus, whether the transportation and insurance costs are included or excluded from the valuation basis may have a significant impact. More importantly, customs officials may not accept the invoice presented by the importer or exporter as being the basis for valuation for purposes of determining the amount of duty to be paid. Instead, they may decide to raise or lower the value of the goods for import duty calculation purposes. A country’s published tariff schedule may not be representative of the ‘real’ nominal tariffs that apply.

Of these two issues, classification is the least troublesome as most countries use internationally developed systems. The main coding system used for classification purposes during the first forty years of the GATT’s existence were the Brussels Tariff Nomenclature (BTN) and the Customs Cooperation Council Nomenclature (CCCN). More recently, GATT contracting parties have switched to the Harmonized Commodity Description and Coding System (HS), which was also was developed by the Customs Cooperation Council in Brussels. The HS has many characteristics of the CCCN, but allows for a greater range of products than its predecessors and permits easier classification of new products. Introduction of the HS is intended to reduce classification errors and the need for reclassification as goods move across customs boundaries, allows for the harmonization of trade documents and facilitates computerization of customs formalities. By the end of 1990 most major trading nations were applying the Harmonized System.

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2 This requires that one directly or indirectly controls the other; both are directly or indirectly controlled by a third person; or together they directly or indirectly control a third person. There must be grounds for believing that the relationship causes the producer concerned to behave differently from non-related producers.
The Agreement on Customs Valuation (formally the Agreement on Implementation of Article VII of GATT) aims to establish uniform, transparent and fair standards for the valuation of imported goods for customs purposes. The main objective of the agreement is to establish a system which outlaws the use of arbitrary or fictitious customs values and which conforms to commercial realities. The agreement includes a set of rules on customs valuation which give greater precision to the general valuation rules of the GATT-1947 (Article VII). Valuation is to be based on the transaction or invoice value of the goods, i.e. the price actually paid or payable for the goods (subject to adjustments concerning freight and several other charges). This method should be applied when: (i) there are no special restrictions as to the disposal or use of goods, (ii) the buyer and seller are not related, (iii) no proceeds of the subsequent sales will accrue to the exporter, and (iv) the sale or price is not subject to conditions the value of which cannot be determined.

Certain additions to the price of imported goods may be made for valuation purposes. These include commission and brokerage fees, the cost of packaging and containers, the value of inputs supplied by the buyer to the production process at reduced costs, related royalties and license fees, and the value of any proceeds that accrue to the seller following subsequent resale. Moreover, optional adjustments related to the freight, insurance and handling charges may be made depending on the valuation base used by the customs authorities. The agreement does not prescribe a uniform system as regards shipping, insurance and handling charges. Thus, a country may opt for a cost, insurance freight (cif), a cost and freight or a free on board (fob) valuation basis.

If these conditions are not met and customs authorities have reasons to believe that the transactions value is inaccurate, the Agreement on customs valuation requires value to be determined by proceeding sequentially through the following valuation options: (1) the value of identical goods; (2) the value of similar goods; (3) the so-called deductive method; (4) the computed value method; and (5) an 'if all else fails' method. It is only when the customs value cannot be determined under a specific option that the next option in the sequence can be used. However, an importer may request that the computed method be used in preference to the deductive method.

In most instances refusal to accept the invoice price will be connected to there being a relationship between buyer and seller. The mere fact of such a relationship is not sufficient grounds for the authorities to reject the invoice price. What matters is that the relationship influences the price. The burden of proof in this regard is upon the importer. If the value is questioned by customs, the importer must show that the transaction value closely approximates: (i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation; (ii) the customs value of identical or similar goods as determined under the deductive method; or (iii) the customs value of identical or similar goods as determined under the computed value method.

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43 The additions that may be made are listed in Article 8 of the agreement. Only factors mentioned in this Article may be included, no others.
The **deductive** value method consists of the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for (i) the commissions usually paid or the additions usually made for profit and general expenses in connection with such sales; (ii) the costs of transport and insurance and associated costs incurred within the country of importation; (iii) costs, insurance and freight charges if these are included in the valuation base; and (iv) applicable customs duties and other national taxes. The **computed** method consists of summing the cost or value of materials and fabrication or other processing employed in producing the imported goods; adding an amount for profit and general expenses equal to that usually reflected in sales of similar goods made by producers in the country of exportation for export to the country of importation; plus handling, freight and insurance charges if these are generally included in the valuation base by customs.

Laws, regulations, judicial decisions and administrative rulings of general application relating to customs valuation are to be published by each GATT member. The applicable legislation is to provide for the right to appeal Customs' determination of value. It must also allow an importer to withdraw her goods from customs if the valuation of the goods is delayed, as long as a guarantee in the form of a bond or deposit for the ultimate payment of customs duties is given.

**Developing Countries**

Developing countries that were not party to the 1979 Tokyo round valuation code may delay application of the provisions of the agreement on customs valuation for a period not exceeding five years from the date of entry into force of the WTO. They may also delay application of the computed value method for an additional three year period. An Annex to the agreement also allows developing countries to request an extension of the five-year delay. Reservations may be entered in respect of any of the provisions of the Agreement with the consent of the other Members. Developing countries which currently value goods on the basis of officially established minimum values may request a reservation to enable them to retain such values on a limited and transitional basis, subject to whatever terms and conditions required by the other Members of the WTO. Finally, developing countries may reserve the right to deny requests by importers to employ the computed value in preference to the deductive method.\(^4\)

**Preshipment Inspection**

Preshipment inspection (PSI) consists of inspection of goods by private, specialized firms before such goods are shipped by exporters to the country of importation. Governments of importing countries usually decide to engage the services of PSI firms in order to reduce the scope for exporters

\(^4\) Certain developing countries expressed concern that there may be problems in using transaction values in instances of imports by sole agents, sole distributors and sole concessionaires. The agreement includes a provision that if such problems arise in applying the Agreement, a study of this question will be made, at the request of the developing countries involved.
and/or importers to engage in either over-invoicing or under-invoicing of imports. Over-invoicing may occur in contexts where there are foreign exchange controls, as it is one mechanism through which capital may be brought outside the country. Under-invoicing is usually driven by tax evasion considerations: by under-reporting the value of an imported item, traders may seek to reduce their tax obligation (partially evade applicable tariffs). Government contracted or mandated PSI should be distinguished from PSI services that are required as part of a contract between buyers and sellers of a product. Most firms that are internationally active in providing inspection services provide pre-shipment certification and inspection of goods because this is required by buyers. Such services focus on the specifications and quality of the goods concerned, not their value. Government-mandated PSI is predominantly concerned with the determination of the classification, volume and value of goods imported into their territories.

Under the WTO Agreement on PSI, countries that use PSI agencies must ensure that such activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective. Quantity and quality inspections must be performed in accordance with the standards defined by the seller and the buyer in the purchase agreement. If these are not specified, relevant international standards of inspection are to apply. Verification of contract prices must be based on a comparison with the price(s) of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, and net of any applicable standard discounts. In doing this, pre-shipment inspection entities are to make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction. The selling price of locally produced goods; the export price of other producers; the cost of production; or 'arbitrary' prices are not to be used for price verification purposes.

As is the case with customs formalities, laws relating to pre-shipment inspection must be published. Exporters are to be provided with all the information which is necessary for them to comply with inspection requirements. This information must include a reference to the applicable laws and regulations, the procedures and criteria used for inspection, price and exchange rate verification purposes, exporters’ rights vis-à-vis the inspection entities, and the appeals procedures established to address complaints by exporters.

User fees

GATT Article VIII (on fees and formalities connected with importation and exportation) requires that all ‘service’ fees must "be limited in amount to the approximate cost of services rendered

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45 These include the size of the transaction, delivery periods and conditions, price escalation clauses, quality specifications, special design, shipping or packing specifications, seasonal influences, license or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately.

46 For an exhaustive discussion and analysis of government mandated PSI (used by some 30 countries, mostly in Africa), see Low (1994).
and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes” (Article VIII:1). Examples of such fees include consular transactions, licensing, statistical services, documentation, certification, inspection, quarantine, sanitation and fumigation. Article VIII applies irrespective of whether a country has bound its tariffs. As has been noted by GATT panels, the term ‘services rendered’ is a misnomer, as most of these customs-related activities are not desired by traders! Clearly the possibility to charge ‘service’ fees is a potential loophole for countries seeking to raise effective tariffs. This has been recognized by GATT members. In a 1988 dispute settlement case brought to GATT concerning the imposition of a uniform ad valorem customs ‘user’ fee by the United States, the Panel concluded that such fees must not only be cost-based, but also service-specific and directly related to the import process. Thus, imposing an ‘average’ fee equal to the total cost of customs administration divided by the total value of imports was considered to be unacceptable. Fees on imports cannot be used to cover the cost of enforcing export regulations or other activities not directly associated with entry of imports. Although the US altered its customs user fee to conform with the Panel’s findings, other countries continue to maintain ad valorem fees that are presumably inconsistent with the GATT.  

Rules of Origin

A rule of origin is a criterion that is used to determine the ‘nationality’ of a product or a producer. Rules of origin are necessary when controlling imports on a discriminatory basis. The only multilateral convention dealing with rules of origin is the 1974 International Convention on the Simplification and Harmonization of Customs Procedures (known as the Kyoto Convention), negotiated under auspices of—and administered by—the Customs Cooperation Council in Brussels. The Convention provides a list of ten types of products that should be considered to originate in a country because they are wholly produced or obtained there, that is, contain no imported materials. These are largely natural resource-based products extracted or obtained from the territory of the country concerned. Where two or more countries are involved in the production of a product, the Convention states that the origin of the product is the one in which the last ‘substantial transformation’ took place, i.e., the country in which the significant manufacturing or processing occurred most recently. Significant or substantial in this respect is defined as sufficient to give the product its essential character. The substantial transformation criterion has been used by the United

47 In part this is because most service fees in existence on the date of a country’s accession to GATT are ‘grandfathered’ and thus immune from scrutiny. Developing countries also appear to have been granted greater leeway than industrialized countries, reflecting the fact that their tariffs were often not bound in any event. A number of developing countries have customs user fees of 5 percent ad valorem or higher. New Members of the WTO can expect to be confronted with greater rigor than incumbents in this respect.

48 Despite the significant flexibility the Kyoto Convention gives to signatories regarding their choice of origin system, only a limited number of countries have signed the convention. Some have accepted only parts of it. Thus, although the U.S. partially ratified the convention, it has not accepted the provisions regarding rules of origin.
States since the early 20th century and is also the basis for the EU’s system of non-preferential rules of origin.\textsuperscript{49}

Substantial transformation is not a precise concept. The Convention provides a number of alternative, indicative, tests or criteria that may be employed in this regard. These include: (1) requiring a \textit{change in tariff heading} (CTH) in a specified nomenclature (currently the Harmonized System); (2) determining a list of \textit{specific processing operations} which do or do not confer upon the products involved the origin of the country in which the operations were carried out; (3) requiring that the \textit{value of the materials} utilized in transforming the product exceeds a specified percentage of the value of the transformed product; or (4) requiring that the percentage of \textit{value added} in the country of processing reaches a specified level. In the last two cases the precise percentage is left for each country to decide.\textsuperscript{50}

During the Uruguay round an agreement on rule of origin was negotiated. The GATT-1947 had no disciplines on rules of origin. An objective of the GATT-1994 disciplines on rules of origin is to foster the harmonization of the rules of origin used by Members. The primary criterion for determining origin is CTH. The Agreement requires a work program to be undertaken by a Technical Committee, in conjunction with the Customs Cooperation Council, with the goal to develop a classification system regarding the changes in tariff (sub)headings based on the Harmonized System that constitute a substantial transformation. In cases where the HS nomenclature does not allow for the expression of substantial transformation, the Technical Committee is to provide guidance regarding the use of \textit{supplementary tests} such as ad valorem percentages and/or manufacturing or processing operations.\textsuperscript{51} After a transitional period--once the harmonization work program is completed--rules of origin are to be applied equally for all non-preferential commercial policy instruments. The Agreement also specifies that rules of origin applied to exports or imports should not be more stringent than the rules applied to determine whether or not a good is domestically produced (as is necessary under antidumping, countervail, safeguard and government procurement procedures).\textsuperscript{52} The agreement does \textit{not} apply to preferential commercial policies such as free trade agreements and GSP schemes.

\textsuperscript{49} For a discussion of the EU and U.S. rules see Vermulst and Waer (1990) and Palmeter (1990), respectively.

\textsuperscript{50} In practice, content requirements may also be phrased in terms of physical units, e.g., physical units of a component sourced from a country should exceed a specified proportion of the total number of components that are used. It can be noted that the CTH or substantial transformation criterion is \textit{implicitly} a value added criterion. In general a CTH will require processing - implying adding value to a product. The primary difference between the two criteria therefore appears to be that under a CTH: (1) it is less clear what the "value added equivalent" is; and (2) there is likely to be a wide variance in these equivalents.

\textsuperscript{51} This appears to follow EU practice, where a value added test tends to be used as an additional criterion in instances where the substantial transformation (CTH) rule cannot be applied.

\textsuperscript{52} Specific criteria regarding the latter issue will depend on GATT rules in each of these areas.
Technical Regulations and Standards

Product standards, technical regulations and certification systems are essential to the functioning of modern economies. Both standards and regulations are technical specifications for a particular product or production process. A standard differs from a regulation in that the former is voluntary, usually being defined by an industry or by a nongovernmental standardization body. Technical regulations are mandatory (legally binding), and are usually imposed in order to safeguard public or animal health, or the environment. Not surprisingly, in most industrialized economies the number of standards far exceeds the number of technical regulations. Certification systems comprise the procedures that must be followed by producers in establishing that their products or production processes conform to the relevant standard/regulation.

Because standards can raise unit costs of production and/or transportation, they may inhibit international trade. To the extent that this occurs, standards are considered to be technical barriers to trade. The GATT does not develop or write standards or technical regulations. The GATT Agreement on Technical Barriers to Trade aims to ensure that technical regulations, standards, testing, and certification of products (for reasons such as safety, health, consumer or environmental protection) do not constitute unnecessary barriers to trade. The agreement requires that standards not disrupt trade, that countries provide national and nondiscriminatory treatment to imported products as far as standards are concerned, that foreign manufacturers be granted access to domestic certification systems, and that international standards be used as much as possible. Further, there should be prior notification and maintenance of a comment period on proposed regulations, and countries must establish so-called enquiry points to make available information on their standards. Only central governments are directly bound by the Agreement, although endeavors are to be made to ensure that all standards-writing bodies are in compliance with its rules. Services, technical specifications included in government procurement contracts, or standards established by companies for their own use are not covered, but standards relating to processes and production methods are covered.

The Agreement on standards has three major parts: (1) disciplines dealing with the adoption of technical regulations and standards in Member countries; (2) provisions dealing with conformity assessment, testing and certification; and (3) transparency provisions aiming at ensuring that Members are aware of existing standards and certification procedures used by trading partners. As far as the first issue is concerned, central government bodies must follow MFN and ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective. These include national security requirements; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life and health, or the environment. Where relevant international standards exist or their completion is imminent, they should be used as a basis for technical regulations, except if this would be ineffective or inappropriate because of, e.g., climatic or geographical factors or fundamental technological problems.

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53 Examples include the American National Standards Institute (ANSI), the British Standards Institution (BSI), the Deutsches Institut für Normung (DIN), and the Association Francaise de Normalisation (AFNOR).
An important change that was made in the Uruguay round is that technical regulations based on product requirements should be worded in terms of performance rather than design or descriptive characteristics. Central government standardizing bodies must accept and comply with a Code of Good Practice concerning the preparation, adoption and application of standards (as opposed to technical regulations). 'Reasonable' measures are to be taken to ensure that local government and non-governmental standardizing bodies accept and comply with the Code. Standardizing bodies that have accepted the Code must notify this fact to the ISO/IEC Information Centre in Geneva. The Code requires among other things that activities of standardizing bodies conform to GATT's MFN and national treatment principles, as well as the various requirements applying to technical regulations. At least once every six months, standardizing bodies are to publish and send to the ISO/IEC Information Centre their work program indicating standards adopted and under preparation.

Conformity assessment procedures are to be applied on a nondiscriminatory basis, expeditiously, and with respect for confidentiality requirements. Substantive requirements with respect to procedures are very similar to those applying to the development of national standards. If relevant guides or recommendations issued by international standardizing bodies exist, central government bodies are to use these in their conformity assessment procedures. If they do not exist, and the procedure used may impact significantly on trade, countries are to publish them at an early stage, notify the WTO Secretariat, and allow for comments. GATT members are, wherever practicable, to formulate and adopt international systems for conformity assessment and become members thereof or participate therein. Such international and regional systems for conformity assessment are to comply with the various requirements summarized earlier. Central government bodies must accept the results of conformity assessment procedures undertaken in trading partners, even if procedures differ from their own, if they are satisfied that they offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. The need for prior consultations in this connection is recognized. Accreditation on the basis of relevant guides or recommendations issued by international standardizing bodies is to be taken into account as

54 International Organization for Standardization and International Electrotechnical Commission, respectively.

55 Obligations with respect to compliance of standardizing bodies with the provisions of the Code of good practice apply irrespective of whether or not a standardizing body has accepted this Code.

56 National members of ISO/IEC are required to become a member of ISONET or to appoint another body to become a member, and to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member. ISONET is a network linking standardizing bodies that are members of the ISO. Through ISONET members disseminate their standards and technical regulations to one another.

57 Again, exceptions are allowed for. Such guides or recommendations may be considered to be inappropriate for reasons such as national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. Specific climatic or geographical factors and 'fundamental technological or infrastructural problems' may also justify an exception.
an indication of adequate technical competence of the foreign entity. GATT Members are encouraged
to negotiate mutual recognition agreements for conformity assessment procedures, and to apply the
MFN and national treatment principles when permitting participation of foreign certification bodies in
their conformity assessment procedures. Local government bodies and non-governmental entities are
only subject to 'best endeavors' requirements.

The third component of the GATT standards disciplines is transparency-related. Each WTO
Member must establish an enquiry point which is able to answer enquiries and provide documents on:
(1) technical regulations adopted or proposed by bodies which have legal power to enforce them, or
regional standardizing bodies; (2) standards adopted or proposed by central or local government
bodies, or by regional standardizing bodies; (3) conformity assessment procedures, existing or
proposed, applied by bodies which have legal power to enforce technical regulations, or by regional
bodies; (4) membership in international and regional standardizing bodies and conformity assessment
systems; and (5) the location of notices published pursuant to the Standards Agreement. Best efforts
are to be made to ensure that enquiry points are also able to answer enquiries regarding standards
adopted or proposed by non-governmental standardizing bodies; as well as conformity assessment
procedures operated by non-governmental or regional bodies.

Announcement of the proposed introduction of technical regulations must be published if these
are not in accordance with a relevant international standard if it may have a significant effect on
trade. The WTO Secretariat is to be notified of the products covered by the proposed technical
regulation, together with an indication of its objective. Such notifications must occur early enough so
that 'reasonable' time is given to allow comments (in writing) to be made and considered. All
adopted technical regulations must be published promptly, with a reasonable interval being maintained
between publication and entry into force so as to allow time for exporters to adapt their products or
methods of production.58 A single central government authority is to be designated that is
responsible for the implementation on the national level of the provisions concerning notification
procedures for technical regulations. The WTO Secretariat is required to reach an understanding with
the ISO to establish an information system under which ISONET members transmit to the ISO/IEC
Information Centre in Geneva the notifications required under the Code of Good Practice for the
preparation, adoption and application of standards. The ISO/IEC Information Centre is to send the
WTO Secretariat copies of any notifications related to the implementation of the Code, and regularly
publish the information received in the notifications made to it. This publication must be made
available to ISONET members and through the WTO Secretariat, to the Members of the WTO.

58 Developed country Members are to provide, upon request, English, French or Spanish translations of the
documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.
The WTO Secretariat is to circulate copies of the notifications to all Members and interested international
standardizing and conformity assessment bodies, and draw the attention of developing country Members to any
notifications relating to products of particular interest to them.
Sanitary and Phytosanitary Measures

An Agreement on the Application of Sanitary and Phytosanitary Measures (SPMs) was negotiated as part of the Uruguay Round which applies to all such measures that may affect international trade. A SPM is defined as any measure applied to protect animal or plant health from risks arising from the establishment or spread of pests and diseases; to protect human or animal health from risks arising from additives or contaminants in foodstuffs; to protect human health from risks arising from diseases carried by pests, animals or plants; or to prevent other damage from the establishment or spread of pests. SPMs include all relevant laws, decrees, regulations, requirements and procedures, including product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments; provisions on relevant statistical procedures and risk assessment methods; and packaging and labelling requirements directly related to food safety.

SPMs may be applied only to the extent necessary to protect human, animal or plant life or health, must be based on scientific principles and may not be maintained without sufficient scientific evidence. They may not unjustifiably discriminate between GATT Members, be more trade restrictive than required to achieve the appropriate level of protection, or be applied so as to constitute a disguised restriction on international trade. They should be based on international standards, guidelines or recommendations, if these exist. WTO Members are to accept the SPMs of other Members as equivalent, even if these measures differ from their own, if the exporting country can demonstrate that its SPMs achieve the desired level of protection. Negotiations to achieve bilateral or multilateral agreements on recognition of the equivalence of specified SPMs is encouraged. Conformity assessment procedures and fees are to be based on MFN and national treatment, procedures and criteria should be published, confidentiality respected, and an appeals procedure established.

The Committee on Sanitary and Phytosanitary Measures may grant developing countries

59 In cases where relevant scientific evidence is insufficient, a SPM may be adopted provisionally on the basis of available pertinent information. In such cases additional information necessary for a more objective assessment of risk must be sought and the SPM reviewed accordingly.

60 SPMs which result in a higher level of protection than would be achieved by international standards may be used if there is a scientific justification, or if justified by the implementation of risk assessment techniques developed by the relevant international organizations. The Agreement requires that SPMs be based on an assessment of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations. In the assessment of risks, available scientific evidence must be taken into account, as well as relevant processes and production methods; inspection, sampling and testing methods; the prevalence of specific diseases or pests; the existence of pest/disease-free areas; ecological and environmental conditions; and quarantine or other treatment. In determining the SPM to be imposed, account must be taken of economic factors as well, including: the potential damage in terms of loss of production or sales in the event of spread of a pest or disease; the costs of control or eradication; and the relative cost effectiveness of alternative approaches to limiting risks.
specified, time-limited exceptions in whole or in part from meeting the requirements of the Agreement. Least developed country Members may delay application of the provisions of the Agreement until mid-2000. Other developing countries have until mid-1997, subject to certain conditions. The Committee is to develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. It is to establish a list of international standards and guidelines relating to SPMs that are determined to have a major impact on trade. The list should include an indication by each Member of the international standards that are applied as a condition for import. In those cases where an international standard is not applied a justification must be offered.

All SPMs which have been adopted must be published. A reasonable interval must be maintained between publication and entry into force to allow time for exporters to adapt. As under the Standards Agreement, an enquiry point must exist to provide answers to SPM-related queries from trading partners and to provide the relevant documents regarding: (a) sanitary or phytosanitary regulations adopted or proposed within its territory; (b) control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory; (c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary and phytosanitary protection; (d) membership in international and regional sanitary and phytosanitary organizations and systems, and in bilateral and multilateral agreements and arrangements (including the texts of the latter).

Whenever the content of a proposed regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, the WTO Secretariat must be notified of the products covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications must take place at an early stage to allow amendments to be introduced and comments to be taken into account. A single central government authority is to be responsible for the implementation, on the national level, of the notification provisions of the agreement.

State Trading

The GATT assumes that state-trading enterprises (STEs) operate in a market environment. The relevant Article of GATT (Art.XVII) pertains to: (i) state-owned enterprises, (Art.XVII:1a); (ii) any enterprise that has been granted formally or in effect exclusive or special privileges (XVII:1a); (iii) marketing boards (Interpretive Note, Art.XVII:1); (iv) any enterprise under the jurisdiction of a contracting party (XVII:1c); and (v) import monopolies (XVII:4b). In the Uruguay round the following working definition of a STE was adopted (in the GATT 1947 the concept was not defined): "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports." STEs may therefore be fully privately owned. What matters is not ownership, but exclusivity.
The right of contracting parties to maintain or establish state-trading enterprises or to offer exclusive privileges is not prejudged by the GATT. The basic obligation imposed on GATT members is that they should ensure that the enterprises covered by Art.XVII not act in a manner inconsistent with the general principle of non-discrimination (MFN). Three qualitatively different legal obligations are imposed by GATT on STEs, depending on the type of entity involved. First, as far as import monopolies are concerned, upon request of trading partners that have a substantial trade in the product concerned, information is to be provided on the import mark-up on the product during a recent representative period, or, if not feasible, the resale price (Art.XVII:4b). Second, in their purchases or sales involving either imports or exports, state-owned enterprises, marketing boards and enterprises granted exclusive privileges, such firms are to act in a non-discriminatory manner (Art.XVII:1(a)). Firms granted exclusive privileges are to make purchases or sales solely in accordance with commercial considerations. Third, Art.XVII:1(c) requires governments to ensure that no enterprises in their jurisdiction are prevented from acting in accordance with the non-discrimination principle.

In the Uruguay round, negotiators agreed to enhance GATT disciplines on and surveillance of STEs to allow a better appreciation of their effect on international trade. Governments are required to notify all STEs to the GATT for review by a Working Party. The notification requirement does not apply to imports of products for immediate or ultimate consumption by the government or the STE itself (i.e., not for resale or use in the production of goods that are sold). Notifications are to be made for all STEs, independent of whether or not imports or exports have in fact taken place. Any WTO Member which believes that another Member has not adequately met its notification obligation may raise the matter bilaterally. If not resolved, a counter-notification may be made, for consideration by the Working Party. The Working Party may make recommendations with regard to the adequacy of notifications and the need for further information. It is to develop an illustrative list showing the kinds of relationships between governments and STEs, and the kinds of activities engaged in by these enterprises. Mark-ups of STEs may be bound similarly to tariffs (Article II:4). Once bound, mark-ups may not exceed the resulting tariff equivalent. It was agreed in the Uruguay Round that the nature and level of any "other duties or charges" levied on bound tariff items (Art. II:1(b)) is to be recorded in the Schedule of tariff concessions against the tariff item to which they apply.

Article XVII is relatively weak and somewhat ambiguous. As noted in Section I above, transition economies that have applied for GATT accession have been confronted with questions regarding the extent of state control and ownership, and the progress that has been achieved with privatization. In part this appears to reflect concerns that Article XVII will not prove to be much of constraint upon enterprises that will continue to have a monopoly position even if the transition to a

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61 An interpretive note states that "the charging by a state enterprise of different prices for its sales of a product in different markets is not precluded [by Art.XVII], provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets."

62 If a country has signed the Government Procurement Agreement, it is of course bound to its requirements (see below).
market economy has been largely realized. Economies in transition that seek accession may therefore be confronted with requests that commitments be made with respect to STEs that exceed those contained in Article XVII. More generally, much will depend on the extent to which Members notify practices of STEs to the Working Party.

A frequent companion of state trading is countertrade. Counterpurchase, offsets, advance purchase, buyback and barter are popular forms of contemporary countertrade. Under the countertrade arrangements the exporters and importers accept reciprocal deliveries in part or full settlement of the value of their deliveries. There is no reference to countertrade in the General Agreement with the exception of a passing reference in the Government Procurement Agreement. Countertrade is a business practice and as such it is not of direct concern to GATT. What is of GATT concern is countertrade regulations adopted by governments. The compatibility of countertrade regulations with the provisions of GATT has to be examined on a case by case basis. GATT has no policy with respect to countertrade *per se*.

**Trade-Related Investment Measures**

Trade-related investment measures (TRIMs) were initially one of the more controversial topics on the agenda of the Uruguay round negotiations. Many developing countries were of the view that attempting to agree to broad-ranging multilateral disciplines on policies affecting investment went far beyond the scope of the GATT, and that the GATT was not necessarily the appropriate forum for such an agreement (or attempt). Certain OECD countries, and the United States in particular, were of the view that policies distorting investment flows could have a significant impact on trade flows, and should be subject to multilateral disciplines. At the start of the Uruguay round, the U.S. sought disciplines on a long list of measures, including local content, export performance, trade balancing, minimum or maximum domestic sales, technology transfer and licensing, remittances, ownership limitations, and investment incentives.

The TRIMs agreement that emerged is, not surprisingly, a compromise. It explicitly affirms that GATT disciplines (national treatment and the GATT's ban on QRs) apply to investment policies insofar as this *directly* affects trade flows. Although this was a point of view that was long held and defended by most OECD countries, it had been resisted by developing countries. The agreement bans TRIMs that violate the GATT's national treatment rule or its prohibition on the use of QRs. An illustrative list of measures is included in the agreement that are considered to violate GATT rules. Of these, performance requirements (such as local content and trade balancing policies) are the most important. The agreement prohibits both mandatory measures and those "with which compliance is necessary to obtain an advantage" (e.g., a tax concession or subsidy). While the TRIMs agreement does not add to existing GATT disciplines, it does require that GATT members eliminate measures that are GATT inconsistent within two, five or seven years (for industrialized, developing and least
developed countries, respectively). Moreover, the agreement is to be reviewed within five years of the establishment of the WTO, at which time the need for more general disciplines on investment, competition policy and the scope for expanding the Illustrative List of prohibited TRIMs is to be determined.

Government Procurement

There are a number of agreements relating to trade in goods that, although negotiated under GATT auspices, apply only to signatories. Of these agreements, that on government procurement is the most important. The agreements are formally known as "plurilateral" trade agreements.64

The Agreement on Government Procurement was originally negotiated during the Tokyo round, and requires national treatment and nondiscrimination for purchases by government entities, and establishes rather detailed rules to enhance the transparency of tendering procedures. The trade-off for what is essentially a "free trade agreement" for procurement—a large market in any country—was that the disciplines of the agreement apply only to those governments that sign it, and then only for specific entities that are listed in the Annexes (schedules) for each of the signatory nations. The revised agreement negotiated during the Uruguay round will enter into force in January 1996.65

Government procurement and sourcing policies often include preferences given to domestic over foreign forms in bidding on public-procurement contracts. Examples of policies pursued by governments include outright prohibitions of foreign sourcing (e.g., U.S. civil servants must fly U.S. airlines); formal criteria for foreign sourcing to be permitted (e.g., minimum cost or price differentials; offset or local content requirements); and informal procedures favoring procurement from domestic firms. An example of the latter are selective or single tendering procedures under which no competitive bidding for a contract is initiated, the government instead directly approaching a specific (usually domestic) firm for a bid. Such discriminatory practices can be very important in terms of restricting access to markets. The "market" for government procurement is usually quite substantial. In the U.S., for example, total procurement by Government entities was over $1 trillion in 1991, or almost 20 percent of GDP.

As noted by Low (1993, p. 231), the TRIMs agreement is somewhat ironic insofar as GATT contracting parties are given grace periods to phase out measures that already were violating the GATT. However, as noted earlier, many developing countries were of the view that the GATT did not apply. Agreement on the scope of the GATT was the main outcome of negotiations.

The other agreements concern civil aviation, dairy products, and bovine meat. These sectoral agreements are discussed in the next Section.

See Hoekman and Mavroidis (1995) for a description and analysis of the new Agreement.
The Government Procurement Agreement (GPA) in principle prohibits preferences for domestic firms by imposing GATT's national treatment and nondiscrimination principles. The rule followed is analogous to that found in the North American Free Trade Agreement: it is the 'best of' national treatment or nondiscrimination: i.e., signatories are to provide products (goods or services) or suppliers treatment no less favorable than that accorded to domestic products/suppliers and no less favorable than that accorded to any foreign product/supplier. Thus, if it turns out that domestic firms are discriminated against in comparison with a foreign firm, this is permissible (as is also the case under GATT and the GATS). But all foreign firms must get the 'best' treatment accorded to that foreign entity. The GPA national treatment and MFN rules also apply to both trade (cross-border supply) and tenders by foreign firms that are locally-established. It thus goes beyond the GATT, which does not deal with establishment-related transactions.

There are three types of entities that are in principle covered by the GPA: central government entities (e.g., Ministries); sub-central government entities (e.g., a Province); and a catch-all of "all other entities that are required to follow the GPA's rules (in practice public utilities)."7 The extent to which bodies belonging to each of these three groups are covered, depends on the schedules that are negotiated between the signatories. The GPA applies to all contracts (calls for tender) by listed central government entities that exceed SDR 130,000. Higher 'thresholds' apply to procurement by sub-central entities (usually around SDR 200,000) and utilities (around SDR 400,000). The GPA's scope was enhanced in the Uruguay round not only by the expansion of entities covered, but also by the inclusion services and construction contracts. Procurement of the latter product categories is again covered only for listed entities, and then only for those services that are explicitly listed in annexes to the GPA for each signatory. In general, only construction contracts above SDR 5 million are subject to the GPA.

The GPA contains detailed rules regarding the tendering procedures that are to be followed by covered entities. It reduces the scope for so-called single or limited tendering, where a firm is directly approached and invited to bid (or simply awarded the contract outright). Tendering is to be competitive, either being open to all firms, or open to all pre-qualified firms. If qualification is a pre-condition, the GPA establishes detailed rules regarding the procedures and modalities for allowing foreign firms to qualify and ensuring that this process does not work to shut out foreign competition. There are also detailed requirements concerning technical specifications used in invitations to bid; publication requirements; time limits and the content of tender documentation to be provided to potential suppliers. The new GPA also requires signatories to establish mechanisms allowing awards to be contested by bidders, and to compensate them should it be found that a decision violates GPA rules and procedures.

Although in principle no discrimination is allowed in favor of domestic firms by covered entities, Article V:4 of the GPA allows developing countries to negotiate "mutually acceptable

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66 See, e.g., Hoekman and Sauvé (1994).

67 The last two categories were added as a result of the Uruguay round.
exclusions from the rules on national treatment with respect to certain entities, products, or services that are included in their lists of entities." Such negotiations may also be initiated ex post, after signing the agreement (Art. V:5). Some scope therefore exists for, e.g., maintaining a price preference policy. However, the option is limited to certain entities, products or services. Many countries have concluded that the GPA is too far-reaching in its implications. Membership of the GPA is quite limited, with only 11 signatories (counting the EU as one). Indeed, not all OECD countries have signed it.

Sectoral Agreements

The GATT has a number of sectoral agreements. Three of these are so-called plurilateral agreements that were initially negotiated during the Tokyo round (1979). They apply only to WTO Members that have signed them. During the Uruguay round two other sector-specific agreements were concluded on agriculture and textiles and clothing. These apply to all WTO Members and have as a goal the re-insertion of these sectors into the GATT system.

Agriculture

Trade in agricultural products, while in principle subject to GATT rules, had in the course of time come to be effectively excluded from the reach of GATT disciplines. A major achievement attained in the Uruguay round was agreement to initiate gradual liberalization of agriculture. The Agreement on Agriculture has three main parts, dealing with market access, domestic support, and export competition (subsidies), respectively. On market access it was agreed that nontariff barriers be converted into tariffs at the entry force of the WTO, that all agricultural tariffs—both pre-existing and new—be bound, and that industrial countries reduce their average tariffs by 36 percent over 6 years from a 1986-88 base. Reflecting the general non-prohibition of state trading, marketing boards and similar monopoly entities, are only subject to the general prohibition on the use of NTBs. Because of so-called 'dirty' tariffication by many countries—i.e., the setting of tariffs above the tariff equivalent of existing NTBs—the extent of liberalization is less than 36 percent. At the level of the tariff line, tariffs per commodity must fall by at least 15 percent. Minimum market opening criteria were established through a requirement that by 2000 at least 5 percent of the market for commodities subject to tariffication be satisfied by imports. Special safeguard mechanisms are available to protect domestic producers if imports exceed specific trigger quantities or are priced below trigger price levels.

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69 Countries seeking to delay tariffication were permitted to do so for 6 years (10 for developing countries) if imports were below 3 percent of domestic consumption in the 1986-88 base period, no export subsidies were granted and measures to restrict output are implemented. In such cases the minimum market access requirement is higher, increasing from 4 percent in 1995 to 8 percent in 2000.
**Domestic production support** to agriculture as measured by the Aggregate Measure of Support (AMS) is to decline by 20 percent over the same period/base year. The AMS includes expenditures on domestic subsidies as well as market price support policies such as administered prices, and therefore captures both border and non-border policies. It is aggregated over commodities and programs. So as to achieve the goal of reducing the trade distorting effects of agricultural policies, the AMS excludes instruments that in principle have minimal effects on production and trade. These include programs that support agriculture generally and do not involve direct transfers to farmers, income transfers that are 'decoupled' from production, policies that contribute less than 5 percent of the value of production, and direct payments under production-limiting programs if these are based on fixed area and yields and are made on 85 percent or less of base period production. EU compensation payments and U.S. deficiency payments—both of which affect production—were also excluded from the AMS. In contrast to the tariff reduction obligations, which apply at the tariff line, the AMS reduction requirement pertains to the sector as a whole, not on commodity basis. The level of the AMS is bound, analogous to the tariffs imposed on agricultural products.

**Export subsidies** are to be reduced by 36 percent in value terms and 21 percent in volume terms from a 1986-90 base. Reductions are to be made on a commodity-by-commodity basis. There is a prohibition on the use of new export subsidies. As are tariffs and the AMS, export subsidy levels are therefore bound.

Developing countries only need to reduce tariffs, support, and export subsidies by two-thirds of the levels mentioned earlier, and have ten years to implement this. As developing countries were allowed to use ceiling bindings at essentially any level, many first established very high tariffs. They are also exempt from the tariffication requirement for those products that are primary staples in a traditional diet. Only production support that exceeds 10 percent is subject to reduction. Input subsidies for low-income farmers are permitted, as are generally available investment subsidies and export subsidies related to export marketing and internal distribution/transport. Once the Uruguay round agreement is fully implemented, 100 percent of agricultural tariff lines will be bound. It is unclear what the tariff reductions imply in terms of effective liberalization of agricultural markets by developing countries as they were not committed to use a particular base year for tariffication. In effect developing countries have the freedom to impose tariffs at whatever level they choose to. While this basically eliminates any reduction in protection, tariffication in itself is a great achievement. The tariffs that are imposed are frequently, but not always, specific. As they are bound, over time price increases will reduce their effectiveness, independent of future trade negotiations.

A Ministerial Decision in the Final Act states that to help address a 'food bill' problem if it arises, "appropriate mechanisms" are to be established to ensure the availability of "food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries." Concrete

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70 Subject to a minimum market access requirement: by the end of ten years foreign market share must be at least 4 percent.
measures that are mentioned include a commitment to increase the proportion of aid on a grant basis "and/or on appropriate concessional terms ... in line with the 1986 Food Aid Convention." Reference is also made in the Decision to the eligibility of countries to draw upon the resources of the IMF and World Bank.

Textiles and Clothing

The textiles and clothing agreement phases out the Multifibre Arrangement (MFA) over a ten-year period. All quantitative restrictions are to be notified to a Textiles Monitoring Body (TMB). New restrictions may only be introduced if GATT-1994 consistent provisions. Restrictions not notified within 60 days of the entry into force of the WTO Agreement must be terminated forthwith. In mid-1995, products which accounted for at least 16 percent of total imports subject to the MFA (in terms of HS lines or categories) are to be integrated into the GATT. Products are to be included at each of four stages of processing: tops and yarns, fabrics, made-up textile products, and clothing. The remaining products are to be integrated into GATT 1994 in three stages. Three years after the WTO enters into force an additional 17 per cent of MFA constrained imports is to be integrated; followed by another 18 per cent over the next four years. At the end of the transition period the remaining 49 percent is to be integrated.

The same stages are used to define commitments to increase the size of quotas. During Stage 1 (first three years) the level of each restriction under MFA bilateral agreements must be increased annually by not less than the growth rate established for the respective restrictions, increased by 16 per cent. In Stage 2 (from the 37th to the 84th month), growth rates are to expand by another 25 per cent; and in Stage 3 (from the 85th to the 120th month) the quota growth rates are to increase by an additional 27 per cent. Flexibility provisions, i.e., swing, carryover and carry forward, under the MFA bilateral agreements will be maintained during the transition. The agreement contains a separate safeguard clause allowing selective protection if imports generally caused or threatened serious damage and there was a sharp and substantial increase from the relevant country. Such actions are time limited (3 year maximum, non-extendable) and may only be taken during the transitional period during which the MFA is phased out.

The plurilateral agreements

The Agreement on Trade in Civil Aircraft eliminates import duties on civil aircraft and the bulk of aircraft parts. The code also reinforces disciplines on non-tariff barriers to trade in aircraft. Signatories to the agreement account for all leading civil aircraft exporters except the Russian Federation. The agreement is supervised by the Committee on Civil Aircraft. It aims at the reduction of both tariffs and NTBs affecting world trade in civil aircraft, and was the only specific sector agreement covering manufactures that was successfully negotiated in the Tokyo Round. The code provided that tariffs on a specific list of civil aircraft products, parts, and repairs were to be eliminated as of January 1, 1980, and that certain NTBs were to be reduced. Domestic subsidies to aircraft industries and the use of special incentives to influence buying decisions were especially targeted when the code was being negotiated. Virtually all major producers of large civil aircraft are signatories to the agreement. Both the subsidies and standards agreements apply to civil aircraft.
The Arrangement Regarding Bovine Meat aims to contribute to the liberalization, expansion and stability of international trade in livestock and meat and to improve international cooperation in the area of trade and production of bovine meat. Beef, veal and live cattle are covered by the arrangement. The operation of the arrangement is supervised by an International Meat Council. The Council evaluates the world supply and demand for meat and provides a forum for multilateral and bilateral consultations on matters affecting international trade in bovine meat.

The International Dairy Arrangement attempts to liberalize and expand world trade in dairy products. It also aims to achieve greater stability in international dairy markets, to avoid surpluses, shortages and undue fluctuations in prices and to promote international cooperation in the area. The arrangement covers all dairy products. It includes three protocols specifying rules and minimum export prices for international trade in certain milk powders, milk fat including butter, and certain cheeses. The International Dairy Council oversees the arrangement.

III. Trade in Services and Trade-Related Intellectual Property Rights

Two major multilateral agreements were negotiated during the Uruguay round addressing topics that were not covered by the GATT: trade in services and trade-related intellectual property rights. The agreements on these two topics are an integral part of the WTO.

The General Agreement on Trade in Services (GATS)

Initially a controversial topic, within a couple of years a virtual consensus had emerged in the Uruguay Round negotiating group that all countries had a potential interest in agreeing to certain rules and procedures regarding measures affecting trade and investment in services. The General Agreement on Trade in Services (GATS) consists of three main elements: (1) a set of general concepts, principles and rules that apply to measures affecting trade in services; (2) specific commitments that apply to those service sectors and subsectors that are listed in a party’s schedule; and (3) a set of annexes that take into account sectoral specificities and allow for temporary exemptions to the MFN obligation.

The GATS applies to measures imposed by a Member that affect the consumption of services that originate in other Members. As the sale of a service often requires proximity between suppliers and consumers, the agreement applies to four “modes” of supply: (1) the cross-border supply of a service (i.e., not requiring the physical movement of supplier or consumer); (2) movement of the consumer to the location of the supplier; (3) services sold in a member country by (legal) entities via a local commercial presence but originating in another contracting party; and (4) provision via the

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*For a detailed discussion of the GATS, see Hoekman and Sauvé (1994).*
temporary movement of natural persons. These modes are covered in principle only. The extent to which different modes can be used by foreign suppliers to provide specific services is determined by a country’s schedule of commitments (see below).

The GATS incorporates a general MFN obligation. For all modes of supply, any service or service supplier originating in a contracting party must be treated no less favorably than any other foreign supplier. An Annex allows signatories to exempt certain measures from the MFN requirement. Such exemptions are to be a once only affair in that they can only be invoked at the entry into force of the Agreement, are in principle time limited (not to last longer than ten years), and are subject to negotiation in subsequent trade liberalizing rounds. More far-reaching market access and national treatment obligations are contained in Part III of the GATS. These specific commitments apply only to services that are included in the schedules of Members. The national treatment and market access commitments made by Members specify the conditions under which foreign providers of a specified service can compete in the domestic market for each of the four modes of supply. National treatment is defined as treatment no less favorable than that accorded to like domestic services and service providers. While similar to GATT’s Article III, it differs in that under the GATS national treatment may or may not be the same as that applying to domestic firms, in recognition of the fact that identical treatment may actually worsen the conditions of competition for foreign-based firms (e.g., a requirement for insurance firms that reserves be held locally).

Six market access restricting measures are in principle prohibited under the GATS. These consist of limitations on: (i) the number of service suppliers allowed, (ii) the value of transactions or assets, (iii) the total quantity of service output, (iv) the number of natural persons that may be employed, (v) the type of legal entity through which a service supplier is permitted to supply a service (e.g., branches vs. subsidiaries for banking), and (vi) the share of equity ownership of a foreign investor or the absolute value of foreign investment. Most of these measures are non-discriminatory, in that they apply equally to foreign and domestic agents. The use of separate market access and national treatment obligations reflects a distinguishing characteristic of service markets: contestability is frequently restricted by nondiscriminatory regulations. The market access article explicitly covers one type of such regulation—quantitative restrictions—that were felt to be of particular importance.

Specific commitments (national treatment and market access) are scheduled by modes of supply and apply only to listed service sectors and subsectors, subject to sector-specific qualifications, conditions and limitations that may continue to be maintained, either across all modes of supply or for a specific mode. Any or all of the six types of measures that are prohibited in the market access article may continue to be applied to a sector that is listed by a country as long as these measures are scheduled. Table 2 illustrates the rather confusing format of country schedules of specific commitments used in the GATS. Each Member first decides (negotiates) which service sectors will be subject to the GATS market access and national treatment disciplines. It then decides (negotiates) what measures will be kept in place for that sector that violate market access and/or national treatment, respectively. Such limitations and exceptions must be specified by mode of supply. As there are four modes of supply, there are therefore eight opportunities for GATS Members to avoid full application of market access/national treatment. In addition to the specific commitments,
countries also make 'horizontal' commitments. These pertain to modes of supply, usually consisting of a compilation of laws and policies that restrict the use of a mode of supply by foreign providers, independent of the sector involved. An example of such a policy that is often scheduled are 'economic needs' tests—laws or regulations stipulating that foreign service providers may only contest a market if it has been ascertained that domestic providers do not exist, or are unable to satisfy demand.

In sectors where specific commitments are undertaken, each Member must ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Judicial, arbitral or administrative tribunals or procedures must exist that allow foreign service suppliers to obtain an impartial review of, and redress for, administrative decisions affecting trade in services, except where this is inconsistent with its constitutional structure or the nature of its legal system. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities are required must inform applicants of their decision within a reasonable period of time. Members may not apply qualification requirements and procedures, technical standards and licensing requirements in a manner that constitutes an unnecessary barrier to trade in services. Such measures should be based on objective and transparent criteria, such as competence and the ability to supply the service; be no more burdensome than necessary to ensure the quality of the service; and in the case of licensing procedures, not comprise in themselves a restriction on the supply of the service. In sectors where specific commitments regarding professional services are undertaken, adequate procedures should exist to verify the competence of professionals of any other Member.

A number of GATS' provisions relate to regulatory regimes. Governments are allowed to maintain monopoly or oligopoly supply of services, but are required to ensure that such firms do not abuse their market power to 'nullify' MFN or specific market access or national treatment commitments relating to activities that fall outside the scope of their exclusive rights. As business practices of service suppliers that have not been granted monopoly or exclusive rights may restrain competition and thus trade in services, Members are obliged, at the request of another Member, to enter into consultations with a view to eliminating business practices that are claimed to restrict trade in services. Article VI (Domestic Regulation) requires that Members establish disciplines to ensure that qualification requirements, technical standards and licensing procedures are based on objective and transparent criteria, are no more burdensome than necessary to ensure the quality of the services concerned, and do not constitute a restriction on supply in themselves (thereby possible circumventing a specific commitment). Members are required to maintain or establish tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.

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72 Exclusive service suppliers are defined as instances where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.
Table 2. Format and Example of a Schedule of Specific Commitments

<table>
<thead>
<tr>
<th>Commitments</th>
<th>Mode of supply</th>
<th>Conditions and limitations on market access</th>
<th>Conditions and qualifications on national treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horizontal commitments</td>
<td>Cross-border supply</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>(i.e., across all sectors)</td>
<td>Consumption abroad</td>
<td>Unbound</td>
<td>Unbound</td>
</tr>
<tr>
<td></td>
<td>Commercial presence</td>
<td>Maximum foreign equity stake is 49 percent</td>
<td>Unbound for subsidies. Approval required for equity stakes over 25%.</td>
</tr>
<tr>
<td></td>
<td>(FDI)</td>
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<td></td>
<td>Temporary entry of</td>
<td>Unbound except for intra-corporate</td>
<td>Unbound except for categories listed in the market access column</td>
</tr>
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<td></td>
<td>natural persons</td>
<td>transferes of senior managers.</td>
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| Specific commitment:         | Cross-border supply    | Commercial presence required               | Unbound                                           |
| E.g., I.A.d. Architectural   | Consumption abroad     | None                                       | None                                              |
| services                      | Commercial presence    | 25 percent of senior management to be nationals | Unbound                                           |
| (FDI)                        | (FDI)                  |                                            |                                                   |
|                              | Temporary entry of     | Unbound, except as indicated in             | Unbound, except as indicated in                   |
|                              | natural persons        | Horizontal Commitments                     | Horizontal Commitments                             |

**Source:** Hoekman (1995)

In sectors where specific commitments regarding professional services are undertaken, Members must provide for adequate procedures to verify the competence of professionals of any other Member. The Council for Trade in Services is to develop the necessary disciplines to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Such disciplines are to be: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not be more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Article VII (Recognition) allows for the establishment of procedures for (mutual) recognition of licenses, education, and/or experience granted by a particular Member. It is noteworthy in requiring Members to "afford adequate opportunity" for other Members to negotiate their accession to an existing bilateral or plurilateral recognition agreement. Recognition arrangements are not to constitute a means of discrimination between countries in the application of standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services. Wherever appropriate, recognition should be based on multilaterally agreed criteria.
Each GATS Member must publish promptly all relevant measures of general application, which pertain to or affect the operation of the Agreement and report these to the GATS Council for Trade in Services if they significantly affect trade in services covered by specific commitments. Each Member must respond promptly to all requests for specific information on any of its measures of general application or relevant international agreements. One or more enquiry points must be created that can provide specific information to other Members, on all such matters as well as those subject to the GATS notification requirement (see above). In principle, enquiry points are to be established within two years from the entry into force of the WTO, but individual developing countries may ask for an extension of this time limit. Enquiry points need not be depositories of laws and regulations.

**Intellectual Property Rights**

Despite its differences with its older sister, the GATS is clearly modeled on the GATT. That is, an attempt was made to agree to general rules and principles relating to trade policies, and to obtain country-specific liberalization commitments. No harmonization of policies was pursued. This is in marked contrast with the TRIPs agreement, which establishes minimum standards of intellectual property protection that must be achieved by all members of the WTO. The TRIPs agreement is noteworthy in the multilateral trade context in that it obliges governments to take positive action to protect intellectual property rights. GATT and GATS do not require governments to pursue specific policies; they merely impose disciplines on (constrain) signatories regarding the types of policies they may pursue. The question of whether seeking harmonization of policies and regulatory regimes that indirectly affect trade is a desirable approach in the multilateral context has attracted increasing attention recently (see Bhagwati, 1994). Abstracting from the important normative issues, the TRIPs agreement, as well as the agreement relating to sanitary and phyto-sanitary measures (regulations), illustrates that multilateral agreement on minimum standards is possible.

The approach taken is somewhat analogous to a Directive in the EU context: the Agreement specifies certain objectives (minimum standards, see below), but leaves it to signatories to determine how these requirements will be implemented.

Protection of intellectual property (IP) was not a completely new issue for trade negotiators. During the Tokyo round the EC and the U.S. had already tabled a draft agreement on trade in counterfeit goods. Moreover, these two major traders pursued unilateral trade policies to offset

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73 The following draws on Hoekman (1994).

74 For economic analyses of the desirability of harmonization in the field of IP protection for different types of countries, see Deardorff (1993) and Maskus (1990), and the references cited therein.

75 Article 1: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."
perceived instances of inadequate IP protection by trading partners. Indeed, the latter were an important factor inducing developing countries to agree to include IP on the agenda of the Uruguay round. Negotiators could draw upon over a century of experience with multilateral cooperation in the IP field. An international agency—the World Intellectual Property Organization (WIPO)—providing a forum for the negotiation of substantive obligations with respect to IP already existed. The main problem was that membership of WIPO was not universal and that the organization lacked an adequate enforcement/dispute settlement mechanism for disputes relating to the Conventions under its aegis. The TRIPs agreement creates a binding enforcement mechanism for signatories of international conventions on IP.

There are many substantive disciplines. National treatment and MFN apply with regard to the protection of IP. Obligations regarding six types of IP are specified, including protection of trademarks (to last at least 7 years; equal treatment to be given to service and trade marks; prohibition on compulsory licensing), geographical indications (prohibition on indications that mislead or constitute "unfair" competition), industrial designs (duration of protection of new and original designs to be at least 10 years; no protection required for designs dictated essentially by technical or functional considerations), and layout designs of integrated circuits (duration of protection at least ten years; protection to extend to products embodying layout design infringements; allowance of compulsory licensing).

In the area of copyright, Members are required to comply with the substantive provisions of the Berne convention (1971), with the exception of its obligations regarding the protection of moral rights. The TRIPs agreement goes beyond the Berne convention by providing for rental rights and protection against unauthorized recording of live performances. Computer software is to be protected as a literary work under the Berne Convention. Copyright protection is to last for at least 50 years. Criminal procedures and penalties are to be applicable to copyright abuses (piracy) on a commercial scale. Last but not least, as regards patent protection all signatories are to comply with the

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76 Section 301 and 337 investigations in the U.S. and the EC's Regulation 2641/84 on illicit commercial practices are important examples. Violations or non-enforcement of intellectual property rights have figured prominently in both 301 and Regulation 2641/84 actions. In part recourse to unilateral instruments reflected the fact that the International Court of Justice, the main dispute settlement forum in this area, requires a compromise between the interested parties to submit the case to it. See Mavroidis (1993).

77 The Paris Convention for the Protection of Industrial Property dates back to 1883; the Berne Convention for the Protection of Literary and Artistic Works was adopted in 1886.

78 Space constraints prohibit a lengthy description of the contents of the agreement. What follows focuses on the most important aspects. See, e.g., Braga (1989) and Maskus (1990) for analyses of the issues and negotiating positions.

79 Exceptions to national treatment or MFN are allowed only if an existing international convention on IP specifies a different approach, if rights are involved that are not addressed by the TRIPs agreement, or, in the case of MFN, if there are international agreements that pre-date the entry into force of the WTO.
substantive provisions of the Paris Convention (1967). Patent protection is to be provided for almost all inventions, and is to be of at least 20 years duration after the date of filing. The 20 year lower bound implies harmonization toward the standards maintained by industrialized countries. This will have implications for many developing countries that either do not provide patent protection for certain goods or processes, or grant patents of relatively short duration. Patents are required to confer specified exclusive rights to their owners.

Virtually any invention should be patentable. The only exceptions allowed are if commercial exploitation of a patent would be prohibited for reasons of public order or morality, and in order to protect human, animal or plant life or health or to avoid serious prejudice to the environment. Diagnostic, therapeutic and surgical methods; plants and animals other than micro-organisms; and essentially biological processes for the production of plants or animals may also be excluded from patentability. The latter exception follows practice in many European countries, which in contrast to the United States, does not recognize the patentability of plants and animals. The compromise that was reached on this issue is reflected in the statement that the relevant provision of the TRIPs agreement in this regard is to be reviewed four years after the entry into force of the WTO. Those developing countries that as of the entry into force of the Agreement did not accord patent protection for certain technologies or types of products have ten years to bring their legislation into conformity with the TRIPs requirements.

Compulsory licensing of patents or government use of patents without the authorization of a patent holder remains a possibility, but subject to a number of conditions. These include requirements that right holders be paid "adequate remuneration ... taking into account the economic value of the [use] authorization" (Article 31:h), and that remuneration decisions are subject to judicial or other independent review. The scope for compulsory licensing is not precisely defined. In the absence of a national emergency situation, a necessary condition is that efforts are first made to obtain authorization from the right holder "on reasonable commercial terms." Claims of 'excessive pricing' (i.e., abuse of dominant position to use the terminology of competition law) may give rise to compulsory licensing. However, Article 27:1 appears to eliminate the possibility that lack of local working of a patent can be sufficient grounds for compulsory licensing. That is, importation satisfies patent working requirements. Article 8:1 of TRIPs permits, as a general principle, Members to

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80 For example, the patent length for pharmaceutical production processes granted in India was only 7 years as of the late 1980s, whereas no patents were provided at all for pharmaceutical products.

81 However, plant varieties must be protectable by patents and/or an effective sui generis system. Thus, countries that do not satisfy this requirement must adapt their legislation. No time period for protection of varieties is specified.

82 Article 27:1 states that "... patent rights [must be] enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced." There is some disagreement as to whether this ensures that local working requirements are inconsistent with the TRIPs agreement. Some developing countries have argued that this remains possible. However, the language of Article 27:1 is relatively clear.
"adopt measures necessary to protect public health and nutrition, and to promote the public interest in
sectors of vital importance to their socio-economic and technological development," subject to the
condition that such measures are consistent with the provisions of the Agreement. It goes on to
permit Members, subject to the same condition, to take "appropriate measures" to prevent the abuse
of IP rights by right holders and to prevent practices from being pursued which "unreasonably
restrain trade or adversely affect the international transfer of technology" (Article 8:2). The term
'abuse' is not defined. Different interpretations are likely in different jurisdictions. This is an area
where disputes may arise.

Explicit provisions exist in the Agreement for the application of competition law to IP
protection. Governments are allowed to take measures to control anti-competitive practices in
contractual licenses that adversely affect trade and may impede the transfer and dissemination of
technology (Section 8, TRIPs). Member countries may specify licensing practices or conditions in
their laws that can constitute an "abuse of intellectual property rights having an adverse effect on
competition in the relevant market" (Article 40:2). Appropriate measures to prevent or control such
practices may be taken. Illustrative examples of such practices that are mentioned include exclusive
grantback conditions, conditions preventing challenges to validity and coercive package licensing.
The 'home' country authorities of specific right holders are required to consult with 'host' country
authorities seeking to secure compliance with its legislation, subject to confidentiality constraints.
What constitutes an 'abuse of competition' is not specified in the Agreement, and the illustrative list
of practices provided is quite short. This may be an area where consultations could prove difficult.

Enforcement and dispute settlement procedures are spelled out in some detail, as this was a
key area for all parties concerned. Those countries seeking protection of IP needed to have binding
and credible enforcement provisions if they were to forsake unilateral retaliatory action. Likely
'target' countries also had a strong interest in constraining the scope for unilateral actions as much as
possible. In principle, given that IP is now subject to multilateral disciplines, unilateral policies such
as Section 301 of the US trade law can only be invoked with respect issues that are not covered by
the agreement.\(^3\) Members must ensure that enforcement procedures are available under their
national laws that permit effective action against any act of infringement of IP rights. Procedures
must be fair, equitable, and not be unnecessarily complicated, costly, or entail unreasonable time-
limits or unwarranted delays. No obligation exists to put in place a judicial system for the
enforcement of intellectual property rights distinct from the enforcement of laws in general. There
are provisions on evidence supporting claims of violation of IP rights, injunctions, damages, right of
information, indemnification of defendants, and existence of effective provisional measures to prevent
an infringement of any intellectual property right from occurring, and procedures to enable right
holders suspecting the importation of counterfeit trademark or pirated copyright goods to lodge an

\(^3\) However, such procedures may continue to act as a form of 'diplomatic protection', since private parties do
not have standing in the GATT (i.e., must rely on their governments to defend their interests in GATT).
application for the suspension of importation. Signatories are to allow criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Penalties in such cases must include imprisonment and/or fines sufficiently large to constitute an effective deterrent.

All Members have one year following the date of entry into force of the WTO to implement the provisions of the TRIPs agreement. Developing countries are entitled to a delay of an additional four years for all provisions of the Agreement with the exception of national treatment and MFN. If countries in the process of transition to a market economy are facing special problems in the preparation and implementation of intellectual property laws, they may also request to benefit from the four year period. Least-developed countries have ten years to conform with the Agreement, and may request extensions of this period. To the extent that a developing country must extend product patent protection to areas of technology that are currently not protectable in its territory (e.g., pharmaceuticals or agricultural chemicals), it may delay the application of the provisions on product patents to these areas for an additional period of five years, bring the total to ten. The TRIPs agreement does not require so-called pipeline protection. This implies that pharmaceutical/agrochemical products or processes that have already been patented in certain countries but are awaiting regulatory approval (this takes an average of ten years in the US: the ‘pipeline’) will not be protected in those developing countries that do not currently meet TRIPs requirements in these areas until the transition period has passed. This was a major issue for developing countries as it determined to a great extent the magnitude of the possible welfare loss associated with granting IP protection to pharmaceuticals.

IV. Regional Trade Agreements and WTO Rules and Procedures

Although the raison d'etre of the WTO and the multilateral trading system it establishes is to encourage nondiscrimination in the application of trade policy by member countries, both the GATT and the recently negotiated GATS make explicit allowance for free trade, customs union and more far-reaching economic integration agreements among a subset of WTO members. However, as such agreements violate the MFN principle, both GATT and GATS impose conditions that must be met for an agreement to be ‘legal’.

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84 Applicants may be asked to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse.

85 However, countries are to provide a means by which applications for patents can be filed; apply to these applications the criteria for patentability as if they were already being applied; and provide protection as from the grant of the patent for the remainder of the patent term, as of the date of filing. Thus, if an application is filed in 1997, the patent will be enforced as of 2005 for another 12 years.

86 See Maskus and Eby-Konan (1994) and Subramanian (1994) for an analysis of the possible orders of magnitude involved.
GATT Article XXIV: Customs Unions and Free Trade Areas

Although drafted before the economic literature in this area was developed, Article XXIV of the GATT appears to be consistent with theoretical prescriptions by requiring that: (1) trade barriers after integration not rise on average (i.e. no increase in explicit discrimination); and (2) agreements eliminate all duties and other restrictions on commerce on "substantially all" trade in products originating in the relevant territories. The elimination of intra-area trade barriers must occur "within a reasonable length of time." The allowance made for a transition period of unspecified length has implied that virtually all regional arrangements subjected to GATT for approval have been essentially "interim agreements."

The first condition's rationale is obvious. Clearly, if restrictions on imports from non-member economies are no higher than before, the extent of possible reductions in imports from non-members is limited. A practical problem faced by the drafters of Article XXIV was that the formation of a customs union will involve changes in the external tariffs of member countries as they adopt a common external tariff. The rule that applies to customs unions is that duties and other barriers to imports from outside the union "shall not be on the whole higher or more restrictive" than those preceding the establishment of the customs union (Article XXIV:5(a)). The interpretation of this phrase became a source of much disagreement between GATr members. The rule for free trade areas was unambiguous, however. Duties applied by each individual country are not to be raised (XXIV:5(b)).

The second condition is somewhat counterintuitive in that maximum preferential liberalization in itself is likely to be more detrimental to non-members than partial liberalization. Requiring it ensures that countries are limited in their ability to violate the MFN obligation selectively. As noted by Finger (1993), the rationale behind the second condition is a public choice one: it is an attempt to ensure that participants in regional liberalization efforts "go all the way". The second condition is also consistent with the analytical framework developed by Viner and others. Indeed, there is a high probability that due to the political dynamics of trade negotiations, negotiators able to pursue 'partial preferences' will tend to cut tariffs on items previously imported from non-member countries. It is precisely for such items that the risk of trade diversion is greatest. From a purely economic perspective, however, what really matters as far as the welfare of non-members is concerned is the impact on trade flows. This is not recognized in Article XXIV of GATT. Even if the two requirements imposed by Article XXIV are met, and even if net aggregate imports do not contract, imports of particular products by the region may decline ex post, and thus be detrimental to the rest of the world. No compensation can be claimed ex post under GATT rules.

The GATT's experience in confronting FTAs and customs union's with Article XXIV has not been very encouraging. Various aspects of the rules and their application, including approval by the Contracting Parties of regional arrangements before they could be said to have entered into force, have proved unsatisfactory. Starting with the examination of the Treaty of Rome establishing the European Economic Community, almost no examination of agreements notified under Article XXIV has led to a unanimous conclusion or specific endorsement by Contracting parties that all the legs! GATT requirements had been met. Working Parties that have been established to determine the
consistency of preferential liberalization agreements notified to the GATT have been singularly unsuccessful in reaching unanimous conclusions. As noted by the Chairman of a recent Working Party established to investigate the 1989 Canada-United States Free Trade Agreement, commenting on the working party's inability to reach a consensus, "Over fifty previous working parties on individual customs unions or free trade areas have been unable to reach unanimous conclusions on the compatibility of these agreements with the GATT—on the other hand, no such agreement has been explicitly disapproved." Only four working parties have been able to agree that a regional agreement satisfied the requirements of Article XXIV (Schott, 1989). It is not much of an exaggeration to say that there was such permissiveness that the GATT rules largely were a dead letter, although the consultations that occurred allowed interested non-members to exert some influence (Jackson, 1969).

The reasons underlying this impotence are well known. As noted by Snape (1993), a conscious political decision was made by contracting parties to GATT in the late 1950s not to closely scrutinize the formation of the EEC, as it was made clear by the original six member states that a GATT finding that the EEC violated Article XXIV could well result in their withdrawal from GATT. To paraphrase Finger (1993a), at the end of the day the GATT "blinked." Given that the EEC most likely did not meet the requirements of Art. XXIV, this created a precedent that was often followed subsequently. Although regional agreements have been tolerated for political reasons, it is certainly the case that the criteria and language of Art. XXIV are ambiguous. Legitimate differences of opinion may exist concerning the interpretation of "substantially all," how to determine whether external trade policy of a customs union does not become more restrictive "on average," or what is a "reasonable length of time" for the transition towards full implementation of a FTA or customs union. Some of these issues were addressed in the Uruguay round.

In the Uruguay round, negotiators reaffirmed that RIAs should facilitate trade between members and not raise barriers to the trade of non-members, and that in their formation or enlargement the parties to RIAs should "to the greatest possible extent avoid creating adverse effects on the trade of other Members." It was recognized that the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV needed to be enhanced. This was to be pursued in part by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and by improving the transparency of all agreements notified to GATT under Article XXIV.

In the future the evaluation under Article XXIV:5(a) of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union is to be based upon "an overall assessment of weighted average tariff rates and of customs duties collected." The assessment must be based on import statistics for a previous representative period (to be supplied

87 GATT Focus, November–December 1991, p. 5.

by the customs union), on a tariff line basis and in values and quantities, broken down by WTO member country of origin. The WTO Secretariat is to compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round. The duties and charges to be taken into consideration are to be the applied rates, not the bound rates. It was also agreed that an assessment of the incidence of trade policies for which quantification and aggregation is difficult may involve of an examination of the individual measures and regulations concerned, the products covered and the trade flows affected.9

Article XXIV:6 requires GATT members joining a customs union and consequently seeking to increase bound rates of duty to enter into negotiations—under Article XXVIII (Modification of Schedules)—on compensatory adjustment, netting out reductions in duties on the same tariff line made by other members of the customs union. If such reductions are insufficient compensation, the Uruguay Understanding requires the customs union to offer to reduce duties on other tariff lines, or to otherwise provide compensation. Where agreement on compensatory adjustment cannot be reached within a reasonable period from the initiation of negotiations, the customs union is free to modify or withdraw the concessions and affected Members are free to withdraw substantially equivalent concessions (i.e., retaliate).

The "reasonable length of time" referred to in Article XXIV:5(c) was agreed to be no more than ten years, although allowance was made for exceptional circumstances (to be fully explained to the Council for Trade in Goods). Working parties are to make appropriate recommendations concerning interim agreements with respect to the proposed time frame and on measures required to complete the formation of the customs union or free trade area. It may if necessary provide for further review of the agreement. Substantial changes in the plan and schedule included in an interim agreement must be notified, and will be examined by the Council for Trade in Goods if so requested by a WTO Member. If an interim agreement notified under Article XXIV:7(a) does not include a plan and schedule, contrary to Article XXIV:5(c), the working party must recommend one in its report. Parties to an agreement may not implement it if they are not prepared to modify it in accordance with the recommendations. Implementation of the recommendations is subject to subsequent review.

Trade Agreements Between Developing Countries

Developing countries may invoke provisions of the GATT allowing them to establish 'free' trade agreements that do not meet the conditions of Article XXIV. The 1979 Decision on Differential and More Favorable Treatment of Developing Countries (the so-called Enabling Clause) allows for regional arrangements between developing countries that discriminate against imports originating in non-members. It is unclear to what extent this implies that Article XXIV disciplines do not apply. However, if a government so desires, agreements that clearly do not meet Article XXIV's requirements—e.g., pertain to a limited set of products, or entail reductions in tariffs rather than elimination—can be and have been justified under the Enabling Clause of the GATT.

GATS Article V: Economic Integration

Article V of the GATS is entitled "Economic Integration," not "Free Trade Areas and Customs Unions" (as in Article XXIV of the GATT), reflecting the fact that the GATS covers not only cross-border trade in services, but also three other "modes of supply": (i) provision implying movement of the consumer to the location of the supplier; (ii) services sold in the territory of a member country by entities originating in other contracting parties through a commercial presence; and (iii) provision of services requiring the temporary movement of service suppliers who are nationals of a contracting party. Analogous to Article XXIV of the GATT, Article V of the GATS imposes three conditions on economic integration agreements between signatories of the GATS. First, such agreements must have "substantial sectoral coverage" (Art. V:1(a)). An interpretive note states that this should be understood in terms of the number of sectors, volume of trade affected, and modes of supply. With respect to the latter, economic integration agreements should not provide for the a priori exclusion of any mode of supply. Second, regional agreements are to provide for the absence or elimination of substantially all discrimination (defined as measures violating national treatment) between or among the parties to the agreement in sectors subject to multilateral commitments. This is to consist of the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, and is to be achieved at the entry into force of the agreement or on the basis of a reasonable time frame (Art. V:1(b)). Third, such agreements are not to result in higher trade and investment barriers against third countries. These conditions constitute the "price" to be paid for the MFN obligation and specific commitments to be waived by GATS Members, i.e., for the implicit discrimination against non-members resulting from the agreement to be deemed acceptable.

The first condition (Art. V:1(a)) is analogous to the "substantially all trade" criterion contained in Article XXIV of the GATT. The rationale underlying this requirement is also similar: the goal is to "raise the cost" for GATS signatories to violate the MFN obligation. Regional integration is tolerated only if it clearly constitutes an attempt to go substantially beyond GATS disciplines and coverage (i.e., is not intended to selectively circumvent the MFN obligation). However, "substantial sectoral coverage" is not the same as "substantially all" sectors, suggesting that the intention of the drafters of Article XXIV of the GATT was perhaps more restrictive than that of those drafting Article V of the GATS. This conclusion is strengthened when Art. V:1(b) is taken into account, which applies with respect to the magnitude of required liberalization. Article XXIV of the GATT requires that "duties and other restrictive regulations of commerce" be eliminated on substantially all intra-area trade. Article V:1(b) of the GATS reveals that a mere standstill may be deemed sufficient in the services context. The GATS requirement is not elimination of existing discriminatory measures and prohibition on new measures, but elimination of existing discriminatory measures and/or a prohibition on new measures.

The third condition is also analogous to language found in Article XXIV. Article V:4 states that economic integration agreements are not to raise the overall level of barriers to trade in services.
originating in other GATS members within the respective sectors or sub-sectors compared to the level applicable prior to such an agreement. Thus, average levels of protection against the rest of the world should not increase. As a result of the more disaggregated (i.e. sub-sectoral) focus taken in Article V, a contracting party cannot argue—in contrast to GATT—that the average level or "general incidence" of protection has not changed, regardless of what might occur at the level of individual products (sub-sectors).

In both the GATT and GATS, compensation of non-members is only foreseen for increases in explicit discrimination (i.e. the raising of external barriers), not for rises in implicit discrimination. As noted earlier, the latter is a central—and inherent—feature of regional integration agreements and is "tolerated" by Contracting Parties so long as the necessary conditions noted above are met. Members of the GATS engaged in economic integration efforts intending to withdraw or modify specific market access and/or national treatment commitments (i.e., raise external barriers) must follow the procedures set out in Article XXI (Modification of Schedules). Article XXI applies to any member of the GATS that is negatively affected by an increase in external barriers that violates a specific commitment. Members intending to alter previously negotiated concessions are required to notify the Council of the GATS of their intentions at least three months before implementing contemplated changes. This is to be followed by consultations and negotiations with affected parties regarding compensation. This language contrasts with the equivalent GATT provision on Modification of Schedules (Article XXVIII), which pertains only to contracting parties with an initial negotiating interest or to those with a "principal supplying interest". In practice this excludes many smaller countries from the compensation negotiations. The GATS language is much broader and allows any affected signatory to participate. GATS disciplines also differ from those of the GATT in that there is no provision made for "balancing". Article XXIV of the GATT specifies that due account be taken of reductions of duties on the same tariff line made by other members of a customs union.

The GATS allows affected Members to request binding arbitration in instances where members cannot agree on the level of compensation required when renegotiating concessions. If the findings of the arbitration are not implemented by the country modifying or withdrawing a concession, affected countries that participated in the arbitration may 'retaliate' through the withdrawal of substantially equivalent benefits. There is no need for authorization by the GATS Council. In this respect Article XXI of the GATS also goes beyond GATT Article XXIV, which only provides for countries concerned to refer disagreements regarding compensation to the Contracting Parties, who may in turn "submit their views."

Both the GATT and GATS contain provisions relating to transparency and surveillance matters. Countries intending to form, join or modify a preferential agreement must notify the relevant multilateral bodies, make available relevant information that may be requested by non-members, and

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90 Such compensation is to be applied on an MFN basis.

91 The Uruguay Round's Final Act contains some modifications to Article XXVIII of the GATT that would give smaller countries greater access to such negotiations. See Section II.1.
may be subjected to the scrutiny of a Working Party to determine the consistency of the agreement with multilateral rules. In both the GATT and GATS, a Working Party's report on the consistency of an agreement may lead to members acting jointly to make "recommendations" to member countries "as they deem appropriate." The GATT differs from the GATS, however, in that Article XXIV contains stronger language than Article V on the 'conditionality' attached to the time frame for implementation. Article XXIV requires that if a Working Party finds that the plan or schedule for an interim agreement is not likely to result in a GATT-consistent customs union or free trade area, its members "shall not maintain or put into force ... [an] agreement if they are not prepared to modify it in accordance with ... the recommendations." No such provision exists in Article V.

V. Summary of Institutional Implications of WTO Membership

The foregoing discussion of the WTO's rules and disciplines, while not comprehensive (the texts of the Uruguay round agreements comprise more than 500 pages, while the GATT's Analytical Index which records GATT case law and history comprises over 1,000 pages of fine print) is nonetheless long enough to lose sight of what exactly is required under the WTO as far as trade laws and institutions are concerned. This Section therefore provides a summary of the main implications. These are divided into four parts: the WTO per se, the GATT, the GATS, and the TRIPs agreement.

WTO

The main requirement associated with WTO membership is to be able to participate in the meetings of the various Councils that administer the GATT, GATS, TRIPs, the trade policy review body (see below), and the dispute settlement body (DSB). With the expansion of the multilateral trading system to services and TRIPs, the institutionalization of the multilateral surveillance of trade policies, and the further formalization of dispute settlement, there will clearly be a greater need for each Member to have permanent representation in Geneva to monitor developments, present its views and defend its rights. A number of developing countries do not maintain a mission in Geneva. Of those that do, many do not have anyone who focuses solely on GATT matters. Instead, the brief of the members of the mission is to deal with the myriad on international organizations that are located in Geneva (e.g., the UN High Commissioner for Refugees, the World Health Organization, the International Organization for Standardization, etc.)

GATT

Institutional changes are likely to be necessary in many developing countries to fulfill WTO obligations. Abstracting from required changes in policy (summarized in the next Section), the following institutional requirements can be noted.

- In 1988, a Trade Policy Review Mechanism (TPRM) was established with the objective of achieving greater transparency in, and understanding of, the trade policies and practices of Member countries. The function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system. The Uruguay round formalized the TPRM,
creating a Trade Policy Review Body (TPRB) that will be responsible for carrying out periodic trade policy reviews.\textsuperscript{92} The TPRB will base its review on a report prepared by the relevant WTO Member, as well as a report prepared by the WTO Secretariat. Both reports, as well as the minutes of the TPRB's meeting will be published by the WTO. The reports by WTO Members must describe the trade policies and practices maintained, using an agreed format that is to be decided upon by the TPRB.\textsuperscript{93} Between reviews, Members must provide brief reports when there are any significant changes in their trade policies. An annual update of statistical information must also be provided to the WTO Secretariat, again following the agreed format. The information contained in reports should to the greatest extent possible be coordinated with notifications made under the various provisions of the GATT, GATS, and TRIPs.

Preparation of TPRM reports will require a government to compile a substantial amount of information, ranging from the tariff schedule that is applied, recent trade flows on a tariff line item basis, and a complete and comprehensive description of its trade legislation, policies and implementing institutions. This is a resource-intensive task, requiring a mix of information pooling and coordination between the relevant government bodies and analytical capacity. Although the TPRM requirement is only periodic, governments should consider creating a body that is permanently responsible for monitoring its trade policy (see Section VI below). To some extent this is already required by the WTO in that annual statistical trade policy-related information must be provided to the WTO.

- There are many notification requirements, all of which require the existence of appropriate bodies or agencies that have the responsibility of satisfying them. All state trading enterprises must be notified to the Council for Trade in Goods, independent of whether or not imports or exports occurred. The introduction of—or any changes in—the import restrictions justified for balance-of-payments purposes, or any changes in the time schedules for the removal of such measures must be reported to the WTO. A consolidated notification, including all changes in laws, regulations, policy statements or public notices, must be provided each year. Such notifications must include full information at the tariff line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected. Notification of progress in the implementation of commitments to reduce agricultural protection negotiated under the Uruguay round Agreement on Agriculture must be submitted by Members to the Committee on Agriculture.\textsuperscript{94} Any new domestic support measure, or modification of an existing measure, for which exemption from reduction commitments is claimed must be notified, including a detailed description of the measure

\textsuperscript{92} The frequency of review by the TPRB depends on the share in world trade of a country. The top four WTO members (counting the EU as one) are subject to review every two years. The next sixteen are to be reviewed every four years. Other Members will be reviewed every six years, although a longer period may be fixed for least-developed countries.

\textsuperscript{93} The format will initially be based on the Outline Format for Country Reports established by a July Decision of GATT Contracting Parties, amended as necessary to extend the coverage of reports to services and TRIPs.

\textsuperscript{94} The periodicity and content of notifications remains to be determined.
and its conformity with the criteria set out in the Agreement. All changes in sanitary or phytosanitary measures must also be notified. The same applies to Technical regulations (whether sanitary or product standards more generally) that diverge from international standards and have a potential significant effect on trade flows, and the objective and rationale of the proposed regulation must be documented. Conformity assessment procedures that are not in accordance with guides and recommendations of international standardizing bodies must also be reported. All quantitative restrictions on textiles and clothing imports must be notified in detail, as must the implementation of liberalization commitments. Within 90 days of the entry into force of the WTO, all trade-related investment measures that are not in conformity with the provisions of the TRIMs Agreement must be notified, along with their principal features. Members which maintain import licensing procedures or change them must notify the relevant Committee within sixty days of publication. All subsidy programs must be notified, with adequate information provided to allow other Members to evaluate the trade effects and to understand their operation. Finally, all GATT inconsistent VERs must also be notified.

- An enquiry point must be created with the responsibility for answering questions and providing relevant documents regarding sanitary or phytosanitary measures adopted or proposed; control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures; the risk assessment procedures, factors taken into consideration, and the determination of the appropriate level of sanitary and phytosanitary protection; and membership in international and regional sanitary and phytosanitary organizations and systems. An enquiry point must also exist to deal with similar questions regarding technical regulations and conformity assessment procedures which are operated within the territory of a Member by central or local government bodies. Enquiry points should, in principle, also be able to provide information on any standards adopted or proposed within its territory by non-governmental standardizing bodies and on existing/proposed conformity assessment procedures which are operated by non-governmental bodies.

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95 Notifications of the institution of import licensing procedures must include the following information: (a) a list of products subject to licensing procedures; (b) contact point for information on eligibility; (c) administrative body (bodies) for submission of applications; (d) date and name of publication where licensing procedures are published; (e) indication of whether the licensing procedure is automatic or non-automatic according to definitions contained in Articles 2 and 3; (f) in the case of automatic import licensing procedures, their administrative purpose; (g) in the case of non-automatic import licensing procedures, indication of the measure being implemented through the licensing procedure; and (h) expected duration of the licensing procedure if this can be estimated with some probability, and if not, reason why this information cannot be provided (Agreement on Import Licensing Procedures, Article 5).

96 Notifications must contain the following information: (i) form of a subsidy (i.e., grant, loan, tax concession, etc.); (ii) subsidy per unit or, in cases where it is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year); (iii) policy objective and/or purpose of a subsidy; (iv) duration of a subsidy and/or any other time-limits attached to it; (v) statistical data permitting an assessment of the trade effects of a subsidy (Agreement on Subsidies and Countervailing Measures, Article 25).
All WTO members, including developing countries, must abide by the requirements of the agreement on *customs valuation*. This may have substantial implications for the way imports are valued by customs officials, as the primary valuation method is to be the transactions value as measured by the invoice of the importer. However, developing countries that were not party to the 1979 (Tokyo round) Agreement on customs valuation may delay implementation of the Agreement for five years after the date of entry into force of the WTO. Such countries may also delay application of the computed value method (see Section II.6 above) for an additional period of 3 years following their application of all other provisions of the Agreement, and may also reserve the right to deny requests by importers to employ the computed value in preference to the deductive method. Developing countries which currently value goods on the basis of officially established minimum values may request a reservation to enable them to retain such values on a limited and transitional basis, subject to the terms and conditions required by the other WTO members. While there is fair amount of slack built into the Agreement in terms of the transition, in the medium term many developing countries will have to alter customs valuation procedures.

All WTO members, including developing countries, must abide by the requirements of the agreement on *Import Licensing*. The rules and all information concerning procedures for the submission of license applications must be published. Application and renewal forms/procedures must be simple. Applicants must be allowed at least 21 days for the submission of license applications; and in principle be confronted with a 'one-stop shop'.

No application is to be refused for minor documentation errors, nor may licensed imports be refused entry for minor variations in value, quantity or weight from the amount designated on the license. Applicants must have the right to demand an explanation for non-approval of a request and have the right to appeal the decision. The period for processing license applications is not to exceed sixty days. The period of license validity must be long enough to allow imports to occur. Where the possibility of exceptions or derogations from a licensing requirement exists, information on how to make the necessary request must be published. WTO Members must be able to provide, upon request, all relevant information concerning: (i) the administration of the restrictions; (ii) the import licenses granted over a recent period; (iii) the distribution of such licenses among supplying countries; and (iv) import statistics for products subject to import licensing. The overall quota amount for which licenses are required by quantity and/or value is to be published, as well as the opening and closing dates of quotas. In the case of non-global quotas (i.e., those allocated among supplying countries), WTO Members that export the product concerned must be informed of the current distribution of quota shares across suppliers. This information must also be published.

There are many requirements concerning the procedures to be followed with respect to the imposition of contingent protection (safeguards, countervailing subsidized imports, and antidumping). Space constraints prohibit even a summary, but the implications for the institutions that implement

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77 If it is impossible to have a sole administrative body responsible, the absolute maximum number of bodies an applicant can be confronted with is three.
such mechanisms are significant. Technically competent and trained personnel is required to administer the relevant laws. Methodics and manuals should be developed to ensure consistent application and interpretation of legal provisions and the various substantive criteria that must be satisfied.

GATS

There are fewer requirements with institutional implications under the GATS. These largely relate to transparency, notification and information exchange.

- At least once a year, Members must inform the Council for Trade in Services of the introduction of new—or changes to existing—laws, regulations or administrative guidelines which significantly affect trade in services covered by their specific commitments (i.e., national treatment and market access).

- Each Member must establish one or more enquiry points to provide specific information to other Members, upon request, on all relevant measures of general application which pertain to or affect the operation of the GATS. Enquiry points are to be established within two years from the entry into force of the WTO, although "appropriate flexibility with respect to the time-limit ... may be agreed upon for individual developing countries." Although it is stated explicitly that enquiry points need not be depositories of laws and regulations, this requirement still has a wide reach. Members must ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available. 98

- Each Member is to establish judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for prompt, objective and impartial review of administrative decisions affecting trade in services.

- Measures relating to qualification requirements and procedures, technical standards and licensing requirements may not unnecessarily restrict trade in services and should be based on objective and transparent criteria, such as competence and the ability to supply the service; not more burdensome than necessary to ensure the quality of the service; in the case of licensing procedures, not in themselves a restriction on the supply of the service. In sectors where specific commitments regarding professional services are undertaken, each Member must provide for adequate procedures to verify the competence of professionals of any other Member.

- GATS Members must ensure that if a monopoly supplier of services competes, either directly or through an affiliated company, in the supply of a service that lies outside the scope of its monopoly

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98 This includes: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notification, registration or licensing requirements, if any.
rights and which is subject to a specific commitment, it does not abuse its monopoly position. The
same applies to cases of exclusive service suppliers, where a Member, formally or in
effect, authorizes or establishes a small number of service suppliers and substantially prevents
competition among them. There are no formal requirements as regards the existence and enforcement
of competition (antitrust) law, but the information exchange foreseen in cases of alleged restrictive
business practices will be facilitated if such a body exists.

TRIPs

The TRIPs agreement has far-reaching implications. First, IP laws must either be passed or
be altered to accord intellectual property the type and length of protection that is specified in the
TRIPs agreement for the six categories of intellectual property that are covered (see Section III.2).
Second, IP laws must be enforced, which requires that customs authorities apply and the judicial
system enforces the laws. For many countries the main implications are likely to lie in the area of
enforcement. At a minimum this will involve training of personnel, and may have budgetary
implications if enforcement capacity is currently limited.

VI. Assessment of WTO Policy Disciplines

Any assessment of the rules and principles embodied in the various trade agreements that are
overseen by the WTO will depend importantly on the perspective that is taken. The WTO is an
attempt in international cooperation between (mostly) sovereign states. The objective is to limit the
potential for governments to impose negative externalities upon other countries when implementing
trade policies. The focus of attention is therefore on the effect of policies on other countries, not on
the effect of a government's policies on its own economy. The assessment of WTO rules and
disciplines that follows is from the perspective of the nation/government that implements trade policy.
To what extent does the WTO help a government in adopting policies that are efficiency enhancing?
Alternatively phrased, to what extent does it help governments implement and maintain a policy mix
that is neutral, guaranteeing/confronting producers with world market prices?

Participation in a multilateral agreement imposing certain disciplines and constraints on
national policy formation may help a government in pursuing or implementing desired changes in
domestic policies. Membership of the WTO may increase both the credibility of initial reform and
help governments resist demands from politically influential interest groups for raising import barriers
in the future. Both the general principles and much of the specifics of the WTO's rules are
efficiency-enhancing. Indeed, membership of the WTO can have substantial implications in terms of
changing trade policies. Thus:

• Policies must be nondiscriminatory. Violation of MFN may only occur under certain
  conditions, which in principle are under surveillance of GATT Members. Once products have been
  imported, they must be treated identically to local competing products as far as taxation and
  equivalent measures are concerned.
WTO Members may only use tariffs to restrict imports, and all such tariffs are bound. The use of quantitative restrictions is heavily circumscribed. Already subject to relatively clear-cut rules under the 'old' GATT, the WTO further tightens disciplines in this regard. The web of bilateral QRs imposed under the MFA will gradually be eliminated, and countries maintaining such restrictions will have to develop a program to abolish them. While largely an issue affecting OECD countries, some countries in the MNA/ECA region—e.g., Egypt—maintain quantitative import restrictions for textiles and clothing, and will thus be affected. QRs on agricultural imports are prohibited except in the context of temporary safeguard actions.99

Governments are subject to requirements relating to reduction of support granted to agricultural production, and export subsidies, if any. Developing countries have been granted some flexibility in this connection, e.g., input subsidies are permitted as are export subsidies related to marketing services.

Developing countries that have a per capita GNP above U.S. $1,000 become subject to GATT's prohibition on export subsidies for manufactured products. This includes both subsidies contingent on export performance and subsidies that are based on the use of domestic inputs (value added or local content criteria).

Developing country WTO members must eliminate all TRIMs (local content requirements, export performance rules, etc.) that violate the national treatment principle or the prohibition on QRs within five years of the entry into force of the WTO (seven years in the case of least-developed countries).

If trade measures are imposed for balance-of-payments purposes, WTO rules require that price-based measures be used in principle. Surveillance of such measures has been strengthened.

In principle, the basis for customs valuation is to be the importer's invoice. Specific conditions are required to be satisfied for rejection of the invoice by customs in determining the magnitude of duties to be paid.

The rules relating to product standards and sanitary/phyto-sanitary measures require that new regulations and conformity assessment procedures be based on international standards.

Reversing (modifying) liberalization commitments is possible under both GATT and GATS, but subject to negotiation with—and compensation of—affected parties. Costs are therefore incurred upon permanent "backsliding." The existence of compensation requirements will help governments to oppose attempts by domestic industries and other interest groups desiring to restrict market access at

99 Quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints and similar border measures are explicitly prohibited (Agreement on Agriculture, Article 4). However, the Agreement makes allowance for tariffs that vary, suggesting that de facto variable import levies may still be possible.

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some point after liberalization has occurred. In conjunction with the efficiency enhancing aspects of
the rules as regards specific policies, adherence to WTO rules and principles can therefore be of great
value to a country in terms of increasing the credibility of reform-minded governments. At the same
time, from an economic perspective there are arguably blemishes. These can be divided into three
types. The first consist of restrictions regarding the use of policy instruments that in certain situations
may be appropriate. The second pertains to the existence of loopholes allowing members to
implement discriminatory trade policies. The third is that GATT has a number of holes in its
coverage. Of these, the last two are the most important.

The WTO outlaws TRIMs and export subsidies, policies that have been used by many
developing countries. Export subsidy disciplines imply that it will be much more difficult for
governments to use subsidies to offset the anti-export bias that is induced by other policies--e.g., an
over-valued exchange rate or high levels of tariff protection that cannot be 'circumvented' by
exporters because of an inefficient and/or ineffective temporary entry and duty drawback regime. In
general, this cannot be regarded as being a detrimental aspect of the WTO. Indeed, to the extent that
it encourages the use of policies that directly address the underlying distortions, this can be regarded
as being beneficial. However, the fact that developing countries have been granted some 'leeway' as
regards the scope for countervailing their subsidy programs reduces the bite of the rules.°
Similarly, there can be a second best rationale for TRIMs in highly distorted economies insofar as it
directs investment into export activities. But dealing with the distortions directly is much preferable.

Turning to the loopholes, the extent to which tariffs and other policies are bound depends
greatly on the preferences of governments. Developing countries have been permitted to bind only a
portion of their tariffs under GATT, mostly maximum, 'ceiling' rates that exceed applied rates.
Developing countries also 'benefit' from special and differential treatment, which usually implies an
exemption from certain rules or principles. Investment policies in general (as opposed to TRIMs) are
not covered by the WTO, and this may have implications in terms of contestability of markets (e.g.,
equity limits on trading companies). GATT allows for antidumping, a policy for which the economic
justification is almost nonexistent, which in turn reduces the relevance of GATT rules with respect to
safeguard actions. It is weak on preferential rules of origin, and allows trade restrictions to be
imposed for balance of payments reasons rather than encouraging the use of alternative
macroeconomic instruments. Disciplines on public procurement practices only apply to those
countries that want to be subject to them.

It can also be noted that the WTO’s approach to trade policy is asymmetric insofar as it is
restricted to import barriers and export subsidies. It has nothing to say about import subsidies or
export taxes. Although an import subsidy may act as an export subsidy if the imports are inputs into
a product that is exported, if it simply encourages domestic consumption the WTO (GATT) is
indifferent. The same is the case for export taxes. Although economic theory informs us that a tax

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°° As discussed previously, if the subsidizing country has less than 4 percent of a market, and the aggregate
share of developing countries with shares below this threshold is less than 9 percent, no investigations can be
initiated.
on exports is equivalent to a tax on imports (Lerner, 1936), there is no recognition of this in the GATT. It appears that this asymmetry reflects the mercantilist underpinnings of the GATT. More generally, reflecting its 'externality' focus, the WTO pays no attention to the welfare consequences of the policies that are pursued by Member states. Subject to whatever agreements have been negotiated, Members are free to adopt any structure of protection. Thus, there are no requirements regarding the dispersion of protection across industries (whether in nominal or effective terms); no rules relating to the granting of tariff preferences and exemptions to specific domestic groups or agencies; no disciplines on many kinds of subsidies (and even prohibited subsidies may be maintained, subject of course, to countervail or retaliation by affected trading partners); no endorsement of—or general rules for—the adoption of duty drawback or temporary admission mechanisms; for imported inputs; and no rules relating to the use of countertrade. What follows does not discuss 'best practices' as far as these issues are concerned. These are relatively well-known, and have been summarized in a number of World Bank studies (e.g., Thomas et al., 1990). Instead, the focus is on the WTO disciplines, and going beyond these.

Many of the WTO's disciplines are optional, either in the sense that members have discretion regarding the extent to which they apply (i.e., their coverage), or have a choice whether to invoke them. A useful distinction can be made between the possibilities that exist to opt out of disciplines that are 'good' in that abiding by them is likely to be efficiency and welfare enhancing to a country, and the possibilities that exist for opting to use measures that are permitted, but are likely to be detrimental to efficiency and welfare. Examples of the first category of 'options' are the magnitude and restrictiveness of tariff bindings, participation in the government procurement agreement, and the specific commitments made under the GATS. Examples of the second set of 'options' are use of antidumping, balance-of-payments safeguards, and participation in regional integration. It is also useful to distinguish between a country's own policies affecting access to its markets and the policies maintained by trading partners. The lower barriers in export markets and the greater is the security (stability) of that market access, the better it is for export-oriented producers. The extent to which the WTO's 'options' are invoked by its member countries largely determines the incentive structure facing firms and consumers. Limiting the extent to which the 'bad' options are exercised and maximizing the extent to which the 'good' options are exploited is, however, a matter for which each national government bears the primary responsibility. Indeed, there is some degree of asymmetry, as the adoption of the 'good' options is subject to pressure from trading partners, whereas there is no such pressure with respect to the 'bad' ones.

There are two key issues for any government: (i) adopting a trade policy regime that is neutral; and (2) establishing a set of institutions that make this trade policy stance a credible one. Without the latter, little can be expected from a trade liberalization effort in terms of private sector supply response. The primary value of the WTO for governments in this connection is as a commitment device. The primary problem associated with the WTO is that its loopholes may substantially reduce the potential 'credibility effect'. Examples of such loopholes are the possibility of demanding 'special and differential' treatment; the mandate to implement antidumping and CVD legislation; the option of using trade restrictions on BOP grounds; the possibility of negotiating free trade agreements that imply less than free trade; and the freedom to severely limit the extent to which service markets are opened to foreign competition.
Special and Differential Treatment

Developing countries have traditionally insisted upon—and been granted—'special and differential' (S&D) treatment in the GATT context. Although many of the S&D provisions of the GATT are of a hortatory nature (e.g., Part IV), Article XVIII of the GATT (entitled Governmental Assistance to Economic Development) permits the withdrawal of concessions (nonapplication of GATT rules) for purposes of infant industry promotion or to protect the balance-of-payments. The Enabling Clause, negotiated during the Tokyo round, should also be mentioned in this connection, as it constitutes the most recent and far-reaching formalization of S&D for developing countries in the GATT. It provides for departures of MFN or other GATT rules in the context of: (i) unilateral tariff preferences granted by industrialized to developing countries; (ii) the application of nontariff barriers for which GATT disciplines exist; and (iii) regional trade agreements involving developing countries.

Ending special and differential treatment of developing countries was not on the Uruguay Round agenda. Indeed, the Punta del Este Ministerial Declaration explicitly stated that "CONTRACTING PARTIES agree that the principle of differential and more favorable treatment embodied in Part IV and other relevant provisions of the General Agreement ... applies to the negotiations ... Developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of developing countries" (p. 7, reprinted in Finger and Olechowski, 1987). Examples of S&D can be found throughout the text. In many instances this simply consists of the granting of longer time periods in which to implement agreements (e.g., TRIPs, TRIMs), in others pre-existing S&D provisions are reaffirmed (e.g., in the TRIMs text, which allows for Article XVII:c actions—infant industry protection). With the exception of the subsidies agreement, no criteria for 'graduation' were agreed to.101 Disinvocation of Article XVIII is voluntary, i.e., remains an issue that is effectively negotiated on an ad hoc basis.

It is completely at the discretion of a government whether to invoke GATT's S&D provisions. The problem is that the mere existence of such provisions may complicate the life of a government that seeks to make its policies more liberal. It also suggests that there is some value to being able to 'opt out'. Experience suggests that invoking S&D is more likely to be detrimental than beneficial, given that the instances in which it is applied usually concern policies or actions that would be efficiency enhancing. The disciplines on subsidies are a good example. Article 27 of the Agreement on Subsidies and Countervailing Measures recognizes that "subsidies may play an important role in the economic development programmes of developing country Members..." It explicitly exempts least developed countries from its disciplines, and grants developing countries some assurance that subsidy programs that are not 'too' successful in stimulating exports may not be countervailed.

101 In the context of Article XVIII:B, the main results of negotiations consist of a recommendation to use price-based measures, a requirement that public announcements be made concerning the timetable for removal of BOP measures, and some procedural improvements relating to surveillance by the relevant GATT Committee. The Subsidies Agreement stipulates that developing countries that have attained a global market share of 3.5 percent for a product are required to phase out export subsidies. There is also a per capita GDP criterion (US $1,000), under which developing countries' export subsidies will not be countervailed.
Many of the S&D provisions of the GATT are not in the economic interest of developing countries. For example, it is unclear why developing countries have not bound tariffs at applied rates, especially those that are in the process of moving towards market determined exchange rates and liberalization of current account transactions, or already have done so. In some cases it may simply reflect the mercantilism underlying the GATT (i.e., a perception that bindings are ‘negotiating chips’), in others it may be that the constituencies in favor of low import barriers are unaware of the potential value of binding rates at applied levels, complemented by a desire on the part of finance ministries not to ‘give away’ a revenue raising tool. More generally, it may be that countries with overvalued exchange rates and resulting foreign exchange shortages/rationing have no wish to be forced to go through GATT’s Article XVIII in instances where measures are required to safeguard the balance of payments.\textsuperscript{102} This is an important issue on which further research is necessary. As it stands, however, not enough use is made of the opportunities offered by the GATT and the GATS to bind policies, thereby enhancing the credibility of the trade regime.

**Safeguards and Antidumping**

Extensive use has been made by many industries in industrialized countries of antidumping and countervailing duty procedures, often in conjunction with the negotiation of voluntary export restraint (VER) agreements.\textsuperscript{103} In comparison to antidumping, very little use has been made of Article XIX-conforming safeguards. The dominance of antidumping duty procedures and VERs reflects the fact that Article XIX-type protection is relatively more difficult for import-competing industries to obtain because the conditions that need to be satisfied are more stringent than those under alternative instruments. Until this was changed in the Uruguay round, Article XIX actions had to be nondiscriminatory and affected exporting countries had the right to claim compensation (or failing adequate compensation, could be authorized by the GATT Council to retaliate). Governments often preferred to use other instruments, either because they desire to exempt certain countries from protectionist measures, or because they wished to avoid the need for compensation. Antidumping is country- and industry-specific and does not require compensation. VERs are also country/industry-specific. They tend to be preferred by exporters to antidumping duties because they are likely to capture some of the resulting rents, if any, and may allow the \textit{de facto} cartelization of an industry. Both AD and VERs may also be less ‘visible’ to consumers than a safeguard action.\textsuperscript{104}

\textsuperscript{102} Invocation of Article XVIII will force governments to be subjected to multilateral surveillance in the GATT, and confront them with the IMF, which participates in GATT’s Balance of Payments Committee. From an economic perspective, trade restrictions are a very inefficient instrument to deal with balance of payments difficulties as they do not directly address the underlying macro-economic imbalances.

\textsuperscript{103} See Finger (1993b) for data.

\textsuperscript{104} These issues have been analyzed at length in the literature. See Hindley (1987), M essertlin (1990), Hillman (1990) or Hoekman and Leidy (1990) for detailed discussions and references.
In virtually all cases where instruments of contingent protection are used, the source of the problem is that competition from imports is putting domestic industries under 'too much' pressure. Given that the source of an industry's problems is import competition, it is 'natural' for an import-competing industry to seek trade measures. Indeed, given that the objective of the industry is to restrict imports, trade policy is the appropriate instrument from its perspective. However, insofar as the cause of an import-competing industry's problems lie in a shift in comparative advantage, it needs to adjust to changed circumstances. Supporting the industry through trade barriers is generally an inappropriate policy from an economic perspective in this regard. The imposition of contingent protection, as is the case for protection in general, results in distributing income from consumers to import-competing (and/or foreign exporting) industries. Usually this is inefficient, as it distorts resource allocation, with costs to consumers almost invariably exceeding the benefits that accrue to the protected industry.

Nevertheless, political pressures may be such that something needs to be done. And trade measures are often the easiest for governments to implement. But it is important that governments maintain control over the process. In practice, they often do not because multiple paths towards 'safeguard' protection exists. Industries can be expected to exploit substitution possibilities across the available instruments, opting for the mechanism that offers the highest 'expected rate of return'. In many OECD countries this has recently been a combination of antidumping and VERs, the threat of the former sometimes being used to obtain/enforce the latter. The mere existence of safeguard instruments may reduce competition between foreign exporters and domestic import-competing firms. The greater the scope for the 'capture' and abuse of such procedures by import-competing interests, the greater such threat effects. The gains from liberalization are consequently reduced, and perhaps even eliminated, for certain sectors or for the economy as a whole (Leidy and Hoekman, 1991).105

The revisions to Article XIX made in the Uruguay round formally outlaw the use of VERs. VER-like actions can be taken under specified conditions under the new rules if both parties agree, but in principle they will be time bound and regressive (maximum duration of 8 years). While not 'optimal' (see the next section for a discussion of 'good practices' in this domain) this is a substantial improvement over the use of bilaterally negotiated VERs. Unfortunately it is not clear that the new agreement will induce a shift away from antidumping. Antidumping actions are likely to remain the instrument of choice for many import-competing industries. Antidumping is increasingly recognized to be a de facto safeguard instrument. De jure it is not considered as such, as dumping has been defined to be an unfair trading practice. But this is simply a legal criterion, not an economic one. It is perhaps useful to discuss briefly the lack of an economic rationale for antidumping. The original theoretical rationale for antidumping law was developed by Viner (1923). He argued that antidumping may be needed to protect domestic consumers from predatory (anti-competitive)

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105 Baldwin (1992) provides a brief review of some of the recent economic literature on contingent protection.
The fear was that a foreign firm (or cartel) could deliberately price products low enough to drive existing domestic firms out of business, then establish a monopoly. Once established, the monopolist could more than recoup its losses by exploiting the resulting market power. For this scenario to be plausible, however, the monopolist (cartel) must not only eliminate domestic competition, it must be able to prohibit entry by new (foreign) competitors. For this to be possible it must either establish a global dominance or it must convince the 'host' government to pursue a policy stance that tolerates or supports entry restrictions (e.g., high tariffs). Both options are difficult to realize, and in practice cases of successful predatory dumping remain undocumented. Proponents of antidumping often have another definition of predation than the economic one described above. Their concern, implicitly if not explicitly, relates to the continued existence of national firms that produce a good. The fact that competition from other outside sources will in most realistic circumstances prevent the formation of a monopoly is considered irrelevant. What matters is the maintenance of a domestic industry. Using antidumping to achieve this objective is inefficient, however, and defending it on the basis of ‘predation’ disingenuous at best. In any event, current antidumping legislation does not require predation or predatory intent.

In addition to ‘predation’, advocates of antidumping policies also argue that antidumping is a justifiable attempt by importing country governments to offset the market access restrictions existing in an exporting firm’s home country that underlie the ability of such firms to dump. Such restrictions may consist of import barriers preventing arbitrage, but may also reflect the non-existence or non-enforcement of competition law by the exporting country. These constitute reasons why dumping is held to be an unfair practice. Thus, the U.S. has claimed that lax Japanese antitrust enforcement permits Japanese firms to collude, raise prices, and use part of the resulting rents to cross-subsidize (dump) products sold on foreign markets. Garten (1994, pp. 11-13) offers a representative defense of antidumping that emphasizes entry barriers in the exporter’s home market. Four major conditions are argued most likely to give rise to dumping: closed home markets of exporters, anti-competitive practices in the exporting country market which permit export sales below cost, government subsidization, and non-market conditions (mainly referring to People’s Republic of China and the economies in transition).

Antidumping is also an inferior instrument to address foreign market closure as it does not address the source of the problem, i.e., the government policies which artificially segment markets, or allow this to occur. An antidumping duty may put pressure on affected exporting firms to lobby their government to eliminate such policies—or to abolish private business practices that restrict entry—but does so in a very indirect manner. Once investigations are initiated, such changes cannot have an impact on the finding. Moreover, in many cases there will not be significant barriers to entry. Thus

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106 Viner distinguished three forms of dumping: sporadic, short run, and long run (permanent). Only the second form justified a reaction in his view, as only this form of dumping can be construed as anti-competitive. In the first case injury to firms is transitory as it simply reflects random events, while the gains to consumers outweigh the losses to domestic producers in the last case.

107 Why the importing country government would allow this is of course an obvious question.
another problem with current antidumping enforcement is that no account is taken of whether price discrimination or selling below cost is the result of market access restrictions. More generally, attempting to use antidumping strategically is clearly useless for small countries.

Dumping is rarely an anticompetitive practice. Predatory pricing is possible, but will not be profitable as long as governments ensure that markets remain contestable. At the same time, antidumping creates a large number of distortions. The threat of antidumping induces rent-seeking behavior on the part of import-competing firms, and leads exporting firms to alter production, allocation, and production-location decisions in ways that can easily reduce welfare at home and abroad. These threat effects are important, as they can imply substantial uncertainty regarding the conditions of market access facing exporters, and the costs of goods for importers. Similar effects can arise under safeguards procedures, but these will generally be less distorting. Safeguards are more transparent, less arbitrary, and less prone to capture. Antidumping mechanisms are simply an option allowed under the WTO's rules; they are not required. The best option for governments that are concerned with both equity and efficiency is not to pass antidumping legislation, or to abolish it if it exists. This is not to deny that there may be situations where temporary protection of an industry is deemed necessary by a government. But the instrument to use in such situations is GATT's safeguard mechanism, not antidumping.

A key problem with antidumping is the discretion that often is granted to investigating authorities—or, alternatively, the guidelines under which such authorities are forced to operate by law—to follow procedures that can make the instrument blatantly protectionist. In practice methodologies used to determine whether dumping has occurred and the size of the dumping margin may be such as the ensure that high positive margins are found in almost any circumstance. An often used practice in this connection is to calculate dumping margins by using methodologies that raise the normal value and lower the average export price, thereby increasing the dumping margin. Normal values can be biased upward by not including sales in the home market that are made at prices that are considered to be below cost, and by excluding sales in the export market that are above the calculated normal value. The latter procedure has been justified on the basis that "sales at a high price should not be allowed to conceal dumped sales" (Hindley, 1994, p. 97). In cases where the normal value is 'constructed' by authorities on the basis of costs, the dumping margins can be inflated in various ways. One way this may be done is through the inclusion of high profit and overhead margins in the calculation of the normal value, but not allowing for this in the calculation of the costs of sales for exports. The use of such biased procedures will often guarantee that a positive dumping margin is found.

The Uruguay round Anti-Dumping Agreement somewhat reduces the protectionist bias of investigating methodologies by imposing procedural constraints and adding some substantive rules. A 'sunset' clause has been added: antidumping duties are to be terminated within five years of imposition, unless a review determines that both dumping and injury caused by dumped imports

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continues to persist or that removal of the measure would likely lead to the recurrence of dumping/injury. De minimis rules were agreed to. Duties may not be imposed if dumping margins are less than 2 percent, or the level of injury is negligible, or the market share of the imports is less than 3 percent and cumulatively less than 7 percent for exporters each supplying less than 3 percent. Discretion with respect to methodologies used to determine dumping and injury margins has been somewhat circumscribed. In effect, what has been done is to authorize practices such as the statistically biased averaging methodologies described earlier, but to subject these to certain constraints. However, many of the practices that have been identified as leading to significant protectionist biases remain untouched.109

For example, authorities may compare a normal value that has been calculated on a weighted average basis with the prices of individual transactions (i.e., not take into consideration export sales above normal value), if they "find a pattern of export prices which differ substantially among different purchasers, regions, or time periods and if an explanation is provided why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction-to-transaction comparison" (Article 2.4.2). As the first condition will usually be met, much depends on the extent to which explanations are demanded. As no objective criteria have been established—simply an 'explanation' this does not appear to be much of a constraint. As noted by Hindley (1994), because Article 17.6 of the Agreement prohibits dispute settlement panels to focus on the substance/merits of a case. They are limited to determining whether the procedural requirements of the Agreement were violated. In cases where the Agreement can be interpreted in more than one way (following customary rules of interpretation of public international law), a decision by antidumping authorities must be accepted if it is based upon one of the permissible interpretations.

Procedural 'biases' and methodological 'abuses' are very difficult, if not impossible to regulate away in the area of antidumping given the definition of dumping. Little was done to compensate for the fact that antidumping authorities retain substantial discretion in applying regulations and defining criteria, and do not require any investigation into the market access conditions prevailing in the exporter's home market, or the threat to the competitive conditions existing on the importer's market. For example, the new requirement that antidumping duties be terminated within five years of imposition would appear at first glance to be a major improvement from an economic welfare point of view. In practice this may not be a binding constraint, as this is conditional upon the findings of a review investigation whether both dumping and injury caused by dumped imports continues (or threatens) to persist. Another example pertains to the definition of an 'interested party' in antidumping cases. This provides users and final consumers of the import a voice during the investigations, but restricts them to providing evidence that is relevant to the determination of dumping, or injury to domestic firms that compete with the imported product. The fact that a duty may injure their proper business is not a factor that can be brought forward. The Agreement also does not require any consideration of the economy-wide impact of antidumping duties, their impact on existing users of imports, or the state of competition in the domestic market.

109 See Finger (1993b) and Hindley (1988, 1994) for a more comprehensive discussion.
The main constraint on the use of antidumping actions has been the requirement that dumping must materially injure the industry petitioning for protection (Finger, 1993b). An unfortunate change introduced in the Uruguay round Agreement on Antidumping is that the size of the dumping margin can be regarded as one indicator of injury. This opens the possibility that the injury constraint may be effectively circumvented. If incorporated into domestic laws controlling trade policy could become very difficult.

Balance of Payments Actions

The inclusion of Articles in the GATT allowing for trade restrictions to be imposed for balance of payments purposes was a direct result of the fixed exchange rate regime that was foreseen under the Bretton Woods system. However, with the move towards a flexible exchange rate system in the early 1970's, the rationale for such measures became much weaker. An adjustable exchange rate provides an automatic mechanism for correcting current account imbalances. The maintenance of an overvalued exchange rate is usually the primary cause of foreign exchange shortages and rationing. Not only are balance of payments restrictions a second-best instrument to deal with such problems—and, of course, need to be complemented by export subsidies to be more equivalent to a devaluation—the use that has been made of the option has reduced the credibility of developing country participation in the GATT. This has damaged both the trading system (because it undermined adherence to the principles on which the system rests) and the imposing developing country which has no effective means within the GATT context to counter powerful protectionist interests at home. The measures imposed have tended to be long lasting, whereas BOP difficulties are mainly of a cyclical nature. Measures have also tended to affect selected products, rather than being applied across the board as would be necessary for balance-of-payments purposes.

Again, as is the case for the other provisions discussed earlier, imposing restrictions on imports for balance of payments reasons is an option. Many developing countries do not exercise the option. But the mere fact of its existence may make it more difficult for a government to resist implementing such restrictions when external and internal imbalances become significant problems.

Regional Integration

Much attention has been devoted recently to the question of whether regional integration is detrimental to non-members, both in the short run (static effects) and in the longer run (taking dynamic effects into account). The impact of regional integration on both member and non-member countries will in large measure be a function of the type of agreement concerned (i.e. free trade area, customs union, common market) and will depend importantly on the degree to which intra-regional trade is liberalized. The more extensive internal liberalization is, the greater the resulting increase in competition within internal markets. While this is welfare-enhancing for member countries—and presumably the object of economic integration—it may also be associated with greater adjustment pressures for inefficient industries located in member countries. The latter may attempt to shift some

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10 Of course, expenditure reducing policies will generally be needed as well.
of the adjustment burden onto third countries by seeking increases in external barriers. Regional integration may, of course, also be detrimental to non-members by inducing a shift away from trading with them.

In the context of agreements liberalizing trade flows, a necessary condition for preferential liberalization to be deemed multilaterally acceptable is that it not have detrimental impacts on third countries. That is, the volume of imports by member countries from the rest of the world should not decline on a product-by-product basis after the implementation of the agreement (Kemp and Wan, 1976; McMillan, 1993). Import volumes are a function of the trade policy stance taken vis-a-vis the rest of the world and the extent to which regional liberalization fosters economic efficiency and growth within member countries. The latter will in turn depend on how comprehensive the regional agreement is with respect to sectoral coverage and the elimination of intra-regional barriers to contesting markets. The trade volume test will capture these various kinds of effects, including those associated with the nontariff measures noted earlier, albeit incompletely. It is also a criterion that can only be applied after the fact. While it cannot be used to determine whether a RIA is acceptable ex ante, in principle it could be used as the basis for ex post compensation claims by countries that turned out to be negatively affected by the formation or enlargement of a RIA. However, neither GATT nor the GATS allows for such claims, nor is a trade-effects test required.

The creation of tariff preferences between member countries is not necessarily the main issue in connection with RIAs. The conditions of market access are equally, if not more, important, in particular the uncertainty created by the threat of facing contingent protection on a regional basis. In the EU such threats are region-wide because the EU is a customs union. If the RIA is a free trade area, effectively threats of contingent protection are often also region-wide insofar as rules of origin prevent arbitrage, and there is a greater likelihood that joint actions will be taken. The threat of contingent protection, especially antidumping, has become an important incentive for third countries to seek to join RIAs (Hindley and Messerlin, 1993). Harmonization of regulatory regimes—such as labor standards—is also a contingent protection issue, as ultimately what is at issue is the possibility of being confronted with allegations of ‘social’ or ‘environmental’ dumping. As RIAs increasingly are instruments for such ‘harmonization’—or for the adoption of mutual recognition procedures—the potential cause for concern on the part of non-members is again obvious. A primary need in this respect is to ensure that RIAs are ‘open’ to new members, i.e., contain an accession clause that establishes objective criteria for new membership.

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111 This simplicity contrasts markedly with the extensive literature focusing on the welfare effects of regional integration for member countries. This literature has built upon Viner’s (1950) seminal work arguing that this depends on the balance between induced trade creation and diversion effects. Trade may be created by substituting inefficient domestic production in each member country with purchases from more efficient producers located in other member countries. Trade diversion involves members importing some products from firms located in a more expensive partner country, rather than from cheaper suppliers located in non-member countries. Unfortunately, these concepts are inadequate to determine welfare consequences for member countries. See Kowalczyk (1990) for a discussion.
Article XXIV of GATT and Article V of GATS both contain loopholes allowing for the formation of agreements that do not fully comply with multilateral disciplines. For example, Articles V:2 and V:3(a) of the GATS respectively allow for consideration to be given to the relationship between a particular regional agreement and the wider process of economic integration among member countries, and give developing countries flexibility regarding the realization of the internal liberalization requirements (i.e., Art. V:1). It is also worth noting that Article V:3(a) does not speak of agreements between developing countries, but of agreements that have developing countries as parties. Thus, in principle, this ‘flexibility’ extends to agreements that have both developed and developing country signatories. Moreover, Article V:3(b) allows developing countries negotiating integration agreements among themselves to give more favorable treatment to firms that originate in parties to the agreement. That is, it allows for discrimination against firms originating in non-members, even if the latter are established within the area. These ‘special and differential treatment’ type of provisions are unlikely to be very effective in attracting the inward foreign direct investment (investment creation) that is often sought by participants in integration agreements.

Although some improvements were made to Article XXIV, these were largely clarifications of the existing rules. No attempt was made to extend multilateral surveillance, e.g., by mandating the WTO Secretariat to monitor the trade effects of RIAs, let alone impose stricter multilateral disciplines on regional agreements. Noteworthy in this regard is the absence of any disciplines with respect to preferential rules of origin in the Final Act. Article XXIV.5(b) requires that duties and ‘other regulations of commerce’ applied by members of a free trade area not more restrictive than those applying prior to the formation of the area. While the associated rules of origin by definition only apply to member states, a third party may perceive that the rules are detrimental to its interests. This has indeed been argued in various GATT Working Parties. For example, the United States argued that the rules of origin embodied in the 1972 free trade agreement between the EEC and Austria (and more generally all the EEC-EFTA agreements) effectively raised barriers to third countries’ exports of intermediate products.\footnote{The rules of origin ... would result in trade diversion by raising barriers to third countries’ exports of intermediate manufactured products and raw materials. This resulted from unnecessarily high requirements for value originating within the area. In certain cases ... the rules disqualifies goods with value originating within the area as high as 96 per cent. The rules of origin limited non-origin components to just 5 per cent of the value of a finished product of the same tariff heading in the 179 tariff headings in the Brussels Tariff Nomenclature Chapters 84-92, or nearly one-fifth of total industrial tariff headings. In many other cases a 20 per cent rule applied.} Preferential rules of origin embodied in a regional trade agreement are also not addressed by the WTO agreement on rules of origin, even though they are arguably of most concern to third countries and those contemplating or in the process of acceding to a regional agreement.

Rules of origin are important as they can be designed so as to ensure that free trade is not achieved, even if this is ostensibly the goal of a FTA. Upon the formation of a free trade area non-member countries may not only be confronted with trade diversion due to the preferential nature of
the abolition of barriers to trade, but also because of an effective increase in protection. For example, assume an intermediate product enters a country free of duty and that this country accedes to a free trade area. Downstream producers in that country may then have an incentive to shift to higher cost regional producers of intermediates in order to satisfy the rules of origin for their product. In effect, the rule of origin is then equivalent to a prohibitive tariff for the original third-country suppliers of components.

Participation in a regional integration agreement is an option. If exercised, it is important that the agreement satisfy the requirements of Articles XXIV of GATT and V of the GATS. But this is not enough to ensure that preferential liberalization will be beneficial to a country. Nor are the requirements of the WTO sufficient to ensure that regional integration agreements are a complement to the multilateral trading system. As mentioned previously, in practice developing countries may be able to 'opt out' of GATT's disciplines on RIAs altogether by invoking the Enabling Clause, and negotiate preferential tariff reduction agreements for a limited number of products. Such agreements are prevalent in the MNA region, and may involve reciprocal reduction of tariffs or zero duties on certain goods. Such agreements can greatly distort trade flows, generating substantial welfare reducing trade diversion.

Services

The main need for most developing countries is to liberalize access to their service markets, thereby reaping efficiency gains as firms and consumers obtain access to lower priced, higher quality services. The issue is what the GATS does to help a government liberalize in the face of opposition by powerful domestic lobbies. The standard rationale for the pursuit of multilateral (reciprocal) liberalization efforts is that increased access to foreign markets is likely to be of interest to domestic export-oriented industries, and that these are then given an incentive to oppose lobbying by import-competing industries against the opening of domestic markets. This political dynamic is arguably less strong in the GATS context because developing countries tend to have less of an interest in service exports (or, more accurately, many of the services where they are likely to have or develop a comparative advantage require movement of labor, and this is a mode of supply that has mostly been kept off the table). The non-generality of national treatment is another important negative factor in this connection, as is the sector-specificity of market access commitments. A government cannot tell its lobbies that it must join the GATS, and that this means it must automatically abide by the national treatment principle for all sectors and offer foreign firms access to service markets. Instead, it must explicitly list each and every sector to ensure that national treatment and market access obligations will apply. This clearly makes matters much more difficult for governments that 'need' an external justification for resisting protectionist pressures. Another weakness of the GATS in this regard is Article XIX which allows for "appropriate flexibility for individual developing countries for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service

\[113\] Note that this is not the case if the product is exported outside the region or consumed in the importing country.
suppliers, attaching to it conditions aimed at achieving the objectives of increasing the participation of developing countries in world trade. This is a guideline for the conduct of future trade liberalizing rounds rather than "obligations" to be undertaken. But it does give developing countries substantial scope to limit the sectoral coverage of their offers.

More generally, GATS imposes few limitations on national policy, leaving a Member pretty much free to do as it likes in the policy domain, subject to the constraint that no discrimination across alternative sources of supply occurs.\textsuperscript{114} It allows parties to implement policies that are detrimental to--or inconsistent with--economic efficiency. A good example is the article specifying the conditions under which measures to safeguard the balance-of-payments may be taken, such measures rarely being efficient. It can also be noted that the GATS does not require a participating country to alter the regulatory structure of certain service sectors, or to pursue an active antitrust or competition policy. Liberalization of trade and investment may need to be augmented by regulatory change (frequently deregulation) and an effective competition policy in order to increase the efficiency of service sectors such as finance, transportation, and telecommunications. If liberalization is simply equated with increased market access for (certain) foreign suppliers, this may have little effect in markets that are characterized by a lack of competition. The main result will then simply be to redistribute rents across firms.

\textit{Summary Evaluation}

Implementing all the rules and principles of the WTO will do much to reduce the extent to which the trade policy regime of a country distorts incentives. Indeed, full implementation of all that is \textit{required} (i.e., abstracting from the 'options') may involve substantial reform of the regulatory environment. The costs associated with setting up enquiry points for product standards and services regulations, for example, can be significant. The same applies to the institutional requirements of the TRIPs agreement. Countries contemplating accession to the WTO, as well as those that were GATT members and must now conform to the disciplines of the WTO, may consider seeking technical assistance from the international donor community.

Although much is required, much also remains discretionary, especially for developing countries. This is really the key issue as far as the impact of the WTO on trade policy stances and market access conditions are concerned. Tariffs facing developing country exporters in OECD markets were already low before the Uruguay round started. What mattered was the restrictive quota regime applying to textiles and clothing, and enhancing the security of market access. Indeed, the MFA can be considered to be a subset of this issue, reflecting the non-functioning of GATT's safeguard provision during the 1970s and 1980s. As noted previously, security of market access is not only a matter of external concern, i.e., access to export markets. More important is the domestic regulatory regime confronting producers in a country that must have access to inputs at world market prices if they are to be able to compete on global markets. Although the GATT's rules on customs

\textsuperscript{114} This assumes that the specific obligations of the GATS apply. To the extent that sectors are not scheduled, a country only has to avoid discriminating across foreign sources of supply.
valuation and transparency in general will help, it gives no guidance to governments on the appropriate policies to foster exports. For many developing countries the issue of contingent protection may become increasingly important in the future, as its use will generally be detrimental to the efficiency and export competitiveness of domestic industries. This has not been an issue in most countries so far because of high levels of import tariffs and extensive use of quantitative restrictions and associated licensing requirements. As countries move towards more open trade regimes and start to bind tariffs at applied rates, controlling contingent protection will become more important.

WTO membership is not a panacea. The focus of the WTO is on the multilateral trading system, not on minimizing the domestic welfare cost of trade policies that are pursued by a government. Although the former is often consistent with the latter, full consistency with WTO requirements is neither necessary nor sufficient to ensure that the trade policy formation process minimizes distortions (be susceptible to capture by rent-seeking lobbies). A great need remains for careful institutional design, and a deliberate and conscious decision whether to exercise the various options allowed for under the WTO, both the 'good' and the 'bad'.

VII. Trade Laws and Institutions: Towards Good Practices

Although the WTO imposes substantial disciplines on its members, it also allows for a great deal of flexibility regarding the design of trade policy-related institutions. While it is obviously necessary that countries adopt policies that are consistent with GATT/WTO obligations, GATT rules mostly set broad guidelines. Within these guidelines there is significant scope for discretion, allowing for the introduction of specific rules and procedures that facilitate the pursuit of policies that may be either detrimental or beneficial to national welfare. As noted previously, certain provisions of the GATT make little economic sense, and their invocation can easily be welfare reducing. Governments must determine to what extent the various loopholes embodied in the WTO should be exploited, and how institutions can be designed so as to ensure that WTO weaknesses in this regard are offset to the greatest extent possible.

To put it somewhat simplistically, the task facing governments concerned with national welfare and economic growth is to maximize the extent to which the 'good' options are used, and minimize the invocation of the 'bad' options. There are two dimensions to this task, one relating to trade policy per se at any point in time (i.e., the level of intervention, the instruments used, etc.), and another relating to the design of the institutional framework governing the trade policy formation process. The second is by far the most important in the longer run. As far as the design of trade policy institutions is concerned, much can be learned from the experience of both industrialized OECD nations and developing countries. It must also be recognized that the coverage of the WTO is incomplete, and, indeed, in certain dimensions is lagging behind recent regional agreements. This is not to suggest that regional integration is to be preferred over multilateral liberalization under WTO auspices. It does mean that the WTO should not be taken as the benchmark for 'best practices', and that much can also be learned from the regional experiences. Some of the provisions, institutions and procedures used in RIAs such as the EU to ensure that the internal market becomes/remains contestable for firms or products originating in member countries are worth emulating.
Trade policy affects the whole economy: policy decisions should therefore be made in a context that allows the interests of all potentially affected actors to be considered. This will not be done unless an explicit attempt is made to design institutions such that an economy-wide focus is indeed taken. Trade policy almost always directly benefits a small segment of the population, and these benefits are often relatively large. The costs of restricting imports—while often large in the aggregate—tend to be spread over the whole economy. As is well known, this greatly reduces the incentives of individual agents to invest resources to counteract lobbying for protection by specific interest groups (Olson, 1965). If trade policy is in the hands of either the legislature or sector-specific executive bodies, it can easily be ‘captured’ by those seeking protection.\textsuperscript{115}

In the legislative context this will depend in part on how representatives are elected. If they represent distinct geographic regions, a firm seeking protection will lobby ‘its’ representatives, who in turn will seek the support of other representatives. The latter will be inclined to accede if they can expect support on other matters, or perceive a probability of being in a similar position in the future. The resulting logrolling can lead to highly protectionist outcomes, as illustrated by the experience of the United States (Destler, 1992). Similarly, if trade policy is placed in the hands of the government bodies with a sectoral responsibility, it may again easily get captured. In practice, in many countries trade policy for industrial products is largely in the hands of the Ministry of Industry or Commerce, while that for agriculture is in the hands of the Agriculture Ministry. As such bodies have a sectoral mandate, they are prone to acceding to requests for protection as this is perceived to be beneficial to their ‘clients’.\textsuperscript{116}

In what follows it is assumed that the fundamental objective of the design of trade policy institutions is to ‘tame the rent-seeker’ (Koford and Colander, 1984). Achieving this is difficult, and will depend in part on the specifics of individual countries. However, some general principles are by now well known. Assuming for purposes of discussion that trade taxes are not the primary revenue generating instrument available to the government, good practices should build upon a recognition that trade policy is an inefficient redistributive instrument. A first requirement then is that the net cost to the economy of a policy is determined (both estimated \textit{ex ante} and monitored \textit{ex post}), and the incidence of the implicit tax is identified. The best way this can be done is by an agency that has a statutory mandate to determine the impact of a trade policy on the economy, both in terms of efficiency (resource cost) and equity (income redistribution). One option in this connection is to give this mandate to the competition law enforcement agency; another is to create an independent agency to fulfill this role. The policy formation process should give a voice to all potentially interested parties, whether they stand to gain or to lose, with final decisions should be taken/approved by an entity that has an economy-wide focus (for example, the Prime Minister’s office or the Ministry of Finance).

\textsuperscript{115} There are many studies of the political economy of protection in a legislative context. A classic treatise is Schattschneider (1935). See Hillman (1989) and Rodrik (1994) for surveys.

To reduce pressure for intervention in trade, participation in international agreements that bind a government to a policy stance can be helpful. Agreements such as the WTO both create pressure for liberalizing access to markets over time in a way that may be both politically more feasible than unilateral action (by providing domestic export-oriented interests with benefits that offset to a greater or lesser extent the losses incurred by protected industries) and locks in the result. As noted previously, this requires that the WTO be implemented to the fullest extent possible by binding tariffs at applied rates and scheduling all service sectors in the GATS, joining the main remaining 'voluntary' discipline, i.e., the Government Procurement Agreement, and pursuing mutual recognition agreements relating to conformity assessment and certification (GATT Standards Agreement), and professional qualifications (GATS), and so forth.

Another requirement is to maintain control over the mechanism through which industries may petition and obtain temporary protection against import competition. In most circumstances there will be a political need for such a mechanism, if only to 'sell' trade liberalization. It is important that only one safeguard mechanism exist under which temporary protection can be granted with a view to facilitating its restructuring. In practice, the safeguard mechanism foreseen under Article XIX of the GATT should be more than adequate to allow domestic import-competing industries to obtain some temporary relief from foreign competition. If it is politically impossible to abolish instruments such as antidumping (the first best solution), competition policy or appropriately defined national welfare ('public interest') criteria should be used in its application, and procedures defined that are neutral (unbiased) with respect to determining if dumping has occurred.

Allowing policies to be challenged before the domestic courts for violation of international (i.e., WTO) commitments is a mechanism that can be used to help enforce international treaty obligations. While this is quite far-reaching, as it implies that a Member decides that the WTO creates rights (and obligations) for individuals, taking this step would greatly increase the strength of WTO disciplines, inducing greater confidence in the commitment of a government to a liberal trade policy stance (Tumilr, 1985). The best illustration of this has been the role of the European Court of Justice in enforcing the provisions of the Treaty of Rome regarding the establishment of the common market.

The best trade policy is free trade. While few countries have achieved this, an increasing number are pursuing it, both unilaterally and in the setting of regional agreement. Few countries in the ECA/MNA regions are large enough to be able to avoid significant distortions created by barriers to trade. The question for many governments is whether modalities exist through which free trade can be pursued in the medium term through incremental steps without confronting serious credibility problems. The WTO can help to some extent to achieve this goal by 'ratcheting' moves to lower tariff rates by binding reductions in barriers through the GATT and the GATS. There is potentially also much to be gained from pursuit of regional integration agreements if these are WTO-consistent (full free trade) and go substantially beyond the WTO as regards their coverage (i.e., include factor mobility and eliminate contingent protection). Such agreements may help a government more than the WTO in terms of locking-in trade policy reforms and increasing their credibility as this is a requirement, not a choice.
Policy Formation: General Normative Principles

"Centralization" of Trade Policy

A key element of the trade regime must be that laws and procedures are created that require that trade policy decisions take into account the impact on the economy as a whole. At a minimum this implies giving domestic actors that depend on imports or exports the legal standing to voice their views in the policy setting process, and that policy recommendations are scrutinized and ultimately taken by the Government, more specifically a government entity that has an economy-wide responsibility. Possibilities include the Prime-Minister's Office, or a requirement that trade policy decisions be taken jointly by the Cabinet. Trade policy should not be in the hands of Ministries with sectoral responsibilities or the legislature. Wherever possible, trade policy reform should be undertaken across all sectors—e.g., through the use of a formula approach—rather than on a sector-by-sector basis.

Moreover, the agency that is given procedural responsibilities for implementing policy should be kept distinct from the policy making/decision process. Policy making is a political process for which the government is responsible. The implementing bureaucracy should be restricted to implementation. This is a technical matter that should be governed by rules and clearly defined criteria. For example, in instances where a petition is made for temporary, 'emergency' protection, this should be conditional on the satisfaction of predetermined conditions. Ideally, if and only if it is determined by the implementing agency that these conditions are met will a case go back to the policymaker for a decision whether or not protection is in the national interest.

Transparency, Accountability and Stability

Regulations and procedures concerning the trade policy formation process should be defined by legislation (i.e., debated and approved by the legislature). The role of the legislature is to set the rules of the ‘trade policy game’. Basic provisions/procedures relating to the setting of product-specific tariffs and protection more generally and the administration of customs procedures (clearance, tax collection, inspection requirements, fees, etc.) should be defined in laws. This ensures greater stability and thus less uncertainty for traders. Laws may, of course, be changed. But, this takes time, involves debate, and allows potentially affected parties to express their views and attempt to influence the outcome of deliberations in a transparent manner. If, in contrast, the rules are not legislated but set by government decree, there is likely to be less transparency, more uncertainty, and greater scope for rent-seeking activity.

The policy formation process can be greatly facilitated by the existence of an independent body that is given the responsibility of evaluating the likely economic impact of proposed trade policies, as well as monitor their effects ex post. The creation of institutions to enhance the domestic
transparency of government decision-making on trade policy matters is encouraged by the WTO, but not required (Annex 3 WTO, paragraph B). Such a body should have a pure 'transparency' function: advising the government on the effects of specific trade policy on competition (market structure, concentration) and national welfare; and being required to prepare and publish a regular comprehensive report of the effects and incidence of the trade and investment policy stance that is maintained (including the use of the WTO’s various 'loopholes'). Export and consumer interests should have the right to request investigations into the impact of the trade and regulatory regime that is maintained. The mandates of the institution should be established by law. It should be staffed by people that are independent of the government. Its funding should also not be at the discretion of the government but also be statutory, and be adequate to allow it to attract competent staff with the appropriate qualifications. It will have a purely advisory role vis-a-vis the government, and not be a part of it: its task is to shed light. It should have a broad mandate, including not just trade policy narrowly defined but regulatory policies restricting access to domestic markets more generally. It should also have the right to self-initiate studies, and not be dependent on a request from the government or the legislature.

Such institutions have been created in a number of countries, most prominently Australia. Many of the proposals for establishment of such a body have been inspired by the Australian Industries Assistance Commission (IAC). However, this does not imply that the Australian model cannot be improved upon. For a detailed description of the IAC and options to strengthen its transparency role, see Rattigan et al. (1989). As noted earlier, the WTO’s requirements concerning the trade policy review mechanism already imply that periodically a comprehensive description and analysis of the trade policy regime must be made. It makes good sense to build upon this requirement and institutionalize such a domestic monitoring capacity.

'Bounding' of Trade and Related Policies

A primary need for a government engaged in a trade liberalization program is to establish and bolster its credibility (Rodrik, 1989). Often very much is done by a government to liberalize trade in the context of an structural adjustment program. However, the credibility of this effort may be low. The GATT/WTO provides a cheap and effective mechanism to lock in such trade reforms. By binding tariffs at new, lower rates, and committing itself GATT rules in the area of QRs, customs procedures, standards, etc., firms and traders obtain greater assurance that lobbying for policy reversals is less likely to be successful, as this would lead to requests for compensation by affected GATT members.

Even if for whatever reasons macro-economic variables turn out to such that a reform program runs into difficulty, binding trade policies under the WTO should help ensure firms and consumers that a government is more likely to deal with the source of the problem, rather than focus on the symptoms and raise trade barriers. By binding tariffs at applied levels, the scope for domestic

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117 See also more generally on this issue, Finger (1982), Spriggs (1991), Laird and Messerlin (1989), Tumlir (1985), and Winters (1994a).
firms to lobby directly for an increase in a specific tariff is greatly reduced, if not eliminated. This will force it to go through the GATT-sanctioned mechanisms for contingent protection, which impose some 'conditionality', and if well-designed, will not encourage direct rent seeking expenditures or constitute a disincentive for firms to adjust to the changed environment.

However, the fact remains that the various Articles of the GATT allowing members to restrict trade in specific circumstances do reduce the value of binding A government must therefore also attempt to credibly commit itself not to invoke the 'bad' policy options that are allowed under the GATT. The design of contingent protection mechanisms (i.e., both the wording of the relevant legislation and the guidelines that are to be followed by those who implement the law) is therefore very important.

Contingent Protection and Safeguard Mechanisms

Political realities, especially in countries that are in the process of moving from highly distorted trade regimes to a more liberal policy stance, often dictate that there be a mechanism allowing for the temporary reimposition of protection in instances where competition from imports proves to be too fierce to allow the restructuring process to be socially sustainable. Indeed, a safeguard mechanism is likely to be a precondition for far-reaching liberalization to be politically feasible. As discussed previously, the GATT explicitly allows for such temporary 'backsliding': as long as it is indeed temporary, and as long as import growth is the cause of serious injury to a domestic import-competing industry. The design of a safeguard mechanism requires substantial care. Allowing for the possibility of 'emergency' protection sends a signal to firms that the government cannot or will not commit itself to a given level of intervention or support. This can negatively influence the performance of particular firms—who may build in this insurance into their management decisions. This can in turn give rise to so-called time-inconsistency problems. If a government is pursuing a liberalization program, but firms do not adjust because they expect to be able to obtain further protection in the future, it may not be optimal (politically) for the government not to grant such protection (or alternatively, to remove the temporary, emergency protection). The design of the mechanism and the rules/criteria that apply are therefore important. External obligations—such as those applying under the WTO—can help in reducing possible time inconsistency problems, but cannot eliminate them.118

Safeguards

The rationale for safeguard protection is to give an industry time to adjust to vigorous import competition. The rules embodied in the GATT Agreement should to a large extent be followed. Safeguard protection should be applied on a nondiscriminatory basis, be subject to time-limits, be

118 As illustrated by the fact that some safeguard actions taken under Article XIX have lasted for many years. Although the WTO's rules in this respect have been tightened, the primary source of discipline remains domestic.
phased out gradually over this time period, and offer some compensation for affected exporters.\textsuperscript{119} The instrument used could be a tariff or a quota. If there is a preference for QRs a global quota should be imposed, with allocation of quota rights to exporters on the basis of historical market shares. These rights should be tradable, thereby allowing more efficient exporters to buy out less efficient ones (Deardorff, 1987). To ensure that pressure to adjust is maintained, the quota should be expanded annually so that its protective effect declines over its lifetime (no more than 4 years, following the GATT Agreement). As safeguards should be intended to give an industry a 'breathing space' in which to adjust/restructure to the new, more competitive environment, they should be non-renewable (in contrast to the GATT, which allows for another 4 year extension).

A decision to award protection should be taken by the President or Prime Minister, after a consideration of the impact this would have on the economy as a whole (the latter should be a statutory requirement). Injury, import growth, and economy wide impact should be determined by an independent body. Of the various preconditions that need to be imposed and satisfied for safeguard protection to be imposed, those relating to the determination of injury are the most important. In practice, criteria that are imposed by implementing authorities in OECD countries allow for a substantial amount of discretion. Usually, a set of factors are mentioned in the relevant legislation or decrees, including changes in profits, employment, market share, capacity utilization, or turnover. Invariably only a number of these criteria need to be satisfied for protection to be awarded. There is also often vagueness with respect to the magnitude of the growth of imports that is required to cause injury, or indeed, how (if at all) to establish a causal link between imports and injury. Even more important, under GATT rules the threat of serious injury is sufficient reason for taking action.

The specific criteria (necessary conditions) need to be well defined in the law. Clearly import growth must be such as to greatly increase foreign market share, and injury criteria should be such as to ensure that the domestic industry as a whole is making substantial losses.\textsuperscript{120} The discretion of the implementing agency for interpretation of the rules should be minimized as much as possible. This will both increase the transparency and certainty of the process, and reduce the possibility of the agency being subjected to outside pressure or lobbying activity. Threat of injury should not be a criterion at all. Instead, procedures should be such that action—if deemed necessary—can be taken rapidly.

Experience suggests that it is very important that only one safeguard mechanism exist. Firms should not have the option to lobby the government or the legislature directly for emergency protection. If they perceive that this is an option, it will induce wasteful, rent-seeking lobbying. One important advantage of explicitly providing for only one safeguard mechanism is that it forces firms to use it, allowing the government to keep control of trade policy. By establishing both the criteria

\textsuperscript{119} The appropriate design of a safeguard instrument has been the subject of substantial analysis. See, Bhagwati (1976), Deardorff (1987), Hindley (1987), or Richardson (1988).

\textsuperscript{120} Hillman et al. (1987) and Leidy and Hoekman (1991) explore some of the perverse incentive effects that can be created if injury criteria are open to manipulation by domestic industries.
and the agency responsible for investigation in its legislation, the determination of the facts of the case becomes a technical matter. The decision whether or not to protect should remain a 'political' one, to be taken in full awareness of the economy-wide implications, and after consideration of alternative instruments that are less distorting.

Many countries already have antidumping legislation, and often have not bound their tariffs in the GATT at applied levels. This gives domestic industries a choice between direct lobbying for an increase in a specific tariff or the initiation of safeguard or antidumping procedures. This choice will depend on whatever path is likely to give the highest expected net benefit. The best practice in this connection is clear. A government should rely solely on safeguard procedures, abolish antidumping legislation if it exists, and bind tariffs at applied rates to reduce the feasibility of direct lobbying for protection. Governments may find it more difficult to abolish antidumping than to bind tariffs, if only because external demand to do the latter exists in the WTO-context, whereas this is not the case for antidumping. But, if so, at a minimum there is a need for careful design of the rules and criteria of antidumping investigations if the mechanism is not to become an outright tool of protectionism.

**Designing 'Unfair-trade' Laws**

Nothing in the GATT requires Members to implement antidumping laws. There is also nothing that prevents them from adopting antidumping laws that are designed to minimize the protectionist biases that can easily arise under a GATT-consistent antidumping mechanism. If antidumping is maintained, the basic objective should not be to focus on the existence of injury to competitors (i.e to the domestic industry producing the like product) but to establish that dumping is injurious to competition (i.e to the economy of the importing country as a whole). Antidumping duties should be imposed only if a cost/benefit analysis determines that the advantages created by the imposition of duties for the economy as a whole outweigh the disadvantages. Four avenues can be explored in this context.121 First, give competition authorities a role in the investigation process. Second, include a clearly defined public interest clause in the antidumping legislation. Third, establish criteria that prevent 'nuisance' cases from being filed. Fourth, use price-based instruments if protection is to be imposed.

(i) *Active scrutiny by competition authorities.* Ample experience in the EU and the U.S. has demonstrated that antidumping can be used as a tool to substantially reduce competition and enforce collusion. Ideally, no contingent protection should be granted by a government if this would have a substantially negative impact on competition (e.g., strengthen market power or dominance). One way to ensure this is to give the competition (antitrust) authorities the task of investigating antidumping petitions. The Polish government, for example, has given the Antimonopoly Office the responsibility of implementing antidumping investigations. This is laudatory, insofar as it ensures that competition policy criteria are applied to the firms (industry) applying for protection. Rather than being limited to an *ex post* role, the competition authorities in Poland have an *ex ante* responsibility. It is not strictly necessary that competition offices be given the task of applying antidumping actions; what matters is

121 What follows draws on Hoekman and Mavroidis (1994a).
that they are able to vet such actions before they are taken. The draft Czech antidumping statute, to
given another example from Eastern Europe, proposes something along these lines. A decision to
apply an antidumping action must be taken by the Government, and not by those administering the
statute. As the head of the competition office has Ministerial rank, this at least allows
competition concerns to be raised.

A key change in comparison to the status quo would be to redefine the concept of injury used
in investigations. Dumping should have a negative impact on competition, not just on competitors.
In practice, the best way to ensure that this is done is to use the same tests that the competition
authorities would use to determine whether price discrimination or selling below cost is
anticompetitive and violates the competition law. Competition offices should also be required to
determine whether the imposition of antidumping duties will lead to an excessive reduction in
competition on the domestic market. Another important element of a more competition-friendly
antidumping mechanism is to ensure that procedures are not biased in favor of finding dumping. As
discussed previously, the GATT's disciplines in this connection are such as to allow criteria that are
statistically biased.

(ii) Public interest clause. A number of countries have adopted so-called public interest
clauses in their antidumping legislation. Although they differ across jurisdictions, public interest
clauses generally require that before duties are imposed, investigating authorities examine the impact
this would have on the users of the alleged dumped import and the final consumers of goods that
embody the imports concerned. Economic theory suggests that in the majority of cases disadvantages
outweigh the advantages, so that in principle such a clause should limit the reach of antidumping. Of
course, this will only result if the clause is appropriately defined and worded. What is necessary is
that action only be possible if not detrimental to the economy, in the sense of costs to users of the
product outweighing benefits to producers.

The practice of jurisdictions that have public interest clauses reveals that vaguely defined
clauses have little impact. Thus, in the case of the EU, which has a ‘Community interest’ clause, it
appears that this provision almost never has led to a decision not to impose duties in instances where
dumping and injury to Community producers was found to exist. One reason for this is that no
guidance is given to investigators how to weigh the injury to producers against the injury to users and
consumers. For a public interest clause to be effective, it is important that it allows potentially
negatively affected parties to defend their interests by giving them the opportunity to present their
arguments to investigators, and have the legal standing to do so. They should have access to the

122 East-west, No. 558, October 28, 1993, p. 3.

123 In the EU-context, the ‘Community interest’ clause was strengthened in March 1994. An amendment to the
antidumping legislation gives legal standing to consumers. It remains to be seen how this strengthening will operate
in practice especially taken into account the heterogeneity/diversity of the consumers as opposed to the homogeneity
of the producers. The recent Peugeot cases brought before the ECJ, where the BEUC (the EU consumers’ group)
played a very active role, suggests that there is reason to believe that consumers will try to exploit the new
possibilities offered to them by the new legislation.
information presented by the import-competing industry seeking protection in making their case. Public interest clauses should come into play at the same time that injury to producers and the causal link between dumping and such injury is established. Currently, public interest clauses are invoked at the final stage of an investigation. This limits their impact since users are required to counteract by then well established evidence, and may have insufficient time to present their arguments. If introduced at a late stage, i.e., after the dumping and injury to producer investigations are completed, it is important that enough time be given to an analysis of the economy-wide impact of imposition of duties.

The experience with public interest clauses in Australia is also informative. The Australian Antidumping Authority has never made a recommendation on public interest grounds. However, there have been some cases where antidumping duties could have been imposed, but exporters were given only a "warning". In these cases it appears to have concluded that taking action was not in the public interest. If it is brought to the Antidumping Authority's attention that exports from a source which have been given a warning have increased and appear to be dumped, it will undertake a fast-track inquiry. This process, called the "Sorbitol-approach", was first used in a case involving a chemical product, sorbitol, from a number of sources. It has also been applied with respect to canned ham (2 companies), automotive lead acid storage batteries (3 companies), polyvinyl chloride (14 companies) and triethanolamine (2 companies). Whether this "surveillance" approach will have a less trade restrictive effect than the imposition of a duty clearly depends on the reaction of the exporters concerned. Evidence drawn from the EU context suggests that surveillance of imports can have trade restrictive effects (Winters, 1994b).

(iii) Defining de minimis requirements. According to the current GATT Agreement, investigating authorities are not supposed to take any action against insignificant increases in dumped imports or insignificant price undercutting. However, allowance is made for the imposition of duties if the cumulation of a number of such insignificant exporters causes injury. Governments interested in reducing the anticompetitive effects of antidumping can introduce much higher de minimis standards than those required in the GATT Agreement. A necessary condition for the imposition of duties should be that an exporter have a significant market share. Concepts developed and employed in the antitrust area can again be useful. Thus, a dominant position by a foreign firm or group of firms (e.g., a cartel) could be made a necessary condition for taking action.124

(iv) Use price-based instruments if protection is to be imposed. The reasons for this are straightforward. Experience suggests that many antidumping investigations ultimately result in the negotiation of a market sharing agreement between the domestic and foreign industry. Use of a tariff ensures that protection will be more transparent, and that foreign firms at least do not face an absolute limit as far as access to the market is concerned. Moreover, use of a tariff increases the incentive for

124 Dominance has been defined in various ways in national laws: some states opt for a 30% threshold, others for 40%, etc. Some also employ three- or five-firm concentration criteria/indices. Whatever the criteria, clearly the thresholds used by competition authorities are much higher than the market shares required under the GATT Agreement.
foreign producers to oppose antidumping measures, and push for reviews. The use of price undertaking and similar agreements is likely to reduce competition below what will result from the use of a tariff.

Countervailing Subsidies

GATT makes explicit provision for the countervailing of subsidized imports that are injurious to a domestic import-competing industry. As is the case with the BOP articles, antidumping, or industry-specific safeguard measures, imposition of a countervailing duty (CVD) is an option, not a GATT obligation. The option is there—the same applies to antidumping—because when the GATT was initially drafted a number of its provisions were largely lifted from or made consistent with U.S. trade law, which allowed for CVDs. The first issue for a government then is to decide whether exercising the option is beneficial for its economy. If standard economic welfare criteria are applied, the case for application of CVDs is very weak, to say the least. This is because essentially a foreign subsidy on a good that is imported is a direct transfer from foreign taxpayers to domestic consumers of the good. If the importing country is small in the sense of not being able to affect its terms of trade for the good involved, levying a CVD on a subsidized import that offsets the subsidy may 'level the playing field' for the domestic industry that is negatively affected by it, but does so at the cost of introducing a deadweight distortion at the same time. Even if this loss is deemed acceptable by the government, it is generally very difficult to determine both the size of a subsidy per unit of imports, and more importantly, its effect. It is likely that in practice a CVD will 'over-correct' and thus distort production decisions.

More generally, CVDs are analogous to antidumping in that they create the potential for all kinds of perverse incentive effects for domestic industries. It should be mentioned that if an importing country is large, levying a tariff can be welfare enhancing. But this is simply because it is able to affect its terms of trade; the existence of the foreign subsidy is irrelevant (Deardorff and Stern, 1987). If an importing country government seeks to protect an industry from the effects of foreign subsidy practices, the appropriate second-best policy is an income transfer/subsidy. If this is not possible, general safeguard mechanisms should be used, not specific CVD procedures.

Competition Policies, Nondiscrimination and Contestability of Markets

The design of trade laws and institutions is important not only to ensure that trade liberalization is not offset by other policies, but also to reduce the likelihood that a major trading partner will cut off market access in the future through antidumping or similar actions. Exporting firms must understand and be able to anticipate possible strategies by firms located in import markets to use antidumping actions, or to claim that newly privatized firms continue to benefit from subsidies that were granted in the past. It is important in this connection that positive actions are taken to increase the contestability of the exporters domestic, home market. As noted earlier, in practice an implicit or explicit rationale for contingent protection offered by proponents of such actions is that exporters have an 'unfair' advantage because they produce in protected home markets. This suggests another rationale for liberalizing access to the domestic market by eliminating quotas and rationalizing and lowering tariffs to the levels maintained by OECD countries, or ideally, even lower.
Competition authorities can act as the ‘conscience’ of the government, recognizing and publicizing the costs to consumers of government policies and actions that restrict competition.\textsuperscript{125} Trade policy is one obvious area that should be given priority in this connection, the service sector another. Competition policy offices could consider actively applying antitrust law in the light of maintained trade policies (e.g., accounting for the effect of protection on market structure, concentration, etc.). Much can be done in this connection through appropriate wording of criteria and implementation guidelines within the framework of currently existing legislation. For example, trade policy considerations can be linked to the definition of the relevant antitrust market.\textsuperscript{126} In principle, the more an industry is protected, the narrower could be the definition of the relevant market, thereby reducing the expected profitability of seeking protection, and thus the incentive to lobby for it. In a similar vein, GATT illegal or ‘grey-area’ measures such as voluntary export restraint and import expansion agreements should be publicly stated to be unenforceable, and subject to competition policy enforcement. De minimis provisions can also be related to the trade policy stance that affects an industry. The more liberal are market access conditions for foreign firms/products, the higher can be the threshold that is applied.

Competition offices have two ways of ‘internalizing’ trade policy. The first is to oppose trade policies that excessively harm competition on the domestic market; the second is countervail the anticompetitive effect of trade policy on an \textit{ex post} basis. The first, ‘direct’ approach has been actively pursued by a number of the CEEC competition offices. In this they compare very well to competition offices in OECD countries, who are much less visible. By commenting on or opposing suggested or existing trade policies, the competition offices ensure that the economy-wide implications of sectoral policies/lobbying are recognized and discussed. The main power of competition offices is, however, of an \textit{ex post} nature. Active enforcement, with guidelines that clearly specify that trade policy will be an important consideration in the implementing competition laws, will help bolster the effectiveness of \textit{ex ante} opposition to policy proposals that restrict access to markets.

Liberalizing access to the service sector may be of particular relevance in this connection. Perceived restrictions on access to distribution channels and related services is sometimes held to be one justification for the imposition of antidumping measures. Whatever the impact on contingent protection actions in export markets, it is very important that antitrust authorities actively pursue a strategy of fostering the contestability of service markets. Services are especially important in the process of economic development in their role of inputs into the production process generally. Service markets are often characterized by proximity requirements (prohibiting trade and implying that competition is local), asymmetric information and imperfect competition.\textsuperscript{127} Reputation is often crucial in signalling quality to consumers, and as reputation is difficult to establish (being a sunk

\textsuperscript{125} What follows draws on Hoekman and Mavroidis (1994b).

\textsuperscript{126} Authorities have substantial latitude in this connection, as the relevant market is not clearly defined in any of the laws. In most jurisdictions the concept is defined through case law and administrative practice.

\textsuperscript{127} See Sapir, Buigues and Jaquemin (1993) for a discussion.
cost), service markets may be difficult to contest. Pervasive product differentiation may further enhance the market power of incumbent firms. While it may be the case that for certain regulated services it is necessary to ensure that quality standards are satisfied, the competition authorities should attempt to ensure that ‘consumer safety justifications’ do not act to bolster the market power of incumbent firms by having a protectionist effect.

A lesson that can be drawn from the past decade’s experience with privatization of service industries in both developed and developing countries is that many services that were (are) provided by the public sector can also be provided by the private sector, often at much lower cost. This does not necessarily imply transfer of ownership of assets, or the absence of regulatory oversight. What it does imply is the adoption of institutions making such markets contestable. Development of an efficient economy requires that domestic residents—both final consumers and businesses—have access to high quality services for the lowest possible price. Foreign investors can make a significant contribution to the improvement of the efficiency of both ‘public’ infrastructure and other services. However, care must be taken that foreign service corporations do not establish a dominant position and exploit their market power. It is therefore important that markets remain contestable. In practice this implies that no restrictions should be placed on the number of foreign firms that are allowed to offer specific services. Entry should be free, subject to prudential supervision as deemed necessary, as the most effective source of competition for many foreign service affiliates is likely to be (the threat of entry by) other foreign or local service corporations.

National Treatment, Harmonization and Mutual Recognition of Regulatory Regimes

National treatment of foreign firms is a necessary condition to ensure a ‘level playing field’ for foreign and domestic firms. National treatment is of course required for goods under the GATT. But it is not a requirement insofar as establishment (inward FDI) by foreign firms is concerned, although under the GATS, countries may make such commitments for specific service industries. One area where national treatment often tends not to be applied is with regard to government procurement. The general effect of discriminatory government procurement policies is to protect domestic industries. As a result, they are often considered to be analogous to a tariff, especially when expressed as in terms of a price preference (see, e.g., Herander, 1982). The WTO’s Plurilateral Agreement on government procurement requires national treatment in the granting of contracts but applies only to those countries that decide to sign it. Nonsignatories should sign the agreement, as national treatment and the implementation of the tendering procedures required are likely to be welfare enhancing.128

128 In principle, procurement costs may be lowered by pursuing price preferences if domestic firms have a competitive disadvantage in producing the product, and only a limited number of firms (foreign and domestic) bid for the contract. In the absence of a preference policy, in such a context foreign firms may exploit their cost advantage by bidding just below what they expect domestic firms to bid, which will be substantially higher than their actual cost. A price preference policy will force foreign firms to lower their bids, as it increases the effective competition from domestic firms. For a price preference scheme to reduce average procurement costs it is necessary that the government have information on the costs of foreign and domestic firms. In practice discriminatory government policies can be expected to be more costly than a national treatment policy.
A key question facing developing countries is how to approach the issue of ‘harmonization’ of domestic regulatory regimes with those applied in major trading partners. Questions relating to environmental, labor, and product/production standards have become increasingly prominent trade policy issues in recent years. They are important, as implicitly or explicitly they are becoming linked to market access. Ultimately what is at stake is the possibility of being confronted with allegations equivalent to ‘social’ or ‘environmental’ dumping. This is one of the factors that may lead countries to seek to negotiate trade agreements with major OECD trading partners. In general it is clear that countries should be very wary about requests/demands for harmonization (Bhagwati, 1994).

Governments should certainly consider going beyond the WTO requirements and recommendations to adopt internationally recognized norms and technical regulations pertaining to product specifications, safety requirements, health standards, etc. Satisfying these objectives is of course already a major task, both for countries that are currently not yet heavily ‘standardized’, and those such as Russia and the FSU where many existing standards and technical regulations do not conform with ISO norms. As important as the adoption of ISO standards is the negotiation of mutual recognition agreements relating to both standards (if different from ISO) and the testing and certification bodies in the respective countries. Encouraging the use—and thus the establishment—of private firms that specialize in testing and certification of both products and production processes will help stimulate trade flows.

Regional Free Trade Agreements: The EU Model?

Many of the ‘good practices’ that were discussed in the beginning of this Section are standards elements of recent regional integration agreements (RIAs). Indeed, policies that apply to trade within an RIA may go far beyond the proposed good practices. In the EU there are no tariffs, no safeguard mechanisms, and full ‘binding’ of policies as a result of the existence of the ECJ. To a large extent the current benchmark for good practice in trade policy is the set of policies and rules that apply to movement of goods, services and factors inside the EU (or European Economic Area). The NAFTA is tentatively following down the EU path, again, of course, for intra-area flows only. The global trend is clearly in the direction of less intervention in trade. The recent RIAs (EU, the NAFTA, the Australia-New Zealand Closer Economic Relations Trade Agreement) suggest that if only to ‘keep up’, governments continue to pursue a unilateral strategy of gradually increasing the contestability of domestic markets.

At the same time, pursuit of integration with the EU may help in moving towards the adoption of ‘better’ practices. Much depends on the details of such of agreements, however, as is illustrated by the recent vintages of the Association Agreements the EU has concluded with especially when no competitive tendering is sought or there is an absolute preference for domestic suppliers.

However, this is certainly not the case as regards EU trade policies that apply to non-member countries, or the institutions that develop these policies. Although what follows focuses on the EU the issues addressed are quite general.
neighboring Central and Eastern European countries (CEECs). As the EU is clearly the primary entity of relevance to the countries in the ECA/MNA regions, a brief discussion of the 'EU-model' is in order. Deeper EU integration of markets, including service markets, can be expected to enhance the competitiveness of the firms located in the EU—whether producers of goods or services. The associated cost reductions and income gains increases the attractiveness of the region as a market, and reduces the relative attractiveness of neighboring countries as a platform for export-oriented FDI. These developments increase the potential gains from pursuing a FTA with the EU. It can help in locking-in trade policy reforms and increasing their credibility. It may also give greater security of market access, and enhancing the attractiveness of the country for inward FDI as the result of the adoption of a more EU-compatible regulatory environment.

While potentially beneficial, preferential liberalization among a subset of countries is inferior to multilateral liberalization. A corollary of this is that if a free trade agreement is sought with the EU, the trade policy stance maintained vis-a-vis the rest of the world should be similar to that applied to the EU. That is, FTAs should be used to facilitate nondiscriminatory, multilateral liberalization. In order to ensure that costly trade diversion does not eliminate many of the potential welfare gains associated with opening up the domestic market to competition from European firms, it is important that tariffs are lowered on a nondiscriminatory basis. The additional 'costs' of doing so—in terms of adjustment pressures and transitional unemployment as resources are reallocated—should be minimal, as domestic industries will be confronted with a significant rise in competitive pressure from EU-based firms. And, of course, the movement towards free trade with the EU will be implemented gradually in any event, spreading such adjustment costs over at least a decade.¹³⁰

Maintaining a multilateral perspective is also important because a FTA will rarely imply free trade. Thus, in practice trade in agricultural produce is invariably excluded from liberalization provisions of agreements concluded by the EU. The Central and East European experience in negotiating Association Agreements with the EU (so-called Europe Agreements) illustrates that obtaining access in products in which the partner country is competitive can run into strong opposition by vested interests in the EU. 'Sensitive' sectors in the EU can be expected to insist upon 'special' treatment. At a minimum this will imply long phase-in periods for liberalization in these areas, accompanied with safeguard mechanisms that are likely to put an upper bound on market share growth of Associated countries. Table 3 provides an illustration of what was negotiated by the CEECs with the EU.

¹³⁰ Thus, a recent World Bank study has concluded that the welfare benefits of trade liberalization by Morocco almost double if such liberalization applies to all potential trading partners and not just to the EU (Rutherford, Rutstrom and Tarr, 1993). The study also concludes that the costs associated with such global liberalization are not significantly higher than those that will result from free trade with the EU. The reason for this is that the inefficient sectoral adjustments induced by a preferential agreement with the EU (the trade diversion) do not occur if liberalization is nondiscriminatory. This does not mean that an Association Agreement involving free trade with the EU without any liberalization of barriers against imports from the rest of the world would not be in Morocco's interest. Welfare of Morocco would rise substantially. The point is that such benefits will be much higher under nondiscriminatory liberalization.
Given that most countries around the EU already have duty-free access for industrial products, it is the safeguards aspect of an agreement that counts for merchandise trade flows. The Europe agreements contain a large number of articles of a safeguard nature. The primary safeguard mechanism for industrial goods allows actions to be taken if imports from a CEEC cause or threaten serious injury to EU producers of like producers or serious disturbance in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region. This is very broad language, and is much wider in scope than similar provisions that are embodied in the GATT. The concepts (criteria) are also not defined, nor is reference made to the GATT for guidance. The agreements also allow for antidumping actions to be taken, consistent with GATT obligations, as well as actions to safeguard public health, safety and morals, and to safeguard the balance of payments. Balance of payments safeguards are not to affect transfers related to foreign direct investment from the EC or repatriation or divestment. Pending negotiated solutions, actions may be taken to restrict imports of agricultural produce if these cause serious disturbance in importing country markets.131

The rules of origin that are agreed will be important in determining the potential for gains of a FTA. In the agreements between the EU and the CEECs, a product is considered "domestic" if processing of foreign inputs is sufficient to lead to a change in the four-digit tariff heading and/or if a local content (value added) threshold is satisfied. In many cases the local content requirement is 60%. The Europe agreements are similar to the 1973 EC-EFTA free trade agreements in that cumulation is not allowed. Thus, content requirements do not apply to the Central and East European countries as a group, but to each individual country. This is in part a reflection of the fact that each agreement is a bilateral one between the EU and a Central and East European country. The only thing that is allowed for in the agreements is that if a product is shipped from one Central and East European partner country to another where it does not undergo sufficient processing for origin status to be conferred, the product will nonetheless be considered as originating in the second Central and East European country if it is shipped to the EC.132

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131 The CEECs may temporarily protect infant industries or sectors under economic restructuring, subject to a number of conditions (tariffs are not to exceed 25%, EC producers are to be given a margin of preference, quotas are not to exceed 15% of the total industrial imports from the EC, and actions may only be taken within three years of liberalization of market access and are not to last more than five years).

132 At the June 1993 Copenhagen summit, the EU indicated that it might be prepared to reduce the restrictiveness of its rules of origin regime by allowing cumulation. The Commission was asked to study the issue and to make recommendations for cumulation with both EFTA and Central and East European partner countries. After a lengthy internal debate, the Commission approved a number of changes to its rules of origin in late 1994. Products containing at least 40 percent value added in three of the six CEECs will satisfy EU origin requirements. A commitment was made to introduce "diagonal" cumulation between the EU/EFTA countries and the CEECs as a second step. This excludes products made by non-European owned production units located in the CEECs. The Commission was unable to commit to a date for full cumulation, i.e., based on location rather than ownership of plants (Financial Times, November 29 and December 2, 1994).
Table 3: EU Tariff and Quota Reductions under the Europe Agreements

<table>
<thead>
<tr>
<th>Product category</th>
<th>Explanatory notes</th>
<th>Date of full duty elimination and mode of reduction</th>
<th>Quantitative restrictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-sensitive industrial goods</td>
<td>Entry into force of interim agreements (March 1992 for first three signatories) (a few items by 1993)</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Certain minerals</td>
<td>Minerals and inorganic chemicals</td>
<td>January 1993 two steps of 50%, the first on entry into force</td>
<td>None</td>
</tr>
<tr>
<td>Certain metals</td>
<td>Non-ECSC products, e.g., zinc, aluminum</td>
<td>January 1996 five steps of 20%</td>
<td>None</td>
</tr>
<tr>
<td>Coal</td>
<td>ECSC product</td>
<td>January 1996 two steps of 50%, biannual</td>
<td>Quotas abolished after one year. German/Spanish QRs by 1/11996.</td>
</tr>
<tr>
<td>Iron and steel</td>
<td>ECSC products</td>
<td>January 1996 five steps of 20%</td>
<td>None, abolished upon entry into force of the agreement</td>
</tr>
<tr>
<td>Textiles and clothing</td>
<td>MFA products</td>
<td>January 1998 2/7th in 1993, then five steps of 1/7th. Duties on OPT abolished immediately for products listed in EU Reg. 636/82.</td>
<td>Quota increase of over 70% in 1992 over original MFA quota for 1991. Additional outward processing quotas equivalent to 100% of increased quotas for 1992. Quotas to be phased out in half the period agreed to in the Uruguay Round. Full phase-out by January 1998.</td>
</tr>
<tr>
<td>Other sensitive industrial goods</td>
<td>Footwear, glass, motor vehicles, furniture, non-MFA textiles, Subject to tariff quotas.</td>
<td>January 1997 Out of quota tariffs to be reduced in five steps of 15%, then eliminated. Duty free quotas to expand by 20% per year. Within quota tariffs to be abolished at an unspecified rate over 3 to 5 years. Copenhagen summit (6/93): Duty free quotas to be increased by 30% per year in the second year; within quota tariffs to be abolished in 3 years.</td>
<td>None</td>
</tr>
<tr>
<td>Agricultural products</td>
<td>Regulation 3420/83 products: certain vegetables, fruits, dairy, oils and fats, wine, spirits, tobacco products</td>
<td>No abolition foreseen for most categories</td>
<td>No abolition foreseen for most categories</td>
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<tr>
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<tr>
<td>Ducks, geese, potato starch, preserved meat, sausage</td>
<td>50% within quota levy reduction; tariffs within and above quota unchanged</td>
<td>Quotas abolished.</td>
<td>Tariff quotas increased by one-third over 5 years.</td>
</tr>
<tr>
<td>Meat, cut flowers, certain vegetables and soft fruits</td>
<td>30% average tariff reduction; minimum import prices for certain soft fruits for processing not changed</td>
<td>None.</td>
<td>Global reference quantity, rising by about 10% per year up to 1996.</td>
</tr>
<tr>
<td>Live bovine animals</td>
<td>If imports are lower in a given year than a global reference quantity, Visegrad countries may make up the balance, paying only 25% of the normal within quota levy (does not apply to Bulgaria or Romania).</td>
<td>Tariff quotas increased by roughly 40% over 5 years.</td>
<td>Tariff quotas increased by roughly 40% over 5 years.</td>
</tr>
<tr>
<td>Live animals (non-bovine) and meat thereof, dairy products, buckwheat</td>
<td>Levy within quota reduced by 60% over 3 years; tariff above quota unchanged</td>
<td>Tariff quotas increased by roughly 40% over 5 years.</td>
<td>Tariff quotas increased by roughly 40% over 5 years.</td>
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<tr>
<td>Vegetables, fruits, jam</td>
<td>Tariffs within quota reduced by 50% over two years.</td>
<td>Tariff quotas, if applicable, to be increased by 50% over 5 years (January 1996).</td>
<td>Tariff quotas, if applicable, to be increased by 50% over 5 years (January 1996).</td>
</tr>
<tr>
<td>Processed agricultural products, including yoghurt, confectionery, dough, pasta, bread, biscuits, nuts, sauces, beer, wine.</td>
<td>Removal of the non-agricultural component of duties (within quota if applicable). Application of reduced variable levies on about 30% of the covered products that are subject to such levies.</td>
<td>No change in treatment</td>
<td>No change in treatment</td>
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<tr>
<td>All other categories</td>
<td>Adoption of EEC Regulation 3796/81 on the common organization of the market</td>
<td>Adoption of EEC Regulation 3796/81 on the common organization of the market</td>
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Notwithstanding these caveats, an Association Agreement with the EU can be beneficial in terms of 'upgrading' the regulatory environment to be more conducive to private sector development. An important component of the Association Agreements with the CEECs concerns the liberalization of the regulatory regime pertaining to capital flows (especially foreign direct investment), increasing the contestability of service markets, and the application of competition law. As such policies almost by definition are applied on a nondiscriminatory basis—in that they apply to actors located within the state's territory—there is less need for concern regarding possible diversion effects and costs.

Indeed, although improved access to EU markets is obviously important, it is probably not the primary source of benefit. Potential benefits of a FTA with the EU are likely to be driven very much by the concomitant reduction in barriers to imports and inward foreign direct investment in the partner country. The CEECs have agreed to allow establishment by EU-based firms in virtually all sectors of economic activity. Although transitional arrangements and temporary exceptions were negotiated, the number of sectors excluded indefinitely are very limited (largely restricted to agricultural land, natural resources and historical monuments). The arguments in favor of such an all-encompassing approach, with a very short negative list of exceptions, are strong. In many sectors—both tradable and non-tradable (services)—establishment is the most direct method of enhancing competition and efficiency, subject to the caveat that appropriate regulatory structures are put in place first. The immediate need for a partner country is to decide whether it is ready to accept freedom of establishment and national treatment obligations in principle, and to determine which industries or activities it wishes to liberalize more gradually. The latter decision in part will have to be a function of the adequacy of the regulatory regimes that are required in an open environment.

The Europe Agreements devote much attention to the approximation of laws and the implementation of EU competition policy disciplines. The basic competition rules of the EU must be adopted by the CEECs, in particular with respect to collusive behavior, abuse of dominant position, public undertakings and competition-distorting state aid (Articles 85, 86, 90 and 92 of the EEC Treaty), insofar as they affect trade between the Community and each Central and East European country.133 State-aid, compatible with EU rules for disadvantaged regions (Article 92.3(a) EEC), can be applied to the entire territories of the associated states during the first five years. The agreements also provide for enhanced transparency of state aids, each party agreeing to provide annual reports on the total amount and distribution of the aid given.

Adoption of Europe Agreement-type requirements to completely liberalize trade in goods and services and factors of production, and to adopt EU-consistent competition policies and subsidy disciplines will have major implications for most countries in the ECA/MNA region. Abstracting from the EU's common agricultural policy—where participation is clearly a non-issue—adoption of EU disciplines of the kind that apply to intra-EU trade and investment flows should facilitate export development by establishing a regulatory environment that is more conducive to competition. The increasing trend towards more stringent standards and regulations that are applied on an EU-wide

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basis further enhances the potential pay-off of harmonizing domestic product standards as much as possible with those of the EU, and obtaining mutual recognition of testing and certification bodies.

That being said, a FTA or Association Agreement with the EU is no panacea. The government of a partner country cannot—even if it were willing to!—rely on the disciplines of an agreement with the EU to create an environment that is supportive of private investment and fosters economic growth. An FTA can help achieve this objective to some extent by partially constraining the use of some instruments, especially trade and investment policy—i.e., the possibility to discriminate against EU firms—but many other instruments remain. Trade policies vis-a-vis third parties, macroeconomic policy, labor market policy, tax policies, and so forth are not affected, and remain the responsibility of the government. Moreover, in many dimensions an agreement will only require national treatment, i.e., the obligation not to discriminate between foreign and domestic firms. But national treatment will often not be enough to attract inward FDI. Similarly, national treatment may not be enough to ensure that domestic firms will have adequate opportunities to compete with EU-based exporters for the local market. It is important that existing policies that unnecessarily reduce the competitiveness of domestic firms be eliminated.

VIII. Conclusions

This paper has summarized WTO rules and disciplines and explored their relevance for governments that are seeking to adopt a neutral policy stance so as to foster greater integration with the world economy. The creation of the WTO extends the scope of multilaterally agreed rules to policies affecting access to service markets and the protection and enforcement of intellectual property rights. Membership of the WTO constrains policy options, and imposes a large number of institutional requirements. The GATT has been expanded with agreements on rules of origin, TRIMs, safeguards, sanitary and phyto-sanitary measures, and preshipment inspection. The Tokyo round codes dealing with subsidies, product standards, antidumping, import licensing, and customs valuation were strengthened and their reach extended to all GATT Members. Although transitional periods were agreed to in many areas to allow developing countries more time to satisfy the various institutional and substantive requirements, much will need to be done. New Members of the WTO—those that are presently seeking accession—confront a rather daunting agenda.

The WTO’s policy disciplines and institutional obligations are to a large extent efficiency enhancing. Nondiscrimination and the many transparency provisions will reduce uncertainty in the market place as regards the applicable rules and procedures that must be satisfied in the import process. Perhaps the most important potential beneficial aspect of WTO membership is that it can be used as a pre-commitment device by governments that seek to enhance the credibility of a liberal trade policy stance and/or reform program. This will not be an automatic consequence of accession to—and membership of—the WTO, however, but requires unilateral decisions/Measures. Actions that could be taken in this connection include:

- Bind tariffs under the GATT at applied rates. If a country is in the process of trade liberalization, a decision to bind tariffs each time they are lowered will signal the importance that is
attached to fundamentally changing the policy regime. Similarly, sectoral commitments under the GATS should be comprehensive, at a minimum locking in the status quo regulatory regime for all services. Currently, developing countries on average have scheduled (i.e., bound the status quo) for only ten percent of their service sectors, let alone made liberalization commitments.

- Public disinvocation of GATT's traditional special and differential treatment provisions will also help enhance credibility. New Members of the WTO can do this by making this part of their Protocol of Accession. It implies full application of the agreements on customs valuation, standards, TRIMs, as well as participation in the government procurement agreement, adherence to the general rules relating to regional integration.

- Ensure that safeguard instruments are designed in a way that minimizes the scope for easy re-imposition of protection. Ideally only one such instrument should be available to the domestic industry, and criteria should be such to ensure that all interests are considered before protection is imposed, and procedures reduce as much as possible the likelihood of protectionist bias. A major potential problem in this connection are antidumping provisions. The experience with this instrument in a number of OECD countries amply illustrates that antidumping is difficult to control. An antidumping statute that is not very carefully designed and administered can substantially reduce the credibility of trade reform. From a domestic efficiency perspective, antidumping is one of the weakest links in the GATT.

- Create a 'transparency' institution that has a statutory mandate to analyze the economic effects of existing and proposed trade policies. This should include a requirement to monitor the use of contingent protection, and evaluate its impact on the competitiveness of export industries and consumers more generally.

- Explore the option of joining regional trade agreements that result in total free trade in goods, services, and capital. Such agreements can be useful as a supplemental credibility enhancing device to support more general, nondiscriminatory opening of the economy. In areas such as policies pertaining to foreign investment and capital flows, trade and investment in services, and the application of competition policies, bilateral or regional agreements can go much further than current WTO rules. The crucial issue here is to limit the associated potential costs by applying the rules that pertain to regional partner countries to the rest of the world as well.

The WTO is not a panacea for governments as far as trade policy and institutions are concerned; neither are free trade agreements. Unilateral decisions concerning the policies and the trade laws and institutions that are maintained remain a key determinant of economic performance. Eliminating the regulatory barriers that constrain the ability of domestic industries to exploit the opportunities for specialization offered by full integration into the world economy requires more than WTO-consistency. Given a decision to liberalize trade and investment, the WTO can play a helpful role, especially as a credibility enhancing mechanism. But very much will continue to depend on the policies that are pursued independently by governments.
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