The GATT-WTO System at Fifty

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THE GATT-WTO SYSTEM AT FIFTY

KEVIN C. KENNEDY*

I. INTRODUCTION

On January 1, 1998, the General Agreement on Tariffs and Trade-World Trade Organization ("GATT-WTO") system celebrated its 50th anniversary. The importance of the GATT-WTO system to opening international markets for goods, services, and capital, in addition to providing secure and predictable access, cannot be overestimated. Every business considering foreign markets for its goods, services, or capital needs answers to a host of vitally important questions before moving forward. The first question is whether market access exists. If a target market is closed to foreign goods, services, or investment, then further inquiries are moot. Assuming that access to a foreign market exists, the next question is how open is that market? What barriers to trade will be encountered as a business enters a foreign market? Will foreign laws discriminate in favor of local competitors? If a foreign business becomes too successful, what, if anything, prevents the importing or host country from enacting laws or adopting regulations that restrict or deny foreign businesses continued access to its market? How certain is the legal environment for trade and investment? Do international rules exist to prevent a rollback on market access? If they do exist, are they sufficiently predictable that strategic business planning is possible?

In many respects, the GATT-WTO system ensures access to international markets, levels the playing field among international competitors, and establishes predictable law for U.S. businesses. The core rationale for the GATT-WTO system is to open markets. For its first two decades, the General Agreement on Tariffs and Trade focused on reducing tariffs and eliminating import quotas on goods, the leading trade-protectionist devices used to shield domestic industries from import competition. By the mid-1960s, as tariff levels declined and as quotas were reduced or eliminated, governments resorted to a variety of non-tariff barriers to trade ("NTBs") to protect their domestic industries. Among these were antidumping duties, countervailing duties, products standards, and valuation of goods. In 1979, with the conclusion of the GATT-sponsored Tokyo Multilateral Trade Negotiations Round, many of these NTBs were addressed through a series of side agreements or "Codes" that were designed

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to keep the playing field level. With tariffs and NTBs in decline as effective trade protectionist devices, governments turned to “gray area” measures – most notably, voluntary restraint agreements (“VRAs”) – to circumvent the Tokyo Round commitments and to protect domestic firms.\(^1\) With the conclusion of the Uruguay Multilateral Trade Negotiations Round in 1994, VRAs were made illegal unless concluded under the strict criteria set out in the Uruguay Round Agreement on Safeguards.\(^2\) Today, countries are once again in search of new ways to protect their workers and industries; two of the most popular are minimum labor and environmental standards.

This paper describes the market access created by the GATT-WTO system over the past five decades, as well as the legal disciplines it brings to international trade. These legal disciplines not only ensure market access for goods and services, but they also restrict governments’ ability to adopt protectionist laws and regulations that impede or block international trade and foreign investment. This paper begins with a background discussion on the GATT-WTO system. It then examines the Uruguay Round agreements on market access and the regulation of NTBs.

II. THE GENERAL AGREEMENT ON TARIFFS AND TRADE

A. A Brief History of GATT

GATT traces its origins to 1944. In that year, at Bretton Woods, New Hampshire, the delegates of the United States and the United Kingdom proposed a comprehensive economic and financial plan for post-World War II reconstruction and development. The delegates envisioned the formation of three international economic and financial institutions. Two of them, the World Bank (“Bank”) and the International Monetary Fund (“IMF”), were created to address development and monetary issues. The International Trade Organization (“ITO”) rounded out the institutional triad. GATT was to serve as an interim agreement until the ITO and its founding document, the Havana Charter, could be approved by national legislatures.\(^3\)

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In September 1946, the United States drafted a proposed Charter that became the basis for discussions at the First Session of the Preparatory Committee on the Havana Charter. Effective January 1, 1948, national representatives provisionally approved GATT in an effort to expedite international negotiations on tariff reductions, and their implementation, pending approval of the Havana Charter by national legislatures. President Truman approved it on behalf of the United States pursuant to authority granted under the Reciprocal Trade Agreements Act of 1934.

GATT Article XXIX makes it plain that GATT was not intended by its drafters to function on a permanent basis. Its drafters contemplated that once the Havana Charter entered into force, and with it the ITO, Part II of GATT, which contains the bulk of the international legal commitments (other than the MFN obligation and tariff commitments), would be suspended. The Havana Charter was a far more complete document than GATT. It contained provisions relating to employment, economic development, restrictive business practices, and dispute resolution under ITO auspices.

The Havana Charter never entered into force. In fact, the United Nations, the depositary for Charter accessions, received no acceptances of the Charter. Once it became clear that the Havana Charter had no chance of being approved by the neo-isolationist U.S. Senate, the State Department issued a statement that the Charter would not be submitted again to Congress. As a consequence, GATT was pressed into service by default to fill the institutional vacuum, despite its shortcomings. Nevertheless, for nearly five decades, GATT became the centerpiece of international trade
law, doubling as a multilateral trade agreement and an international trade forum for its 114 contracting parties.

B. GATT's Basic Economic Premise

Although not explicitly stated in GATT, the guiding economic premise that underlies the entire GATT-WTO system is open trade. One commentator has explained open trade (sometimes referred to as liberal trade) in the following terms:

In a liberal economic system, government does not thwart private parties in their attempts to enter voluntary transactions, and taxes are stable, predictable, and nonprohibitive. The General Agreement on Tariffs and Trade (GATT) is liberal in this sense. Interventions [by governments] in liberal exchange across frontiers to make trade fair may be the political price of liberalism, but such interventions are themselves its antithesis.  

Why did open trade become GATT's desideratum? The answer is short but compelling. By exploiting the law of comparative advantage, liberal trade policies permit the unrestricted flow of the best goods and services at the lowest prices, thereby increasing total world wealth. Under the law of comparative advantage resources are allocated efficiently across and within industries in response to competitive pressures from imports. Both of these phenomena lead to product specialization and increased firm size, which in turn lowers the unit cost of goods and services.

The role that multilateral trade rules play in fostering liberal trade manifests itself in two important ways. First, specialization and economies of scale become possible because of secure access to a barrier-free international market. Second, increased international competition leads to product and process innovation, further reducing costs and expanding consumer choices.  

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8 For a collection of the classical and contemporary arguments in support of free trade and the arguments for protectionism, see RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS 5-78 (1996) [hereinafter BHALA, INTERNATIONAL TRADE LAW]. See also The Miracle of Trade, THE
C. GATT’s Core Legal Principles

How does GATT achieve its goal of promoting liberal trade? It does so primarily through four core legal commitments, sometimes referred to as the four pillars of GATT. They are: (1) the unconditional most-favored-nation (“MFN”) obligation that prohibits importing countries from discriminating against or giving preferences to any other country, regardless of whether the latter has made any trade concessions to the former; (2) the national treatment obligation, which requires that imports be treated the same as the like domestic product insofar as taxes and other domestic regulations are concerned; (3) binding commitments to reduce tariffs on imports; and (4) the elimination of quotas on imports.

As a general proposition, any government regulation of or interference with international trade that deviates from the liberal trade philosophy of GATT is disapproved. But that is true only as a general matter. Despite its commitment to the goal of liberal trade, GATT permits government intervention in the market to regulate or prohibit the flow of goods across national borders under limited circumstances. Besides authorizing the imposition of tariffs on imported goods, GATT also permits deviations from the liberal trade paradigm in three important circumstances.

First, an importing country facing a balance-of-payments shortfall may temporarily impose “quantitative restrictions” (i.e., quotas) on imported goods until its balance-of-payments position improves. Second, domestic industries seriously injured by imports of competing products may receive "safeguard" relief from their home government (known in the United States as Section 201 escape clause relief). Such relief can take the form of a temporary increase in tariffs, the imposition of quotas, or both, on competing imports. The third exception is a set of GATT exceptions. They are found in Articles XX and XXI, covering public health and safety measures, inter alia, and national security, respectively.

GATT 1947 and the trade philosophy it embodies weathered a series of protectionist storms reasonably well over its 50-year history. From its inception GATT never was intended to be a permanent agreement or an international trade organization. Against incredible odds, however, GATT acquitted itself reasonably well in both roles, and its success in promoting

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9 See GATT, supra note 5, art. II:2.
10 See id. art. XII.
12 See GATT, supra note 5, arts. XX, XXI.
trade liberalization is undisputed.

D. GATT's Four Pillars

1. Introduction

The GATT-WTO system is built on four legal principles or "pillars" that support the other legal obligations undertaken by WTO Members. The four pillars of the GATT-WTO system are: (1) the unconditional most-favored nation obligation; (2) tariff bindings; (3) the national treatment obligation; and (4) the elimination of quantitative restrictions.

The unconditional MFN obligation requires that a WTO Member treat imports from a Member on an equal, nondiscriminatory basis vis-a-vis all other Members' imports. The MFN obligation is "unconditional" in the sense that MFN treatment must be accorded all imports from WTO Members, regardless of country of origin, and regardless of whether the exporting Member negotiated reciprocal trade concessions with the importing Member.

The economic rationale for the MFN commitment is the basic, but compelling, one that discrimination can lead to wasteful trade diversion. Without the benefit of the MFN principle, the most efficient producers may not have equal access to a foreign market because of discriminatory trade preferences in favor of less efficient producers from other countries. The unconditional MFN principle fosters economic efficiency by promoting the most efficient allocation of resources and, thereby, lowering costs of production, increasing consumer choices, and promoting world economic growth. Unconditional MFN also serves the important political function of facilitating trade negotiations that would otherwise become extremely knotty if reciprocity were demanded as a condition for receiving the benefits of a trade concession.

The second pillar of the GATT-WTO system is tariff bindings. Tariffs (also known as customs duties) are the one form of trade protection permitted under GATT. In a perfect world of totally liberalized trade any form of government-sanctioned trade protection would be unacceptable. The political reality, however, is that at the time of the birth of the GATT-WTO system in 1947, contracting parties' tariff rates were high in order to protect domestic industries from import competition. Consequently, the progressive liberalization of trade through the gradual reduction of tariffs was the only palatable GATT response.

Besides the political reasons for the existence of tariffs, an economic case can be made for why tariffs are preferable over all other forms of trade protection. Unlike import quotas and other non-tariff barriers to trade, tariffs are "transparent," that is, the level of protection they afford can be readily
and accurately determined. This in turn permits a foreign producer to calculate at what price it will have to sell its goods in order to be competitive in a foreign market. The transparency of tariffs also facilitates trade negotiations by assisting trade negotiators who are often under domestic political pressure to secure reciprocal trade concessions. At a minimum, the exchange of tariff concessions permits a rough apples-to-apples comparison, as well as one domestic interest group to be leveraged against another.

If, in GATT parlance, negotiated tariff concessions are "bound," they cannot be increased above the bound duty rate unless compensation is paid to other adversely affected WTO Members (such compensation will usually take the form of increased duties on goods of export interest to the Member raising its tariff). Tariff bindings enable foreign producers to better plan their entry into an export market by locking in one variable in the price structure – the duty rate imposed on their product at the time of importation. Working hand in glove with tariff bindings is the MFN clause. Through the operation of the unconditional MFN commitment, negotiated tariff concessions are generalized and, thereby, made multilateral.

The third GATT-WTO pillar is the national treatment obligation. The principle of nondiscrimination embodied in the MFN commitment is carried over to the national level, so that Members are required to treat imports no less favorably than the domestic like product respecting internal measures and taxation.

Completing the tetrad of GATT-WTO pillars is the obligation to eliminate quantitative restrictions on imports and exports. This obligation permits the laws of supply and demand to determine the price of goods, rather than allowing prices to be set by an artificial short supply created by a government restriction on the quantity of a product that may be imported or exported.

2. The MFN Commitment

GATT Article I:1 contains the core MFN obligation. Within its scope are four areas of government activity, three that take place at the border and a fourth that deals with goods once they have entered the customs territory of a WTO Member.\textsuperscript{14} The MFN obligation applies equally

\textsuperscript{14} Article I:1 provides that with respect to (1) customs duties and charges of any kind imposed on importation or exportation, (2) the method of levying those duties and charges, (3) all rules and formalities in connection with importation and exportation, and (4) all matters referred to in paragraphs 2 and 4 of Article III concerning national treatment in internal taxation and regulation:

any advantage, favor, privilege or immunity granted by
any contracting party to any product originating in or
destined for any other contracting party shall be accorded
to bound or unbound tariff items. In addition, a Member cannot cite more favorable treatment in one instance to offset less favorable treatment in another instance and, thereby, claim observance of the MFN obligation on balance. If imports from two WTO Members are “like products,” then those imports are entitled to identical treatment regardless of their country of origin.

3. Tariff Bindings

The crowning achievement of the GATT-WTO system has been the progressive reduction of tariff levels over the course of its 50-year history. Tariffs or customs duties on imported goods are the only form of trade protection that the GATT-WTO system does not specifically prohibit. Rather, the imposition of tariffs is permitted with very few qualifications, the most important being that they be imposed on an MFN basis.

The GATT preamble and Article XXVIII bis provide for multilateral tariff negotiations to reduce existing tariff rates and to bind tariff concessions. When tariff concessions are “bound,” the duties assessed on the “bound” items may not be greater than the bound rate. Bindings are a legal guarantee that tariffs will not be increased above the maximum tariff level. Members are free to set a tariff at any level they wish below the bound rate without prejudice to their right to increase the tariff to the bound rate at

immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The text of Article I: 1 is plain that the rule of nondiscrimination among WTO Members applies unconditionally. See WTO Agreement, supra note 2, art. I: 1.


Because no definition of the term “like product” is included in GATT, decisions on this question are made on a case-by-case basis after applying a variety of criteria that GATT panels have found to be relevant, including the product’s end-uses in a particular market, consumer tastes and habits, and the product’s characteristics. See, e.g., Report of the GATT Working Party, Border Tax Adjustments, GATT B.I.S.D. (18th Supp.) at 97, 102 (1970). See generally Rex J. Zedalis, A Theory of the GATT “Like Product” Common Language Cases, 27 Vand. J. Transnat’l L. 33 (1994).

GATT Article II: 1(a) sets out this basic obligation:

Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than

that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

See WTO Agreement, supra note 2, art II: 1.

It is possible to make a tariff concession without entering into a binding on that concession. Until the Uruguay Round, most developing-country tariff rates were not bound. Because tariffs are relatively easy to administer and can be revenue raising if not trade prohibitive, they are the trade barrier of choice for most developing countries.
a later date. With bound tariff rates exporters can price goods destined for a foreign market knowing exactly what the duty rate on the goods will be when they arrive at the foreign destination, thus keeping an important element of an item's total price fixed.

If an importing Member raises a duty rate above the bound tariff rate, adversely affected trading partners are entitled to compensation. Compensation can include tariff reductions by the importing Member on goods of export interest to adversely affected exporting Members, or it can be retaliatory and take the form of increased tariffs by the adversely affected Member on items of special interest to exporters in the Member making the tariff withdrawal.

Besides encouraging the reduction of tariff levels, the GATT-WTO system recognizes tariffs as the only form of permissible financial charge that may be imposed on imported goods. It undergirds this policy through other GATT articles, such as Article III, prohibiting discriminatory internal taxes, and Article VII, prohibiting excessive charges associated with customs procedures.

Once tariff concessions are negotiated, insuring their integrity and preventing their circumvention is one of the main objectives of the GATT-WTO system. This objective is accomplished in several ways, including through the unconditional MFN commitment and rules on valuation. Regarding the mutually supporting roles that GATT Articles I and II play for each other, the unconditional MFN obligation ensures that if Member A has negotiated specific tariff reductions on goods it exports to Member B in exchange for tariff cuts on goods that Member B exports to Member A, Member A can rest assured that it will not lose the benefit of its bargain if Member B thereafter negotiates an even lower tariff rate on those same goods with Member C. Unconditional MFN ensures that goods originating from Member A will receive the same tariff treatment from Member B that Member B accords to goods originating from Member C.

In order to prevent circumvention of tariff bindings through devices that either improperly inflate the price of imported goods or lower the price of the domestic like product, GATT employs a number of devices, including (1) rules on valuation that prevent an importing country from overvaluing imported items and thereby wiping out the benefit of any tariff concession,20 (2) rules on national treatment that require imported items and the like domestic product to be treated equally for purposes of internal taxes and regulations,21 and (3) rules on government subsidies to local industries.

21 See WTO Agreement, supra note 2, art. III.
where such subsidies can have the effect of lowering the price of domestically produced goods to the competitive disadvantage of the imported like product.22

A fourth innovation to prevent circumvention of tariff bindings was introduced in 1994. Prior to 1994, a contracting party was not required under GATT 1947 to record with GATT its “other duties or charges” under Article II. This lack of transparency made it difficult for other contracting parties to determine if a contracting party was in violation of its Article II obligations regarding such duties and charges. However, the Uruguay Round Understanding on the Interpretation of Article II:1(b) required Members to record in their schedule of concessions all such “other duties or charges” levied on bound tariff items. All such recorded charges and duties are bound, and the assessment of any new or omitted “other duties or charges” on bound tariff items is prohibited.23 The 1994 Understanding further required Members to record in their schedule of concessions the nature and level of all other duties or charges, regardless of whether those duties and charges are imposed on bound items or on imports generally. Such recordation is without prejudice to the right of other WTO Members to challenge at any time the GATT-consistency of such “other duties or charges.”24

4. The National Treatment Obligation

The Article III national treatment obligation is the third pillar in the GATT-WTO system. National treatment clauses were standard in bilateral treaties of friendship, commerce, and navigation concluded between the United States and many of its trading partners, and are thus not unique to the

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24 To prevent the erosion of the benefit of tariff concessions, Article II:3 provides that “[n]o contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.” WTO Agreement, supra note 2, art. II:3. Without this restriction, a WTO Member that had made a 10-percent concession on tariffs could wipe out the benefit of the concession by altering its valuation or currency conversion methodologies with a 10-percent upward adjustment.

GATT Article II:4 restricts import monopolies from providing protection in excess of the amount of protection provided in the appropriate Schedules. Policing this rule requires a comparison of the purchase and resale prices of the import monopoly, with allowances being made for reasonable transportation costs and related overhead costs, and a reasonable margin of profit.

GATT Article VII, as amended and clarified by the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, lays down methodologies that WTO Members are to adhere to when making valuation determinations.
GATT-WTO system. The general theme of Article III of GATT is to prohibit Members from circumventing tariff concessions through non-tariff barriers to import trade that might undermine the benefit of a tariff reduction. Like its MFN counterpart, national treatment is a nondiscrimination obligation, but imposed at the national level. Once imports have entered a Member's territory, internal taxes must be applied equally to imports and the like domestic product, and national regulations must not treat imports "less favorably" than similar domestic goods. The national treatment obligation is also part of the General Agreement on Trade in Services ("GATS").

The broad purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. Article III ensures that internal measures are not applied to imported or domestic products in a way that affords protection to domestic products. To that end, WTO Members are obligated to provide equality of competitive conditions - a level playing field - for imported goods vis-a-vis like domestic products.

Article III:4 is the source of specific national treatment commitments with respect to internal regulations affecting imports. Article III:4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

By its express terms, Article III:4 is limited to regulations affecting like

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products. The operative word in paragraph 4 is "affecting" – a broad term that includes internal regulations that not only govern the sale, purchase, or distribution of imported products, but also those which have a negative effect on the competitive opportunities enjoyed by imports vis-a-vis the domestic like product in the importing Member’s home market. Thus, for example, a 1984 GATT panel report condemned as violative of the national treatment obligation a requirement in the Canadian Foreign Investment Review Act ("FIRA") that as a condition on government approval of a foreign investment, parts, supplies, and materials had to be purchased locally. Unless the foreign investor agreed to purchase goods of Canadian origin in preference to imports, provided the former were "competitively available," its investment would not be approved. Even though the obligation was imposed on investors and not importers, the regulation was nevertheless violative of Article III:4. In the panel’s words:

The Panel sympathizes with the desire of the Canadian authorities to ensure that Canadian goods and suppliers would be given a fair chance to compete with imported products. However, the Panel holds the view that the purchase requirements under examination do not stop short of this objective but tend to tip the balance in favor of Canadian products, thus coming into conflict with Article III:4.  

See id. at 166. The GATT panel also rejected the argument that the undertakings of private investors to purchase locally did not constitute "regulations or requirements" within the meaning of Article III:4. The panel stated:

[W]ritten purchase undertakings . . . once they were accepted [by the Canadian government], became part of the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. . . . [T]he word ‘requirements’ as used in Article III:4 could be considered a proper description of existing undertakings.

See id. at 158. Accord GATT Dispute Panel Report on EEC — Regulations on Imports of Parts and Components, Mar. 20, 1990, GATT B.I.S.D. (37th Supp. B) at 132, 197 (1990) ("[N]ot only requirements which an enterprise is legally bound to carry out . . . but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute ‘requirements’ . . . "). See id.
The FIRA dispute highlighted the apparent gap in coverage of internal measures directly affecting foreign investment that indirectly affect trade in goods. This gap has been partially closed by the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), discussed below.

Internal regulations that are *de facto* and *de jure* neutral may still violate Article III:4 if they adversely affect the competitive opportunities of imports in the domestic market. Exposure of imported products to the risk of discrimination is itself a form of discrimination prohibited under Article III. In the GATT panel report, *Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, the panel concluded that Canadian minimum price regulations for beer undermined one of the fundamental purposes of Article III:4, which is to ensure that internal regulations do not dilute or eliminate the benefit of Article II tariff concessions. Moreover, the aforementioned report established that equality of treatment of imported products vis-a-vis the like domestic product still may be a national treatment violation. Even though the two products are treated identically (e.g., as in the case of minimum price regulations), a national treatment violation nevertheless exists if the imported product could undersell the like domestic product but for the minimum price control.

Just as tariff bindings afford exporters a minimum level of certainty regarding pricing, the national treatment obligation prevents importing Members from using internal regulations in a way that frustrates exporters' ability to reasonably assess the legal and regulatory climate in a target export market.

5. The Elimination of Quotas

The fourth pillar of the GATT-WTO system, and the most important of the original the GATT 1947 commitments respecting non-tariff barriers to trade, is the Article XI commitment to eliminate quantitative restrictions (quotas) on imports and exports. Article XI prohibits quantitative restrictions for two reasons. First, quotas lack the transparency of customs duties. Second, by creating an artificial short supply, quotas prevent the laws of supply and demand from determining the price at which domestic and imported goods should be sold.

When GATT 1947 entered into force, the use of quotas was widespread. Despite the Article XI commitment, the use of quotas continued relatively unabated in several key economic sectors over the next five years.

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decades. In some instances, import and export quotas were formalized through legal agreements between exporting and importing countries, the most notorious of these being the Multifiber Arrangement on textiles and clothing that was in effect continuously from 1974 through 1994. In other instances, export quotas were put in place through legal instruments labeled “voluntary export restraints” (“VERs”). The most noteworthy of these VERs are the 1981 agreement between the United States and Japan limiting exports of Japanese automobiles to the United States, and the VERs of the 1970s and 1980s on exports of steel and steel products. Although VERs were passed off to the public as beneficial and harmless, there is little doubt that their sting was felt in the form of higher prices to consumers.

The prohibition on quantitative restrictions is broad. First, both import and export quotas are prohibited. Second, any type of government measure that may lead to the imposition of a quota is prohibited. As is the case with alleged national treatment violations, whether a quantitative restriction has actual trade effects is irrelevant. The existence of a quantitative restriction, regardless of whether it actually impedes imports or exports, violates Article XI:1 because it affects the conditions of competition.\textsuperscript{33} The prohibition on quantitative restrictions is supplemented by the TRIMs Agreement, discussed below, which prohibits host-country restrictions on the importation or exportation of goods as a condition to government approval of a foreign investment.

There are three important GATT-authorized exceptions to the general prohibition on quantitative restrictions. The first concerns quotas imposed on agricultural products that are part of a government market stabilization program. The second is an exception under Article XII for quotas imposed to correct a balance-of-payments problem.\textsuperscript{34} The third is an exception for quotas imposed as a remedy under an Article XIX safeguard action.

A \textit{de facto} fourth exception to both the Article XI proscription on quantitative restrictions and the Article XIII requirement of nondiscrimination in the allocation of quotas is the VRA or VER. Under the terms of a VRA, exporting countries of a product agree to limit the volume of their exports to an importing country. The proliferation of these grey-area

\textsuperscript{33} See Report on EEC—Oilseeds, \textit{supra} note 22, at 130.

\textsuperscript{34} WTO Members invoking Article XII or XVIII:B as of 1995 include Bangladesh, Egypt, India, Israel, Nigeria, Pakistan, the Philippines, Poland, South Africa, Sri Lanka, Tunisia, Turkey, and the former Yugoslavia. WTO Members which have disinvoked Article XII or XVIII:B since 1979 include Argentina, Brazil, Colombia, the Czech and Slovak Federal Republic, Ghana, Greece, Hungary, Italy, Korea, Peru, and Portugal.
measures\(^{35}\) (a neologism for "GATT-inconsistent") was becoming a serious threat to the continued relevance of GATT both as an institution and as a legal instrument for regulating international trade. The Uruguay Round Agreement on Safeguards directly addresses the subject of VRAs, requiring Members to phase them out over a five-year period and thereafter making them illegal unless they are concluded in strict observance of the rules laid down in the Safeguards Agreement.\(^{36}\)

**E. GATT Regulation of Other Non-Tariff Barriers to Trade**

Non-tariff barriers can be defined by what they are not—all barriers to trade that are not tariffs. Admittedly, this definition is not especially gratifying or enlightening. Crafting a more useful definition, however, is probably futile. The 50-year experience of the GATT-WTO system shows that the garden of NTBs is hardy, diverse, and full of hybrids. With the deep reductions in import duties that the GATT-WTO system has witnessed since 1947, coupled with stricter disciplines on the use of quantitative restrictions, the use of NTBs proved irresistibly tempting to some WTO Members with protectionist proclivities.

The balance of commitments in the GATT-WTO system serve mainly to strengthen the four pillars by prohibiting Members from erecting non-tariff barriers to trade as a substitute for tariffs and quotas. The most important of these commitments concern transparency of government rules and regulations on import trade, national standards and technical regulations on imported goods, government procurement, and customs classification and valuation of goods.

1. **Transparency of National Regulations on Trade**

There can be little question that the smooth functioning of a multilateral trade system requires transparency of the trade regulations and measures adopted by its Members. To that end, GATT Article X, *Publication and Administration of Trade Regulations*, provides in part:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the

\(^{35}\) At the time the Uruguay Round was launched, 96 VRAs were in force affecting products ranging from steel, machine tools, transportation equipment, electronic products, footwear, textiles, agricultural products, and automobiles. Of these 96 arrangements, 53 protected EEC markets and 32 protected the U.S. market. *See* Gary Samson, *Safeguards*, in *The Uruguay Round: A Handbook*, *supra* note 7, at 143-45.

\(^{36}\) *See* Agreement on Safeguards, *supra* note 2, art. 11.1(b).
classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

While Article X of GATT is designed as a prophylactic to forestall resort to byzantine and obscure internal and border measures affecting trade, its shortcomings have been the topic of discussions within the GATT-WTO system.37

2. The GATT Article XX General Exceptions

Article XX permits Members to derogate from general GATT obligations in limited circumstances. A WTO Member that initially is unsuccessful in defending a border measure against the charge that it is inconsistent with a GATT obligation will often argue in the alternative that one or more of the Article XX exceptions applies. However, any Member invoking Article XX in defense of a challenged measure carries the burden of proving that the measure meets the criteria for an Article XX exception.38

Article XX consists of a chapeau or preamble, followed by ten specific exceptions.39 Any Member invoking an Article XX exception must

37 See Guide to GATT Law and Practice, supra note 4, at 300.
38 See, e.g., Administration of the FIRA, supra note 29, at 164.
39 Subject to the qualifications set forth in the chapeau, nothing in GATT is to be construed to prevent adoption or enforcement of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the exportation of gold or silver;
(d) necessary to secure compliance with laws or regulations . . . relating to customs enforcement . . . the protection of [intellectual property rights], and the prevention of deceptive practices;
(e) relating to the products of prison labor;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,
show, first, that its measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Second, any such measure must not amount to a disguised restriction on trade. 40

a. Measures for the Protection of Human, Animal, or Plant Life or Health

Article XX(b) authorizes measures “necessary to protect human, animal or plant life or health.” This provision allows Members to give priority to health over trade liberalization, provided a measure is “necessary.” In the first WTO panel report, Standards for Reformulated and Conventional Gasoline, the Appellate Body offered the following views on the breadth of the chapeau:

[T]he chapeau says that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .” The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favored-nation obligation, of course, but others as well . . . .

Id. at 617.

The Appellate Body continued:

“Arbitrary discrimination”, “unjustifiable discrimination” and “disguised restriction” on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that “disguised restriction” includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction.” We consider that “disguised restriction”, whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. . . . The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

Id. at 629 (emphasis in original).
Conventional Gasoline,\textsuperscript{41} the panel examined whether U.S. Clean Air Act regulations\textsuperscript{42} that discriminated against imported gasoline were "necessary," within the meaning of Article XX(b).\textsuperscript{43} The panel agreed with the United States that "a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health."\textsuperscript{44} The panel asked whether alternative measures were reasonably available that were either GATT-consistent or less inconsistent with it than the existing U.S. regulations. The panel concluded that a regulatory scheme that permitted importers to use individual baselines similar to those available to U.S. refiners was one such alternative, in contrast to the statutorily mandated baselines that included penalties for submission of false foreign data. In the panel’s view, "the United States had not demonstrated that data available from foreign refiners was [sic] inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation [e.g., under the antidumping or countervailing duty laws].\textsuperscript{45}

A recurring issue under Article XX(b) has been one of transparency, \textit{i.e.}, the lack of adequate publication, notification, and consultations concerning measures taken under paragraph (b). In 1989, Chile complained that millions of dollars in fruit exports to the United States were lost because of a U.S. ban on Chilean fruit following the discovery of toxic chemicals in Chilean grapes. Chile urged the establishment of a system for the expeditious notification and review of such measures to ensure that the measures adopted were proportionate to the threat. Later that year the Director-General offered a recommendation to the GATT Council which was duly noted. Its three recommendations are: (1) a measure taken should not be any more severe, and should not remain in force any longer, than necessary to protect the human, animal, or plant life or health involved; (2) the importing country should notify the Director-General as quickly as possible by telephone followed by a written communication to all contracting parties; and (3) the importing country should submit to expeditious informal consultations with the principally concerned contracting party as soon as a trade-damaging act has occurred with a view

\textsuperscript{44} See Standards for Gasoline, supra note 41, at 296.
\textsuperscript{45} Id. at 297.
to reaching a mutually satisfactory resolution of the dispute.\textsuperscript{46} The 1994 Uruguay Round Agreement on Sanitary and Phytosanitary Measures incorporates and expands on the Director-General’s 1989 initiative.

3. The Article XXI Security Exception

Article XXI lists government measures that are exempt from regular GATT obligations when taken on national security grounds. They are: (1) furnishing information the disclosure of which the Member considers contrary to its essential security interests; (2) taking action for the protection of the Member's essential security interests relating to fissionable materials or arms traffic, or taken in time of war or other international emergency; and (3) taking action in pursuance of a Member’s obligations under the U.N. Charter for the maintenance of international peace and security.

The practice under Article XXI has centered around Article XXI(b)(iii): action which a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. During the Falklands war in 1982, for example, the European Community (“EC”), Canada, and Australia imposed a two-month import ban on goods from Argentina. Argentina complained that this action violated, \textit{inter alia}, Articles I, II, and XI. The countries taking the measure stated that Article XXI did not require notification. The upshot was a Decision Concerning Article XXI of the General Agreement adopted by GATT on November 30, 1982, which stated cryptically that contracting parties affected by action taken under Article XXI retain their full rights under the General Agreement.\textsuperscript{47}

In 1985, the United States imposed a trade embargo on Nicaragua, invoking the Article XXI(b)(iii) exception.\textsuperscript{48} Following a complaint from Nicaragua, a panel was established to examine the U.S. measures, but its terms of reference precluded the panel from judging the validity or motivation for the invocation of Article XXI(b)(iii).\textsuperscript{49} In 1991, the EC, Canada, United States, Japan, and several other countries imposed trade sanctions on the former Yugoslavia. Because of the uncertainty over the status of the successor government, a GATT complaint was not acted upon.

Before 1996, the GATT security exceptions had not been a source of serious disruption of the GATT-WTO system. However, with the


\textsuperscript{48} See GUIDE TO GATT LAW AND PRACTICE, supra note 4, at 601.

enactment in 1996 of two controversial U.S. laws tightening trade sanctions against Cuba, Iran, and Libya, an area that had been relatively calm began to stir.

a. The Helms-Burton Dispute

Extremely controversial legislation was enacted in 1996 that was designed to tighten the U.S. trade embargo on Cuba formalized under the Cuban Democracy Act of 1992. On March 12, 1996, President Clinton signed the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, popularly known as the Helms-Burton Act. The Act broadened the U.S. embargo against Cuba by barring U.S. foreign aid to countries that provide assistance to Cuba; authorizing U.S. nationals who had property confiscated by the Cuban government since 1959 to sue foreign companies if they are "trafficking" in the property that was expropriated by the Cuban government after the Cuban revolution; and barring the issuance of visas to aliens who, after the effective date of the Act, confiscate, convert, or traffic in property expropriated from a U.S. citizen.

The President has the power to suspend for up to six months at a time the implementation of provisions in Title III of the Act that authorize U.S. nationals to bring lawsuits to recover confiscated property, if doing so would be in the national interest. In an effort to quell the international furor touched off by the Helms-Burton Act, President Clinton suspended Title III in July 1996, postponing the effective date of that portion of the Helms-Burton Act until February 1, 1997. On January 3, 1997, President Clinton issued another Title III waiver, stating that he will continue to suspend its operation so long as U.S. trading partners continue their efforts to promote a transition to democracy in Cuba.
The Helms-Burton Act triggered diplomatic protests and threats of retaliation from several U.S. trading partners, including Canada, Mexico, and the EU. The EU approved blocking legislation in 1996 to prevent enforcement in EU-member courts of U.S. judgments entered pursuant to Title III of Helms-Burton.

In 1996, the EU filed a complaint with the WTO's Dispute Settlement Body against the United States, alleging that the Helms-Burton Act violates GATT Articles I (MFN), III (national treatment), V (freedom of transit), XI (the prohibition on quotas), and XIII (the allocation of quotas); and GATS Articles I (scope), III (transparency), VI (impartial administration of domestic regulations), XVI (market access), and XVII (national treatment). It was anticipated that the United States would defend the Helms-Burton Act on Article XXI's national security grounds, but it was feared that the United States would reject any standard terms of reference for a panel and judge for itself whether its national security interests were genuinely implicated. After discussions with the United States in April 1997, the EU requested a suspension of the WTO panel proceedings, pursuant to Article 12.12 of the Uruguay Round Dispute Settlement Understanding. The suspension followed an agreement with the United States that an effort would be made to secure from Congress waiver authority under Title IV, which denies U.S. entry to any foreigner trafficking in U.S. property confiscated in Cuba.

Considering the disruption to the stability of the GATT-WTO system that the phrase "essential security interests" could cause if interpreted broadly or unilaterally by the Member invoking it, it is fortunate that Article XXI has not evolved into the exception that swallowed GATT. If every WTO Member arrogates for itself the right to be the final arbiter on

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56 See EU Said Not Planning to Revive Challenge to Helms-Burton Challenge, 14 INT'L TRADE REP. (BNA) at 1040 (1997); EU Warns It Will Reinstate Complaint On Helms-Burton if Congress Tightens Law, 14 INT'L TRADE REP. (BNA) at 1069 (1997); For and Against Punishing US Allies on Cuba, CHRISTIAN SCI. MONITOR, June 3, 1997, at 19.
questions relating to trade and national security, such action could deliver a mortal blow to the GATT-WTO system.

III. THE URUGUAY ROUND AND THE BIRTH OF THE GATT-WTO SYSTEM

A. Overview of the Uruguay Round Results

Five decades had left GATT, the founding document of international trade, dog-eared. Derogations from the most-favored-nation and national treatment obligations in the form of GATT-authorized waivers, the imposition of quotas in a manner that ignored GATT rules on quantitative restrictions, the existence of high tariffs in developed countries on goods of the greatest export interest to developing countries, and the lack of an effective dispute settlement mechanism for the speedy and binding resolution of disputes were all sources of mounting and vociferous criticism of GATT. Critics charged that the acronym “GATT” stood for “the Gentlemen’s Agreement to Talk and Talk.”

After seven years, the most far-reaching and comprehensive development in world trade since 1947 took place in 1994 with the successful completion of the Uruguay Round.57 Peter Sutherland, the first Director-General of the World Trade Organization, described the conclusion of the Uruguay Round as “a defining moment in modern history.”58 If it hasn’t silenced the critics, the Uruguay Round at least has turned down the volume. The Uruguay Round arrested the slide away from liberal trade and the multilateral rules designed to promote it by renewing the original GATT


58 See PHILLIP EVANS & JAMES WALSH, THE EIU GUIDE TO THE NEW GATT 1 (1994) [hereinafter EIU GUIDE TO GATT].
1947 commitment to open markets and eliminate government intervention that impedes trade flows. What is more, the Uruguay Round has expanded the multilateral trade system’s portfolio by including two new sectors: services and intellectual property.

Among its long list of accomplishments, the Uruguay Round can take credit for securing commitments from Members to eliminate several high-profile NTBs. These NTBs include barriers to agricultural trade and to trade in textiles and clothing, import licensing procedures, preshipment inspections, product standards and technical regulations, trade-related investment measures, and safeguard actions. The Uruguay Round brings renewed legal discipline to voluntary restraint agreements, so-called “gray area” measures, that are technically subject to GATT rules but had managed over time to slip past GATT regulation. 59

The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (“Final Act”), signed in Marrakesh on April 15, 1994, 60 covers all areas negotiated in the Uruguay Round, with the specific market access commitments on tariff reductions and non-tariff barriers to trade in goods and services being recorded in national Schedules of Concessions and Commitments, respectively. Outside of the Final Act, the most important of the Uruguay Round agreements is the Agreement Establishing the World Trade Organization, 61 under which the institutional functions of GATT 1947 are replaced by the World Trade Organization. 62

The WTO Agreement establishes a single institutional framework that encompasses (1) GATT, (2) a series of understandings that amend GATT 1947, and (3) multilateral trade agreements (“MTAs”) covering international rules on trade in goods, services, and intellectual property rights. 63

59 See Agreement on Safeguards, supra note 2, art. 11.1(b). This Article prohibits the resort to voluntary restraint agreements unless entered into in strict conformity with criteria of the Safeguards Agreement.

60 See generally Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Uruguay Round Results, supra note 2 [hereinafter Final Act].


63 The following Annexes are appended to the WTO Agreement and are an integral part of it: GATT 1994, as amended (Annex 1A), General Agreement on Trade in Services (Annex 1B), Agreement on Trade Related Aspects of Intellectual Property Rights (Annex 1C), Understanding on Rules and
MTAs are integral parts of the WTO Agreement and are binding on all WTO Members. The six Uruguay Round Understandings included in Annex 1A; GATT 1947, as amended and modified; waivers granted under GATT 1947 and still in force on the date of entry into force of the WTO Agreement; and the Marrakesh Protocol, to which the WTO Members’ schedules of market access commitments are appended, are referred to collectively as “GATT 1994.”

The Uruguay Round negotiators concluded the following twelve MTAs on trade in goods:
1. Agreement on Agriculture;
2. Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”);
3. Agreement on Textiles and Clothing;
4. Agreement on Technical Barriers to Trade (“TBT Agreement”);
5. Agreement on Trade-Related Investment Measures (“TRIMs Agreement”);
6. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Antidumping Agreement”);
8. Agreement on Preshipment Inspection;
9. Agreement on Rules of Origin;
10. Agreement on Import Licensing Procedures;
11. Agreement on Subsidies and Countervailing Measures (“SCM Agreement”); and,
12. Agreement on Safeguards.

In addition to the twelve MTAs on trade in goods, the Uruguay Round negotiators broke new ground by including two new sectors in the GATT-WTO system: (1) services trade under the General Agreements on Trade in Services, and (2) the protection of intellectual property rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).

The trade system envisaged by the WTO Agreement is a “single undertaking” approach. That is, membership in the WTO requires accepting all the results of the Uruguay Round without exception, i.e., GATT 1994 and

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64 See WTO Agreement, supra note 2, art. II:1-2.
65 See generally Uruguay Round Results, supra note 2.
66 See WTO Agreement, supra note 2, Annex 1C, art. 14.5.

the MTAs.67 The "a la carte" approach of the Tokyo Round was terminated, with the exception of the plurilateral trade agreements (PTAs) listed in Annex 4 on government procurement, dairy products, and bovine meat. The PTAs are part of the WTO Agreement for the Members that accept them, are binding on those Members, but create no obligations or rights for others.68

With the establishment of the WTO as the successor organization to GATT, GATT in its WTO metamorphosis finally emerged as a permanent international organization and a fully binding international trade agreement after nearly 50 years of provisional status.

B. Tariff Reductions

Over the course of the eight GATT-sponsored multilateral trade negotiation rounds, average tariffs in developed countries have been significantly reduced. While average tariff levels in developed countries had fallen dramatically over the past 50 years, tariff structures had not changed as dramatically, with tariffs remaining persistently high on certain finished manufactured goods, including textiles and footwear.69 Following the Uruguay Round, tariff rates in developed countries stand at an average of 3 percent on imports from other developed countries, down from the 5.5

67 See WTO Agreement, supra note 2, art. II.2. The Uruguay Round MTAs contain market-access commitments and schedule the elimination of tariff and non-tariff barriers to trade in the various sectors covered by the MTAs. For timetables on this trade liberalization, see generally Timeline of Uruguay Round Commitments, INT'L ECON. REV. 18 (USITC, Sept. 1995).

68 See WTO Agreement, supra note 2, art. II.3. Three of the PTAs -- the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement -- are successor agreements to ones concluded in the Tokyo Round. The texts of the Dairy and Bovine Meat Agreements are exactly as negotiated in 1979, but the agreements have been re-dated and their titles changed from "Arrangement" to "Agreement." Those two agreements were terminated at the end of 1997. See id. art. VI:3, Termination of the International Bovine Meat Agreement, Decision pursuant to art. VI:3; art. VIII:3, Termination of the International Dairy Agreement, Decision pursuant to art. VIII:3.

The fourth PTA, the Agreement on Trade in Civil Aircraft, is a holdover agreement from the Tokyo Round and remains in force but without coming under WTO auspices. The Uruguay Round negotiators contemplated that the four PTAs would emerge from the negotiations. Failing an EU-US agreement on civil aircraft, only three became a formal part of the Uruguay Round package of agreements.

The four PTAs are unique in the GATT-WTO system in that they operate under a conditional MFN principle, instead of the unconditional MFN principle that covers the rest of the GATT-WTO agreements. The conditional MFN principle permits the parties to the PTAs to exclude all free riders, as was the case with the Tokyo Round Codes.

At the start of the Uruguay Round, average tariff rates in the Quad (Canada, the EU, Japan, and the United States) on finished manufactures were 6.9 percent in the United States, 8.1 percent in Canada, 7 percent in the EU, and 6.4 percent in Japan. Average tariff rates on raw materials at the same time were 1.8 percent in the United States, 2.6 percent in Canada, 1.6 percent in the EU, and 1.4 percent in Japan. See GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, TRADING FOR GROWTH: THE NEXT ROUND OF TRADE NEGOTIATIONS 77 (1985). The post-Uruguay Round average tariff rates in developed countries on raw materials is 1 percent; on semi-manufactured goods, under 3 percent; and on finished products, under 5 percent. See EIU GUIDE TO GATT, supra note 58, at 74.
percent pre-Uruguay Round average, or a 45 percent reduction. Developed
countries reached agreement in the Uruguay Round on tariff concessions
that resulted in bound tariff rates on 99 percent of the value of imported
manufactured goods and on 98 percent of the value of all imports to
developed countries from all sources. 70 Although this figure is impressive,
it represents only a marginal improvement on the Tokyo Round results
which bound 94 percent of all developed countries’ tariffs. 71 What is
impressive about the Uruguay Round results on this score, however, is that
as part of the market access package of agreements, the Quad Members
(Canada, the EU, Japan, and the United States) agreed to eliminate most
tariffs in several sectors, including pharmaceuticals, construction equipment,
medical equipment, steel, beer, spirits, furniture, toys, paper, and farm
equipment; to reduce tariffs for other products by an average of one-third;
and to chop tariff “spikes” of 15 percent or greater. 72

Developed countries’ average tariff rates on imported goods from
developing countries stand at 4.8 percent post-Uruguay Round, 1.8 percent
higher than the average duty rate on imported goods from developed
countries. 73 Developed countries’ average tariffs on textiles and footwear
goods of obvious export interest to developing countries remain persistently
high even after the Uruguay Round, at 12.4 percent and 7.1 percent,
respectively. 74

The results for developing countries in the Uruguay Round tariff
negotiations parallel the agreements reached by developed countries in
many respects. Many developing countries still maintain high average
tariffs, augmented by sharp spikes for protected sectors of the economy. For
example, average tariffs in China stand at 51 percent on manufactured
goods, although average tariffs on raw materials have been reduced to 17
percent. India’s tariffs average 27 percent, 75 although it has committed to
reducing its tariffs on most products to world levels sometime after 2000. 76
Despite the high tariffs in China and India, many developing countries
participating in the Uruguay Round reduced their tariff rates by 28 percent
from pre-Uruguay Round levels, resulting in average tariffs of 10.7 percent

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70 See Marcelo de Paiva Abreu, Trade in Manufactures: The Outcome of the Uruguay Round
and Developing Countries Interests, in THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES 55,
at 55 (Will Martin & L. Alan Winters eds., 1995); EIU GUIDE TO GATT, supra note 58, at 72.
71 See EIU GUIDE TO GATT, supra note 58, at 72.
AGREEMENTS PROGRAM 5 (USITC, No. 2769, 1994).
73 See de Paiva Abreu, supra 70, at 56.
74 See EIU GUIDE TO GATT, supra note 58, at 73.
75 See id. at 72.
76 See China to Lower Tariffs on Raw Materials for Second Time in Two Years, Ministry
Says, 14 INT’L TRADE REP. (BNA) at 1542 (1997); India to Reduce Import Tariffs to World Levels Over
Next Few Years, 13 INT’L TRADE REP. (BNA) at 1553 (1996).
on imported goods from developed countries, compared to the pre-Uruguay Round 14.9-percent average tariff rate. 77

In a parallel development at the Uruguay Round on tariff bindings, many developing countries bound a large percentage of their tariffs as well. After the Uruguay Round, 61 percent of the tariffs on manufactured goods imported by developing countries will have a bound duty rate, compared with 13 percent before the Uruguay Round. 78 Several developing countries, mainly in Latin America, agreed to bind 100 percent of their tariff on manufactured goods, while Asia averaged 70 percent on manufactured goods. India, Korea, Malaysia, the Philippines, Singapore, and Thailand bound between 60 to 89 percent of their tariffs on manufactured goods. 79

Overall, existing pre-Uruguay Round tariff rates were reduced 40 percent as a result of the Uruguay Round. Seventeen percent of industrial goods will enter developed countries duty free by 1999. 80

With the conclusion of the Uruguay Round Agreement on Agriculture, a wide range of non-tariff barriers on agricultural products, including quotas, voluntary restraint agreements, and variable import levies were eliminated and "tarrified," i.e., converted into tariff equivalents that provide approximately the same level of trade protection as the previous non-tariff barriers. 81 Developed countries made a commitment to reduce agricultural tariffs by 36 percent over six years. Developing countries committed to a 24 percent reduction over ten years. 82 Tariffs on agricultural products will be high for the foreseeable future and the subject of future

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77 See de Paiva Abreu, supra note 70, at 56. Average tariffs for select Latin American countries show a relatively low tariff rate, but with significant tariff "spikes" for certain import-sensitive sectors of the economy. For example, Bolivia, with an average tariff of 10 percent, and Chile, with an average tariff of 11 percent, have adopted moderate uniform tariffs. Most countries in the region have adopted a tiered structure of escalating rates but with moderate total averages, such as Argentina at 12 percent, Colombia at 11 percent, Brazil at 14 percent, and Uruguay at 20 percent. See Sam Laird, Latin American Trade Liberalization, 4 MINN. J. GLOBAL TRADE 195, 203-04 (1995). The introduction of the MERCOSUR common external tariff is not expected to affect the average tariff rates of MERCOSUR countries, although tariff structures may be affected. Zero tariffs rates are exceptional, and most maximum rates are set between 30 percent and 40 percent. With tariffs rates being structured in much the same way as developed countries tariffs, foodstuffs and basic commodities have the lowest rates, followed by goods that have undergone an intermediate stage of production, such as producer goods, which receive the mid-range rates, and finished imported goods, such as automobiles, being assessed the highest duty rates. The average tariff rates of the largest Latin American countries at the conclusion of the Uruguay Round were 12 percent for Argentina, 10 percent for Bolivia, 14 percent for Brazil, 11 percent for Chile, 11 percent for Colombia, 12.5 percent for Mexico, 21.5 percent for Uruguay, and 10 percent for Venezuela. See General Agreement on Tariffs and Trade, Trade Policy Reviews 1989-93; General Agreement on Tariffs and Trade, Council Overview of Developments in International Trade and the Trading System: Annual Report by the Director General, GATT Doc. No. C/RM/43/3/Rev.1 (1992).

78 See de Paiva Abreu, supra note 70, at 55.

79 See id.

80 See EIU GUIDE TO GATT, supra note 58, at 72.

81 See Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, Uruguay Round Results, supra note 2, art. 4 [hereinafter Agreement on Agriculture].

82 See id. arts. 4, 15.
tariff-reduction negotiations.

The Marrakesh Protocol provides that as a general rule WTO Members will implement their tariff reductions in five equal stages, with the first reduction taking place on the date the WTO Agreement enters into force (January 1, 1995), and with each successive reduction being implemented on January 1 of each of the following years. The staging does not apply to tariff reductions for agricultural products. Members are free to implement reductions sooner, but the final cut must be implemented no later than January 1, 1999.

1. Trade in Information Technology Products.

Manufacturers interested in creating well-paying jobs for workers, earning a high return on their investment, and being competitive in world markets for their goods have shifted all or a substantial portion of their manufacturing base out of low value-added, labor-intensive production and reinvested in more capital-intensive, high value-added pursuits. Their primary focus has been on advanced-sector products. Similarly, governments interested in job creation and fostering new industries have lowered or eliminated altogether tariff and non-tariff barriers to trade in advanced-sector products.\(^83\)

One of the most important advanced-product sectors is information technology products. (Other advanced-sector products include, of course, civil aircraft and parts, pharmaceuticals and scientific equipment.) The most noteworthy achievement of the first WTO Ministerial Conference held in Singapore in December 1996 was the successful conclusion of the Information Technology Agreement ("ITA"). The parties to the ITA agreed to eliminate all duties on a host of information-technology products beginning July 1, 1997, and ending no later than January 1, 2000.\(^84\) A non-exhaustive list of the products covered by the ITA includes the following:\(^85\)

- computers (supercomputers, mainframe computers, work stations, personal computers, automatic teller machines, calculators, and all computer

\(^{83}\) The author's assertion is based on the experience of developing country economies in the 1990s. In 1996, for example, the United States exported nearly $40 billion in computer and office equipment, $30 billion in airplanes and parts, and $21 billion in scientific instruments for a total of $91 billion. This figure represents 15 percent of total U.S. exports of goods in 1996. See U.S. Trade Developments, INT'L ECON. REV. 23 (USITC, Feb./Mar. 1997).

\(^{84}\) WTO, Council for Trade in Goods, Implementation of the Ministerial Declaration on Trade in Information Technology Products, G/L/160 (1997).

\(^{85}\) For a complete list of the products by name and HS headings included in the ITA, see Ministerial Declaration on Trade in Information Technology Products, Attachments A & B, WT/MIN(96)/16 (1996).
telecommunications equipment (telephone sets, cordless phones, cellular phones, pagers, answering machines, fax machines, switching and transmission equipment, and optical fiber cable)

- software
- semiconductors (memory chips, microprocessors, manufacturing equipment, and test equipment)
- printed circuit boards

In view of this list of products, even a casual observer can see how the ITA and the Agreement on Basic Telecommunications are perfect complements to one another.

The ITA is a set of three documents: (1) the Ministerial Declaration on Trade in Information Technology Products,*88 (2) Implementation of the Ministerial Declaration on Trade in Information Technology Products prepared by the Council for Trade in Goods,*89 and (3) the participating Members’ schedules of tariff concessions.*90

a. Ministerial Declaration

The Ministerial Declaration on Trade in Information Technology Products memorializes the parties’ agreement on information technology (“IT”) products. Fourteen WTO Members*91 (28 governments counting the 15 EU-member states), accounting for over 80 percent of world trade in IT products, agreed on December 13, 1996, to bind and eliminate over a 2½-year period all duties and charges of any kind on the products listed in the two attachments to the Declaration. By late March 1997, 11 more WTO Members (the Czech Republic, Costa Rica, Estonia, India, Israel, Macau, *
Malaysia, New Zealand, Romania, the Slovak Republic, and Thailand) also joined the 14 charter Members. By March 26, 1997, 25 schedules of tariff concessions had been approved, covering more than a 92-percent share of world trade in IT products.\(^92\) The criterion laid down in the Ministerial Declaration that 90 percent of the world IT market had to be represented before the ITA would enter into force thus had been reached.\(^93\) Under the generalizing effect of the unconditional MFN commitment, all WTO Members are entitled to these accelerated tariff reductions, even though not all WTO Members participate in the ITA.

The annex on modalities appended to the Declaration provides the terms on scheduling tariff concessions on covered IT products and on tariff reductions. All tariff concessions must be bound no later than July 1, 1997, and eliminated in equal steps. The first duty rate reduction is to be made on July 1, 1997, the second on January 1, 1998, the third on January 1, 1999, and the last on January 1, 2000.

The participants agreed to encourage "autonomous" elimination of customs duties prior to these dates. In that connection, the EU agreed to accelerate the reduction of its seven-percent duty on semiconductors a year early (January 1, 1999), in exchange for a commitment from the United States to eliminate on July 1, 1997, all duties on IT products with duty rates of three percent or less, or where the EU's share of the U.S. market for the product is 10 percent or greater. Over $2.5 billion in EU imports to the United States will benefit.\(^94\)

b. Implementation of the Ministerial Declaration

In March 1997, the ITA participants established a Committee of Participants on the Expansion of Trade in Information Technology Products.\(^95\) The Committee's function is to oversee the implementation of the ITA and to serve as the forum for meetings of the participants. The ITA participants also adopted procedures for consultations on and review of product coverage.\(^96\) The procedures include the submission of

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\(^{92}\) See Implementation of the Ministerial Declaration on Trade in Information Technology Products, Note by the Secretariat, Informal Meeting of 26 March 1997, G/L/159/Rev.1, at 2 (1997).

\(^{93}\) Ministerial Declaration on Trade in Information Technology Products, Annex, para. 4, WT/MIN(96)/16 (1996). By May 1997, 41 Members had signed the Ministerial Declaration, representing more than 95 percent of world trade in IT products. See U.S., Major Trading Partners Urge Others to Improve Offers in Financial Services Talks, 14 INT'L TRADE REP. (BNA) at 811 (1997); USTR Says Information Technology Agreement 'On Track' to Take Effect on Schedule July 1, 14 INT'L TRADE REP. (BNA) at 206 (1997).


\(^{95}\) See Implementation of the Ministerial Declaration, supra note 92, paras. 3-6.

\(^{96}\) See id. para. 7.
lists of additional IT products for possible additional tariff concessions no later than December 31, 1997. No later than June 30, 1998, the Committee must meet to decide whether to revise the list of IT products in Attachments A and B to the Annex to the Declaration. On July 17, 1998, talks on an "ITA II" were suspended until at least September 1998.  

2. Schedules of Tariff Concessions

Each of the ITA participants submitted revised schedules of tariff concessions that reflect the duty reductions agreed to under the ITA. Over 300 tariff line items were included in the U.S. schedule submitted on April 2, 1997. Over 75 IT products scheduled by the United States already received duty-free treatment as the result of concessions made either during the Uruguay Round negotiations or under the Agreement on Trade in Civil Aircraft. Other IT products scheduled by the United States carried duty rates ranging from 9.4 percent to 0.8 percent. Over 115 products carry duty rates of three percent or less, and fewer than 50 products carry duty rates of six percent or greater.

C. Transparency Provisions

An indication of the seriousness with which the WTO Members take the transparency issue, and of the general level of dissatisfaction with Members' compliance with the GATT-WTO notification and publication requirements, are the two Uruguay Round agreements dealing with transparency. The first is the Trade Policy Review Mechanism ("TPRM"). The TPRM is the successor to the Trade Policy Review Mechanism first created in 1989. The second is the Decision on Notification Procedures, a partial successor arrangement to the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. The purpose of the TPRM is to improve WTO Members' adherence

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98 The schedules have been annexed to the Marrakesh Protocol of Accession to the WTO, available at <http://www.wto.org>. The ITA permits Members to extend the time period for tariff elimination "in limited circumstances." India has taken advantage of this exception by agreeing to eliminate tariffs on information technology products by 2005. See India to Eliminate Tariffs On Info Tech Products by 2005, 14 INT'L TRADE REP. (BNA) at 1019 (1997).
99 In 1997, a group of U.S. capacitor and resistor manufacturers brought suit in the U.S. Court of International Trade challenging the President's authority to enter into the ITA. See Kemet Electronics Corp. v. Barshefsky, 976 F. Supp. 1012 (Ct. Int'l Trade 1997). Although the court preliminarily ruled that the plaintiffs had standing to challenge the President's authority to issue a proclamation implementing the tariff cuts called for under the ITA, the plaintiff's request for a preliminary injunction was denied.
to GATT-WTO commitments made under the MTAs through the systematic and periodic review of Members' trade policies and practices by the Trade Policy Review Body. The Quad Members are subject to TPRM review every two years. The next sixteen Members in terms of shares of world trade are subject to review every four years. The remaining Members are subject to review every six years, with a longer period for least-developed country Members. The operation of the TPRM will be reappraised in 2000.

The Decision on Notification Procedures advances the transparency goal as well. In the Decision the Members reaffirmed their commitment to notify and publish measures affecting the operation of GATT 1994 and create a central registry for filing notifications. The Council for Trade in Goods is responsible for reviewing notification obligations and procedures under the MTAs. The Decision contains an Annex, *Indicative List of Notifiable Measures*, that lists the types of measures subject to notification: tariffs; tariffs quotas and surcharges; quantitative restrictions, including voluntary export restraints and orderly marketing arrangements affecting imports; other non-tariff measures, such as licensing, mixing requirements, and variable levies; customs valuation; rules of origin; government procurement; technical barriers; safeguard actions; anti-dumping actions; countervailing actions; export taxes; export subsidies, tax exemptions and concessionary export financing; free-trade zones, including in-bond manufacturing; export restrictions, including voluntary export restraints and orderly marketing arrangements; other governmental assistance, including subsidies and tax exemptions; the role of state-trading enterprises; foreign exchange controls related to imports and exports; government-mandated countertrade; and any other measure covered by the MTAs.\(^{101}\)

In addition to the transparency commitments in GATT Article XI, the TPRM, and the Uruguay Round Decision, several of the MTAs contain their own transparency provisions.

First, Article 18.2-18.3 of the Agreement on Agriculture requires Members to submit notifications on the implementation of commitments made under the Agreement generally, and specifically to notify promptly any new domestic support measure.

Second, Article 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures obligates Members to "notify changes in their sanitary and phytosanitary measures and . . . provide information on [such] measures in accordance with the provisions of Annex B." Annex B, *Transparency of Sanitary and Phytosanitary Regulations*, requires Members to publish promptly all such regulations in a manner that enables interested Members to become acquainted with them, and to allow a reasonable

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\(^{101}\) See Final Act, *supra* note 60, pt. B.
passage of time between promulgation and entry into force of such regulations "in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member."  

Third, Article 2.9 of the TBT Agreement requires Members to give advance notice of any proposed product standard in order to give other Members a reasonable opportunity to comment on the proposal before it takes effect. Annex 3 of the TBT Agreement, Code of Good Practice for the Preparation, Adoption and Application of Standards, provides guidelines that governmental and non-governmental standardizing bodies are to follow when preparing standards, including notice and an opportunity to comment by interested persons.  

Fourth, the Agreement on Textiles and Clothing is sprinkled with express notification requirements.  

Fifth, in Article 6.1 of the TRIMs Agreement, Members "reaffirm, with respect to TRIMs, their commitment to obligations on transparency and notification in Article X of GATT 1994, in the undertaking on "Notification" contained in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994."  

Sixth, Article 2.5 of the Agreement on Preshipment Inspection provides that "User Members shall ensure that preshipment inspection activities are conducted in a transparent manner." Article 2.6 of the Preshipment Inspection Agreement further requires that exporters be provided with a list of all the information that is necessary for exporters to comply with inspection requirements.  

Seventh, the Agreement on Rules of Origin, having the long-range goal of eventual harmonization of Members' rules of origin, commits Members during and after the transition period to publish their laws, regulations, judicial decisions, and administrative rulings relating to rules of origin as if they were subject to, and in accordance with, the provisions

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102 See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, Uruguay Round Results, supra note 2, Annex B:2 [hereinafter SPS Agreement].

103 See, e.g., Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, Uruguay Round Results, supra note 2, arts. 2, 3, 4, 10; Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards [hereinafter TBT Agreement]. The TBT Agreement is in effect an agreement on transparency that requires notification and publication of all national regulations dealing with product standards.

104 See, e.g., Agreement on Textiles and Clothing, Apr. 15, 1994, WTO Agreement, Annex 1A, Uruguay Round Results, supra note 2, arts. 2.3, 2.4, 2.7, 2.17, 2.18, 3.3, 3.4, 3.5 [hereinafter Agreement on Textiles and Clothing].
of Article X:1 of GATT 1994. As part of the long-range harmonization program, Members are further obligated to provide the WTO Secretariat with their rules of origin, and judicial decisions and administrative rulings relating to rules of origin.

Eighth, Article 5 of the Agreement on Import Licensing Procedures requires Members instituting licensing procedures to notify the Committee on Import Licensing.

Ninth, Article 25 of the Agreement on Subsidies and Countervailing Measures directs Members to submit notifications of subsidies annually in sufficient detail to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programs.

Tenth, Article 12 of the Agreement on Safeguards, Notification and Consultation, obligates Members to notify the Committee on Safeguards when initiating any safeguards proceeding or granting any escape clause relief. Article 13, Surveillance, charges the Committee on Safeguards with monitoring Members’ compliance with the Agreement.

Finally, the GATS and the TRIPS Agreement have their own transparency provisions. GATS Article III, Transparency, requires Members to publish promptly all relevant measures of general application that affect the operation of GATS, and to notify annually any new laws or amendments to existing laws that significantly affect trade in services. Similarly, Article 43 of the TRIPS Agreement, Transparency, requires Members to publish all laws, regulations, and decisions dealing with the subject matter of the Agreement, and to notify the Council for TRIPS of all such laws, regulations, and decisions.

In view of this litany of transparency obligations, it is fair to conclude that the GATT-WTO system is obsessed with transparency, and justifiably so. Recalling Aristotle’s maxim, “knowledge is power,” it is not hard to understand why. Subjecting WTO Members’ trade policies and practices to the kind of scrutiny that one sees at the national level in democracies is an important check against a slide into non-compliance with GATT-WTO disciplines. The extent to which Members are prepared to be subjected to this kind of scrutiny is also a rough measure of the extent to which accountability figures in international trade relations.

D. The SPS Agreement

Before the Uruguay Round Agreements were added to the GATT-WTO legal regime, Article XX(b) was the only GATT provision – and at

105 See Agreement on Rules of Origin, Apr. 15, 1994, WTO Agreement, Uruguay Round Results, supra note 2, Annex 1A, arts. 2(g), 3(e).
106 Id. art. 5.1.
best a skeletal one – dealing expressly with the subject of sanitary and phytosanitary ("SPS") measures. Experience has shown that SPS measures are frequently employed as other, more traditional barriers to trade (e.g., tariffs and quotas) are reduced or eliminated. Many countries, including the United States, often have had the unhappy experience of negotiating tariff reductions and quota eliminations, only to be met with a suspect SPS measure that wipes out the benefit of the earlier bargain. Until the SPS Agreement, no multilateral trade agreement existed with a fully articulated set of rules governing a country’s use of SPS measures in connection with imported goods. The SPS Agreement filled this gap by circumscribing WTO Members’ use of such measures as a non-tariff barrier to trade.

The SPS Agreement applies to all sanitary and phytosanitary measures that may, directly or indirectly, affect international trade. The SPS Agreement does not create any substantive SPS measures per se. Instead, the Agreement sets forth a number of general procedural requirements to ensure that a SPS measure is in fact a scientifically-based

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By the time the Uruguay Round was concluded, one regional agreement existed governing sanitary and phytosanitary measures, namely, NAFTA Chapter Seven:B. Its rules were derived in large part from earlier drafts of the Uruguay Round Agreement on Sanitary and Phytosanitary Measures.

The SPS Agreement provides a comprehensive definition of sanitary and phytosanitary measures. An SPS measure is any measure applied:

(a). to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b). to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c). to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests;

(d). to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

protection against the risk asserted by the country imposing the measure, rather than a disguised barrier to trade.\textsuperscript{110}

The Agreement expressly recognizes that countries have a legitimate right to protect human, animal, and plant life and health, and to establish a level of protection for life and health that they deem appropriate. As explained more fully below, the provisions of the SPS Agreement are designed to preserve the ability of Members to act in this area while at the same time guarding against the use of unjustified SPS measures that are primarily designed to protect a domestic industry.

The basic right of Members under the SPS Agreement is the ability to take SPS measures necessary for the protection of human, animal, or plant life or health. This right is qualified by three provisos. Such measures must be (1) applied only to the extent necessary, (2) based on scientific principles, and (3) maintained with sufficient scientific evidence, except that such measures may be imposed temporarily, when evidence is insufficient, pending receipt of additional information necessary for a more objective assessment of risk.\textsuperscript{111}

A Member is free to establish its own level of sanitary and phytosanitary protection, including a "zero risk" level if it so chooses. Regardless of the level of risk a Member chooses to adopt, however, a measure must be based on scientific principles and on sufficient scientific evidence. The judgments to be drawn from that evidence are left to the Member, because scientific certainty is rare. Many scientific determinations require judgments among competing scientific views (e.g., whether or not global warming is taking place; if it is, whether the cause is attributable to humans; and, if so, what the proper response is). There is obviously a good deal of "play in the joints" of the SPS Agreement.\textsuperscript{112}

The problem of misuse of SPS measures is especially acute in connection with imports of agricultural products. They are frequently the target of legitimate and not so legitimate SPS measures. There was a concern in some quarters that as the provisions of the Uruguay Round Agreement on Agriculture eliminate or substantially reduce tariff and quota barriers to agricultural trade, a new set of SPS measures would be introduced as contingent protection, that is, whose sole purpose would be to protect domestic agricultural producers from import competition. To counter such a development preemptively, the SPS Agreement was negotiated in

\textsuperscript{110} See generally David A. Wirth, The Role of Science in the Uruguay Round and NAFTA Trade Disciplines, \textit{27} CORNELL INT'L L.J. 817 (1994).  
\textsuperscript{111} See SPS Agreement, supra note 102, arts. 2.3, 5.7.  
tandem with the Agreement on Agriculture to ensure that the benefits of liberalized agricultural trade are not diluted. Indeed, Article 14 of the Agreement on Agriculture underscores the importance of not allowing unjustified SPS measures to undermine the gains of the Agriculture Agreement. It provides that "Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures."113

As illustrated by the long-brewing dispute between the United States and the EU over the 1987 EU ban on U.S. beef from cattle fed with growth-inducing hormones, the problem of SPS measures used to block trade in agricultural products is a real one. The United States claimed the ban lacked any scientific justification, a position with which the EU took strong issue. The issue finally was resolved by the Appellate Body in 1998 in favor of the United States.114

E. The TBT Agreement

The elimination of tariffs as a significant barrier to trade is cold comfort to manufacturers whose products cannot enter a foreign market in any event because of nonconformity with local product standards. The cost of having products modified, tested, and approved by authorities in the foreign market can effectively cancel the benefit of reduced tariffs. In the arsenal of weapons at a country’s disposal to block the free flow of goods across national borders, one of the most insidious and effective NTBs is product standards. What makes product standards insidious is that the same standard can simultaneously be a legitimate health and safety regulation and a disguised restriction on trade. For example, a country may decide to set the bar high for environmental, health, and safety regulations compared with other countries out of a legitimate concern for the health and welfare of its citizens, but perhaps also in part to protect local manufacturers from import competition. Even when national product standards are not consciously used to block imports, standards often differ from one country to another, impeding the free flow of goods. Because of such differences, minor but

113 Article 14 of the Agreement on Agriculture also provides that least-developed country members may delay the application of the SPS Agreement until 2000. See Agreement on Agriculture, supra note 81, art. 14. Other developing countries were permitted to delay the application of the Agreement until January 1, 1997, if necessary because of a lack of technical expertise or infrastructure. No specific problems with regard to the implementation of the Agreement by developing country have been brought to the attention of the Committee on SPS Measures.

costly modifications must often be made to a product destined for foreign markets.

In theory, countries ought to be able to reach some consensus on a common set of environmental and safety requirements, but reaching any consensus has proven difficult in practice. To be sure, some standards harmonization has occurred. In the case of automobiles, for example, the United States was the first country to adopt pollution standards for automobile exhaust emissions, and made them more stringent in 1983. The 1983 standards were adopted by Japan and Switzerland for some models.115 In 1996, industry officials from the United States and the EU approved a series of recommendations to their respective governments for harmonizing safety and environmental standards in the automobile industry, motivated in large part by the additional 10-percent cost of designing and developing automotive products for the two markets.116

Despite the barrier to trade that technical standards can create, most product standards are not the invention of some malevolent bureaucrat bent on wrecking world trade. Product standards are commonplace in a developed economy. They may be voluntary (e.g., U.S. Department of Agriculture standards for grading eggs) or mandatory (usually referring to a technical regulation that is government-imposed). Standards are sometimes developed at a time when national markets are isolated from each other, so that there is simply no incentive to harmonize national standards. A simple example, but one with which every international traveler is familiar, is that of electric plugs, outlets, and voltage. Any American who has had the unhappy experience of plugging a 120-volt rated hair dryer into a 220-volt outlet in Europe (assuming the U.S. traveler had the right adapter plug for the 220-volt outlet in the first place) is familiar with the consequences of a lack of harmonization in product standards. In some instances, the incentive to harmonize is high because it is in everyone’s best interests to do so. For example, as soon as telegraphy became transoceanic, radio telecommunications would have been thrown into chaos if countries did not step in and agree to harmonize standards and assign radio frequencies through international bodies, such as the International Telegraphic Union and its successor, the International Telecommunications Union.117

Once market access significantly improved and trade flows substantially increased, the differences in product standards and certification

117 See Eicher, supra note 115, at 138.
systems presented a significant barrier to trade. As imports were tested to determine whether they conformed with domestic standards, the suspicion grew that standards and certification procedures were being used as a gossamer-thin disguise to restrict trade. From an economic perspective, this suspicion, if true, was unwelcome. From a legal perspective, if any technical regulation or conformity assessment procedure expressly discriminates against imports, such regulation or procedure in all likelihood violates GATT Article III (in the case of an internal measure) or GATT Article XI (in the case of a border measure). Any alleged violation of these two Articles must be considered against the backdrop of Article XX's general exception that permits the adoption and enforcement of measures to protect human, animal, or plant life or health. The chapeau to Article XX provides, however, that any such measures "must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction to international trade . . . ." In addition, GATT panels and the Appellate Body have adopted a "least trade restrictive" principle - also known as the minimum derogation principle - when assessing measures that seek the protective cover of Article XX. They ask whether there are alternative measures reasonably available that would be as effective as the one adopted that are less trade restrictive than the measure adopted. If there is, then the measure adopted does not qualify under the Article XX exception.

Putting to one side the question of GATT-legality for a moment, the lack of harmonization of national standards (or "standardization") can be a formidable problem for a manufacturer exporting a product to a number of countries with different product standards. Manufacturing a single product that meets all of the national standards may be impossible, thus requiring a different version of the product for different export markets, thereby raising the unit cost of the product because of the inability to achieve economies of scale in production runs. In addition, transparency can be a problem when local producers are able to discover new rules or amendments more quickly than foreign competitors. Finally, if testing and certification is required during the production process, it will be impossible to export the product unless the firm is willing to bring in (and the importing country is willing to send) foreign inspectors, or unless the importing country is willing to accept foreign conformity assessment certifications. In light of the waste associated

with a lack of standardization, harmonizing standards makes good economic sense.

Standards can be the result of market forces or government intervention. A group of market-dominant manufacturers, for example, might respond to consumer demands that certain features of their products be designed in an identical way, such as the location of the brake and accelerator pedals in a car. Trade associations might try to anticipate consumer demands and reach agreement on standardization. Competition in the market place also might settle the issue. When a manufacturer beats the competition and secures the lion’s share of the market, its product becomes “the standard.” For example, the VHS format for videocassettes beat out Sony’s Beta format, even though the latter was considered superior by some users. In the war for market share in personal computers, the team of IBM and Microsoft have won the standards battle with Apple. At other times governments intervene and mandate a standard, often in the name of consumer protection. In the United States, for example, the standards for black-and-white and color television receivers were set by the federal government.

The Uruguay Round TBT Agreement builds on its predecessor agreement, the Tokyo Round Standards Code. Using the 15-year experience of the Standards Code, the Uruguay Round negotiators started with the text of the Standards Code and drafted a successor agreement that restates, clarifies, and modestly expands the Code. In contrast to the Code’s limited coverage with only 46 signatories, the TBT Agreement, as one of the twelve MTAs covering trade in goods, is binding on all WTO Members. The TBT Agreement balances the ability of governments and the private sector to implement legitimate standards and the procedures for assessing product conformity with those standards against their unjustified use to protect a domestic industry. The TBT Agreement establishes rules on distinguishing legitimate standards and conformity assessment procedures from protectionist measures and procedures in three areas: (1) the preparation and adoption of technical regulations and standards; (2) conformity assessment procedures and mutual recognition of other countries assessments; and (3) information and assistance about technical regulations, standards, and conformity assessment procedures. Like its predecessor, the TBT Agreement does not establish or prescribe standards, technical regulations, or conformity assessment procedures. Rather, as explained more fully below, it establishes general procedural requirements to be observed when adopting or using such measures so that they do not create unnecessary obstacles to trade.

The SPS Agreement and the TBT Agreement are mutually exclusive. The TBT Agreement excludes from its scope of coverage sanitary
and phytosanitary measures as defined in the SPS Agreement.\textsuperscript{119} The SPS Agreement similarly provides that it does not affect Members' rights under the TBT Agreement with respect to measures outside the scope of the SPS Agreement.\textsuperscript{120}

Despite their mutual exclusivity, the substantive provisions of the two agreements mirror each other in most respects. A significant difference between the SPS and TBT Agreements, however, is the test used to determine whether a measure is impermissibly protectionist in nature. Whereas the TBT Agreement relies on a nondiscrimination test, the inquiry under the SPS Agreement is based on scientific justification and risk assessment. A strict requirement of nondiscrimination would not be practicable for SPS measures that discriminate against imported goods based on their origin. Goods may pose a risk of disease precisely because the goods come from a Member where such disease is prevalent. The same situation might not be true for similar goods coming from another Member. Discrimination is, therefore, tolerated under the SPS Agreement, so long as it is not arbitrary or unjustifiable.

Article 2.4 of the TBT Agreement directs Members to adopt international standards where such standards exist. The leading international body involved in the drafting and promulgation of international technical standards is the International Standards Organization ("ISO"), a federation of 91 national standards organizations. Standards that the ISO adopts are voluntary.

The ISO is currently developing two series of standards directly bearing on the TBT Agreement. One series is known as the ISO 14000 series for environmental management systems, environmental auditing systems, life-cycle analysis, and environmental labeling.\textsuperscript{121} These standards will have a far-ranging impact on environmental management programs of firms located in Members that adopt these standards.\textsuperscript{122}

The second series is known as ISO 9000 series of quality standards. These standards cover five areas in the production and manufacturing process: (1) design, development, production, installation, and servicing; (2) build-to-print, installation, and servicing without design; (3) assembly and

\textsuperscript{119} See TBT Agreement, supra note 103, art. 1.5.

\textsuperscript{120} See SPS Agreement, supra note 102, art. 1.4.


test; (4) implementation and control; and (5) implementation of ISO 9000 (audits, certification, and registration).\(^{123}\) A typical use of ISO 9000 standards is in the automobile industry. In the United States, for example, the Big Three (General Motors, Ford, and Chrysler) require that suppliers of raw materials, component parts, subassemblies, and service parts meet ISO 9000 quality standards.\(^{124}\)

1. The EC-US Mutual Recognition Agreements

In June 1997, the United States and the EU concluded a package of mutual recognition agreements ("MRAs") in six sectors covering approximately $50 billion in two-way trade.\(^{125}\) The six sectors covered are: telecommunications equipment, medical devices, pharmaceuticals, recreational craft, electrical safety, and electromagnetic compatibility. The MRAs eliminate the need for dual testing and certification in these six sectors, saving manufacturers more than $1 billion in annual costs. This savings is equivalent to a two to three-point reduction in tariffs.\(^{126}\)

The MRAs provide that the parties will accept or recognize the results of procedures used in conformity to specified legislative, regulatory, and administrative provisions of each party, when those results are produced by the other party’s conformity assessment bodies or authorities.\(^{127}\) In short, the MRAs allow U.S.-origin products or processes destined for the EU to be assessed for conformity in the United States with EU testing, inspection, and certification standards, and vice versa. Designating Authorities in the United States and the EU are responsible for monitoring the performance of conformity assessment bodies within their respective territories.\(^{128}\) For example, the U.S. Food and Drug Administration is the Designating Authority responsible for monitoring conformity assessment bodies in the United States under the Sectoral Annex on Pharmaceutical Good
Manufacturing Practices. The MRAs will be phased in and fully implemented in 18 months for recreational craft, two years for telecommunication and electronic products, and three years for pharmaceuticals and medical devices.

F. Trade in Agricultural Products

The Agreement on Agriculture is part of a package of Uruguay Round Agreements that addresses agricultural trade issues. The Agreement has three main features: (1) increased market access for agricultural products; (2) commitments to reduce domestic subsidies on agricultural products; and (3) commitments to reduce export subsidies on agricultural products. The long-term objective of the WTO Members is to establish a fair and market-oriented agricultural trading system that includes substantial reductions in agricultural support and protection. The Agreement on Agriculture initiates this reform process in the areas of market access, domestic subsidies, and export subsidies.

Over the course of the GATT-WTO system's 50-year history, WTO Members have erected a vast array of non-tariff barriers to agriculture trade, in the form of quotas, variable import levies, and voluntary import and export restraints. To remedy this situation, the market access commitments of the Agreement on Agriculture require (1) a guaranteed minimum access...
level for all agricultural products, (2) the “tariffication” of non-tariff barriers into tariff equivalents, and (3) the use of tariff-rate quotas to ensure that the market access commitments are honored. 136

In situations where there are no significant imports of agricultural products, WTO Members provide in their Schedule of Commitments minimum access opportunities for such imports. Access is based on a percentage of domestic consumption, beginning at 3 percent in 1995 and increasing to 5 percent by 2000. In cases where imports are greater than these thresholds, current market access levels are to be maintained. 137

The minimum access commitments will permit at least some trade in agricultural products to occur in cases where previously non-tariff barriers effectively blocked such trade, and/or where the new tariff equivalents are so high that they continue to block all such access. 138

The tariffication process is an important first step toward greater liberalization of the agricultural sector in future WTO negotiations. Unlike non-tariff barriers, that are difficult to quantify in terms of their impact on trade flows primarily because they are not transparent, the impact of tariffs on trade are quantifiable because they are transparent. Non-tariff barriers also can be administered in an arbitrary manner, making planning on the part of exporters impracticable if not impossible because such barriers become a moving target. Bound tariffs, on the other hand, present a fixed target that cannot be raised arbitrarily. Exporters in that case are able to plan for sales in foreign markets. Moreover, tariffs simplify trade negotiations because they are quantifiable, making comparisons of trade barriers due to tariffs easier for negotiators.

Recognizing the pernicious effect that non-tariff barriers have had on agricultural trade, Article 4 of the Agreement prohibits Members from maintaining, resorting to, or reverting to non-tariff measures, old or new. The process of tariffication – converting non-tariff measures into ordinary customs duties – yields a tariff that is equivalent to the level of protection afforded by the non-tariff measures that the new tariff replaces. 139 It requires

136 See Agreement on Agriculture, supra note 81, art. 4.
137 See id.
138 For example, minimum access for U.S. exports of the following items is guaranteed: 29,000 tons of poultry to the EU, 54,000 tons of pork to the Philippines, 6,102,100 tons of corn to Korea, and 1,000 tons of prunes to Poland. See STATEMENT OF ADMINISTRATIVE ACTION, supra note 57, at 712. The Foreign Agricultural Service of the U.S. Department of Agriculture has prepared fact sheets detailing the market access commitments and subsidy reductions made by key U.S. trading partners for several leading commodities, including citrus, cotton, dairy, feed grains, vegetables, pork, poultry, rice, sugar, and wheat. They are available from the Department of Agriculture’s website at <http://ffas.usda.gov/fasresources/ag-trade-policy/com-fact-sheets.html>.
139 Guidelines for the calculation of tariff equivalents are contained in an attachment to Annex 5 of the Agreement. The tariff equivalent is generally the difference between the internal and external price for the product, expressed as an ad valorem or specific duty rate. The external price is the average f.o.b. unit value price set by major exporters of the product, adjusted by adding insurance and freight.
Members to convert existing measures into ordinary customs duties and to bind them, subject to special safeguard provisions applicable in cases of rapidly increasing agricultural imports.\textsuperscript{140} In practice, tariffication means replacing non-tariff barriers with a tariff-rate quota.\textsuperscript{141} A WTO Member will assess duties on agricultural imports that are in excess of the minimum or current access level commitments for the imported product. The duty rate assessed will be the one that results from the tariffication process.\textsuperscript{142} The quantity of imports subject to minimum or current access level commitments will enter either duty free or be subject to an "in-quota" duty rate lower than the rate that results from tariffication.\textsuperscript{143} Agricultural tariffs, including those that predated the Uruguay Round and those resulting from tariffication, are to be reduced by an average of 36 percent on a simple average basis over a six-year period ending in 2000 in the case of developed countries. For developing countries, the average reduction is 24 percent over a ten-year period ending in 2004. The lower, in-quota duty rates generally will not be reduced. All customs duty rates are to be bound, with developing countries establishing ceiling bindings where no bindings existed before the Uruguay Round. Prior to the

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\textsuperscript{140} Non-tariff measures identified in the Agreement include minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, regardless of whether those measures were grandfathered under GATT 1947, maintained under GATT 1947 waivers, or listed in a country's protocol of accession to GATT 1947. See Agreement on Agriculture, supra note 81, art. 4.2 n.1.

\textsuperscript{141} Under a tariff-rate quota, one tariff rate (the "in-quota tariff rate") applies to imported products up to a stated amount (the "in-quota quantity"). A higher tariff rate (the "over-quota tariff rate") applies to imported products in excess of that amount (the "over-quota quantity").

\textsuperscript{142} See STATEMENT OF ADMINISTRATIVE ACTION, supra note 57, at 711.

\textsuperscript{143} The following illustration of the tariffication process is provided in the Uruguay Round Statement of Administrative Action:

\textbf{STATEMENT OF ADMINISTRATIVE ACTION, supra note 57, at 711.}
Agreement on Agriculture, only 55 percent of tariff line items for agricultural products were bound in developed countries, and only 18 percent were bound in developing countries. Least-developed countries commit to tariff bindings on agricultural products, but are not required to make any further commitments to reduce tariffs.

In addition to the average tariff reductions, a minimum 15-percent tariff reduction must be made for each tariff line (10 percent in the case of developing countries). In order to meet the overall 36-percent tariff reduction commitment, Members undoubtedly will reduce duties on import-sensitive agricultural products by the 15-percent minimum, and make greater reductions on products that are either less import-sensitive or in which there is little trade.

The Agreement on Agriculture is merely the first step in an ongoing process of fundamental agricultural reform. Recognizing that the WTO's long-term objective is a substantial reduction in trade protection of the agricultural sector, WTO Members agree in Article 20 to continue the reform process by reinitiating negotiations in 1999.

In rating the extent to which the Agreement on Agriculture produced liberalization in agricultural trade, one could ask how much pain the Agriculture Agreement inflicted on WTO Members. A fundamental maxim of both physical fitness and free trade is "no pain, no gain." It would appear that the Agreement on Agriculture was not extremely painful for most WTO Members. While the it mandates some reforms, those reforms are so modest that they do little to liberalize agricultural trade. The Agreement on Agriculture sets the stage, however, for future reforms and liberalization efforts by requiring all agricultural tariff lines to be bound.

It is unfortunate that the Uruguay Round negotiators avoided the pain of concluding a comprehensive agreement and instead compromised with a gradual reform agreement, postponing resolution of many difficult issues that inevitably will have to be addressed. One of the dangers of not agreeing to a more aggressive agricultural reform package, and opting instead for gradualism, is that special interest groups have been given time to organize and possibly mount a war of attrition to slow and eventually stall long-range reforms.

In the United States, farmers enjoy a comparative advantage in agriculture, so American farmers who wanted to continue to farm would have been able to do so even if radical farm reforms had been negotiated. In Europe and Japan, growers do not enjoy a similar comparative advantage, but they do live close to alternative jobs outside of agriculture. If far-ranging farm reforms had been adopted as part of a comprehensive Uruguay Round package, new jobs in services as well as manufacturing would have absorbed those dislocated European and Japanese farmers. In addition, if countries had cut all farm subsidies simultaneously, world food prices would have
risen and provided more cushion to farmers.

In short, the Uruguay Round was a missed opportunity for meaningful agricultural reform that may never present itself again. Radical farm reform that was both multilateral and part of a broader package of trade reforms in non-farm sectors offered the best hope for lasting reform with the least long-term dislocation for farmers.

G. Trade in Textiles and Clothing

If one were forced to choose the most protected sector over the 50-year history of the GATT-WTO system, steel, automobiles, agriculture, semiconductors, and footwear would all be contenders. Considering the length and the breadth of trade protection that the textile and clothing sector has received for over three decades, it would be hard to argue with one economist’s conclusion that this sector was (and in many respects continues to be) “the most systematically and comprehensively protected sector in the world...”144

The history of U.S. trade protection for the textile and clothing industry can be traced back to the inter-war period. Under the Tariff Act of 1922 and the Tariff Act of 1930 (the notorious Smoot-Hawley Tariff Act), the tariff wall erected for cotton and wool goods was prohibitively high (46 percent and 60 percent, respectively, compared to 35 percent for meat products and 31 percent for chemicals).145 Other countries, notably Japan, used a mix of high tariffs and quotas to protect their domestic textile and clothing industry.

In the post-war era following the successful negotiation of the GATT, GATT contracting parties tended to keep their import restrictions on textiles and clothing from low-wage countries in place. When Japan joined GATT in 1955, many GATT contracting parties, excluding the United States, invoked the Article XXXV non-application provision and thereby continued to restrict Japanese imports of textiles and clothing. The United States for its part entered into a five-year voluntary export restraint agreement with Japan beginning in 1957, under authority of Section 204 of the Agricultural Act of 1956. While Japan’s share of imported textile products fell off as a consequence, the slack was picked up by other textile-exporting countries like Hong Kong.

In search of a more comprehensive solution to the problem of surging textile imports, in 1960 GATT negotiators adopted the concept of “market disruption.” This concept permitted contracting parties to impose

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145 See id. at 146.
import restraints on fairly-traded but low-priced textile imports that fell below a trigger price without a showing of injury to the domestic textile industry. With “market disruption” as the measure for safeguard measures, importing countries were relieved of the usual Article XIX requirement of finding injury before imposing safeguard measures. Market disruption became the cornerstone of the 1961 Short-Term Arrangement Regarding International Trade in Textiles,\textsuperscript{146} the 1962 Long-Term Arrangement Regarding International Trade in Cotton Textiles (with extensions through 1973),\textsuperscript{147} and the successor Multifiber Arrangement that entered into force in 1974, covering cotton and non-cotton textile products.\textsuperscript{148}

The position of developing countries during the Uruguay Round textile and clothing negotiations was that trade restrictions on textile exports to developed countries should be eliminated over a six-year period. Under intense, protectionist pressure from the domestic textile industry, the United States took a gradualist approach by advocating a ten-year phase out of the MFA, the imposition of global (versus bilateral) quotas on textile trade, and a progressive increase in the size of quotas. Complicating negotiations for the United States was the assurance to Congress from the Clinton administration during the approval debate of the North American Free Trade Agreement (“NAFTA”) that the U.S. textile industry would be protected adequately from low-priced Mexican imports through special rules of origin applicable to textiles and clothing.\textsuperscript{149}

The Agreement on Textiles and Clothing (“ATC”) is a blend of the parties’ negotiating positions.\textsuperscript{150} Under the ATC, trade in textiles and clothing is gradually brought under GATT-WTO disciplines. MFA quotas in effect on December 31, 1994, that were notified to the Textiles


\textsuperscript{149} See \textit{EIU GUIDE TO GATT}, supra note 58, at 25. The EU’s position was close to that of the United States, which also was under pressure from domestic textile manufacturers to protect the industry from import competition. \textit{See id.}

Monitoring Body within 60 days after entry into force of the ATC, are carried forward into the ATC. Thereafter, the MFA restrictions are superseded by the ATC, which phases them out over ten years, by January 1, 2005, through two mechanisms: product integration and quota acceleration.

First, the ATC integrates trade in the textile and clothing sector into the GATT-WTO system over a ten-year transition period, making such trade subject to the normal WTO rules on permissible trade restrictions, including tariffs, antidumping and countervailing duties, and GATT Article XIX safeguard measures.\textsuperscript{151} Second, the ATC provides for a ten-year phase-out of all quotas maintained on non-integrated products that were established under the bilateral agreements entered into under MFA auspices. (Unilateral quotas that were imposed under Article 3 of the MFA were eliminated one year after entry into force of the ATC.\textsuperscript{152}) The ATC also requires enhanced market access for textile-exporting countries.

If the parties to an MFA bilateral agreement are WTO Members, their obligations are subsumed under the ATC. The obligations of parties to an MFA bilateral agreement where both parties are not WTO Members (\textit{e.g.}, the bilateral agreement between China and the United States) continue in force independent of the ATC.

1. Product Integration

Article 2 of the ATC lays out a three-stage timetable during which textile quotas are phased out and trade in textiles and clothing progressively integrated into the GATT-WTO system.\textsuperscript{153} Once these product groups are integrated into GATT 1994, any border measure taken against the integrated products must comply with regular GATT-WTO rules, in particular GATT Article XIX on safeguards, the Agreement on Safeguards, and GATT Article XI on quotas. Each WTO Member must notify the Textiles Monitoring Body of all restrictions the Member has on textile and clothing imports.\textsuperscript{154}

The product integration process requires importing countries to bring 51 percent of their textile imports under normal GATT-WTO rules in three successive stages that take effect upon entry into force of the ATC, three years later, and at the beginning of year eight. With the entry into force of the ATC, each importing WTO Member integrated into GATT 1994 at least 16 percent of the total 1990 volume of textile and clothing products

\textsuperscript{151} See Agreement on Textiles and Clothing, \textit{supra} note 104, art. 1.

\textsuperscript{152} See \textit{id.} art. 2.5.

\textsuperscript{153} See \textit{id.} art. 2.6. The base year for integration stages and quota growth is 1990. The products that are subject to integration and quota growth are from four groups: tops and yarns, fabrics, made-up textile products, and clothing. The Annex to the ATC lists all covered products.

\textsuperscript{154} See \textit{id.} art. 2.7.
imported by the member.\textsuperscript{155} Each Member is free to choose which tariff lines or product categories it wants to integrate, thereby preserving the ability to postpone integration of the most import-sensitive products. Nevertheless, Members must select products from four product groups: tops and yarns, fabrics, made-up textile products, and clothing.

By January 1998 (37 months after entry into force of the ATC), Members must have integrated another 17 percent of the total 1990 volume of textile and clothing products imported by the Member.\textsuperscript{156} By January 2002 (85 months after entry into force of the ATC), Members must integrate another 18 percent of the total 1990 volume of textile and clothing products imported by the Member.\textsuperscript{157} Finally, by January 2005 (121 months after entry into force of the ATC), the remaining 49 percent of textiles and clothing trade must be integrated immediately.\textsuperscript{158} The ATC and all restrictions thereunder stand terminated in January 2005, on which date the textiles and clothing sector will be fully integrated into GATT 1994. There may be no extensions of the ATC.\textsuperscript{159}

2. Quota Growth

Article 2 provides for annual quota growth during each stage of the integration process. During Stage 1, which ended on December 31, 1997, the quota level under MFA bilateral agreements in force prior to the effective date of the ATC was increased annually by not less than the growth rate established under the bilateral agreement, plus an additional 16 percent.\textsuperscript{160} The level of each remaining restriction must be increased annually during Stage 2, which ends December 31, 2001, by the growth rate established during Stage 1, increased by an additional 25 percent.\textsuperscript{161} Similarly, during Stage 3, which ends December 31, 2004, the growth rate must not be less than the growth rate established during Stage 2, increased by an additional 27 percent.\textsuperscript{162}

\textsuperscript{155} See \textit{id.} art. 2.6.

\textsuperscript{156} See \textit{Agreement on Textiles and Clothing, supra} note 104, art. 2.8(a). For a report on the ATC integration process during Stage 1, see Textiles Monitoring Body, Comprehensive Report of the Textiles Monitoring Body to the Council for Trade in Goods on the Implementation of the Agreement on Textiles and Clothing During the First Stage of the Integration Process, G/L/179 (1997).

\textsuperscript{157} See \textit{Agreement on Textiles and Clothing, supra} note 104, art. 2.8(b).

\textsuperscript{158} See \textit{id.} art. 2.8(c).

\textsuperscript{159} See \textit{id.} art. 9. For the status of Members' integration programs, see Report of the Council for Trade in Goods to the General Council, G/L/134, at 16-17 (1996).

\textsuperscript{160} See \textit{id.} art. 2.13. Typical growth rates under MFA bilateral agreements were one percent for wool goods and six percent for all other products, although for major Asian suppliers (e.g., Hong Kong and the Philippines) the quota growth rate was less. See \textit{The Year in Trade} 1993, \textit{supra} note 72, at 10.

\textsuperscript{161} See \textit{Agreement on Textiles and Clothing, supra} note 104, art. 2.14(a).

\textsuperscript{162} See \textit{id.} art. 2.14(b).
To illustrate this "growth on growth" quota growth rate, if the MFA annual quota growth rate was six percent annually, then for Stage 1 the annual quota growth rate was 6.96 percent \((0.06 + (0.06 \times 0.16))\). For Stage 2, the annual quota growth rate would be 8.7 percent \((0.0696 + (0.0696 \times 0.25))\); and for Stage 3, the annual quota growth rate would be 11.049 percent \((0.087 + (0.087 \times 0.27))\).

The MFA "flexibility" provisions of swing, carryover, and carry forward are continued in the ATC.\(^{163}\)

Small supplier countries that account for 1.2 percent or less of individual import markets receive accelerated quota growth treatment by leapfrogging quota growth stages, \(i.e.,\) smaller suppliers are entitled to a 25-percent quota acceleration at the start of the ATC, an additional 27-percent increase in 1998, and final quota elimination in 2002.\(^{164}\) For the United States, small suppliers include Bahrain, the Dominican Republic, Egypt, Guatemala, Hungary, Jamaica, Kenya, Kuwait, Macau, Mauritius, Myanmar, Poland, Romania, the Slovak Republic, and Uruguay.\(^{165}\)

3. Market Access

As part of the integration process, Article 7 obligates Members to improve market access for textile and clothing products through the following measures: (1) tariff reductions and bindings; (2) the reduction or elimination of non-tariff barriers; (3) the facilitation of customs procedures; and (4) the fair and equitable treatment of textiles and clothing under antidumping duty, countervailing duty, and intellectual property laws. Members further commit not to introduce changes in their tariff classification schemes that would adversely affect market access.\(^{166}\)

If any importing Member fails to adopt adequate market access measures, a complaining Member may be permitted to withhold from the offending Member increases in quota growth rates during the next stage of the transition.\(^{167}\)

The Agreement itself does not address customs duties levied by WTO Members on textile and clothing products. Tariff concessions on these products are included in each Member’s Schedule of Concessions appended to the protocol to GATT 1994.

**H. Preshipment Inspection**

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\(^{163}\) See id. art. 2.16.

\(^{164}\) See id. art. 2.18. Members are abiding by this provision. See Report of the Council for Trade in Goods, supra note 159, at 19, para. 16.17.

\(^{165}\) See Hillman, supra note 150, at 882.

\(^{166}\) See Agreement on Textiles and Clothing, supra note 104, art. 4.2.

\(^{167}\) See id. art. 8.12.
Beginning in the 1980s, it became common for a number of countries, primarily developing countries, to hire commercial inspection firms to verify the customs classification and value of goods destined for their markets. These companies usually operate at seaports and airports in developed countries where they examine exporter claims concerning the quality, quantity, price, and financing terms of the goods for export.\footnote{See \textit{A Negotiating History}, supra note 57, at 738-39.}

In response to a growing concern that the use of inspection firms was impeding the flow of trade, the Uruguay Round negotiators concluded the Agreement on Preshipment Inspection ("PSI Agreement").\footnote{See Agreement on Preshipment Inspection, Apr. 15, 1994, Uruguay Round Results, \textit{supra} note 2.} The PSI Agreement requires WTO Members that employ inspection companies (user Members) to ensure that preshipment inspections are conducted in a reasonable manner so as not to unnecessarily interfere with legitimate trade.

Article 2 of the PSI Agreement sets out 22 obligations of user Members. One of the most important obligations that user Members undertake is to ensure that inspection procedures and criteria are objective and applied in a non-discriminatory manner to all exporters. Article 2 also requires that preshipment activities be conducted in a transparent manner. For example, user Members must ensure that PSI firms provide exporters with all the information necessary for exporters to comply with inspection requirements. In addition, user Members must ensure that PSI firms avoid unreasonable delays in inspections and issue within five working days after they complete their inspection either a clean report of findings or a detailed written explanation that specify the reasons for why such a report cannot be issued.

Article 4 of the PSI Agreement establishes a binding arbitration procedure in the event differences between an exporter and a PSI firm cannot be resolved. Such arbitration is to be conducted under the joint auspices of the Independent Entity (created by the WTO in 1996 as a subsidiary body of the Council for Trade in Goods), the International Chamber of Commerce, and the International Federation of Inspection Agencies. Decisions of the three-member panels are to rendered within eight working days of the request for independent review.\footnote{See \textit{id.} art. 4.}

\section*{I. Import Licensing Procedures}

A number of countries use a system of "automatic" and "non-automatic" licensing systems to monitor and regulate imports.\footnote{See \textit{Statement of Administrative Action}, \textit{supra} note 57, at 907.} An

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\begin{itemize}
  \item \footnote{See \textit{A Negotiating History}, \textit{supra} note 57, at 738-39.}
  \item \footnote{See Agreement on Preshipment Inspection, Apr. 15, 1994, Uruguay Round Results, \textit{supra} note 2.}
  \item \footnote{See \textit{id.} art. 4.}
  \item \footnote{See \textit{Statement of Administrative Action}, \textit{supra} note 57, at 907.}
\end{itemize}
"automatic" licensing system is used to monitor, but not to regulate, the importation of goods. Governments use a "non-automatic" system to administer quotas and tariff-rate quotas. Under the latter, only a limited number of licenses are issued.

The WTO Agreement on Importing Licensing Procedures builds on the Tokyo Round Licensing Code and strengthens the rules governing import licensing procedures by improving the transparency and predictability of such procedures. The Agreement establishes firm deadlines for the publication of new or revised licensing requirements and imposes time limits on processing licensing applications. The Agreement also establishes a limit on the number of government agencies an importer must contact in order to obtain a license.\textsuperscript{172}

Article 2 of the Licensing Agreement governs "automatic" licensing systems. In order to qualify as an "automatic" system, completed applications must be approved immediately and in no case more than 10 days after submission.\textsuperscript{173}

Article 3 governs "non-automatic" licensing systems. Governments using them must publish licensing criteria in a manner that is understandable. Denials of applications must be accompanied by reasons. An aggrieved applicant must be afforded an opportunity to appeal. Licensing systems that administer quotas must publish the amount of the quota, the quota allocations among supplying countries, and the opening and closing dates of quotas. Applications must be processed within 30 days on a first-come, first-served basis. If applications are considered simultaneously, then they must be processed within 60 days.\textsuperscript{174}

\section*{J. The TRIPS Agreement}

Among the signal achievements of the GATT-WTO system, the Uruguay Round TRIPS Agreement ranks high among them. The TRIPS Agreement is one of two Uruguay Round Agreements (the other being the General Agreement on Trade in Services) that breaks new ground by not dealing with trade in goods strictly. It thus takes the GATT-WTO system into uncharted territory.\textsuperscript{175} Some consider the TRIPS Agreement the most

\textsuperscript{172} See id.

\textsuperscript{173} See WTO Agreement, supra note 2, Annex 1A, art. 2.2(a)(iii).

\textsuperscript{174} See id. art. 3.5(f).

remarkable achievement of the entire Uruguay Round. It fills the intellectual property rights ("IPR") protection gap within GATT by establishing minimum levels of protection for copyrights, trademarks, geographical indications, industrial designs, patents, plant varieties, computer chip layout designs, and trade secrets. It couples these IPR protections with the requirement that WTO Members adopt effective enforcement mechanisms. Unlike other GATT commitments that mainly obligate Members to refrain from taking certain proscribed actions, the TRIPS Agreement obliges Members to adopt both minimum standards of IPR protection and domestic enforcement mechanisms.

As is the case with most international agreements, the TRIPS Agreement represents a series of compromises. It gives developed countries the substantive minimum standards and procedural protections they wanted. At the same time, it accommodates the developing countries by giving them generous transition periods. The TRIPS Agreement does not achieve all the goals that some developed countries sought. For example, the long transition period (ten years) given to all Members within which to adopt laws providing for the patentability of drugs was criticized by the U.S. pharmaceutical industry. Conversely, developing countries criticized the Agreement’s restrictions on the use of compulsory licensing.

1. Minimum IPR Standards

As explained more fully in the following pages, Part II of the TRIPS Agreement, Standards Concerning the Availability, Scope and Use of Intellectual Property Rights, sets forth in detail the minimum standards Members must observe in granting IPR protection. It is divided into eight sections. The first seven sections identify the seven types of intellectual property Members must protect, namely, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout

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176 See, e.g., McGovern, supra note 57, § 21.211.

designs of integrated circuits, and undisclosed information. These sections also specify the scope of that protection. The eighth section treats anticompetitive practices associated with IPR licensing.

a. Copyright

Article 9.2 reiterates the core copyright principle that copyright protection only extends to expressions and not to ideas, procedures, methods of operation, or mathematical concepts. It thus qualifies Article 1, which permits Members to provide broader IPR protection than is required under the Agreement. Members are prohibited from expanding the types of expressions that are copyrightable.

Article 10 follows the Berne Convention's classification of computer programs as literary works, and Members are required to protect them as such. Article 10.2 further requires copyright protection for compilations of data or other materials which by reason of the selection or arrangement of their contents constitute intellectual creations.

The minimum term of protection for most copyrighted works is the life of the author plus 50 years. In cases where the term of protection is calculated on a basis other than the life of a natural person (e.g., in the case of anonymous works), Article 12 provides a minimum term of copyright protection of no less than 50 years from the end of the calendar year of authorized publication. For photographic work or a work of applied art, the minimum term of protection is 25 years. For performers and producers of sound recordings, the term of protection is 50 years from the end of the calendar year in which the fixation or performance took place. For broadcasters, it is 20 years from the end of the calendar year of broadcast.

Article 13 deals with limitations or exceptions to exclusive rights. It restricts such limitations or exceptions "to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." Such limitations include, for example, fair use of copyrighted work for educational purposes.

Article 14, entitled Protection of Performers, Producers of Phonograms (Sound recordings) and Broadcasting Organizations, requires, in the case of sound recordings, that Members provide recording producers a 50-year term of protection, and the unlimited right to authorize or prohibit reproduction or commercial rental of their sound recordings. A special exception is carved out for countries with a system of payment to

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179 See id.
compensate for rental of sound recordings. In the case of sound recording performers, Article 14.1 requires Members to make it possible for performers to prevent unauthorized fixation, broadcast, or reproduction of their live performances (i.e., "bootlegging"). Under Article 14.3, broadcasting organizations are to receive similar rights as performers. If a Member does not grant such rights to broadcasters, then the copyright owner is to receive them.

b. Trademark

Part II, Section 2, of the TRIPS Agreement deals with the subject of trademarks. Article 15.1 defines a trademark broadly as:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings . . . . Any personal names, letters, numerals, figurative elements and combinations of colors . . . shall be eligible for registration as trademarks.

Once it is determined that the subject matter is protectable and registerable as a trademark, Article 16 of the TRIPS Agreement confers on the owner of a registered trademark the exclusive right to prevent all third parties not having the owner’s consent from using identical or similar signs for goods or services which are identical or similar to those for which the trademark is registered. Where identical marks are used on identical goods or services, a likelihood of confusion is presumed.

The initial term and each renewal term of a registration may not be less than seven years, subject to renewal in perpetuity. A registration may be canceled only after an uninterrupted, three-year period of non-use. Valid defenses to an allegation of non-use include import restrictions or other governmental requirements making use of the trademark impossible within the territory of the Member. Use of a trademark by a person under the control of the owner, such as a licensee, constitutes use of the trademark for purposes of maintaining the registration.

c. Industrial Designs

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180 Only Japan and Switzerland have such a system. See Statement of Administrative Action, supra note 57, at 983.
181 See TRIPS Agreement, supra note 178, art. 18.
182 See id. art. 19.1.
183 See id.
184 See id. art. 19.2.
Articles 25 and 26 of the TRIPS Agreement protect industrial designs. Article 25 requires Members to provide protection for independently created industrial designs that are new or original, i.e., that differ significantly from known designs or combinations of known designs. Members may provide that designs dictated essentially by functional or technical considerations are not protected. However, no requirement exists that the design have aesthetic appeal.

Members are neither required to nor prohibited from registering industrial designs. If they do require registration of textile designs in order for them to be protected, Members must not make the requirements for securing protection of such designs so onerous, costly, or protracted that such requirements unreasonably impair the opportunity to seek and obtain protection. In lieu of protecting textile designs through industrial design law, Members are given the option of providing such protection through copyright law.\textsuperscript{185}

Under Article 26.1, Members must establish legal mechanisms by which owners of industrial designs can prevent others from making, selling, or importing articles that copy the protected design. Limited exceptions to the protection of industrial designs are permitted, provided they do not prejudice the legitimate interests of owners. The term of protection must not be less than ten years.\textsuperscript{186}

d. Patents

Section 5, on patents, is the most significant achievement of Part II of the TRIPS Agreement. It also is the one section where the greatest accommodations had to be made between the competing positions of developed and developing countries.

With the limited exceptions described below, the scope of patentable subject matter extends to any invention, whether a product or process, in all fields of technology, provided they are new, involve an inventive step (i.e., are non-obvious), and are capable of industrial application (i.e., are useful).\textsuperscript{187} Provided they have not fallen into the public domain at the time the TRIPS Agreement becomes applicable in a Member, patents are available and patent rights enjoyable without discrimination as to the place of invention, the field of technology, or whether the product is imported or produced locally.\textsuperscript{188}

\textsuperscript{185} See id. art. 25.2.
\textsuperscript{186} See TRIPS Agreement, supra note 178, art. 26.3.
\textsuperscript{187} See id. art. 27.1. “Non-obvious” and “useful” are the U.S. criteria for patentability of an invention, in addition to novelty.
\textsuperscript{188} See id. arts. 25.1, 70.3.
The scope of patent rights is delineated in Article 28. In the case of products, a patent confers on its owner the exclusive right "to prevent third parties not having the owner's consent from the acts of: [sic] making, using, offering for sale, selling, or importing for these purposes that product."\textsuperscript{189} In the case of processes, the owner has the exclusive right "to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: [sic] using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process."\textsuperscript{190} Patent owners also have the right to assign, transfer, and license the patent.\textsuperscript{191} The inventor has the right to be mentioned on the patent.\textsuperscript{192}

A mandatory condition that Members must impose on all patent applicants is the requirement that an applicant disclose the invention in a manner sufficiently clear and complete for the invention to be worked by a person skilled in the art.\textsuperscript{193} A Member may in the alternative impose the more demanding standard that requires the applicant to indicate the best mode for working the invention known to the applicant on the filing date or, where priority is claimed, on the priority date of the application.\textsuperscript{194}

Article 30 permits Members to make limited exceptions to the otherwise exclusive rights conferred on an owner by a patent, provided that such exceptions do not unreasonably conflict with the normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner. The terms "unreasonable" and "legitimate" are not defined, virtually ensuring future disputes.

\textbf{i. Excluded Subject Matter}

Members may exclude, as non-patentable, the following inventions:

- diagnostic, therapeutic, and surgical methods for the treatment of humans or animals;
- plants and animals, other than micro-organisms (e.g., yeasts or bacteria); and biological processes for the production of plants or animals, other than non-biological and microbiological processes;

\textsuperscript{189} See id. art. 28.1(a).
\textsuperscript{190} See id. art. 28.1(b).
\textsuperscript{191} See id. art. 28.2.
\textsuperscript{192} Paris Convention, art. 4 ter.
\textsuperscript{193} See TRIPS Agreement, supra note 178, art. 29.1.
\textsuperscript{194} See id. Under Article 2.1 of the Agreement, the priority system of Article 4 of the Paris Convention is incorporated by reference. Under that system, the date of subsequent filings made in other Members relates back to the date of the first filing for a period of twelve months for patents and utility models, and six months for trademarks and industrial designs. As explained above, the Patent Cooperation Treaty extends this period for 18 months for patent applications. The Madrid Protocol authorizes single-country trademark registrations that perfect trademark rights in all other signatory countries.
inventions that if commercially exploited within the territory of the Member would threaten public order or morality, including human, animal, or plant life, and the environment. Despite the exception for plant and animal patents, Members still must provide protection for plant varieties either by patents or by an effective *sui generis* system. An acceptable *sui generis* system of protection for plant varieties would be one that is consistent with the International Convention for the Protection of New Varieties of Plants ("UPOV Convention"). As part of the TRIPS Agreement's built-in agenda, Members also agree to review patent protection for plants and animals in 1998.

**ii. Pharmaceuticals and Agricultural Chemicals**

Resolving one of the thorniest IPR issues dividing developed and developing countries, namely, the patentability of pharmaceuticals and agricultural chemicals, Article 70.8 of the TRIPS Agreement makes special provision for those Members that do not provide patent protection for pharmaceutical and agricultural chemical products on the date the TRIPS Agreement entered into force. First, such Members immediately must create an interim system that permits patent applications to be filed for these products. Second, when the application is filed, novelty will be determined as of the date of filing (the so-called "mailbox" provision). Third, for products that are the subject of an application under the interim system, the Member must provide exclusive marketing rights for five years after the product receives marketing approval, or until a patent is granted or approved for marketing in another WTO Member. See id. art. 27.3(b).

The transition periods applicable to patent protection for pharmaceuticals and agricultural chemicals are discussed below.

In a 1997 WTO panel proceeding, the United States complained that India did not maintain a "mailbox" mechanism that was consistent with Article 70.8. The panel agreed with the United States. It rejected India's claim that the receipt of mailbox applications through an unpublished administrative system qualified as TRIPS' compliant. The panel also concluded that the transparency provisions of TRIPS Article 63 apply immediately, even for developing and least-developed countries that are the beneficiaries of the TRIPS' transitional phase-in periods. See Report of the WTO Panel, India -- Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, at 56-57, 59, paras. 7.39-7.43, 7.48-7.50 (1997).

In early 1997, the United States and Pakistan resolved a similar dispute brought by the United States to the Dispute Settlement Body. The United States complained that Pakistan had failed to create a system to permit the filing of applications for patents on pharmaceutical and agricultural chemical products. See Complaint of the United States, Pakistan -- Patent Protection for Pharmaceutical and Agricultural Chemical Products, WS/DS36 (1996).

In order to be entitled to exclusive marketing rights, the product must be patented and approved for marketing in another WTO Member. See id. art. 70.9. In 1997, a WTO panel found India to be in breach of this obligations under Article 70.9 because it did not have legislation in place authorizing executive authorities to grant exclusive marketing rights. See Report of the WTO Panel, India...
rejected, whichever period is shorter. Finally, Article 39.3 mandates that when Members require as a condition for approving the marketing of pharmaceutical or agricultural chemical products the submission of undisclosed test or other data that involved a considerable effort to originate, the Member must protect such data from unauthorized disclosure. Alternatively, a Member may introduce procedures to ensure that the data are protected against unfair commercial use.

iii. Compulsory Licensing

In order to shield patent owners from excessive government encroachment on their exclusive rights, Article 31 tightly regulates any compulsory license system (euphemistically referred to in the Agreement as "other use without authorization of the right holder") that is used by a Member to force a patent owner to license a government entity or a third party designated by the Member.

Circumstances in which a compulsory license may be authorized in countries with such measures include situations where the owner fails to work the invention within a certain period of time after receiving a patent, or to prevent or remedy other anti-competitive practices that might result or have resulted from the exercise of the exclusive patent rights by the owner.200

When authorizing a compulsory license, a Member’s action is circumscribed in the many respects.

1. Authorization of such use must be considered on its individual merits.201
2. Unless it is to remedy an anti-competitive practice, such use may only be permitted if the proposed user has made efforts to obtain authorization from the patent owner on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time.202


200 U.S. law authorizes the issuance of compulsory licenses under the Atomic Energy Act, the Clean Air Act, and the Energy Policy Act. See STATEMENT OF ADMINISTRATIVE ACTION, supra note 57, at 1005. Regulations governing the grant of compulsory licenses comply with the TRIPS Agreement criteria, with the exception of the restrictions on the compulsory licensing of semiconductor technology, which were amended. See id.

201 See TRIPS Agreement, supra note 178, art. 31(a).

202 This requirement may be waived by a Member in cases of national emergency, circumstances of extreme urgency, or public non-commercial use. See TRIPS Agreement, supra note 178, art. 31(b).
3. The scope and duration of such use shall be limited to the purposes for which it was authorized. 203
4. Such use shall be non-exclusive. 204
5. Such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use. 205
6. Unless it is to remedy an anti-competitive practice, any such use must be authorized predominately for the supply of the domestic market of the Member authorizing such use. 206
7. Authorization for such use is subject to termination when a change in the circumstances which led to it no longer exist. 207
8. The patent owner must be paid adequate remuneration. The need to correct any anti-competitive practices may be taken into account in determining the amount of the remuneration. 208
9. The validity of any decision relating to the authorization or to the remuneration shall be subject to judicial or other independent review by a higher authority within the Member. 209
10. Where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent," which is the subject matter of the compulsory license), (a) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent, (b) the owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent, and (c) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent. 210

Article 5 of the Paris Convention adds two important qualifications regarding compulsory licenses. First, no proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license. Second, a compulsory license may not be applied for on the ground of failure to work or insufficient

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203 A special requirement for semiconductor technology provides that the scope of the use shall be only for public non-commercial use (e.g., educational use) or to remedy a practice determined after judicial or administrative process to be anti-competitive. See TRIPS Agreement, supra note 178, art. 31(c).
204 See TRIPS Agreement, supra note 178, art. 31(c).
205 See id. art. 31(d).
206 In the case of a customs union such as the EU, it is an open question whether the relevant market is the entire territory of the customs union or the territory of an individual member-state.
207 See TRIPS Agreement, supra note 178, art. 31(f).
208 See id. art. 31(g).
209 See id. art. 31(h).
210 See id. art. 31(i).
working of the invention before the expiration of a period of four years from
the date of filing of the patent application or three years from the date of the
grant of the patent, whichever period expires last.

iv. Other Provisions

Rounding out Section 5 of the TRIPS Agreement are Articles 32, 33,
and 34. Article 32 requires an opportunity for judicial review of any decision
to revoke or forfeit a patent. Article 33 provides a minimum term of patent
protection of 20 years from the date of filing.

Article 34 on burden of proof in civil proceedings respecting the
infringement of a process patent eases the proof problems that a process
patent owner can encounter in an infringement action. Members must
provide judicial authorities with the power to require that an alleged
infringer prove that its product, if identical to the product that would be
produced from the exercise of a patented process, was produced using a
different process in at least one of the following circumstances: (1) if the
product obtained by the patented process is new; or (2) if there is a
substantial likelihood that the identical product was made by the process and
the patent owner has been unable through reasonable efforts to determine the
process actually used.

e. Layout-Designs of Integrated Circuits

The protection of integrated circuit layout-designs (topographies of
computer chips) is provided for in part under Articles 35 through 38 of the
Agreement, and in part under the Treaty on Intellectual Property in Respect
to Integrated Circuits ("IPIC Treaty"), incorporated by reference in Article
35. Members are required to protect layout-designs, but in a manner they
deem appropriate. In all events the following unauthorized acts must be
declared unlawful: (1) reproducing a protected layout-design; and (2)
importing, selling, or distributing for commercial purposes a protected
layout design, an integrated circuit incorporating one, or an article
incorporating such an integrated circuit.

211 The IPIC Treaty defines a layout design or topography in Article 2 as a three-dimensional
disposition of the elements of an integrated circuit, at least one of which must be an active element. IPIC
Treaty Article 3 requires that in order to be protectable, the topography must be original and not
commonplace, although a combination of commonplace elements may be original. IPIC Treaty Article
6.2 provides that there are no rights against an identical layout design that was independently created.
(1989).
212 See id. art. 6.1.
213 See TRIPS Agreement, supra note 178, art. 36.
A Member may not make unlawful importing, selling, or distributing for commercial purposes an integrated circuit or an article incorporating such an integrated circuit, if the person performing the act did not know or had no reasonable grounds to know of the unlawfully incorporated layout design. However, once the responsible person has received sufficient notice that the layout-design was unlawfully reproduced, Members must require that a person pay a reasonable royalty to the right holder for stock in hand or ordered before the notice.\textsuperscript{214} The minimum term of protection is 10 years from the date of filing an application for registration or from the first commercial exploitation, wherever in the world it occurs.\textsuperscript{215} Notwithstanding these two yardsticks, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.\textsuperscript{216}

f. Undisclosed Information

Article 39.2 requires Members to provide protection to the holders of undisclosed information (i.e., trade secrets), provided the information (1) is secret, (2) has commercial value because it is secret, and (3) has been subject to reasonable steps to keep it secret. Included under this rubric are data submitted to governmental agencies in connection with patent applications for pharmaceuticals, discussed above.

K. The General Agreement on Trade in Services

GATT 1947 was concerned almost exclusively with rules on trade in goods. The Uruguay Round's banner achievements were in expanding the scope of the GATT-WTO system to include non-goods sectors, liberalizing trade in several advanced sectors, and setting the WTO Members on a course to further liberalization agreements on advanced-sector trade. With the successful conclusion of the General Agreement on Trade in Services and the TRIPS Agreement, the negotiators broke new ground by introducing core GATT disciplines to trade in services and providing effective protection of intellectual property rights. Follow-on WTO negotiations also have produced agreements on trade in information technology products, telecommunications, and financial services.

The service sector has overtaken manufacturing as the most important part of developed countries' economies. Service industries

\textsuperscript{214} See id. Article 37.2 incorporates the restrictions on compulsory licensing contained in Article 31, mutatis mutandis. See id. art. 37.2.
\textsuperscript{215} See id. arts. 38.1, 38.2.
\textsuperscript{216} See id. art. 38.3.
account for 61 percent of gross domestic product ("GDP") and over one-half of employment in developed countries.\textsuperscript{217} The ratio of world merchandise trade to services trade was four to one in 1995.\textsuperscript{218} The WTO estimates that world trade in services exceeds $4 trillion annually.

Jobs in the service sector provide nearly 80 percent of U.S. employment.\textsuperscript{219} That figure is expected to increase to 88 percent by 2005.\textsuperscript{220} The service sector generated 75 percent of GDP in the United States in 1996.\textsuperscript{221} Services trade represents more than one quarter of total U.S. exports. In 1995, total U.S. exports of services was over $210 billion, which grew in 1996 to nearly $224 billion. This figure compares with total U.S. exports of merchandise trade of nearly $625 billion in 1996. The United States also had a trade surplus in services of $68 billion in 1995, and of $73 billion in 1996. It enjoys a services trade surplus with Canada, the EU, and Japan.

Given the substantial increase in the volume of services trade, liberalizing trade in services by bringing multilateral disciplines to bear on this sector was an important Uruguay Round goal for developed countries. Developed countries enjoy a comparative advantage in the more capital-intensive and highly-skilled service industries, such as telecommunications and financial services.

Developing countries, on the other hand, were unreceptive to the proposal to add services trade to the Uruguay Round agenda. Behind the leadership of India and Brazil, they were opposed to putting services trade on the Uruguay Round agenda at all. To the extent they enjoy any comparative advantage in this sector, it is in the labor-intensive construction industry. But restrictive immigration and labor laws historically have prevented trade in such services. More importantly, developed countries showed no interest in changing these trade-restrictive immigration laws.\textsuperscript{222}

Ultimately, services trade was added to the Uruguay Round agenda. After resolving some preliminary issues (e.g., the definition and quantification of services trade), the General Agreement on Trade in Services was successfully concluded. It was, however, one of the last agenda items to be wrapped up during the negotiations.

The GATS is the first multilateral agreement covering trade and investment in the services sector. It is divided into seven parts, consisting of

\begin{itemize}
  \item \textsuperscript{217} See \textit{The Manufacturing Myth}, \textit{THE ECONOMIST}, Mar. 19, 1994, at 91.
  \item \textsuperscript{218} See \textit{THE ECONOMIST}, May 3, 1997, at 99.
  \item \textsuperscript{219} See \textit{id}.
  \item \textsuperscript{220} See \textit{id}.
  \item \textsuperscript{221} See \textit{Good News for U.S. Trade}, \textit{CHRISTIAN SCI. MONITOR}, Mar. 17, 1997, at 18.
  \item \textsuperscript{222} For background on the issues confronting the Uruguay Round negotiators in liberalizing trade in services, see \textit{CONGRESSIONAL BUDGET OFFICE, THE GATT NEGOTIATIONS AND U.S. TRADE POLICY} 119-30 (1987); \textit{EIU GUIDE TO GATT, supra} note 58, at 28.
\end{itemize}
twenty-nine articles and eight annexes. The bricks and mortar of the GATS are built on three pillars. First, the GATS framework agreement prescribes core principles and basic obligations governing trade in services that are applicable to all WTO Members. These basis obligations include rules on MFN treatment, national treatment, and transparency. The GATS is modeled after the GATT in both name and content.

Second, market access commitments made by WTO Members are included in national schedules of commitments that are appended to and made an integral part of the GATS. The Members' schedules of market access commitments are analogous to the schedule of tariff concessions that Members make under GATT Article II.

Third, the GATS' eight annexes complement the general rules and market access commitments. The Uruguay Round participants recognized that negotiations would have to be continued on certain service sectors if the Round was ever going to be concluded. These specific sectors (e.g., maritime transport, telecommunications, financial services) had proven to be major stumbling blocks for the negotiators. To that end, appended to the GATS are several annexes with guidelines and deadlines for future market access negotiations on the maritime transport, financial, and basic telecommunication services sectors. Market access commitments have been successfully negotiated for the financial services and telecommunication sectors. Negotiations on maritime transport services has been deferred until 2000.

Part I of the GATS sets out its scope of coverage and defines several key terms (other definitions are provided in GATS Article XXVIII). Under GATS Article I:1, WTO Members agree in principle to universal coverage of all trade in commercial services. No service sector is excluded a priori under the framework agreement. The GATS Annexes do exclude air transport services and reserve for later negotiation specific commitments on maritime transport, financial services, and telecommunications trade.

1. Modes of Supply

Article I:2 defines "trade in services" by the following four "modes

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223 See generally GATS, supra note 26.
224 GATS Article I:3(b) defines "services" as "any service in any sector except services supplied in the exercise of governmental authority." Article I:3(c) in turn defines "services supplied in the exercise of governmental authority" as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers [i.e., government monopolies]." See GATS, supra note 26.

Government procurement of services is governed by the Agreement on Government Procurement. It is discussed below. See Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4, Uruguay Round Results, supra note 2, Annex 4 [hereinafter Government Procurement].
of supply" (i.e., the way in which services are delivered).

1. The cross-border supply of services from the territory of one Member into the territory of any other Member. For example, a securities firm in Country A sells bonds from Country A to consumers in Country B; or an architect from Country A sends design drawings by mail to a client in Country B.

2. The consumption of services in the territory of one Member by the service consumer of any other Member. For example, a tour company in Country A supplies a service to Country B consumers in Country A; or a student from Country A studies abroad in Country B.

3. The service supplier of one Member supplies services through a commercial presence in the territory of any other Member. For example, a bank located in Country A renders banking services through its branch located in Country B; or an advertising firm in Country A establishes an office in Country B to render services to clients located there.

4. The service supplier of one Member supplies services through the presence of natural persons of a Member in the territory of any other Member. For example, an architect from a U.S. firm performs on-site design services in Europe; or an accountant from Country A travels to Country B to render accounting services to a client in Country B.

The first, second, and fourth modes of supply involve the cross-border delivery of services. The third mode of supply involves the sale of services through an affiliate, i.e., the delivery of services by a foreign-owned firm within the territory of another Member through facilities or other commercial presence.

The Annex on Article II Exemptions is arguably the most important of the eight annexes appended to the GATS. It authorizes MFN exemptions, provided that the exemption is listed in the Member’s Schedule of Commitments and does not extend beyond 10 years. Only a handful of the scheduled MFN exemptions do not include an expiration date. All unexpired exemptions will be reviewed by the Council for Trade in Services by 2000. Approximately two-thirds of the WTO Members listed MFN exemptions in their schedules (Japan did not list any MFN exemptions). For example, the EU Schedule of Commitments provides preferences to EU-member states for audiovisual services.

Exemptions are subject to negotiation in subsequent trade liberalizing rounds. Any exemption with a term greater than five years is subject to review by the Council for Trade in Services. The Council has no express authority to demand termination of the exemption, however.226

225 See GATS, supra note 26, art.II: Annex, exemptions, para. 6.
226 See id. para. 3.
Meaningful trade in services requires that service suppliers and their customers be able to make unimpeded capital transactions across national borders. To that end, Article XI limits the ability of Members to restrict international transfers and payments for current transactions relating to specific market access commitments. Members may restrict such payments and transfers solely in accordance with Article XII on balance-of-payments restrictions.

2. Market Access

If the framework agreement is the skeleton of the GATS, then the schedule of market access commitments is the flesh on the bones. The Members' schedules list the service sectors and modes of supply for which individual Members have agreed to provide full or partial access to the service suppliers of other WTO Members.

In order to harmonize Members' schedules, during the Uruguay Round the GATT Secretariat suggested the use of a Services Sectoral Classification List ("SSC List"). The SSC List includes 155 service industries, each with four possible modes of supply, with each mode subject to both market access and national treatment commitments. This matrix equals 1,240 service "cells" for which commitments were requested. Thus, more than 100 Uruguay Round participants negotiated bilaterally for market

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The following table illustrates the format of members' schedules of commitments:

<table>
<thead>
<tr>
<th>Modes of Supply</th>
<th>Sector or Sub-Sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
<th>Additional Commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cross-border supply</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consumption abroad</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commercial presence</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Presence of natural persons</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

access to 1,240 service "cells" on an MFN and national treatment basis. The negotiation of these schedules on a bilateral request/offer basis was, not surprisingly, time-consuming.

Some Uruguay Round participants wanted to schedule market access commitments on the basis of a positive list approach. That is, unless the service sector or mode of supply is expressly listed in a Member's schedule of commitments, it is not covered under the GATS. Other participants wanted to proceed on the basis of a negative list approach. That is, market access would exist for all sectors and modes of supply on a national treatment basis unless express reservations were made in the Member's schedule of commitments.

The specific commitments made under the GATS are a blend of these two approaches. Only those industries that are listed in a Member's schedule of commitments are open to foreign service suppliers with respect to at least one mode of supply (i.e., a positive list approach). However, if a Member has made a commitment, only the conditions, limitations, or qualifications on market access and national treatment listed in the schedule may be imposed (i.e., a negative list approach).

Developed countries made market access commitments on approximately 45 percent of their service sectors. Developing countries as a group made commitments on only 12 percent. Starting with 620 as the maximum number of service sectors, sub-sectors, and modes of supply on which commitments could have been made, the United States made 384 commitments; the EU, 392; Canada, 352; Japan, 408; and Mexico, 252. For all service sectors, only 25 percent are scheduled by developed countries without conditions or qualifications. The comparable figure for developing countries is 7 percent.

Unless a reservation is otherwise recorded in a Member's schedule of commitments, if a Member makes market access commitments, then full market access and national treatment is required. A Member is prohibited from maintaining or adopting several types of limitations or measures, unless it has otherwise so specified in its schedule. Typical kinds of numerical limitations that a Member might inscribe in its schedule of commitments include the following:

- limitations in the form of quotas or the requirement of an economic needs test on the number of service suppliers or

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228 An explanatory note to the GATS prepared by the GATT Secretariat during the Uruguay Round provides that when market access commitments are made, they do not include a right to supply services that are inputs to the committed service. See GATS, supra note 26, Explanatory Note, para. 17 (1991).

229 See BERNARD HOEKMAN, Assessing the General Agreement on Trade in Services, in THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES, supra note 70, at 327, 359.

230 See GATS, supra note 26, art. XVI:2(a)-(f).
operations;\textsuperscript{231} 
- limitations in the form of quotas on the total value of service transactions or assets;\textsuperscript{232} 
- measures that restrict or require specific types of a legal entity or joint venture through which a service supplier may supply a service;\textsuperscript{233} 
- limitations on the total number of natural persons that may be employed in a particular service sector; and 
- limitations on the participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Most market access and national treatment commitments to date are essentially standstill agreements. That is, existing market access and national treatment limitations, if any, are maintained. However, Members commit not to impose additional or new trade restrictions in the future. Consequently, while the GATS lays a foundation, broad trade liberalization in services did not take place in the Uruguay Round. With the exception of the financial services and telecommunications negotiations, where Members sought genuine liberalization of those two service sectors, the most noteworthy achievement of the first round of services trade negotiations was to provide an unprecedented amount of information on barriers to services trade maintained by WTO Members. Thus, through the commitments that identify measures that are barriers to services trade, the Uruguay Round negotiators accomplished the twin goals of establishing benchmarks for future services trade negotiations and making barriers to services trade more transparent where market access commitments were made. Because of the GATS positive list approach, however, benchmarks and transparency are non-existent if no market access commitment was made for a service sector or sub-sector. Improved commitments on trade liberalization of most service sectors must await the follow-on services negotiations scheduled for 2000.

3. Progressive Liberalization

Mindful that an agreement on the complete liberalization of trade

\textsuperscript{231} Examples include a license for a new restaurant based on an economic needs test, annually established quotas for foreign medical practitioners, nationality requirements for service suppliers (equivalent to a zero quota), and restrictions on the amount of broadcasting time available for foreign films. See Explanatory Note, supra note 228, para. 6.

\textsuperscript{232} For example, foreign bank subsidiaries' assets might be capped at a fixed percentage of total domestic assets of all banks. See id.

\textsuperscript{233} Examples include a requirement that foreign companies establish subsidiaries, or that in a particular sector commercial presence take the form of a partnership. See id.
in services was not likely to happen overnight, Part IV schedules future negotiations for further liberalization of trade in services. It also lays down rules for negotiating schedules and for the subsequent modifications of those schedules.

Article XIX schedules successive rounds of negotiations beginning no later than 2000 and periodically thereafter. They are aimed at the progressive liberalization of trade in services. For each round, negotiating guidelines and procedures are to be established, taking into account the trade liberalization efforts undertaken by Members autonomously since 1995 and the special situation of least-developed countries.234 Article XIX contemplates that the process of progressive liberalization may take place through bilateral, plurilateral, or multilateral negotiations in each round, provided they are aimed at raising the overall level of specific commitments.235

4. Schedules of Specific Commitments

Article XX establishes the format for each Member's schedule. In contrast with the broad brushstrokes of the framework agreement, the Members' schedules of specific commitments are detailed. As previously noted, each Member's schedule of commitments is inscribed with the limitations on market access and national treatment that a Member imposes on foreign service suppliers.236 All schedules must specify: (1) terms, limitations, and conditions on market access; (2) conditions and qualifications on national treatment; (3) undertakings relating to additional commitments; (4) the time frame for implementation of commitments; and (5) the date of entry into force of commitments.237 Measures that are inconsistent with both Article XVI (market access) and Article XVII (national treatment) are to be inscribed in the column relating to market access limitations, in which case the inscription will be considered a condition or qualification on national treatment as well.238

During the Uruguay Round negotiations participants agreed to follow a set of guidelines for the scheduling of specific commitments under the GATS. The guidelines encouraged Members to use the SSC List developed during the Uruguay Round. This SSC List is based on the U.N.

234 See GATS, supra note 26, art. XIX:3.
235 See id. art. XIX:4.
236 At the request of the USTR, the ITC has assumed responsibility for maintaining and updating the U.S. Schedule of Commitments in all service sectors. See generally U.S. INT'L TRADE COMM'N, U.S. SCHEDULES OF COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (USITC, May 1997).
237 See GATS, supra note 26, art. XX:1.
238 See id. art. XX:2.
Provisional Central Products Classification ("CPC") System.\textsuperscript{239} Although the use of the SSC List is not mandatory, most Members have adopted it as the basis for scheduling their commitments.\textsuperscript{240}

Schedules are bifurcated into cross-industry ("horizontal") commitments and industry-specific ("vertical") commitments. Cross-industry commitments in effect are across-the-board conditions and restrictions applicable to all industries listed in a Member’s schedule. Although GATS Article XX does not require cross-industry commitments, and although no guidelines were established for such commitments, the participants adopted this approach in the interests of avoiding excessive repetition in the industry-specific schedules. As a consequence, in order to determine the extent of market access and national treatment, it is necessary to consult both the cross-industry and specific-industry schedules. Horizontal commitments appear at the beginning of national schedules.

The cross-industry commitments deal for the most part with issues bearing on the third (commercial presence) and fourth (the presence of natural persons) modes of supply, \textit{e.g.}, investment, taxation, real estate transactions, government subsidies, and the temporary entry of persons. For example, the United States has made horizontal commitments on the temporary entry and stay of natural persons; the acquisition of land by aliens; differential taxation measures; and subsidies available from the Overseas Private Investment Corporation ("OPIC") in the form of insurance programs, small business loan programs, and several state preferential loan programs.\textsuperscript{241}

\textsuperscript{239} The Services Sectoral Classification List classifies services into the following twelve sectors (further divided into 155 sub-sectors):

13. Business (six sub-sectors, including professional services)
14. Communication (five sub-sectors, including telecommunication services)
15. Construction and Related Engineering (five sub-sectors)
16. Distribution (five sub-sectors, including wholesale, retail, and franchising)
17. Education (five sub-sectors)
18. Environment (four sub-sectors)
19. Financial (three sub-sectors)
20. Health and Social Services (four sub-sectors)
21. Tourism and Travel (four sub-sectors)
22. Recreational, Cultural, and Sporting (five sub-sectors)
23. Transport (nine sub-sectors)
24. Other Services Not Included Elsewhere.

\textsuperscript{240} The GATS classification system has been criticized for lacking clarity. \textit{See Classification Called Unclear; Film Industry Urges Broader Application}, 14 INT’L TRADE REP. (BNA) at 585 (1997).

\textsuperscript{241} \textit{See The United States of America, Schedule of Specific Commitments, GATS/SC/90, 1-14 (1994), reprinted in U.S. SCHEDULE OF COMMITMENTS, supra note 236. In the second and third columns on limitations on market access and limitations on national treatment, the United States has inscribed "Unbound," except for measures concerning services salespersons, certain intra-corporate transferees (managers, executives, specialists, and managerial personnel engaged in establishing a commercial presence in the United States), and fashion models and specialty occupations.}
In addition, Members may list Article II MFN exemptions that permit preferential treatment of some Members' service suppliers over others. For example, the United States has listed MFN exemptions regarding the movement of persons for countries with whom the United States has a Friendship, Commerce and Navigation ("FCN") Treaty or a Bilateral Investment Treaty ("BIT"); certain differential taxation measures; and certain aspects of air, road, pipeline, and space transport.242

The specific-industry commitments consist of a matrix in which commitments are made for each industry (referenced by a SSC List number and letter, or by a U.N. Provisional Central Products Classification System number) under each of the four modes of supply. For each mode of supply, a Member may offer a "full commitment" (inscribed in the schedule by the word "none," indicating no restrictions on market access or national treatment in a given sector and mode of supply) or a "partial commitment" (inscribed in the schedule by noting the specific market access or national treatment restrictions on a given sector and mode of supply).

Full and partial commitments are "bound," requiring compensation to adversely affected Members in the event new restrictions are imposed or existing ones become more burdensome in the future. In the absence of a full or partial commitment, measures that restrict market access or are inconsistent with national treatment may be maintained or increased in the future. The absence of a commitment is inscribed in a Member's schedule with the word "unbound" in the given sector and mode of supply.243

5. Movement of Natural Persons

Under the Annex on Movement of Natural Persons Supplying Services Under the Agreement, Members agree to provide temporary entry for management and specialized personnel during the ordinary course of providing services.244 "Movement of natural persons" refers to the temporary admission of foreign nationals into the territory of another WTO Member as part of the business of supplying services abroad.245 The GATS does not apply to measures affecting natural persons seeking access to a Member's

242 See The United States of America, Final List of Article II (MFN) Exemptions, GATS/EL/90, 78-94 (1994), reprinted in U.S. SCHEDULE OF COMMITMENTS, supra note 236. The United States also listed a number of MFN exemptions in financial services that require reciprocal treatment of U.S. financial service suppliers. The financial services MFN exemptions have been delisted as a result of the 1997 financial services agreement.

243 In certain circumstances, the term "unbound" is followed by an asterisk to indicate that the mode of supply for the particular service sector is not technically feasible, e.g., cross-border supply of hair-dressing services is technically infeasible.

244 See GATS, supra note 26, Annex on Movement of Natural Persons Supplying Services Under the Agreement, para. 1.

245 See id.
employment market. It also does not apply to measures regarding citizenship, residence, or employment on a permanent basis.\textsuperscript{246}

The Annex does not prevent a Member from applying measures to regulate the entry of natural persons. Such measures may include measures to ensure the orderly movement of persons across its borders, provided that such measures are not applied in a manner that nullifies or impairs the benefits accruing to any Member under the terms of a specific commitment.\textsuperscript{247} However, the sole fact that a visa is required for natural persons of certain Members and not others is not to be regarded as nullifying or impairing benefits under a specific commitment.\textsuperscript{248}

A Ministerial Decision on Negotiations on Movement of Natural Persons established a Negotiating Group on Movement of Natural Persons to reach further commitments to liberalize the movement of natural persons. Negotiations were concluded in July 1995 on additional commitments inscribed in schedules that were adopted in the Third Protocol to GATS.\textsuperscript{249}

\textit{L. Trade in Financial Services}

Realizing that a final agreement on financial services was out of reach by the December 1993 deadline for the Uruguay Round, participants agreed to continue negotiations on financial services through June 1995 to see if adequate market access commitments in the areas of banking, securities, and insurance could be secured.\textsuperscript{250}

Frustrated with the reluctance of participants to make broad financial services offers during the Uruguay Round, the United States reacted by making conditional MFN offers as a negotiating tactic for prying more liberal offers from footdraggers. Countries whose offers were deemed adequate received reciprocal offers from the United States. Unconditional MFN treatment was withheld, however, from countries that the United States considered to be "free riders." This two-tiered approach rankled many participants as a dangerous departure from the near-sacrosanct unconditional MFN principle enshrined in GATT Article I.\textsuperscript{251}

The United States announced on June 28, 1995, that it would maintain its exemption from the MFN obligation relating to trade in financial services because it regarded the offers made by the other

\textsuperscript{246} See id. para. 2.
\textsuperscript{247} See id. para. 4.
\textsuperscript{248} See id. para. 4 n.1.
\textsuperscript{249} See Decision on Acceptance of the Second and Third Protocols to the GATS, S/L/28 (1996).
\textsuperscript{251} See id.
participants as insufficient. In response, the EU arranged for improved offers in an effort to induce other participants not to withdraw their financial services commitments. By July 1995, approximately 30 WTO Members (counting the EU as one) reached an interim agreement on financial service commitments. They adopted a Second Protocol to the GATS containing schedules of their commitments that expired on December 12, 1997. That date coincided with the new date for the completion of the financial services follow-on negotiations that were launched in 1997.253

1. The Understanding on Financial Services

The Understanding on Commitments on Financial Services ("Understanding") was incorporated in the Final Act Embodying the Results of the Uruguay Round. The Understanding was intended to harmonize the structure of the market access commitments agreed to by the Members during the post-Uruguay Round financial services negotiations. It supplements, but does not conflict with, Part III of the GATS on specific commitments in two areas: market access and national treatment.

First, the Understanding contains a standstill restriction that provides that Members will only inscribe conditions, limitations, and qualifications to their specific commitments to the extent of existing non-conforming measures. Under Part III of the GATS, in contrast, it also is possible for a Member to inscribe future non-conforming measures in a Member's schedule of commitments.

Second, regarding market access commitments, Members agree to the following eight rules:

1. Members shall list in their schedule of financial service commitments existing monopoly rights and shall endeavor to eliminate them or reduce their scope.257

252 See THE YEAR IN TRADE 1994, supra note 250, at 31 n.83.
254 See Final Act, supra note 60, para. 1. The Understanding is special among the Uruguay Round agreements in being one of a small family of plurilateral agreements that are part of the GATT-WTO system (the other plurilateral agreements being the agreements on government procurement, dairy products, and bovine meat). As is the case with the other plurilateral agreements, the Understanding is not binding on all WTO Members either because it was not made an integral part of the WTO Agreement, having been excluded from the Annex 2 list of Uruguay Round Understandings. The Understanding was the work product of the OECD-member countries and was intended to bind them only.
255 See Understanding on Commitments in Financial Services, Uruguay Round Results, supra note 2, para. A.
256 See id. paras. B.1-11.
257 This obligation extends to "other public entities" that are otherwise excluded from GATS coverage under the Annex on Financial Services, para. 1(b)(iii). See GATS, supra note 26.
2. Notwithstanding GATS Article XIII on government procurement, Members agree to accord MFN and national treatment to non-resident financial service suppliers in the purchase or acquisition of financial service by public entities.\textsuperscript{258}

3. Members shall permit the cross-border delivery and purchase of insurance services relating to (a) maritime shipping, commercial aviation, and space launching; (b) reinsurance; and (c) financial information and data processing.\textsuperscript{259}

4. Members shall grant non-resident financial service suppliers the right to establish a commercial presence within their territory, including through the acquisition of existing enterprises, subject to terms, conditions, and procedures for authorization of the establishment of a commercial presence that are otherwise consistent with the GATS.\textsuperscript{260}

5. Members shall permit financial service suppliers of any other Member established in the former's territory to offer any new financial service.\textsuperscript{261}

6. Members shall not take measures that prevent transfers of information or the processing of information that are necessary for the conduct of ordinary business of a financial service supplier, subject to the right to protect personal data and privacy and the confidentiality of individual records and accounts.\textsuperscript{262}

7. Members shall permit the temporary entry of personnel of a financial service supplier that has established a commercial presence in the territory of a Member, including senior managerial personnel possessing proprietary information essential to the service supplier, specialists in the operation of the supplier, and, subject to the availability of qualified personnel within the Member's territory, computer and telecommunications specialists, actuarial specialists, and legal specialists.\textsuperscript{263}

8. Members commit to remove or limit any significant adverse effects on other Members' financial service suppliers of (a) non-
discriminatory measures that prevent other Members' financial service suppliers from offering all the financial services permitted by the Member, (b) non-discriminatory measures that limit the expansion of financial service activities into a Member's entire territory, (c) measures that apply to both banking and securities services when the financial service supplier concentrates its activities in securities services, (d) and other measures that adversely affect the ability of financial service suppliers to operate, compete, or enter a Member's market. Members need not, however, discriminate against their own financial service suppliers in honoring this commitment.\textsuperscript{264}

Third, regarding national treatment, Members agree to provide financial service suppliers of other Members access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the ordinary course of business, other than the facilities of a Member's lender of last resort.\textsuperscript{265} When membership or participation in any self-regulatory body, securities or futures exchange, or any other organization is required by a Member as a condition of supplying a particular financial service on an equal footing with resident financial service suppliers, Members must ensure that such entities accord national treatment to non-resident financial service suppliers.\textsuperscript{266}

2. The Interim Agreement on Financial Services

The Uruguay Round participants had laid the groundwork for multilateral negotiations leading to a rules-based agreement on financial services. With an agreement in place containing binding market access commitments, backed by the mandatory dispute settlement provisions of the DSU, financial service suppliers would have a certain and predictable legal climate within which to plan foreign investment and operations.

Despite the best efforts of the Uruguay Round participants to chart a course toward deeper and broader offers on market access for financial services that would culminate in a comprehensive, multilateral agreement, those efforts failed to produce commitments from key players, most notably the United States. The United States concluded that market access commitments by some Latin American and Asian countries were not adequate to warrant U.S. support of a comprehensive agreement. Accordingly, the United States signed the Second Protocol and submitted its

\textsuperscript{264} See id. para. B.8.
\textsuperscript{265} See GATS, supra note 26, para. C.1.
\textsuperscript{266} See id. para. C.2.
schedule of commitments. This schedule essentially was a list of the commitments it had made in December 1993. However, the U.S. schedule included an MFN exemption that restricted access to its financial services sector by other Members' financial services suppliers on the basis of reciprocal treatment of U.S. suppliers by those Members.

Undaunted and behind the leadership of the EU, 29 participants reduced their commitments to a Second Protocol to the GATS, the implementing document of the interim financial service agreement that contains their schedules of commitments on financial services. The Second Protocol ("Interim Agreement") entered into force on September 1, 1996, and expired December 12, 1997.

The Interim Agreement contains commitments from more than 90 countries that include some access to Members' banking, insurance, and securities markets. For example, Canada extended NAFTA treatment to all WTO Members. The Philippines opened its insurance market to foreign firms for the first time in 50 years. The Interim Agreement also increased the number of licenses available for foreign financial institutions. For example, Thailand committed to issue seven extra banking licenses by 1997. Finally, the Interim Agreement increased levels of foreign equity participation in branches or subsidiaries of banks and insurance firms in the territory of another WTO Member. For example, Brazil opened participation in the privatization of its banks to foreign firms. The commitments extend to all WTO Members on an MFN basis.

3. The 1997 Agreement on Financial Services

Negotiations on a comprehensive financial services agreement


269 WTO Members involved in negotiating the Second Protocol include Australia, Brazil, Canada, Chile, the Czech Republic, the Dominican Republic, Egypt, the EC, Hong Kong, Hungary, India, Indonesia, Japan, Korea, Kuwait, Malaysia, Mexico, Morocco, Norway, Pakistan, the Philippines, Poland, Singapore, the Slovak Republic, South Africa, Switzerland, Thailand, Turkey, and Venezuela.


271 For the specific commitments made by the 29 participants in the Interim Agreement, see THE SECOND PROTOCOL TO THE GENERAL AGREEMENT ON TRADE IN SERVICES, REVISED SCHEDULES OF COMMITMENTS ON FINANCIAL SERVICES (World Trade Organization ed., 1996).

272 See GATS, supra note 26, art. II-1.
resumed on April 7, 1997. Participants set December 12, 1997, as the deadline for reaching an agreement. Negotiators started with a clean slate, so that all Members that had made commitments under the Interim Agreement started from zero. They were successfully completed on December 12, 1997, with the agreement scheduled to enter into force at the latest by March 1, 1999. A total of 56 offers (representing 70 countries, counting the EU-members states as one) were submitted and annexed to the Fifth Protocol to the GATS, bringing to 102 the number of WTO Members that have made financial services commitments under the GATS. As measured in revenue, the agreement covers more than 95 percent of trade in banking, insurance, securities, and financial information. Importantly for the long-term health of the agreement, India and the United States both withdrew their broad MFN exemptions based on reciprocity applicable to the financial services sector.

In the insurance sector, 52 countries representing over 90 percent of world insurance premiums have guaranteed market access through a commercial presence for all insurance subsectors (i.e., life, non-life, reinsurance, brokerage, and auxiliary services). Forty-five countries permit 100-percent ownership of insurance subsidiaries or entry through branches, including the Quad Members and Mexico); 7 countries allow 100-percent ownership of subsidiaries, but no entry through branches (i.e., Brazil, Chile, Indonesia, Jamaica, Nicaragua, South Africa, and Venezuela); and 9 countries allow majority control of insurance subsidiaries (i.e., Egypt, Ghana, Kenya, Pakistan, the Philippines, Romania, Singapore, Slovenia, and Thailand).

The participants in the 1997 financial services negotiations also made commitments in connection with the cross-border delivery of insurance services. For example, in the specialty category of MAT insurance (marine, aviation, and transport), 27 countries permit cross-border MAT insurance, including Canada, the EU, Japan, and Mexico. Thirty-five countries have made commitments in the reinsurance and brokerage subsectors of cross-border insurance activities. For example, Japan has authorized the cross-border delivery of reinsurance, but not brokerage services.

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274 For a summary of the improvements in the new financial services commitments, see WTO, Successful Conclusion of the WTO's Financial Services Negotiations, PRESS/86 (1997).

275 See id.

276 See id.

277 See id.
In banking, 60 countries guarantee a right of establishment for banks. Thirty-five countries, including the Quad Members, permit 100-percent ownership of subsidiaries or branches. Sixty-four countries have grandfathered acquired rights of foreign banks.\textsuperscript{278}

In the securities sector, 45 countries, including the Quad Members, guarantee a right of establishment of foreign securities firms. Thirty-seven of them permit 100-percent ownership of subsidiaries or branches. Fifty-nine countries have grandfathered the rights of foreign securities firms. Fifty countries permit foreign firms to provide and transfer financial data, and information.\textsuperscript{279}

\textit{M. Telecommunications Trade}

The telecommunications industry generated $867 billion in revenue in 1996 from the sale of goods and services, a figure that is predicted to exceed $1.25 billion by 2000.\textsuperscript{280} In 1996, world trade in telecommunication goods and services was worth $115 billion.\textsuperscript{281} The world telecommunications market is clearly an economically valuable one, accounting for more than 2 percent of world GDP.\textsuperscript{282} It also is a fast-growing one, with average annual revenue growth rates of 5.2 percent since 1980, and 9.7 percent in developing countries from 1990 to 1995.\textsuperscript{283} The Quad Members plus Australia account for more than three-quarters of revenue in world telecommunications.\textsuperscript{284}

For countries with an advanced-sector economy, or hoping to have one someday, telecommunication products are an increasingly valuable and growing component of an advanced economy's manufacturing base. For 1996, world trade in telecommunications equipment alone was worth $85 billion.\textsuperscript{285} Equally important, a reliable telecommunications network is a critical element of an advanced economy's infrastructure. It makes possible other advanced-sector economic activities, including virtually all service sector activities.

Telecommunication services are commonly bifurcated into basic

\textsuperscript{278} See id.
\textsuperscript{280} \textit{The Economist}, Mar. 8, 1997, at 119.
\textsuperscript{281} See id.
\textsuperscript{282} See id.
\textsuperscript{283} See id.
\textsuperscript{285} See \textit{The Economist}, supra note 280, at 119.
and value-added services. Value-added services are sometimes referred to in the United States as "enhanced" services. Basic telecommunication services include voice telephone, telex, and telegraph. Value-added services are computer-based and include electronic and voice mail, online and database information retrieval, and data and transaction processing.

Many countries offered commitments on value-added telecommunications during the Uruguay Round. Negotiations on basic telecommunications was a different story. The openness of countries' markets in basic telecommunications varies widely. For example, in contrast to the open and competitive U.S. telecommunications market that followed the 1984 break-up of AT&T, the basic telecommunications market in Europe is dominated by public and private monopolies or single service providers. Because of this gulf in perspectives, offers on basic telecommunications were slow to develop. Despite these difficulties, rather than end negotiations on this branch of telecommunication services trade, the participants agreed instead to extend negotiations on basic telecommunications for two years. After a further extension of negotiations, an Agreement on Basic Telecommunications finally was concluded in early 1997. It entered into force on February 6, 1998, and liberalizes trade in the basic telecommunications sector.\[286\]

In sum, at the conclusion of the Uruguay Round in December 1993, approximately one-half of the participants scheduled specific commitments on value-added telecommunication services. Negotiations on basic telecommunication services were extended through 1996. The participants also reached agreement on access to Members' telecommunication networks, memorialized in the GATS Annex on Telecommunications. The achievements of the Uruguay Round negotiations on telecommunication services are explained in the next two sub-sections.

1. The Annex on Telecommunications

The telecommunications sector serves a dual role as both a distinct sector of economic activity and as the means of delivery for other economic activities. Recognizing this duality, the GATS Annex on Telecommunications was negotiated to ensure that in its role as the means of delivery, access to telecommunication networks does not turn into a non-tariff barrier to trade.

The Annex on Telecommunications applies to all measures that affect access to and use of public telecommunication transport networks and

\[286\] See id.
services. It does not apply to measures affecting cable or broadcast distribution of radio or television programming. Every Member must ensure that the obligations of the Annex are applied to their own suppliers of public telecommunication transport networks and services by whatever means necessary.

Unless a Member has scheduled a specific commitment that requires access or use, nothing in the Annex on Telecommunications requires a Member to authorize a service supplier of any other Member to establish, construct, acquire, or otherwise supply telecommunication transport networks or services. Likewise, much to the relief of developing countries, the Annex on Telecommunications does not require a Member to acquire, lease, or build a telecommunications network or supply telecommunication services that are not offered to the public generally.

Paragraph 4 of the Annex on Telecommunications pertaining to transparency obligates Members to make publicly available all relevant information on conditions affecting access to and use of the networks and services.

Paragraph 5 is the heart of the Annex on Telecommunications. Its heading could easily serve as the sub-title of the Annex: Access to and Use of Public Telecommunications Transport Networks and Services.

Paragraph 5(a) provides in pertinent part:

Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule.

A footnote clarifies that the term “non-discriminatory” refers to MFN and national treatment as defined in the GATS. It adds that sector-specific usage of the term means “terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or service under like conditions.” This language strongly suggests that no derogations from the MFN or national treatment obligations may be

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287 See GATS, supra note 26, Annex on Telecommunications, para. 2(a). Public telecommunications transport service means service that a Member requires to be offered to the public generally (thus, they may be privately owned), and include telegraph, telephone, telex, and data transmission. Public telecommunication transport network means the infrastructure which permits telecommunications between defined network termination points. See id. para. 3(a), (c).

288 See id. para. 2(c)(i).

289 See id. para. 2(c)(ii).

290 See id. para. 5.

291 See GATS, supra note 26, para. 5(a) n.2.
listed in a Member’s schedule of commitments regarding access to or use of public telecommunication networks or services.

The specific access and use rights accorded foreign service suppliers include: (1) the right to purchase or lease and attach terminal or other equipment that is necessary to supply services; (2) the right to interconnect private leased or owned circuits with public networks or services; (3) the right to use operating protocols of the supplier’s choice in the supply of any service; and (4) the right to use networks and services for the movement of information within and across borders, subject to reasonable measures necessary to ensure security and confidentiality (e.g., encryption requirements).\(^292\)

A Member may impose three general types of measures on access and use. First, a Member may impose measures necessary to ensure that public service suppliers are able to make their networks or services available to the public generally.\(^293\) Second, a Member may impose measures necessary to protect the technical integrity of networks or services.\(^294\) Third, a Member may impose measures necessary to ensure that service suppliers are providing only services for which the Member has scheduled a commitment.\(^295\) Provided that they fall within one of the three types of permissible measures just described, a Member may impose specific conditions on access and use. These conditions include: (1) restrictions on resale or shared use; (2) requirements to use specified technical interfaces and protocols for inter-connection with such networks and services; (3) approval of terminal or other equipment that interfaces with the network; (4) restrictions on inter-connection of private leased or owned circuits with such networks or services; and (5) requirements on registration and licensing.\(^296\)

Developing countries are given a special dispensation that allows them to protect (“strengthen” in the words of the Annex) their domestic telecommunications infrastructure and service capacity through reasonable conditions on access and use, notwithstanding the limitations imposed on Members by Paragraph 5 in that connection.\(^297\) Any such conditions must be specified in the developing-country Member’s schedule (no Member has done so). The Annex on Telecommunications also encourages technical cooperation between developed- and developing-country Members.\(^298\)

Finally, recognizing the importance of international standards for global compatibility and inter-operability of telecommunication networks:

\(^{292}\) See id. para. 5(b)-(d). Compare with GATS, supra note 26, art. III bis.

\(^{293}\) See id. para 5(e).

\(^{294}\) See id.

\(^{295}\) See GATS, supra note 26, para. 5(e).

\(^{296}\) See id. para. 5(f).

\(^{297}\) See id. para. 5(g).

\(^{298}\) See id. para. 6.
and services, Members agree in Paragraph 7 to promote such standards through appropriate international organizations. Such organizations include the International Telecommunication Union and the International Organization for Standardization. Members also agree to engage relevant non-governmental organizations by making arrangements with them for consultation on matters arising from the implementation of the Annex on Telecommunications.

2. Commitments on Enhanced Telecommunication Services

The modes of delivery for enhanced telecommunication services are either cross-border or through a foreign commercial presence. Physical delivery is through telecommunication and computer networks that link communication centers throughout the world. As noted above, the Annex on Telecommunications ensures suppliers reasonable and nondiscriminatory access to and use of public telecommunication network carriers and services when such services or facilities are required to supply a service included in a Member’s schedule of commitments.

Enhanced telecom service suppliers create global networks by leasing lines from basic telecommunication carriers. Consumers can access enhanced services, such as e-mail or computer databases, by connecting to an enhanced telecommunication network through a personal computer. Consumers can use a local telephone number provided by the supplier, a long-distance number, an Integrated Services Digital Network (“ISDN”) connection through a local telephone network, or a local telephone company to connect to a network.

The negotiations on specific commitments on enhanced telecommunication services were a modest success. Fifty-eight countries, including all the Quad Members, scheduled commitments on value-added telecom services. As is true with the vast majority of specific GATS commitments negotiated during the Uruguay Round, however, the value-added service commitments are standstill commitments that maintain the status quo rather than liberalize trade. However, because the global market for value-added telecom services was comparatively open at the start of the negotiations, the standstill commitments made in the Uruguay Round will prevent rollbacks on existing market access. The openness of the enhanced telecommunications market is an indication that countries believe that their enhanced telecom service providers are competitive on a global basis and

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that neither they nor the public need protection from foreign competition.300

With few exceptions, U.S. providers of enhanced telecommunication services operate freely in Canada, the EU, Japan, and Mexico. This open business environment for value-added telecommunication services is largely the by-product of bilateral and regional agreements that predate the GATS.301 Nevertheless, the GATS buttresses this already favorable climate through the standstill commitments scheduled by the Quad Members.

First, with regard to the cross-border delivery of enhanced telecommunication services, market access is virtually unrestricted in Canada, the EU, Japan, and the United States. While no national treatment limitations exist in Mexico, some modest market access restrictions require that a permit be obtained to provide many types of value-added services.302 None of the Quad Members listed any MFN exemptions that apply directly to enhanced telecommunication services.

Second, with regard to the delivery of enhanced telecom services through a commercial presence, foreign suppliers face far more restrictions in all Quad Members. For example, while Canada and Japan do not have any limitations that specifically are targeted at the enhanced telecom service sector, cross-industry ("horizontal") restrictions on market access include capping equity ownership, voting rights, and representation on boards of directors. Typical cross-industry limitations on national treatment include requirements that newly established businesses be controlled by residents of the host country.

U.S. enhanced telecom service providers have expressed overall satisfaction with the GATS commitments made by Canada, the EU, Japan, and Mexico. Their main criticism is the GATS scheduling methodology. The GATS' positive list approach does not automatically accord market access or national treatment to new services that grow out of technological advances. Because restrictions on emerging services are unbound, trading partners may impose on such services whatever national treatment limitations or market access restrictions they choose without paying compensation to adversely affected WTO Members. NAFTA's negative list approach is, for that reason, a preferable methodological approach because all emerging services are automatically entitled to market access and

301 For example, the United States and Japan concluded an international value-added network services ("IVANS") agreement in 1991 that provided market access to Japanese business markets for U.S. providers of enhanced telecommunication services. NAFTA also provides U.S. enhanced service suppliers with liberalized access to the Canadian and Mexican markets.
302 See Marie C. Wold, Liberalization of the Mexican Telecommunication Sector, INDUS., TRADE, & TECH. REV. 1 (USITC, Apr. 1997).
national treatment.

3. Commitments on Basic Telecommunication Services

On February 15, 1997, 69 developed and developing countries from 55 WTO Members (54 governments plus the 15 EU-member states) successfully concluded an agreement on basic telecommunication services that entered into force January 1, 1998. Not only were the number of offers broader than those from April 1996 (55 versus 34), but they were deeper as well, covering services not previously scheduled by Members in April 1996.

No single document memorializes the participants' "agreement" per se. Rather, the legal document that provides authoritative and complete information on the commitments made by each participant is the national Schedule of Specific Commitments annexed to the Fourth Protocol of the GATS.\(^{303}\)

The agreement covers 95 percent of world revenue in telecommunication services. Before the agreement, only 17 percent of the top 20 telecommunication markets were open to foreign service providers. With the agreement, 100 percent of those markets now are open.\(^{304}\)

The basic telecommunication services covered by the agreement are defined broadly as any telecommunication transport network or service. Specifically, these services include telephone services, circuit-switched data transmission services,\(^{305}\) packet-switched data transmission services, telex services, telegraph services, facsimile services, private leased circuit services, analog and digital cellular mobile telephone services, mobile data services, paging, personal communications services, submarine cable services, satellite-based mobile services, fixed satellite services, VSAT services, gateway earthstation services, teleconferencing, video transport, and trunked radio system services.\(^{306}\)

The 55 national schedules of specific commitments have three

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\(^{304}\) See Statement of Ambassador Charlene Barshefsky, supra note 303.

\(^{305}\) Circuit-switching is the technical description of older technology for the switching process that dedicates to two or more users the exclusive use of the circuit until the connection is terminated. Packet-switching is newer technology that is used almost exclusively for data exchange. Unlike circuit-switched data, packet-switched data are transmitted in multiple "packets" through available circuits and reassembled at the termination point. See generally A Survey of Telecommunications, THE ECONOMIST, Sept. 13, 1997, at 25-27.

\(^{306}\) See WTO Negotiations on Basic Telecommunications, supra note 303.
elements: market access, investment, and pro-competitive regulatory principles. A sample of the market access commitments shows that 47 of the 55 schedules, representing 99 percent of WTO Members’ total basic telecommunication services revenue, commit to the competitive supply (i.e., two or more suppliers are permitted) of voice telephone service either immediately on January 1, 1998, or, in the case of 25 Members, on a phased-in timetable. Forty-one schedules list commitments on local service; 38 list commitments on domestic long-distance service; and 42 list commitments on international service.307 Market access commitments on other basic telecommunication services include 49 schedules with commitments on data transmission service, 46 on cellular/mobile telephone service, 41 on leased circuit service, and 36 on fixed satellite service. Nine countries listed MFN exemptions (Argentina, Antigua and Barbuda, Bangladesh, Brazil, India, Pakistan, Sri Lanka, Turkey, and the United States).308

On investment, most schedules of commitments (42 of 55, covering 97 percent of WTO Members’ total basic telecommunication services revenue)309 permit delivery through some form of a commercial presence. Foreign service suppliers thus have the right to acquire, establish, or own all or part of a foreign-based telecommunications company. For example, in its schedule of commitments the EU has inscribed “none” in the market access and national treatment columns with respect to the delivery of the following services through a commercial presence: voice telephone, packet-switched data transmission, circuit-switched data transmission, telex, telegraph, facsimile, leased circuit, and mobile and personal communication systems.310 With respect to these same services, Japan has limited foreign capital participation in its two largest carriers, Nippon Telegraph and Telephone (“NTT”) and Kokusai Denshin Denwa (“KDD”) to a maximum of 20 percent.311

307 The following countries have deferred full market access to international telephone services: Spain, until December 1, 1998; Peru, until 1999; Argentina, Ireland, Portugal, Singapore, Venezuela, until 2000; Bolivia, the Czech Republic, until 2001; Greece, Poland, Romania, the Slovak Republic, until 2003; Hungary, Mauritius, until 2004; Bulgaria, Indonesia, until 2005; Grenada, Senegal, Thailand, Turkey, until 2006; Brunei, until 2010; Antigua and Barbuda, until 2012; and Jamaica, until 2013.

308 See WTO Negotiations on Basic Telecommunications, supra note 303.


310 European Communities and Their Member States, Schedule of Specific Commitments, Supplement 3, GATS/SC/31/Suppl.3 (1997). Some EU-member states have deferred the implementation of the commercial presence commitment until 2000 (Ireland and Portugal) and 2003 (Greece). See also John David Donaldson, “Television Without Frontier”: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity, 20 FORDHAM INT’L L.J. 90 (1996).

311 See Japan, Schedule of Specific Commitments, GATS/SC/46/Suppl.2 (1997).
Canada likewise has restricted the delivery through a commercial presence of basic telecommunication services by limiting foreign capital participation in most basic telecommunication service companies based in Canada to a cumulative total of 46.7 percent of voting shares, based on 20 percent direct investment and 33 1/3 percent indirect investment. In light of several developing-country offers that allow more foreign participation than does Canada, this limitation was not well received by Canada's major trading partners. An exception to this limitation has been made for mobile satellite systems and fixed satellites that are 100-percent foreign-owned and controlled. These services may be used by Canadian service providers to provide services in Canada.\footnote{See Canada, Schedule of Specific Commitments, Supplement 3, GATS/SC/16/Suppl.3 (1997).}

Mexico also has inscribed market access limitations with regard to delivery through a commercial presence. Only companies organized under the laws of Mexico are eligible to receive approval from the Secretary of Communication and Transportation to supply basic telecommunication services in Mexico. Direct foreign participation in such companies is capped at 49 percent.\footnote{See Mexico, Lista de compromisos específicos [List of Specific Commitments], Supplement 2, GATS/SC/56/Suppl.2 (1997).} An exception exists for cellular services where Mexico allows 100-percent foreign ownership. The United States has inscribed market access limitations with respect to direct foreign ownership of a common carrier radio license.\footnote{The United States of America, Schedule of Specific Commitments, Supplement 2, GATS/SC/90/Suppl.2 (1997), reprinted in U.S. SCHEDULE OF COMMITMENTS, supra note 236. The limitations are fourfold. A license may not be granted to or held by (1) a foreign government, (2) a non-U.S. citizen, (3) any corporation not organized under U.S. laws, or (4) a U.S. corporation of which more than 20 percent of the capital stock is owned or voted by a foreign government, a non-U.S. citizen, or a corporation not organized under U.S. laws. See Vincent M. Paladini, Foreign Ownership Restrictions under Section 310(B) of the Telecommunications Act of 1996, 14 B.U. Int’l L.J. 341 (1996).}

Under the rubric of regulatory principles, the Negotiating Group on Basic Telecommunications developed a Reference Paper on competition principles, based on the U.S. Telecommunications Act of 1996. It addresses the following matters:

- safeguards against anti-competitive practices by monopolies, such as cross-subsidization or using information obtained from competitors with anti-competitive results;
- cost-based and timely interconnection on non-discriminatory terms, rates, and quality;
- transparent and non-discriminatory universal service requirements \(i.e.,\) requirements that mandate basic telecommunication service for every citizen at affordable prices;
- transparent and publicly available licensing criteria, including a
statement of reasons for licensing denial;
• independence of regulators from suppliers of basic telecommunication services;
• transparent and non-discriminatory rules for the allocation of scarce resources, such as radio spectrum frequencies; and
• publication of international accounting rates.\footnote{See U.S. Trade Representative, WTO Basic Telecommunications Services Agreement, \textit{supra} note 309.}

Sixty-three of the 69 participating governments, covering 94 percent of WTO Members' total basic telecommunication services revenue, inscribed commitments on regulatory principles in the "Additional Commitments" column of their national schedules. Of these, 57 committed to the Reference Paper by inscribing it in whole or in part in their schedule of commitments, including the Quad Members and Mexico. Bangladesh, Brazil, Mauritius, Morocco, Turkey, and Venezuela deferred the date of entry into force of the regulatory principles. Bolivia, India, Malaysia, Pakistan, and the Philippines adopted them in part.\footnote{See \textit{id.}}

Of all the service sectors for which GATS commitments have been made, the scope of the commitments made on basic telecommunications services are the most ambitious to date. It opens the world's three largest telecommunication markets – the EU, Japan, and the United States – to international competition beginning in 1998. Still, much hard work lies ahead, especially in loosening the grip that government-owned telecommunication monopolies have on their domestic markets. Additional market openings will be sought in the GATS negotiations scheduled for 2000.\footnote{See \textit{GATS}, \textit{supra} note 26, art. XIX.}

\textbf{N. Government Procurement}

Government procurement refers to the activity of a government in purchasing goods and services for its own requirements and not for resale. Government purchases of goods and services at the national and subnational level are substantial. By one estimate, the world market for government procurement exceeds $1 trillion annually.\footnote{See Gerard De Graaf & Matthew King, \textit{Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round}, 29 INT'L LAW. 435, 436 (1995).} For the very reason that governments purchase significant amounts of goods and services, historically, strong political pressures exist for making such purchases

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\begin{itemize}
\item \textsuperscript{315} See U.S. Trade Representative, WTO Basic Telecommunications Services Agreement, \textit{supra} note 309.
\item \textsuperscript{316} See \textit{id.}
\item \textsuperscript{317} See \textit{GATS, supra} note 26, art. XIX.
\end{itemize}
exclusively from local sellers.\textsuperscript{319}

The issue of government procurement was placed on the Uruguay Round agenda at the very start of the negotiations in 1987. As a result of an EU-US disagreement over expanding coverage to include subcentral levels of government (the EU, but not the United States, wanted state government procurement to be part of any new agreement), negotiations on a new procurement agreement were stalled during the Round. Following U.S. assurances to secure commitments from state governments to open their procurement, the parties signed the replacement Uruguay Round Agreement on Government Procurement\textsuperscript{20} literally on the eve of the ministerial summit to approve the results of the Uruguay Round negotiations in April 1994.\textsuperscript{321}

The renegotiated Government Procurement Agreement ("GPA") improves the Tokyo Round Government Procurement Code ("Code") in at least three respects.\textsuperscript{322} First, the Code's rules on bid challenge procedures and dispute resolution are strengthened. Second, the new GPA expands the Code vertically by covering subcentral levels of government and central government-owned utilities and transportation facilities. Third, the new GPA expands the Code horizontally by covering government procurement of services and construction contracts. Besides these achievements, the negotiators added an important new Member, Korea. Estimates put the dollar value of the new Agreement at $350 billion annually, expanding the coverage of the Code tenfold.\textsuperscript{323}

The GPA applies to any law, regulation, procedure, or practice regarding any procurement by entities covered by the Agreement as

\textsuperscript{319} See Alan Kashdan, Government Procurement, in THE WORLD TRADE ORGANIZATION, supra note 57, at 555.
\textsuperscript{321} See Alan Kashdan, Government Procurement, in THE WORLD TRADE ORGANIZATION, supra note 57, at 555.
\textsuperscript{322} The Agreement on Government Procurement had twelve signatories as of 1997: Aruba, Canada, the EC, Hong Kong, Israel, Japan, Korea, Lichtenstein, Norway, Singapore, Switzerland, and the United States. Hong Kong, which was a signatory to the 1979 Procurement Code, broke off accession negotiations during the Uruguay Round, citing the requirement of reciprocal market access as contrary to the unconditional MFN principle. It recanted and finally joined in 1996. Singapore and Liechtenstein completed accession negotiations in 1997, and Taiwan was in the process of completing accession negotiations. Report (1996) of the Committee on Government Procurement (1994 Agreement), WT/L/190, 2-3 (1996). For an overview of the Agreement on Government Procurement, see Jean Heilman Grier, Japan's Implementation of the WTO Agreement on Government Procurement, 17 U. PA. J. INT'L ECON. L. 605, 606-20 (1996).
specified in Appendix I.\textsuperscript{324} Appendix I is divided into five annexes that contain the equivalent of the schedule of commitments made under GATT and the GATS: central government entities (Annex 1), sub-central government entities (Annex 2), all other entities that procure in accordance with the provisions of the GPA, \textit{e.g.}, government-owned utilities and transportation authorities (Annex 3), services, whether listed positively or negatively, that are covered by the GPA (Annex 4), and construction contracts (Annex 5).

Each Annex also contains value thresholds for each party.\textsuperscript{325} Although the thresholds listed by the parties differ in specific cases, generally, the thresholds are SDR 130,000 ($182,000) for central government procurement of goods and services,\textsuperscript{326} SDR 200,000 ($280,000) for sub-central government procurement,\textsuperscript{327} SDR 400,000 ($560,000) for government-owned utilities,\textsuperscript{328} and SDR 5 million ($7 million) for construction contracts.\textsuperscript{329}

Unlike the procurement of goods, in which the MFN obligation applies, an element of reciprocity is introduced in the procurement of services. For example, the United States and Canada both make service procurement available to other parties only if they also have scheduled the covered service in their Annex 4.

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\textsuperscript{324} See Government Procurement, \textit{supra} note 224, art. I:1. Regarding laws, regulations, procedures, or practices on procurement, Article XIX, \textit{Information and Review as Regards Obligations of Parties}, is a transparency provision. It obligates the parties to publish all laws, regulations, judicial decisions, and administrative rulings of general application, and any procedure (including standard contract clauses) regarding government procurement covered by the Agreement, in appropriate publications listed by the parties in Appendix IV, “in such a manner as to enable other Parties and suppliers to become acquainted with them.” \textit{See id. art. XIX:1. Article XIX:5 further obligates the parties to compile annual statistics on their procurement, including statistics on the estimated value of contracts awarded, broken down on an entity-by-entity basis, by category of product or service.}

\textsuperscript{325} Under NAFTA, central government purchases of goods between Canada and the United States is subject to a lower threshold of $25,000. For other federal government procurement in the three NAFTA Parties, the thresholds are $50,000 for goods and services, and $6.5 million for construction contracts. For procurement by government-owned utilities and transportation authorities, the threshold for goods and services is $250,000, and $8 million for construction services. \textit{See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (containing chs. 10-22), art. 1001, Annex 1001.2(c).}

\textsuperscript{326} In connection with procurement of services by publicly-owned utilities and transportation authorities, the thresholds are as high as SDR 450,000 in some cases. Japan’s threshold for architectural and engineering services in general is SDR 450,000. See WTO Committee on Government Procurement, Thresholds in Appendix I of the Agreement Expressed in National Currencies for 1996/1997, GPA/W/12 (1996). \textit{See also Grier, \textit{supra} note 322, at 623-25.}

\textsuperscript{327} Israel has set its threshold at SDR 250,000, the United States and Canada at SDR 355,000 ($500,000).

\textsuperscript{328} The United States agreed to apply a threshold of SDR 179,000 ($250,000) for federally-owned utilities, such as the Tennessee Valley Authority.

\textsuperscript{329} In connection with construction contracts entered into by publicly-owned utilities and transportation authorities, the thresholds are as high as SDR 15 million in some cases. Israel’s threshold for construction contracts is SDR 8.5 million; Japan’s and Korea’s is SDR 15 million ($21 million) for construction services. The United States applies these same thresholds on a reciprocal basis.
Derogations from the MFN obligation have been made in the Annex 2 offers on subcentral governments. In exchange for the voluntary commitment of 37 U.S. states to be bound by the GPA and of two other U.S. states and seven cities to extend national treatment in certain goods and services procurement, the EU agreed to extend the coverage of the GPA to all subcentral levels of government in the procurement of goods, but not services.

The balance of the GPA addresses issues of technical specifications, bid tendering procedures, qualifications of prospective tenderers, invitations to bid, selective tendering procurement, time limits for tendering, tender documentation, submission of tenders, award of the contract, notice of award, and challenge procedure. 330

O. Dispute Settlement in the GATT-WTO System

Without an effective enforcement mechanism, the commitments made by WTO Members would ring hollow. Criticisms of the dispute settlement process under GATT 1947 are legion and will not be recounted in any depth here. 331 The most frequently recurring complaints about dispute settlement under GATT 1947 include the following:

- GATT lacked a single dispute settlement procedure, with the Tokyo Round Codes containing separate dispute settlement mechanisms;
- GATT disputes were sometimes resolved through the grant of waivers;
- small countries were handicapped in achieving effective results against large countries;
- the GATT panel process was lengthy and subject to delaying tactics;
- GATT contained no provision for the automatic establishment of a panel;
- inadequate staff and experts often hamstrung panels in their fact-}

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330 See generally Alan Kashdan, Government Procurement, in The World Trade Organization, supra note 57.
finding;
• the insistence on approval of panel reports by consensus permitted the losing country to block adoption of reports;
• effective enforcement and sanctions were almost nonexistent, with the exception of bilateral retaliation; and
• GATT did not require notification of the implementation of a panel recommendation.

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes332 ("DSU") addresses almost all of these criticisms. As noted in DSU Article 3.2, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." To that end, the DSU establishes an integrated, rules-based dispute settlement process with a right of appellate review. The DSU virtually assures that all panel or Appellate Body reports will be adopted expeditiously and without modification.333

DSU Article 1 integrates the dispute settlement process of the GATT-WTO system by extending the DSU’s scope of coverage to all disputes brought under the WTO Agreement, the MTAs, and the Agreement on Government Procurement.334 With the exception of certain special or additional rules contained in eight of the MTAs listed in Appendix 2 of the DSU, the rules and procedures of the DSU apply to all disputes.335

DSU Article 6.1 addresses one of the major criticisms of the GATT panel process, namely, the lack of automaticity in the establishment of a panel after a complaining party so requests. DSU Article 6.1 provides that a panel will be convened automatically and at the latest at the Dispute

332 See generally WTO Agreement, supra note 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 [hereinafter DSU].
334 See DSU, supra note 332, art. 1.1, app. 1. With the exception of the Civil Aircraft Agreement, the parties to PTAs have agreed that the DSU will apply to the resolution of disputes arising under those PTAs.
335 See id. art. 1.2. For example, article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures provides that in disputes involving scientific or technical issues, WTO panels should seek advice from experts chosen by the panel.
Settlement Body ("DSB") meeting following the meeting at which the item appears on the DSB's agenda, unless the DSB unanimously agrees not to do so. Failure to establish a panel, of course, would require the concurrence of the complaining Member.

DSU Article 20 eliminates another source of disenchantment with the GATT dispute settlement process, namely, protracted panel proceedings. DSU Article 20 sets a general time frame of nine months (12 months if the panel report is appealed) for the completion of a panel proceeding, unless otherwise agreed to by the disputing Members. The nine-month period runs from the date the panel is established until the date the DSB considers the report for adoption.

The inability of disputing parties to frame the issue or issues to be presented to a panel for its resolution often impeded the establishment of GATT panels. DSU Article 7 eliminates this stumbling block by providing standard terms of reference, unless the parties agree otherwise within 20 days from the establishment of the panel.

Within one week after appointment of the panelists and agreement on the terms of reference, the panel is to meet with the parties to establish a timetable for the panel process, including deadlines for written submissions. DSU Article 12.8 establishes a six-month deadline (three months in urgent cases) that starts from the date the panel is composed and the terms of reference are agreed upon by which the panel must issue its final report. If a panel cannot issue its report within six months, then it may extend the time period for completing its report. In no case, however, should the period of time from the establishment of the panel to the circulation of the report to the Members exceed nine months. Panel proceedings also may be suspended for up to 12 months at the request of the complaining Member.

It is a virtual certainty that panel reports will be adopted and become binding under the improved WTO dispute settlement process. Consequently, appellate review, an innovation introduced by the Uruguay Round negotiators to ensure the WTO dispute settlement process has received wide acceptance. Not only should appellate review give the DSU broader

336 See id. art. 12.9. For example, in the panel proceeding, United States -- Import Prohibition of Certain Shrimp and Shrimp Products, the panel delayed the completion of its proceedings for an additional six months due to the complexity of the matter and the need to seek technical and scientific expertise. Thus, instead of completing its proceedings within the normal six-month period, this panel will take over a year. See Communication from the Chairman of the Panel, United States -- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/10 (1997). See also Panel on U.S.-Japan Film Dispute Delays Final Report Until October, 14 INT'L TRADE REP. (BNA) at 1058 (1997).

337 See DSU, supra note 332, art. 12.12 For example, at the request of the EU on April 25, 1997, the panel established in United States -- The Cuban Liberty and Democratic Solidarity Act, WT/DS38, suspended its work. See Communication from the Chairman of the Panel, United States -- The Cuban Liberty and Democratic Solidarity Act, WT/DS38/5 (1997).
acceptance and greater legitimacy, but it also will ensure uniform interpretation of Uruguay Round agreements.

As a general rule, appellate proceedings are not to exceed 60 days from the date a Member formally gives notice of its decision to appeal to the date the Appellate Body circulates its report. The scope of appellate review is limited to issues of law covered in the panel report and legal interpretations developed by the panel.

In accordance with DSU Article 17.9, the Appellate Body adopted working procedures in 1996, subsequently revised in 1997. The Working Procedures for Appellate Review provide, inter alia, for the following:

- every effort will be made to take decisions by consensus;
- to ensure consistency and coherence in decision-making, the Appellate Body members will convene on a regular basis to discuss matters of policy, practice, and procedure;
- the three-member division responsible for deciding an appeal will exchange views with other members before the division finalizes its report; and
- uniform procedural rules govern filing and service of documents, ex parte communications, notice of appeal, the contents of written submissions, and transmittal of the record.

In a remarkable volte-face from the GATT practice that permitted a losing party to block the adoption of a panel report, a WTO panel or Appellate Body report is adopted automatically unless the DSB disapproves the report by consensus. The DSU guarantees the winning Member the fruits of its victory, even if all other WTO Members object to the report. If a panel report is not appealed, the report will be adopted at a DSB meeting within 60 days after circulation of the panel report to the Members. If a DSB meeting is not scheduled within this 60-day period, a special DSB meeting will be held for this purpose. An Appellate Body report must be adopted by the DSB and unconditionally accepted by the disputing Members unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days after its circulation to WTO Members.

Article 21.1 recognizes that prompt compliance with DSB recommendations is essential to the effective resolution of disputes. The Member found to have violated an MTA ("the Member concerned" is the term used in the DSU) must state its intentions regarding the implementation
of the recommendations at a DSB meeting held within 30 days after a report has been adopted. If immediate compliance is impracticable, then a Member may have "a reasonable period of time" within which to comply.345 A reasonable period of time can be the period of time proposed by the Member with the approval of the DSB, generally not to exceed 15 months measured from the date of the establishment of the panel. In no event is it to exceed (1) 18 months, unless the parties so agree; (2) a period of time mutually agreed by the parties to the dispute; or (3) a period of time determined through binding arbitration, generally not to exceed 15 months from the date of adoption of the report.346

If there is a disagreement over whether a Member has in fact complied with a DSB recommendation, the matter may be referred to the original panel for its determination of this issue.347 Its report is to be circulated within 90 days after referral. Until the matter is satisfactorily resolved, it is to remain on the DSB's agenda with the Member concerned giving a status report of its progress on the implementation of the recommendation.348

Full implementation of a recommendation to bring a measure into conformity with an Uruguay Round MTA is the DSU's preferred method for resolving a WTO-dispute.349 By removing the offending measure, trade liberalization is promoted and trade equilibrium restored. In terms of a complete remedy, however, the aggrieved Member is not necessarily made whole solely by the removal of the offending measure. The specific remedy of removing the offending measure may not compensate the complaining Member for any trade losses it may have suffered as a result of the responding Member's violation. However, in cases involving, for example, an improper assessment of ordinary customs duties, antidumping duties, or countervailing duties, refund procedures exist under national law.

Failing full implementation of a DSB recommendation, DSU Article 22 authorizes compensation to a complaining Member from an offending Member on terms mutually agreed to between the disputing Members.350 Compensation might restore the overall balance of trade liberalization that existed prior to the dispute if, for example, the offending Member offers to reduce tariffs on products of export interest to the complaining Member. However, any compensation agreement in the form of improved market

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345 See DSU, supra note 332, art. 21.3.
346 See id. arts. 21.3(a)-(c), 21.4.
347 See id. art. 21.5.
349 See DSU, supra note 332, art. 22.1.
350 See id. art. 22.2.
access for the complaining Member’s goods must be “consistent with the covered agreements,"351 that is, it must be instituted on an MFN basis, thereby generalizing the benefit of the compensation to all WTO Members. This requirement could complicate compensation negotiations.

Failing conclusion of a compensation agreement within 20 days after the expiration of a reasonable period of time for implementing a recommendation, a complaining Member may request the DSB to authorize the suspension of concessions limited solely to the Member concerned. The suspension need not occur on an MFN basis. This limitation is a form of damage control, thereby minimizing the negative trade impact of retaliation.

Regarding the suspension of concessions, the general principle is that the complaining Member first should seek to suspend concessions with respect to the same sector in which the violation occurred, i.e., cross-sector retaliation is discouraged. For example, with respect to a trade-in-goods violation, a suspension of concessions may take place with regard to goods generally. If the GATS has been violated, then the suspension should focus on the principal service sector affected (there are eleven, including, for example, telecommunication and financial services). If the TRIPS Agreement has been violated, then the suspension should focus on the specific intellectual property right that was violated (e.g., patent, trademark, copyright).352

If a sector-specific suspension is not practicable or effective, then the suspension may be in other sectors under the same agreement (e.g., suspension of telecommunication trade benefits in retaliation for a financial services violation). If such retaliation is not practicable or effective, or the circumstances are serious enough, then suspension under another agreement may be authorized.353

The level of the suspension is to be equivalent to the level of the nullification or impairment. If the Member concerned objects to the proposed level of suspension or to cross-sector retaliation, the matter is to be referred to binding arbitration which is to be completed within 60 days.354

In a flank attack on unilateral actions taken by the United States under Section 301 of the Trade Act of 1974,355 DSU Article 23, Strengthening the Multilateral System, flatly prohibits Members from making unilateral determinations on the following matters: (1) whether an Uruguay Round agreement has been violated, (2) whether another Member has failed to implement a DSB recommendation within a reasonable period

351 See id. art. 22.1.
352 See id. art. 22.3(f).
353 See DSU, supra note 332, art. 22.3.
354 See id. art. 22.6.
of time, or (3) whether the level of suspension of concessions is appropriate. The DSU is the exclusive mechanism for resolving these issues, absent the mutual agreement of the disputing Members. 356

As noted by the DSB in its 1996 annual report, the number of matters referred to the DSB is considerably greater than the number under GATT during similar periods. 357 The following table provides a snapshot of the status of WTO disputes as of January 1998:

<table>
<thead>
<tr>
<th>Consultation Requests</th>
<th>Distinct Matters</th>
<th>Active Cases</th>
<th>Appellate Reports Adopted</th>
<th>Disputes Under Consultation</th>
<th>Settled, Withdrawn, or Inactive Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>109</td>
<td>76</td>
<td>18</td>
<td>8</td>
<td>34</td>
<td>20</td>
</tr>
</tbody>
</table>

The Quad Members (Canada, the EU, Japan, and the United States) have been the main participants in DSU proceedings, both as complaining and responding parties. The leading complainants are the United States (34), the EC (21), Canada (9), and Japan, Mexico, and India (5 each). 358 The leading respondents are the EC (21), the United States (20), Japan (11), Korea (8), India (8), and Brazil (7). 359

Developing countries also have begun using the DSU in increasing numbers, in contrast to the experience under GATT 1947. The following tables summarize the number of complaints brought by and against developed and developing country Members as of January 1998.

<table>
<thead>
<tr>
<th>Complaints by Developed-Country Members</th>
<th>Developed-Country Respondents</th>
<th>Developing-Country Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>75 requests for consultations involving 51 distinct matters</td>
<td>28</td>
<td>22</td>
</tr>
</tbody>
</table>

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356 In lieu of panel proceedings, DSU Article 25 authorizes disputing Members to mutually agree to resolve their dispute through binding arbitration. See DSU, supra note 332, art. 25.
357 Summaries of all pending, completed, and settled DSU proceedings and DSB reports have been prepared by the WTO Secretariat, available at <http://www.wto.org/wto/dispute/bulletin.htm>.
359 See id.
Outside of GATT 1994, the MTAs most often the subject matter of DSU proceedings have been the SPS and TBT Agreements (20), the TRIPS Agreement (10), the Agreement on Agriculture (9), the TRIMs Agreement (9), and the GATS (4).360

IV. FOREIGN DIRECT INVESTMENT IN THE GATT-WTO SYSTEM

National laws and regulations that discriminate against foreign direct investment distort international trade in much the same way as do tariffs, quotas, and other NTBs. By favoring domestic investors or discriminating against foreign investors, the most efficient producers may be not be able to penetrate a market due to government interference in the market.

The forces that drive a firm to consider making a foreign direct investment ("FDI") are manifold. As global competition intensifies, many firms identify advantages in establishing a presence overseas.361 For example, building a manufacturing facility in a region where labor and raw materials costs are low may improve profitability. Likewise, acquisition of an equity position in principal suppliers may enhance managerial control, reduce costs, and improve efficiency. As high-tech products near the end of their life cycle, the product and production technology become more standardized and labor intensive, forcing companies to invest abroad to take advantage of lower-cost sources of materials and labor, thereby improving

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361 For the reasons why firms engage in foreign direct investment (FDI), and the perceived benefits and costs of FDI, see REPORT OF THE WTO SECRETARIAT, TRADE AND FOREIGN DIRECT INVESTMENT 8, 15-17 (1996), available at <http://www.wto.org/wto/Whats_new/chpiv.htm>.
their competitive position.\textsuperscript{362} A company may also elect to sell its products through affiliates located in foreign markets, thereby increasing sales and reducing foreign exchange risks. A firm might consider a foreign investment in order to bring its product closer to the target market.

Benefits also accrue to the host country from foreign direct investment. The economic benefits of FDI include the efficient use of host-country resources, technology transfer to the host country (including organizational and managerial skills), positive employment effects in the host country, and improved productivity of local firms.

The growth of multinational enterprises has resulted in a tremendous increase in the volume of foreign direct investment.\textsuperscript{363} The total inflow of foreign direct investment worldwide in 1995 was $315 billion, with $203 billion of that figure going to developed countries.\textsuperscript{364} The inflow of foreign direct investment into developing countries increased from $13 billion in 1981 to nearly $100 billion in 1995.\textsuperscript{365} Total worldwide FDI in 1995 increased 40 percent from $225 billion in 1994.\textsuperscript{366} Five countries – France, Germany, Japan, the UK, and the US – account for two-thirds of total FDI outflows. Ten countries received two-thirds of total FDI, with the four leading host countries for FDI inflows during the decade 1985-95 being the United States ($478 billion), the UK ($200 billion), France ($138 billion), and China ($130 billion).\textsuperscript{367}

Despite the benefits of FDI and the tremendous growth worldwide in FDI, many barriers still exist. The most common restrictions include investment notification, approval, or authorization requirements that are

\textsuperscript{362} See BHALA, INTERNATIONAL TRADE LAW, supra note 8, at 75 (1996).

\textsuperscript{363} Investment can be divided into two broad categories: portfolio investment and FDI. The former involves acquiring shares of foreign corporations without exercising any direct control over management of the organization. FDI, in contrast, involves acquiring a significant controlling interest of existing foreign firms or establishing new firms. One measure of a controlling interest is that a foreign investor must hold at least 10 percent of a firm's equity in order for that investment to be classified as FDI. See Approaching the Next Frontier for Trade in Services: Liberalization of International Investment, INDUS., TRADE, & TECH. REV. 2 (USITC, No. 2962, Apr. 1996). Because the issue of control is less important with portfolio investment, so too are issues of government policy and industrial competitiveness are less significant. However, because FDI often involves issues of significant control over a domestic firm, it raises sovereignty issues for many host countries. Nevertheless, growth in FDI is considered by most developing countries to be beneficial because it enhances economic growth, productivity, and competitiveness. See generally UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS 219 (1996); TRADE AND FOREIGN DIRECT INVESTMENT, supra note 361. An extensive bibliography on trade and investment can be found in TRADE AND FOREIGN DIRECT INVESTMENT, id. at 46-53.


\textsuperscript{365} See WORLD INVESTMENT REPORT 1996, supra note 363, at 227.

\textsuperscript{366} See id. at 227.

\textsuperscript{367} See TRADE AND FOREIGN DIRECT INVESTMENT, supra note 361, at 5.
sometimes contingent upon satisfying criteria that are highly subjective and, therefore, subject to political manipulation; limitations on the acquisition of real estate; and conditions requiring nationality or residency of senior managers or members of the board of directors. One study of the investment policies of the members of the Organization of Economic Cooperation and Development ("OECD"),\(^{368}\) whose investment policies should in theory be the most liberal in the world, reveals that they collectively maintain over 400 investment restrictions.\(^{369}\) The 15-member states of the EU as a group have the greatest number of investment restrictions, accounting for 54 percent of all restrictions identified for OECD members. The United States has the second largest number of restrictions, accounting for 17 percent of the OECD total, followed by Canada, Mexico, and Australia, with 14 percent, 7 percent, and 6 percent, respectively.\(^{370}\)

GATT 1947 is virtually silent on the subject of FDI. Had it been approved, the Havana Charter would have covered restrictive business practices, commodity agreements, and in Articles 11 and 12, foreign investment. The question of investment was revisited in the 1955 GATT review conference after it was obvious that the Havana Charter and the ITO were stillborn. That conference recommended that contracting parties take steps to stimulate the international flow of capital.\(^{371}\)

Progress on a comprehensive multilateral agreement on investment under WTO auspices has been halting.\(^{372}\) Many developing-country Members are hostile to the idea in the absence of a complementary set of rules on restrictive business practices. Some developing-country Members fear that investment by multinational corporations can lead to the development of monopolies that in turn can lead to predatory pricing that drives local competitors out of business.

Two WTO Working Groups have been established to examine the relationship between trade and investment, and between trade and competition policy. The Ministerial Declaration issued at the conclusion of the 1996 Singapore Ministerial Conference provides:

Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-

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\(^{368}\) The OECD was founded in 1961 and is the primary organization for industrialized nations to discuss trade and economic matters. Its objectives are to achieve economic growth and employment in member countries while maintaining financial stability. Its 29 members include the 15 EU-member countries, Australia, Canada, the Czech Republic, Hungary, Iceland, Japan, Korea, Mexico, New Zealand, Norway, Poland, Switzerland, Turkey, and the United States.

\(^{369}\) See *Liberalization of International Investment*, supra note 363, at 8.

\(^{370}\) See id.

\(^{371}\) See *Trade and Foreign Direct Investment*, supra note 361, at 33-34.

\(^{372}\) See *FDI Seen by Some Officials as Subject for World Trade Organization Talks*, 13 INT’L TRADE REP. (BNA) at 709 (1996).
in agenda in these areas, including the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to: establish a working group to examine the relationship between trade and investment; and establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.\textsuperscript{373}

Whether the WTO will conclude a framework agreement on investment is uncertain. Considering the diverse and broad WTO membership that includes developed, developing, and emerging economies, a strong argument can be made that the WTO is the proper forum for concluding a multilateral investment agreement, not only because of its broad-based membership, but because of the close link between trade and liberalized investment rules.\textsuperscript{374}

Although no comprehensive WTO agreement regulating all aspects of FDI currently exists, the GATT-WTO system does integrate trade and FDI in several important respects. The Agreement on Trade-Related Investment Measures, the GATS, the TRIPS Agreement, the Agreement on Subsidies and Countervailing Measures ("SCM"), the GPA, and the DSU provide a patchwork quilt of GATT-WTO rules integrating trade and foreign direct investment, albeit a quilt with several missing patches.

\textit{A. The TRIMs Agreement}

The TRIMs Agreement represents a modest attempt to reinforce GATT rules respecting national treatment and the prohibition on import quotas, but falls short of being a comprehensive set of rules regulating either international investment or restrictive business practices, topics much discussed in trade circles.\textsuperscript{375} The TRIMs Agreement builds on Article III, which requires Members to provide national treatment to imported products,

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and Article XI, which prohibits Members from imposing quantitative restrictions on the importation or exportation of goods. Although Article III:4, 5, and 7 do apply to certain aspects of investment laws, the GATT panel dispute involving the Canadian Foreign Investment Review Act spotlighted the need for Article III repair through the adoption of specific and unambiguous rules on certain trade-distorting investment measures, in particular local content requirements.376

What is a trade-related investment measure or “TRIM”? A TRIM is any measure imposed by a government (usually but not exclusively a developing country) on a foreign investor (often but not always a multinational enterprise) as a condition for investing in the host country. TRIMs can be positive or negative. Examples of positive TRIMs include financial incentives, such as tax holidays or subsidies, to invest within the host country generally or within certain economically depressed regions of the host country specifically.377 Examples of negative TRIMs include local equity requirements, licensing requirements, profit remittance restrictions, foreign exchange restrictions, transfer-of-technology requirements, domestic sales' requirements, trade-balancing requirements, local-content requirements, export requirements, and import-substitution requirements.378

The TRIMs Agreement deals exclusively with negative TRIMs and addresses only a handful of the most egregious trade-related investment measures; it has three main features.

First, it identifies certain types of investment measures that are inconsistent with GATT. Article 2.1 of the TRIMs Agreement stipulates that "no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994." Article 2.2 refers to the illustrative list of TRIMs that are inconsistent with Articles III:4 and XI:1 of GATT 1994. The TRIMs Annex provides that measures must be mandatory, that is, enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage. Next, these mandatory measures are prohibited if they require the purchase or use of domestic products (i.e., local content requirements), limit the purchase or use of imported products to an amount related to the volume or value of local products that are exported (i.e., trade-balancing requirements), or tie access to foreign exchange to an investor's foreign exchange earnings (i.e., foreign exchange balancing restrictions). The prohibited measures listed in the illustrative Annex to the TRIMs Agreement underscore the close link

376 See Administration of the FIRA, supra note 29.
377 For a list of typical TRIMs, see WORLD INVESTMENT REPORT 1996, supra note 363, at 181; Low & Subramanian, supra note 364, at 417.
378 For an illustrative list of local content requirements in 27 developing countries, see Low & Subramanian, supra note 364, at 419-20.
between foreign investment and international trade. The prohibitions of the TRIMs Agreement apply equally to measures imposed on domestic firms, not just on foreign investments, and cover both new and existing investments.

Second, the TRIMs Agreement requires that all inconsistent TRIMs be notified and eliminated in two years in the case of developed countries, five years in the case of developing countries, and seven years in the case of least-developed countries. In order not to disadvantage established enterprises that are subject to a TRIM relative to new investments that are exempt from it, Members may apply the same TRIM to new investments during the transition period, where the existing and new investment produce like products.

Third, in a small victory for developing-country Members, the Council for Trade in Goods is to review the operation of the TRIMs Agreement by the end of 1999. As part of the Council's review, the Council is to "consider whether the Agreement should be complemented with provisions on investment policy and competition policy." The TRIMs Agreement's built-in agenda will dovetail into the work of the two Working Groups established in the 1996 Ministerial Conference meeting to examine the issues of trade and foreign investment, and trade and competition policy.

The TRIMs Agreement is the first successful attempt made within the GATT-WTO system to facilitate foreign investment by eliminating non-tariff barriers to trade in goods associated with foreign investment. The Agreement is designed to ensure that governments do not apply measures to foreign investment that create restrictions or distortions for trade in goods. It gives investors the assurance that they may freely buy, sell, import, and export goods that are produced in countries outside the country in which their investment is located. At the same time, however, the TRIMs Agreement may have been a solution in search of a problem. It is reported, for example, that only 6 percent of all overseas affiliates of U.S. companies are affected by TRIMs. It is also reported that most TRIMs have little effect on managers' behavior because they would have made most of the same decisions with or without local investment measures to influence or guide their decision-making.

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379 See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, Uruguay Round Results, supra note 2, art. 5.2. A time-extension is possible under Article 5.3 if a developing-country or least-developed country Member “demonstrates particular difficulties in implementing the provisions of this Agreement.”

380 See id. art. 5.5.


382 See EIU GUIDE TO GATT, supra note 58, at 32.

383 See id. at 33.
The TRIMs of greatest concern to the United States going into the Uruguay Round covered only a small amount of total foreign investment and existed mainly in developing countries.\(^3\)\(^8\)\(^4\) Ironically, developing countries were granted a waiver under Article 4 of the TRIMs Agreement for balance-of-payment purposes.

Overall, the TRIMs Agreement is an unbalanced document that reflects the bargaining positions of the EU and developing countries in the Uruguay Round negotiations.\(^3\)\(^8\)\(^5\) What the United States wanted in a TRIMs Agreement was a comprehensive investment code. What the United States got was something far more modest in scope. The TRIMs Agreement became a bargaining chip for the United States that it waged in order to secure gains in the areas of intellectual property protection and trade in services.

The areas where a TRIMs Agreement was most needed, i.e., restrictive business practices and positive TRIMs, are the very areas where the TRIMs Agreement is virtually silent. And the practices that the TRIMs Agreement does address could have been dealt with under existing GATT-WTO rules. All of the legal tools necessary to curb the use of the negative TRIMs listed in the Annex were in place under GATT 1947. The negative TRIMs listed in the Illustrative Annex all violate Articles III and XI with or without a TRIMs Agreement stating that they do. The absence of a strong dispute settlement mechanism in GATT 1947 probably explains why a TRIMs Agreement was considered necessary in the first place and why more TRIMs weren’t challenged under GATT 1947.\(^3\)\(^8\)\(^6\)

B. The GATS

Foreign investment in the services sector is governed by the GATS, which is in part a binding, multilateral sectoral agreement on foreign investment. The GATS permits market access for service suppliers through four modes of supply, one of which is clearly investment-related: the commercial presence of a service supplier.\(^3\)\(^8\)\(^7\) The term “commercial presence” is defined as “any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of

\(^3\)\(^8\) See id.

\(^3\)\(^8\)\(^5\) See id. at 34, 36.

\(^3\)\(^8\)\(^6\) The U.S. complaint against Canada’s Foreign Investment Review Act is a notable exception.

\(^3\)\(^8\)\(^7\) See GATS, supra note 26, art. 1:2.
supplying a service. The GATS clearly contemplates FDI. Another closely-related mode of supply is the supply "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." This mode of supply contemplates the temporary entry of personnel and the intra-company transfer of managerial and other key employees.

Market access to and national treatment of any service sector through one or more of the four modes of supply depends on whether a Member has made a market access and national treatment commitment in its GATS Schedule of Specific Commitments. All WTO Members have submitted schedules, but many have placed limitations on market access and national treatment in connection with the "commercial presence" mode of supply. Typical limitations that Members list in their Schedules of Commitments relating to commercial presence are restrictions on the types of legal entity through which a service supplier may supply a service, and limitations on the participation in foreign capital in terms of the maximum percentage of foreign shareholding or aggregate foreign investment permitted. As part of the WTO's built-in agenda, these limitations will be reviewed in the follow-on services negotiations scheduled for 2000.

C. The TRIPS Agreement

Like its sister agreement, the GATS, the TRIPS Agreement is the most comprehensive framework agreement of its kind. Although the TRIPS Agreement does not directly address the issue of FDI, its provisions on minimum standards of intellectual property protection and domestic enforcement procedures bear directly on the legal environment in which FOI operates. If a foreign investor cannot place an investment in a host country with the assurance that its intellectual property rights (patents, trademark, copyright) will be adequately protected from infringement, that investor may very well decide not to make the investment. With the minimum protections of the TRIPS Agreement in place for patents, trademarks, copyright, trade secrets, geographical designations, layout designs of integrated circuits, and industrial designs, coupled with effective mechanisms for the enforcement of those rights against piracy and infringement within the host country, FDI will be encouraged, especially FDI by firms with valuable intellectual property to protect.

388 See id. art. XXVIII(d).
389 See id. art. I:2.
390 See id. arts. XVI, XVII.
391 See id. art. XIX.
392 See id. art. XIX.
D. The SCM Agreement

Host countries frequently offer a variety of fiscal and financial incentives to attract FDI. Fiscal incentives include tax holidays, accelerated tax depreciation, and export-based incentives, such as tax credits on domestic sales in return for export performance. Financial incentives include subsidized loans, loan guarantees, and government insurance at preferential rates.393

The SCM Agreement establishes disciplines on the provision of subsidies. Fiscal and financial incentives are subsidies within the meaning of the SCM Agreement to the extent they are “a direct transfer of funds” from a government, “government revenue . . . otherwise due [that] is foregone or not collected,” or “a government [provision of] goods or services other than general infrastructure.”394 The SCM Agreement prohibits investment incentives meeting the definition of “subsidy” and contingent upon export performance by an investor,395 as well as investment incentives contingent upon the use of domestic over imported goods.396

Article 6 of the SCM Agreement makes actionable the provision of subsidies that cause “serious prejudice” to the interests of another Member. Annex IV of the SCM Agreement identifies government funds given to firms in a “start-up situation” as an example of a subsidy that can give rise to a “serious prejudice” complaint.397

E. The Agreement on Government Procurement

Article III:2 of the plurilateral Agreement on Government Procurement provides that procuring entities will not discriminate against locally-established suppliers on the basis of degree of foreign affiliation or ownership.

F. The DSU

Any FDI-related dispute arising under any GATT-WTO MTA must be resolved under the provisions of the DSU. As noted, this vastly improved,

393 For a list of the main types of incentive measures offered to foreign investors, see WORLD INVESTMENT REPORT 1996, supra note 363, at 180.
394 Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, Uruguay Round Results, supra note 2, art. 1.1(a)(i)(i), (ii) and (iii).
395 See id. art. 3.1(a).
396 See id. art. 3.1(b). This type of incentive is also listed in the Annex to the TRIMs Agreement as a prohibited measure.
397 See id. Annex IV:5. A “start-up” situation is one where financial commitments for product development or construction of facilities to manufacture products benefitting from the subsidy have been made, even though production has not begun. See id. n.65.
rules-based GATT-WTO dispute settlement process will give investors a more certain legal climate within which to make their foreign investment, to the extent a WTO agreement covers the matter in dispute and the investor’s home country chooses to espouse the investor’s claim in the DSB.

V. CONCLUSION

From a legal standpoint, there has never been a better time for small and medium-size firms to consider taking their business abroad. The legal climate for international trade and investment has never been more friendly or predictable. Tariffs and non-tariff barriers to trade on imported goods have never been lower. Market access for goods and services has never been better. Although the GATT-WTO system has not yet adopted a comprehensive agreement covering all aspects of foreign direct investment, several WTO Agreements protect many aspects of a foreign direct investment, including rules protecting intellectual property and prohibiting local-content requirements. In addition, under the GATS, many countries have made market access commitments permitting foreign investors to establish a commercial presence in order to provide certain services.

Despite the nagging U.S. trade deficit, in a 1996 poll of 1,000 persons who were asked if world trade is good for the economy, 82 percent responded in the affirmative, with 15 percent responding that trade was a menace. In a similar poll taken four years earlier, nearly half of those surveyed saw trade as a threat.

Regardless of one’s views on the desirability of international trade, the reality is that the world economy has become increasingly more integrated over the 50-year history of the GATT-WTO system. As a percentage of GDP, exports represented 20 percent of GDP for Germany, France, and the UK in 1995. For the NAFTA Parties, exports as a percentage of GDP were 32 percent for Mexico, 34 percent for Canada, and just under 10 percent for the United States in 1995. Japan’s export-to-GDP ratio also was just under 10 percent.

Canada’s economy is clearly the most integrated of this group of countries, followed by Mexico. Mexico’s surge in export growth from a lowly 2.2 percent of GDP in 1973 is attributable to several factors. These factors include the market reforms introduced in the mid-1980s by the de la

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399 See J. COM., July 19, 1996, at 6A.
398 See id.
400 See THE ECONOMIST, Apr. 27, 1996, at 113. Germany, France, and the UK ranked among the top five exporters and importers in world merchandise trade in 1996. The United States and Japan ranked first and third, respectively. The leading exporter of commercial services in 1995 was the United States, with nearly $190 billion in exports, nearly double that of second-place France which had $96 billion in exports of services trade.
Madrid government, Mexico’s accession to GATT in 1986, and the successful conclusion of the NAFTA negotiations by the Salinas government in 1992 -- in short, to the increased integration of its economy into the world economy.

Mexico has learned the lesson that domestic economic growth is inextricably bound with integration into the world economy. In the words of Professor Peter Drucker:

The last 40 years . . . teach that protection does not protect.
... That protection breeds complacency, inefficiency and cartels has been known since before Adam Smith. The counterargument has always been that it protects jobs, but the evidence of the last 40 years strongly suggests that it does even do that.
... The lessons of the last 40 years teach us that integration is the only basis for an international trade policy that can work, the only way to rapidly revive a domestic economy in turbulence and chronic recession.401

International trade agreements that do not provide a certain legal environment within which business can operate are of little utility to firms contemplating overseas sales or investment. While not solely responsible for the liberalization of international trade, the rules-based GATT-WTO system deserves most of the credit for the increased integration of national economies into a world economy. Assured market access, backed by enforceable rules, is its hallmark. It provides businesses with the predictable legal climate that is indispensable to planning and without which international trade would grind to a standstill.