

Core WTO Agreements: Trade in Goods and Services and Intellectual Property

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1. Introduction

Prior to January 1, 1995, when the World Trade Organization (WTO) was established, only trade in goods was subject to multilateral rules. These rules were codified in the General Agreement on Tariffs and Trade (GATT), which came into force on January 1, 1948. Upon creation, the WTO subsumed GATT within itself and added to it the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). These latter agreements brought trade in services and intellectual property rights, respectively, within the ambit of multilateral rules.

Currently, the WTO has 137 members, accounting for more than 90 percent of the world trade. More than three fourths of these members are developing or least developed countries. The organization has four principal functions: administering trade agreements, settling trade disputes, conducting trade policy reviews of its members, and acting as a forum for trade negotiations. In addition, it provides technical assistance to developing countries in the area of trade policy and also cooperates with other multilateral agencies.¹

In this chapter, I discuss the core WTO agreements covering trade in goods and services and intellectual property rights. Section 2 is devoted to trade in goods, Section 3 to trade in services and Section 4 to intellectual property rights. In Section 5, I conclude the chapter. To economize on space, I limit the discussion to the essential provisions of the agreements.²

¹ It is doubtful, however, that with a total budget of less than \$85 million in 1999 and a staff of 500, it could have provided significant volume of technical assistance to developing countries.

² For an in-depth coverage, the reader should consult Jackson (1997) and Hoekman and Kostecki (1995).

2. Trade in Goods

At the end of the Second World War, along side the two international financial institutions—the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (World Bank)—the United States and United Kingdom led an effort to create a permanent international institution governing world trade in goods. This effort culminated in the signing of the Charter for the International Trade Organization (ITO) in Havana in March 1948 by fifty-three countries. As it turned out, however, the ITO was never ratified by the United States Congress and was, thus, stillborn.

The discussions for the ITO had been conducted at four major meetings. At the third of these meetings held in Geneva during April-November 1947, twenty-three participating nations decided to sign the General Agreement on Tariffs and Trade to undertake trade liberalization that seemed politically feasible at the time. As a part of this agreement, they negotiated reductions in tariffs on some 50,000 items. Fearful that the negotiated tariff reductions might unravel if they waited too long, the GATT signatories agreed to implement the agreement on January 1, 1948.

GATT had many of the same provisions as the ITO. At the time the agreement was signed, the expectation was that the ITO would eventually supersede it. But as the prospects for the ratification of the ITO by the United States dimmed, *de facto*, GATT became an international trade organization. It came to govern international trade in goods between the signatory countries, which grew in number over time. It also became the umbrella organization for multilateral trade negotiations.³

³ By the time the Uruguay Round was negotiated, there were as many as ninety-nine GATT signatories.

The original GATT had three parts containing thirty-five articles in all. Part I contains two articles, one on the most-favored-nation treatment and the other on tariff concessions. Part II has twenty-one articles covering issues such as national treatment, anti-dumping, quantitative restrictions, emergency safeguards, subsidies, state trading, general exceptions, security exceptions and nullification or impairment. Part III has twelve articles addressed to the formation of customs unions and free trade areas and many procedural matters including withdrawal of concessions, modification of schedules and accession of new members.

The only significant addition to the original GATT was Part IV entitled “Trade and Development,” which was approved in 1965 and implemented in June 1966. This addition came at the insistence of the developing country members. There are three articles in this part, which happen to be long on promises but short on specific commitments. Not surprisingly, apart from sensitizing the contracting parties to the importance of GATT for developing countries, this part has had minimal impact on the actions taken by the signatory countries.

The Tokyo Round (1973-79) adopted the so-called Enabling Clause that legalized partial trade preferences among developing countries, as also one-way partial preferences by developed to developing countries. The latter provision legitimated the Generalized System of Preferences (GSP) that had come to exist since at least 1971. The Enabling Clause was never formally incorporated into GATT but its provisions have been clearly influential in the creation of many partial PTAs and legitimating the GSP.

The Tokyo Round was also responsible for the negotiation of several codes and agreements, signed principally by developed countries. The codes related to subsidies and

countervailing measures, product standard, government procurement, customs valuation, import-licensing procedures and anti-dumping. The agreements covered civil aircraft, bovine meat and dairy products. Many of the codes later served as the basis of parallel agreements in the Uruguay Round, signed by all WTO members.

The Uruguay Round (UR) (1986-94) brought about major changes in and considerable consolidation of the rules governing trade in goods. The basic international rules applicable to goods trade are now contained in what is referred to as GATT 1994, which incorporates within it GATT 1947 as rectified, amended or modified prior to the establishment of the WTO and six UR Understandings on the interpretation of a subset of the GATT articles. These basic rules are supplemented by a number of agreements on goods trade. These are referred to as Agreements on: Agriculture, Sanitary and Phytosanitary (SPS) Measures, Textiles and Clothing, Technical Barriers to Trade (TBT), Trade Related Investment Measures (TRIMs), Anti-dumping, Customs Valuation, Pre-shipment Inspection, Rules of Origin, Import Licensing Procedures, Subsidies and Countervailing Measures, and Safeguard.

In the following, I will describe the WTO regime in goods as implied by GATT 1994 and these UR Agreements. To appreciate these rules, the reader may find it useful to bear three points in mind. First, the guiding philosophy of the GATT-WTO system is to achieve a liberal trade regime. Therefore, the majority of the provisions we will encounter relate to the lowering of the barriers to trade. Second, negotiators must carry with them domestic consumer and producer interests, which inevitably results in the accommodation of certain protectionist measures. Finally, as an extension of the second point, in the negotiations, a country views its own liberalization as a cost and that of the partners as

benefit. This “mercantilist” view of trade policy naturally introduces an element of reciprocity in the negotiations.

2.1 The Most favored Nation Principle

Central to the global trading system in goods is the unconditional most favored nation (MFN) principle enshrined in Article I of GATT 1994. According to this provision, if country A grants a concession to country B as a part of a bargain, it must automatically grant the same concession to all other WTO members even if the latter offer no concession in return. Thus, a member country must treat all WTO members at par with its most favored trading partner.

An immediate implication of this provision is that a country must charge the same tariff rate on imports irrespective of its origin (leaving aside the possibility that the imports may have come from a nonmember). If applied without exception, this provision has the virtue that it ensures a single tariff rate on each product in a country. The resulting tariff regime is not only transparent but also economically efficient from the global standpoint. Being entirely nondiscriminatory, it also gives least reason for political discord across trading partners.

Being a compromise among competing interests, the WTO agreements admit a variety of violations of the MFN principle. Article I itself accommodates the trade preferences that existed prior to April 10, 1947. But more extensive violations of the MFN principle have come from preferential trade areas (PTAs) under three sets of provisions (see below for more details). First, GATT Article XXIV permits the formation of free trade areas (FTAs) and customs unions (CUs) whereby two or more WTO members eliminate trade barriers among them but not on outside countries. Under an FTA, such as the North

American Free Trade Agreement (NAFTA), each member retains its own external tariffs while under a CU, such as the European Community (EC), the members adopt a common external tariff on each product.⁴ These arrangements naturally introduce discrimination between union member and outside countries.

Second, the Enabling Clause, introduced in 1979, allows two or more developing countries to exchange partial trade preferences with one another. In these cases, internal tariffs need not be eliminated entirely; nor is it required that substantially all products be covered. The Enabling Clause also permits one-way preferences by developed to developing countries. These preferences, as exemplified by GSP, may be partial and can be granted on selected products.

Finally, in the past, the GATT contracting parties have granted waivers from the application of Article I. The United States-Canada Automotive Products Agreement of 1965, which established a free trade area between the two countries in the automotive sector, operated under such a waiver. During 1971 to 1981, GSP also operated under a similar waiver.

Violations of the MFN principle also happen in the application of safeguard measures (see below for more details). For instance, when anti-dumping duties are imposed, they apply only to those firms or countries found guilty. This automatically induces discrimination in trade policy. Any time that safeguard actions take the form of

⁴ According to Dam (1970, p. 48), when GATT was originally signed, Article XXIV was limited to customs unions and did not contain the provision for free trade areas. The exception to the MFN clause for preferences existing on April 10, 1947 and customs unions engendered in 1947 a movement to establish a similar exception for free trade areas. France, Syria and Lebanon, who hoped to work out an arrangement along FTA lines among French territories, led this movement. At the Havana Conference, they succeeded in having Article XXIV modified to include free trade areas.

quantitative restrictions, no matter how they are administered, discrimination is likely to result. Voluntary export restraints, which limit imports from specific countries only, are outright discriminatory.

Countries may also discriminate across trading partners by classifying imports so as to place similar products coming from different partners into categories subject to different tariff rates. But such discrimination can be challenged successfully in the WTO at least so long as the products can be shown to have similar characteristics.

2.2 *National Treatment*

While Article I of GATT 1994 is designed to eliminate discrimination among imports from different WTO members, Article III aims to eliminate discrimination against imported goods vis-à-vis domestically produced goods once they cross the border. It stipulates that once imports have entered the territory of a member country, they must be treated no less favorably than similar domestically produced goods.⁵ Article III explicitly states that products from other member countries should not be subject to internal taxes or other charges in excess of those applicable to similar domestically produced goods. At least equal treatment to imports must also be given with respect to all laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use.

Also prohibited under the national treatment provision are any internal quantitative restrictions that discriminate against imports. For instance, producers cannot be required that a minimum proportion of an input used in production be of domestic origin. Such

⁵ Note that *more* favorable treatment to foreign goods than to similar domestically produced goods is permitted.

“domestic content” requirements have been a source of contention, especially when imposed on foreign investors. The UR Agreement on TRIMs now explicitly recognizes that the domestic content requirements violate Article III of GATT.

The national treatment provisions do not apply, however, to laws, regulations or requirements governing the procurement of goods by government agencies for governmental use. A code on government procurement was signed by a plurality of the members in the Tokyo Round. While future negotiations may try to extend this code, appropriately modified, to the entire WTO membership, at present, government procurement is exempt from Article III.

In recent years, technical standards are fast becoming effective means of discrimination in favor of domestic producers of manufactures. The standards can be set in such a way as to make it costly for foreign producers to comply.⁶ Likewise, unduly strict inspections of imports for health and safety reasons may raise the costs of imports unnecessarily.⁷ The UR Agreements on TBTs and SPS measures have recently tried to address some of these concerns. The Agreement on TBTs explicitly states that WTO members shall “ensure that neither technical regulations, nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.” The

⁶ For instance, Swiss car manufacturers routinely equip their cars with wipers on headlights. The adoption of this feature as a requirement for car sales in Switzerland may unduly raise the production costs of foreign suppliers who do not normally equip their cars with this gadget. Even though the regulation has the appearance of being consistent with the national treatment provision, it can have a protective effect.

⁷ The much-publicized beef-hormone case is a good example of a contentious SPS restriction. In 1988, the European Union (EU) banned the use of hormonal substances to fatten animals meant for human consumption after slaughter. This ban affected the U.S exports of beef from animals that were fed the hormonal substances. The U.S. challenged the EU measure at the WTO as being protectionist rather than a legitimate SPS measure and eventually won the case.

Agreement on SPS similarly requires that sanitary and phytosanitary measures “should be applied only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.”

2.3 *Tariffs*

GATT shows a strong preference for tariffs over other instruments of protection. Tariffs may be levied on a per-unit basis or on an *ad valorem* (according to value) basis. Tariff concessions that countries give upon accession to the WTO or as a part of negotiations are recorded as “bound” tariffs in their tariff schedules. Under Article II, these schedules form an integral part of GATT. The schedules are drawn according to the “positive list” approach, which means that no commitment exists for products not included in the schedule. For the included products, countries are not to impose a tariff on the WTO members higher than the commitment or “binding” indicated in the schedule.

Prior to the UR Agreement, developed countries had 78 percent of their tariff lines of industrial products bound. The corresponding figure for developing countries was merely 22 percent. As a result of the UR Agreement, these percentages have gone up to 99 and 72 percent, respectively. Thus, under the UR Agreement, developing countries have gone on to expanded their tariff bindings substantially.⁸ Even though these bindings are often higher than the tariff rates actually applied, this is a significant development in terms of the expanded embrace of the GATT discipline by developing countries.

⁸ Hoekman and Kostecki (1995), Table 4.1, p. 90.

GATT Article VIII requires that the charges relating to exports and imports other than tariffs and export taxes (covered under Article III) should be limited to the cost of services rendered. These charges should not be levied with the intention to provide extra protection or generate revenues. Nevertheless, countries often introduce charges that are not called tariffs but have the same effect as them. Examples include taxes on foreign-exchange transactions, special import surcharges and other taxes affecting imports. The UR Understanding on Article II imposes major constraints on the use of these “para-tariffs.” It requires that, for each tariff line, national schedules record "other duties or charges" levied in addition to the recorded tariff and bind them at the levels prevailing on the date established in the Uruguay Round Protocol.

2.4 Customs Procedures

Valuation procedures at the border can also be used to increase the effective duty on imports. Simply assigning a product a higher price than justified can increase the incidence of tariff on it. GATT Article VII addresses this issue, requiring that the assessment of the custom duty be based on the actual value of the merchandise or of like merchandise. The provisions of Article VII are somewhat vague, however, especially with respect to the definition of “actual value”. The UR Agreement on Customs Valuation (formally the Agreement on Implementation of Article VII of GATT) attempts to correct this deficiency by establishing uniform, transparent and fair valuation standards. It requires that valuation be based on the transaction value of or invoice value of the good. If the customs authorities doubt the transactions value, they should rely on the value of identical or similar goods. The Agreement also clarifies how transportation, handling and insurance costs are to be treated

for the assessment of tariffs. Accordingly, the members are free to base the valuation on the cost, insurance and freight (c.i.f), cost and freight or free-on-board (f.o.b.) basis.

In recent years, developing countries have been increasingly relying on pre-shipment inspections (PSI) to reduce the scope for under-invoicing or over-invoicing of imports. They hire specialized PSI firms, which inspect the goods prior to being shipped and provide information on their quantity and value. In effect, these inspections substitute for inspections by domestic customs authorities that may not be able to perform the function efficiently. For some time, exporters had objected to some of the practices of the PSI firms. The UR Agreement on Pre-shipment Inspection responds to these concerns and stipulates that PSI firms must carry out their activities in a transparent, objective and nondiscriminatory manner. They must apply the standards agreed in the buyer-seller agreement. If no standards are specified, the relevant international standards are to be applied.

2.5 *Quantitative Restrictions*

Article XI of GATT 1994 prohibits quantitative restrictions as long-run measures except when they are applied to agricultural or fisheries products in conjunction with measures restricting the domestic output of similar products. Temporary export restrictions or prohibitions are permitted to relieve critical shortages of foodstuffs or other essential products (Article XI: 2a). Temporary import restrictions are permitted to relieve short-run balance of payments difficulties (Article XII). If this is done, the quota should not be administered on a selective basis, subjecting some countries to the restriction but not others.

Preference is for an overall quota.⁹ If country-by-country allocations are nevertheless made, they should be either negotiated with major partners or conform to the proportions in a previous representative year (Article XIII). Developing countries are given special exemption from Article XI obligations on grounds of balance of payments considerations and infant-industry protection (Article XVIII).

The provisions of Article XI notwithstanding, until recently, quantitative restrictions have been employed extensively. Developing countries made liberal use of Article XVIII exception granted on the balance of payments grounds. Developed countries invoked the restrictions on domestic output as the basis for similar restrictions on the imports of agricultural products. Imports of textiles and clothing into developed countries, including the United States, European Union, Canada and Australia, were regulated by the GATT sanctioned Multi-fiber Arrangement (MFA) which imposed country-specific voluntary export quotas. Voluntary export restrictions were also used in auto and steel industries.

In recent years, there has been some capping of the quantitative restrictions, however. With the adoption of flexible exchange rates in many cases and a general trend towards trade liberalization, developing countries have increasingly phased out quantitative restrictions. The UR Agreement on Agriculture has led to the replacement of non-tariff barriers by tariffs to a large degree. The UR Agreement on Textiles and Clothing is expected to phase out the MFA by the year 2005. And the UR Agreement on Safeguards

⁹ Use of licenses is permitted to administer the quota though the procedures should be transparent. The UR Agreement on Import Licensing Procedures lays down the criteria for transparency in this regard. For example, the agreement requires parties to publish sufficient information for traders to know the basis on which licenses are granted.

now prohibits the use of new voluntary export quotas and requires the existing one to be phased out.¹⁰

2.6 *Subsidies*

The WTO rules generally do not permit the use of subsidies, especially if they lead to an expansion of a country's exports or lower the prices of exports below those prevailing at home. Article XVI of GATT 1994 contains general provisions against subsidies that expand the exports of primary products or lower the export prices of other products below those prevailing in the domestic market. Article VI provides for countervailing duties to offset subsidies granted, directly or indirectly, on the manufacture, production or export of any merchandise. To countervail, injury or threat of injury to an established industry must be determined. Alternatively, the subsidy must be shown to retard the establishment of an equivalent domestic industry.

The provisions on subsidies and countervailing in the original GATT did not define precisely which subsidies could be subject to a countervailing action. As a result, during 1970s and 1980s, there were several disputes in this area.¹¹ The UR Agreement on Subsidies and Countervailing Measures has gone some ways towards alleviating this problem with respect to industrial products while the UR Agreement on Agriculture does the same for agricultural products.¹²

¹⁰ It must be pointed out, however, that recently the United States did introduce voluntary export quotas in steel through direct agreements with Brazilian firms.

¹¹ See Hoekman and Kostecki 1995, p. 106.

¹² This agreement builds on the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, which was negotiated by a subset of the GATT members in the Tokyo Round.

To solve the problem of definition, Agreement on Subsidies and Countervailing Measures introduces the concept of a "specific" subsidy. A subsidy is specific if it is available only to an enterprise or industry or group of enterprises or industries within the jurisdiction of the authority granting the subsidy. In addition, subsidies that are contingent on export performance or on the use of domestic over imported goods and categorized as prohibited (see the next paragraph) are defined as "specific". Only specific subsidies are subject to the disciplines set out in the agreement.

The agreement divides subsidies into three categories: prohibited, actionable and non-actionable. Subsidies that are contingent on export performance or on the use of domestic over imported goods are prohibited. These subsidies are subject to the WTO dispute settlement procedures and, thus, can be challenged by the injured party whether it happens to be the importing country or a third country whose export interests in the importing country are adversely affected. If the subsidy is ruled as prohibited by the dispute settlement body, it must be immediately withdrawn. If withdrawal does not take place within the specified time period, the complainant is authorized to take countermeasures.¹³

The "actionable" subsidies are those that adversely affect the interests of other WTO signatories. The adverse effects may include injury to domestic industry of another signatory, nullification or impairment of benefits accruing directly or indirectly to other signatories under GATT 1994 (in particular the benefits of bound tariff concessions), and

¹³ Least developed countries and developing countries with a per-capita income of less than \$1,000 have some procedural reprieve in the case of export subsidies. Rather than being subject to Article 4 procedures normally applicable to prohibited subsidies, they are subject to Article 7 procedures normally applicable to actionable subsidies. Unlike the former, the latter require the complainant to demonstrate that the subsidy has resulted in injury to its domestic industry, nullification or impairment of a concession accruing under GATT 1994 or serious prejudice to its interests.

“serious prejudice” to the interests of another member. Serious prejudice is presumed to exist if the sum of *ad valorem* subsidies to a product exceeds 5 per cent, an enterprise receives reprieve from the government-held debt, or an enterprise or industry is given subsidies to cover operating losses. Members affected adversely by actionable subsidies may challenge them in the WTO Dispute Settlement Body. If the DSB rules in their favor, the subsidizing member must withdraw the subsidy or remove the adverse effects. If this is not done within the specified time period, the complainant may be authorized to take countermeasures.

In the third and final category, we have subsidies that are termed non-actionable. These subsidies can be either non-specific subsidies or specific subsidies for industrial research and pre-competitive development activity, subsidies to disadvantaged regions that are non-specific within the regions, or certain type of assistance for adapting existing facilities to new environmental requirements imposed by law and/or regulations.

As an alternative to the dispute settlement remedy, consistent with GATT Article VI, Agreement on Subsidies and Countervailing Duties allows domestic remedies via the use of countervailing measures on subsidized imported goods. By its very nature, this remedy is available only to the importing country and not to third countries whose exports into the importing country may be adversely affected by the subsidy. To ensure that all interested parties can present information and arguments, the Agreement sets out disciplines on the initiation of countervailing cases, investigations by national authorities and rules of evidence. The agreement requires not only the establishment of injury to the domestic industry but also a causal link between the subsidized imports and the alleged injury. Countervailing investigations are not permitted in cases where the amount of a subsidy is *de*

minimis (the *ad valorem* subsidy is less than 1 percent) or where the volume of subsidized imports or the injury is negligible. Investigations must be concluded normally within one year and should in no case take longer than 18 months. All countervailing duties have to be terminated within 5 years of their imposition unless the authorities determine that this would result in the continuation or recurrence of subsidization and injury.

The Agreement gives some (very limited) leeway to developing countries in the use of subsidies for economic development. For example, in the case of prohibited subsidies, least developed countries and developing countries with per-capita incomes below \$1,000 are subject to remedies under more demanding procedures normally applied to actionable subsidies. Countervailing investigation against a developing country must be terminated if the overall subsidy is less than 2 percent or if the volume of the subsidized imports represents less than 4 percent of the total imports.

Subsidies on agricultural products are governed largely by the Agreement on Agriculture. To avoid repetition, the main provisions of this agreement are left for chapter 3 which devoted exclusively to agriculture.

2.7 *Anti-dumping*

Though the WTO rules normally discourage protectionist policies, they do permit and accommodate anti-dumping measures to provide temporary relief to domestic industry against “dumping” by foreign firms. Many trade economists view anti-dumping as the most pernicious WTO-sanctioned instrument of protection available to countries currently. The best explanation for its existence is that developed countries have chosen not to give it up. Lately, however, developing countries have also become frequent users of this instrument.

The WTO provisions on anti-dumping are contained in GATT Article VI and the UR Agreement on Anti-dumping (formally, Agreement on Implementation of Article VI). The latter builds on the Tokyo Round Anti-dumping Agreement, which had been signed by developed countries only. The UR Agreement revises the Tokyo Agreement in some areas while adding precision in others.

In broad terms, two conditions must be fulfilled before anti-dumping duties can be imposed: the existence of dumping must be established and dumping should be determined to cause material injury to an established industry or retard the establishment of a domestic industry. For the purpose of establishing dumping, GATT Article VI defines dumping as the sale of a product of a country into another at less than “normal value.” Sales at less than fair value can be said to have occurred if the exporter sells the product in the importing country at a price below what he charges in his own domestic market. If the price in the domestic market is not available, the export price may be compared to the highest price charged for a like product by the exporter in a third country or the cost of production in the exporting country after due allowance is made for selling cost and profit.

The Agreement on Anti-dumping introduces specific provisions relating to the methodology of establishing the existence of dumping and injury. For example, the United States and European Community had for years compared the prices charged in *individual* export transactions with the *average* home market price to establish dumping. This practice biased the outcome in favor of a positive finding. The Agreement on Anti-dumping now requires that export prices be compared on either "average-to-average" or "transaction-to-transaction" basis. As a result, the US has adopted the average-to-average comparisons in majority of the cases.

The Agreement also restrains the methodology for calculating "constructed value" which has been used in the United States as a measure of normal value that is compared with the export price to establish the existence of dumping. In the past, calculations of constructed value could be inflated by adding 10% of overhead cost and 8% profit to direct costs of labor and material. This biased the system in favor of a positive finding of dumping. The Agreement requires that overhead and profits be based on actual data.

GATT Article VI offers minimal guidance with respect to the criteria to be satisfied to establish injury to the domestic industry. The Agreement on Anti-dumping explicitly stipulates that the determination of injury be based on positive evidence relating to the *volume of the dumped imports* and their effect on *prices* and the impact on *industry* in the importing country. Regarding the volume of the dumped imports, the authorities must consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption. The effect of the dumped imports on prices is to be judged by considering whether there has been a significant price undercutting by the accused, or whether the dumped imports have significantly depressed prices or prevented price increases, which otherwise would have occurred.

The examination of the impact of the dumped imports on the domestic industry must include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. These include actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. The Agreement explicitly states that this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

GATT Article VI requires an injury test for the "industry" but does not define industry. As a result, in practice, in the past, when individual firms or trade associations filed anti-dumping petitions, it was presumed that they were acting on behalf of an "industry." Under the Agreement, a determination must now be made though the test is relatively lax. The test requires that the petition must be "supported" by producers (a) accounting for 25% of total production of "like products" and (b) representing more than 50% of the production of those firms expressing a position, pro or con, on the petition.

In the United States, anti-dumping duties have traditionally stayed in force for years. The Agreement introduces a sunset clause under which such duties are to be generally terminated after five years. Unfortunately, the clause is weakened by the provision that if the authorities determine that the expiration will lead to further dumping and material injury, they can extend the measures beyond five years--apparently indefinitely.

Finally, in the United States, a dumping margin in excess of .5% of the export price has been sufficient for a positive finding of dumping. The Agreement raises this margin to 2%. Moreover, if the volume of dumped imports from a country is less than 3% of total imports of like products, anti-dumping proceedings must be terminated. This restraint is weakened, however, by the additional provision that if dumped imports from several countries together account for more than 7% of total imports, the 3% rule does not apply.

2.8 Safeguards: Emergency Protection

GATT Article XIX provides an explicit "escape clause" remedy for an industry that is subject to serious injury. If, due to unforeseen circumstances, the obligations incurred by a country under GATT, including tariff concessions, lead to such a large increase in the imports of a product as to cause or threaten serious injury to domestic producers of like

products, the country can suspend the obligations relating to the product in whole or part and until such time as necessary to prevent or remedy the injury. Since the obligations undertaken by a member may include the removal of quantitative restrictions, Article XIX is consistent with quotas. The actions under Article XIX must be implemented on a nondiscriminatory basis. The underlying objective of Article XIX is to provide a “safety valve” to members so that they will be encouraged to undertake liberalization commitments without the fear of serious dislocation of the domestic industry.

In the past, under Article XIX, the country taking a safeguard action was required to give trade concessions of equivalent value in other areas to the trading partners whose export interests were adversely affected. If this was not done, the trading partners were free to withdraw concessions of equal value from the country taking the safeguards action. This feature made safeguard actions quite similar to the renegotiation of obligations under Article XXVIII.¹⁴ The main difference was that safeguard actions were intended to be temporary while Article XXVIII renegotiations were permanent. But since no formal time limits were imposed on safeguard actions, in practice, even this difference meant little. As I discuss below, the UR Agreement on Safeguards has altered some of the provisions relating to the time limits on safeguard actions and compensation.

Formal safeguard measures have not been employed frequently due to the availability of other instruments (for example, tariffs and quotas in developing countries and anti-dumping and Article XXVIII renegotiations in developed countries). What have been used are "gray area measures" such as the voluntary export restraint (VERs). Under these measures, targeted countries agree to limit their exports of a product to the country seeking

¹⁴ See Hoekman and Kostecki (1995, p. 168).

import restriction to the agreed upon levels. Being targeted to specific countries, VERs are discriminatory. Exporting countries generally accepted the restriction because the alternative could be worse (for example, anti-dumping). Under VERs, they were at least able to capture the bulk of the quota rent through an increase in the price received by their exporters.

The essential objective behind the UR Agreement on Safeguards was to encourage member countries to make use of the conventional safeguards over anti-dumping and VERs. To this end, it abolishes the use of VERs. It required the VERs in force at the time of the establishment of the WTO to be phased out over a period of four years. For future, the Agreement explicitly states that a WTO member state "shall not seek, take or maintain any voluntary export restraints, orderly market arrangements, or any other similar measures on the import side." Unfortunately, since the only way to enforce this provision is through a challenge by the "victim" in the WTO and the "victim" in this case is the initiator, it is doubtful the VERs will disappear altogether. Indeed, recently, the United States has been gone on to introduce new VERs on the imports of steel from Brazil.

The Agreement on Safeguards also introduces an explicit time limit on the use of formal safeguards. Accordingly, these are to be limited now to four years. If it is determined, however, that protection is necessary and there is evidence that the industry is adjusting rather than simply enjoying its protected status, the safeguards may be extended for another four years.

As described above, GATT Article XIX originally provided for either compensation to affected exporting countries or, if an agreement on compensation could not be reached, suspension of offsetting concessions granted the nations imposing safeguard measures. This

feature made safeguards less attractive than anti-dumping since the latter does not require no compensation or allow retaliation. Accordingly, the Agreement on Safeguards eliminates the provision of retaliation for the first three years provided the measure is taken in response to absolute increase in imports and in accordance with other provisions laid out in the agreement.

Two special provisions for developing countries are worth noting. First, exports of a developing country are exempt from safeguard actions so long as they constitute less than 3% of the total imports of the product in question. The exemption does not apply, however, if cumulated exports of such countries exceed 9% of the total imports. Second, developing countries can use safeguard measures for ten years. But because they are not exempt from retaliation in the absence of compensation beyond the three-year period, this provision does not help make safeguard actions more attractive than anti-dumping measures.

2.9 Trade Related Investment Measures

The UR Agreement on Trade Related Investment Measures (TRIMs) explicitly recognizes certain trade policy measures relating to investment as being inconsistent with some of the GATT provisions. Despite inconsistency with the GATT obligations, member countries have applied some of these measures in the past. They are to be now phased out and their future use prohibited. The Agreement on TRIMs provides that no member country should apply any TRIMs inconsistent with its GATT obligations with respect to national treatment (Article III) and prohibition of quantitative restrictions (Article XI). The agreement provides an illustrative list of TRIMs agreed to be inconsistent with these obligations. The list includes "local content requirements," which require particular levels of local procurement by an enterprise and "trade balancing requirements," which restrict the

volume or value of imports such an enterprise can purchase to an amount related to the level of products it exports. The former violates Article III and the latter Article XI of GATT.

The agreement required that developed countries eliminate all non-conforming TRIMs within two years, developing countries within five years and least-developed countries within seven years. It also provided for consideration, at a later date, of whether it should be complemented with provisions on investment and competition policy more broadly.

2.10 State Trading

GATT permits state trading enterprises to engage in export and import activity under Article XVII. The original GATT did not define state trading enterprises, which led to a very wide interpretation of the term. The UR Understanding on Article XVII corrects this deficiency and defines state trading enterprises as “Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports and exports.” Note that this definition covers private enterprises as long as they enjoy exclusive rights or privileges.

Article XVII requires that in their purchases and sales involving imports or exports, state trading enterprises should adhere to the most favored nation principle. The enterprises must carry out the purchases or sales according to commercial considerations and afford the enterprises of other member countries adequate opportunity to compete. These provisions do not apply to imports of products for use of governmental consumption.

Article XVII also requires that, if requested by another member, a country authorizing a state monopoly of a product, which is not the subject of a concession under Article II, should provide information on the import mark up on the product during a recent representative period. If this information is not available, the country should provide the information on the price charged on the resale of the product. The mark-ups may be negotiated by member countries on a reciprocal basis and bound in the manner tariffs are negotiated and bound under Article II.

To promote transparency, the UR Understanding on Article XVII requires that all state trading enterprises be notified to the WTO Council for Trade in Goods for review by a Working Party. Any member that has a reason to believe that another member has not met its notification obligations adequately may raise the matter with the member concerned. If the matter is not satisfactorily resolved, the member may make a counter notification to the Working Party.

In view of the fact that state trading is pervasive in centrally planned economies, GATT/WTO members have often imposed special conditions in the accession agreements with these countries. Poland and Romania, which acceded to GATT in 1967 and 1971, respectively, were subject to explicit requirements to expand their imports from GATT members. They were also subject to special safeguard provisions, allowing for discriminatory action against their imports. Hungary, which acceded in 1973, was not subject to import requirements but did agree to the special safeguard provisions. Most recently, China has also been subject to similar safeguard provisions by the United States.¹⁵

¹⁵ See Hoekman and Kostecki (1995, pp. 111-112) for more details.

2.11 Preferential Trade Areas

The GATT provisions relating to preferential trade areas (PTAs) have been partially covered in the context of the exceptions to the MFN principle. These may be considered here in greater detail. GATT Article XXIV accommodates free trade area (FTAs) and customs unions (CUs). As already noted, FTAs free up trade among union members, with each member retaining its own external tariff. CUs are FTAs with a common external tariff for each product. Article XXIV requires three conditions to be fulfilled by CUs and FTAs: (i) trade barriers on outside countries should not rise on average, (ii) tariffs and other trade restrictions must be removed on ‘substantially all’ intra-regional trade within a ‘reasonable’ time period, and (iii) the arrangement must be notified to GATT, which may decide to establish a working party to determine if these conditions are satisfied.

In practice, the first two of these conditions have been rarely fulfilled. For instance, the European Economic Community (EEC), which is regarded as the foremost example of a customs union, did not incorporate agriculture into the arrangement for decades. Yet, GATT never ruled that the arrangement was inconsistent with Article XXIV due to the threat by the EEC members to withdraw from the multilateral agreement in case of an adverse finding. Thus, political compromise has prevailed over rules.

The UR Understanding on the Interpretation of Article XXIV attempts to enhance the effectiveness of the role of the Council for Goods in reviewing the arrangements to be undertaken by its Committee on regional Trade Agreements (CRTA). But so far this has not resulted in major success with no verdicts given on Article XXIV consistency on any of the arrangements under review. The Understanding introduces a ten-year limit on the transition period though allowance can be made under ‘exceptional circumstances’. It also requires a

customs union to compensate the nonmembers who are adversely affected by one or more members raising their tariffs to conform to the common external tariff of the union. The Understanding recognizes that in assessing the need and magnitude of compensation, account may be taken of the reduction in tariff rates of other members. In case of failure to compensate, nonmembers can retaliate through the withdrawal of an equivalent concession.

PTAs among developing countries can be formed under the 1979 Enabling Clause. Under this provision, partial tariff preferences are admissible. This means that preferences among developing countries need not result in the formation of full FTA or CU. Preferences that apply to only a subset of products or do not lead to zero tariffs among participating countries are permitted. Not surprisingly, the arrangements among developing countries are almost always notified to the WTO under the Enabling Clause.

2.12 Non-application of the Agreement and Security and Environmental Exceptions

According to Article XXXV (Non-application of the Agreement), members are allowed a one-time exception with respect to their GATT obligations vis-à-vis a new member. GATT obligations do not apply between two members if they have not entered into tariff negotiations with each other and either of the members does not consent to the application at the time either becomes a member. What this means is that even when two-thirds of the WTO membership confers the membership on a country, some members and the new entrant may choose not to give the full GATT rights to each other. This provision was behind the debate in the United States recently on giving China permanent MFN status to China.

Article XXI (Security Exception) allows certain exceptions on national security grounds. Members cannot be asked to disclose information that will compromise their security. Countries are allowed to take any actions on security grounds relating to fissionable materials and traffic in arms, ammunition and implements of war. In time of war or other emergency in international relations, they are also allowed to take any actions necessary for security. These actions may include, for instance, the withdrawal of the MFN status or national treatment from specific members.

Finally, Article XX (General Exceptions) lists a set circumstance under which members can introduce measures that are otherwise contrary to their GATT obligations. The most important of these are measures (a) necessary to protect public morals, (b) necessary to protect human, animal or plant life or health, (c) relating to the importation or exportation of gold and silver, (d) necessary to secure compliance with laws and regulation that are not inconsistent with GATT, (e) relating to the products of prison labor, (f) imposed for the protection of national treasures of artistic, historic or archeological value, and (g) relating to the conservation of exhaustible natural resources if such measures are introduced in conjunction with restrictions on domestic consumption or production.¹⁶

The preamble to Article XX imposes tough restrictions on the use of measures aimed at achieving these objectives. It states that such measures are permitted provided they “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade.” The WTO Appellate Body has taken this preamble very seriously in

¹⁶ The list includes three additional types of measures relating to obligations under any intergovernmental agreement, restrictions on exports of inputs imposed as a part of a stabilization plan and acquisition or distribution of products in general or local short supply.

the disputes relating to some of the environmental measures undertaken by the United States. In particular, in the much-publicized shrimp-turtle case, the Appellate Body ruled that while the measures taken by the United States fit category (b) above, they violated Article XX because they constituted arbitrary and unjustifiable discrimination between countries where the same conditions prevailed. Given that developed countries are likely to continue introducing environmental measures that may have an adverse impact on the trading rights of developing countries, Article XX is likely to play an important role in the forthcoming years.

2.13 Government Procurement

As previously noted, the national treatment provision (Article III) of GATT 1994 does not apply to government procurement. The status of the MFN principle would appear to be more ambiguous. But in listing the subjects to which the MFN principle is to apply, Article I refers to “all matters referred to in paragraphs 2 and 4 of Article III.” Since paragraphs 2 and 4 of Article III do not apply to government procurement, this reference in Article I has been interpreted to exclude the latter from the application of the MFN principle. As Jackson (1997, p. 225) notes, practice under GATT confirms this interpretation.

Thus, government procurement is essentially out of the net of GATT discipline. Over the years, the increasing share of the government expenditure in the GDP led the member countries to consider bringing government procurement into the multilateral discipline. The result was the Tokyo Round Agreement on Government Procurement by a small number of countries. This agreement was revised further under the Uruguay Round. The revised version came into force on January 1, 1996.

Thought the revised agreement is far reaching, potentially covering entities at central, sub-central and other levels of government and extending to services and construction contract, only eleven WTO members have signed it. The list of non-signatories includes many OECD countries. The agreement is nondiscriminatory only among the signatories. This means that any concessions offered under the agreement by one signatory to another do not extend to non-signatory WTO members.

The extent to which entities belonging to the central, sub-central and other levels are covered depends on the schedules negotiated between signatories. The agreement applies to all contracts above SDR 130,000 and SDR 200,000 issued by listed central and sub-central entities, respectively. The agreement also contains detailed rules regarding the tendering procedures and seeks transparency.

The extension of the Agreement on Government Procurement to all WTO members or the negotiation of a new agreement applicable on a multilateral basis remains a subject on the WTO agenda. The issue is controversial but the pressures for it from export lobbies, especially from the countries that signatories to the present agreement, are likely to persist.

3. Trade in Services

Until the Uruguay Round, trade in services was not subject to any multilateral rules. A major accomplishment of the Uruguay Round was the creation of a framework agreement which brings trade in services into the fold of the WTO. Services are traded internationally in ways fundamentally different from goods. Moreover, barriers to them are more complex than border barriers such as tariffs and quotas. For these reasons, GATT rules could not be applied directly to trade in services and a new set of rules that would facilitate trade

liberalization in this area was needed. The General Agreement on Trade in Services or GATS was a response to that need.

GATS is divided into six Parts, which together contain 29 Articles, with the last article containing eight sectoral annexes. Part I (Article I) deals with the *scope* of the agreement and *definition* of services in terms of various modes of supply, Part II (Articles II-XV) describes a set of *general* obligations and disciplines that apply to all services, Part III (Articles XVI-XVIII) relates to *Specific* commitments on the national treatment and market access applying to a subset of service sectors listed in a member's *Schedule* on a sector-by-sector and country-by-country basis, Part IV (Articles XIX-XXI) commits members to *progressive liberalization* through periodic negotiations, Part V (Articles XXII-XVI) lays down the *institutional provisions* covering such matters as consultation between members, dispute settlement and the Council for Trade in Services, and Part VI (XXVII-XXIX) contains *final provisions* regarding circumstances under which a member can deny benefits of GATS, some definitions, and annexes. The sectoral *Annexes* explain how GATS is to be implemented in the specific sectors. In the following, I provide a more detailed discussion of the main provisions.

3.1 *Scope and Definition*

GATS Article I begins by establishing the scope of the agreement. The agreement applies to measures taken by central, state or local governments and authorities and by nongovernmental bodies in the exercise of powers delegated by central, state or local governmental authorities. It excludes services supplied in the exercise of governmental authority.

The definition of trade in services is given in terms of four modes of delivery. First, there is electronic commerce that involves arms-length supply of services and comes closest to the mode used for the delivery of goods. But it is distinguished from the latter in that at least at the current state of knowledge, it does not permit the inspection of "wares" at the border and hence cannot be subject to tariff duties. Second, some services require the movement of the buyer to the location of the seller. Tourism is the most important example of this mode of delivery. Third, we have services that require commercial presence of the provider. Most financial services fall into this category. Finally, there are services that require the movement of the provider or "natural person" to the location of the buyer. These services include, for example, construction and consulting services.¹⁷

3.2 *The MFN Provision*

Like GATT, GATS adopts the MFN treatment as a key provision (Article II) with the qualification that at the time the agreement came into force (January 1, 1995), signatories could schedule a one-time exemption from it. The exemption was to be claimed by country and by sector.¹⁸ In principle, these exemptions can last up to ten years and but may be negotiated away sooner. Over 60 GATS members took the MFN exemption at the time of the signing of the UR Agreement.

In the spirit of Article XXIV in GATT, Article V in GATS allows exemption from MFN if two or more countries want to enter into a preferential arrangement liberalizing trade in services with one another without extending this liberalization to other Members.

¹⁷ In the last two cases, trade in services is intimately related to the movement of factors.

¹⁸ This provision can be compared to the non-application provision of GATT.

The exemption applies only if the arrangement has a substantial sectoral coverage and eliminates substantially all discrimination among participants in the sense of Article XVII (see below). Developing countries are given more flexibility in forming preferential trade arrangements, especially with respect to the coverage of measures that discriminate against partner countries.

3.3 Market Access, National treatment and the Schedule of Specific Commitments

Each country gives market access (Article XVI) under GATS through a schedule that lists the sectors in which it commits to giving concessions to other members. No market access commitment is presumed to exist in a sector not listed in the schedule. Six types of restrictive actions are prohibited unless otherwise specified in the schedule. These are: (i) limitations on the number of service suppliers, (ii) limitations on the total number of service transactions or assets, (iii) limitations on the total number of service operations or total quantity of service output, (iv) limitations on the total number of natural persons that may be employed in a particular service sector or by a service supplier, (v) measures which restrict or require specific types of legal entity joint venture, and (vi) limitations on the participation of foreign capital in terms of maximum percentage limit of foreign shareholding or the total value of investment.

In GATT, national treatment on internal taxation and regulation is a general obligation. But in GATS, being an important instrument of liberalization, it is a specific commitment (Article XVII). National treatment applies only to those services included in the schedule of the member and even then it can be subject to specific conditions. For

instance, it may subject the imported services to a higher tax than identical domestically supplied services.

The process of scheduling sector-specific commitments (Article XX) is a hybrid between negative- and positive-list approaches. A Member must first identify in its schedule the sectors in which it wishes to make commitments. Following the positive-list approach, the country makes commitments with respect to the listed sectors only. But following the negative-list approach, it is presumed that complete access and national treatment are granted except to the extent that explicit qualifications and limitations are listed.

The schedule has a horizontal and a vertical section. The former is a general section applying to all sectors listed in the vertical section. The latter spells out qualifications applying to specific sectors. In the horizontal section and for each specific sector in the vertical section, qualifications to commitments must be listed separately for each mode of delivery and with respect to market access and national treatment. Given four modes of supply, this leads to eight entries in the horizontal section and for each specific sector in the vertical section.

The following chart, taken from Low (1997), illustrates the structure of the GATS schedule. As just noted, the horizontal section, designed to avoid repetition, contains market access and national treatment limitations that apply to all scheduled sectors. When the entry in the market access or national treatment column for a given mode of delivery says “none,” it implies a complete absence of limitations and conditions. On the other hand, if the entry says "unbound," no commitment under the particular mode of delivery has been made.

3.4 *Preferential Trade Areas*

As noted previously, GATS Article V allows members to liberalize preferentially in services. The requirements imposed on such liberalization are similar to those in the GATT Article XXIV relating to preferential trading in goods. The main difference is that no distinction is made in GATS between FTAs and CUs. This is perhaps because of the conceptual difficulties in making such a distinction in view of the fact that trade in services is normally not subject to border barriers.

Member countries can form PTAs in services provided (a) they have a substantial sectoral coverage and (b) they eliminate substantially all discrimination in the sense of providing national treatment (as defined by Article XVII). The first of these conditions is to be met in terms of the number of sectors, volume of trade affected and modes of supply. In order to meet this condition, the agreement should not provide for *a priori* exclusion of any mode of supply. The second condition is to be met by removing the existing measures that discriminate against union partners and prohibiting any new discriminatory measures except those relating to short-run balance of payments difficulties (Article XII) general exceptions relating to public morals, human, animal or plant life or health, and so on (Article XIV) and security exceptions (Article XIV bis).

Table 1

Services Activity	Mode of Supply	Limitation on Market Access	Limitation on National Treatment
Part I: Horizontal Commitments			
All Sectors	1. Cross-border 2. Consumption abroad 3. Commercial presence 4. Movement of natural persons	None None None Unbound except intra-corporate transfers of executives for initial four years; extension subject to economic needs test	None None Subsidies for research and development Unbound except under market access column
Part II: Sector-specific Commitments			
Accounting Services	1. Cross-border 2. Consumption abroad 3. Commercial presence 4. Movement of natural persons	None None Only natural persons may be registered as auditors Unbound except as provided in the horizontal section	None None At least one equity partner in a firm must be a permanent resident Unbound except under market access column
Electronic Data Interchange	1. Cross-border 2. Consumption abroad 3. Commercial presence 4. Movement of natural persons	None None None Unbound except as provided in the horizontal section	None None None Unbound except as provided in the horizontal section

Source: Low (1997)

In arrangements that include developing countries, Article V provides some flexibility, especially with respect to condition (b) above. In evaluating whether or not this condition is satisfied, the overall as well as sector specific level of development in the country concerned may be taken into account. This provision is clearly different from the GATT Article XXIV which makes no concessions for developing countries forming FTAs or CUs with developed countries. Where arrangements between two or more developing countries are concerned,

this provision opens the possibility of a partial exchange of preferences as under the Enabling Clause for PTAs in goods.

There are three additional conditions that PTAs in services must satisfy. First, the arrangements must not result in increased barriers to trade with extra-union WTO members. Second, a service supplier of any other WTO member that is a juridical person constituted under the laws of a PTA member must be entitled to treatment granted under the PTA agreement, provided it engages in substantive business operations in the territories of the PTA members. This condition is weakened in PTAs that have only developing countries as members. In such arrangements, more favorable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to the agreement. Finally, member countries forming a PTA should promptly notify the agreement, its enlargement or significant modification to the Council for Trade in Services.

3.5 Mutual Recognition of Qualifications

Under Article VII, a member may give recognition to the experience obtained, requirements met or licenses or certificates granted in another member. Such recognition may be accorded autonomously, through a mutual recognition agreement or an agreement to harmonize the standards.

While recognition and harmonization of standards are likely to have liberalizing effect on trade in services, they may also effectively result in discrimination against member countries whose standards are not recognized. To seek a balance between these two opposing effects, Article VII makes an effort to ensure that adequate opportunity is given to other countries to have their standards recognized as well. Thus, a member signing an agreement with another member is asked to give adequate opportunity to other members to

negotiate their accession to the agreement or negotiate comparable one. A member that accords the recognition autonomously is asked to give adequate opportunity to any other member to demonstrate that education, experience, license, or certification obtained or requirements met in its territory should be recognized as well.

Members are not to accord recognition in a manner that constitutes a means of discrimination between countries or disguised restriction on trade in services. Whenever appropriate, the members should accord recognition on multilaterally agreed criteria. In appropriate cases, members are to cooperate with relevant inter-governmental and non-governmental organizations towards the establishment and adoption of common international standards for recognition.

3.6 Transparency, Domestic Regulation and the Status of Monopolies and Exclusive Service Suppliers

To ensure smooth flow of trade, Article III introduces some transparency requirements, Article VI addresses domestic regulatory issues and Article VIII deals with sectors or sub-sectors characterized by monopolies and exclusive service suppliers. Article III requires all members to publish all relevant measures of general application affecting trade in services. They are also to notify the Council for Trade in Services all new or modified laws, regulations, and administrative guidelines affecting scheduled commitments at least once a year. Each member is also required to establish inquiry points to provide specific information to other members on laws, regulations or administrative guidelines which affect trade in services covered by GATS.

Article VI requires that in sectors where a member has made specific commitments, all measures of general application affecting trade in services be administered in a

reasonable, objective and impartial manner. The legal system permitting, members are also required to maintain or institute judicial, arbitral or administrative tribunals or procedures which provide for prompt review of and remedies for administrative decisions affecting trade in services. Where authorization is required for the supply of a service on which a specific commitment has been made, the relevant authority must make its decision within a reasonable time.

Article VIII (implicitly) permits monopolies and exclusive suppliers in service industries but requires that they not be allowed to abuse their market power so as to violate the MFN obligations or to nullify any specific commitments of the country. When the monopoly supplier competes in the supply of a service outside of his monopoly rights and which is subject to the member's specific commitments, he is not to abuse his monopoly power. For instance, a monopoly operator in telecommunications sector in a member country is not to operate in a way that nullifies the member's specific commitments with respect to the provision of Internet services.

Article IX relates to business practices of suppliers who do not fall under Article VIII. It states that upon request from another member, a member will enter consultation with a view to eliminating business practices that restrain competition and thereby restrain trade in services. The obligations imposed by this provision are not onerous, however. The member is asked to "accord full and sympathetic consideration" to the request and "supply publicly available non-confidential information relevant to the matter in question."

3.7 Restrictions to Safeguard the Balance of Payments

Like GATT, GATS (Article XII) permits temporary suspension of liberalization commitments for the balance of payments reasons. The measures must be

nondiscriminatory, consistent with the Articles of Agreement of the International Monetary Fund, no more restrictive than necessary and should not cause undue damage to the commercial interests of other members. In determining the incidence of restrictions, members are permitted to give priority to sectors more essential to their economic or development interests but restrictions are not to be adopted for the purpose of protecting a particular service sector.

Article XI requires that except under the circumstances necessitating Article XII actions, members are not to restrict international transfers and payments for current transactions relating to their specific commitments.

3.8 General and Security Exceptions

Like GATT, GATS (Articles XIV and XIV bis) allows exceptions to the agreement on specific grounds. In the spirit of GATT Article XX, GATS Article XIV, members are allowed to take the measures necessary to protect public morals or maintain public order, to protect human, animal or plant life or health, and to secure compliance with laws and regulation that are not inconsistent with GATS. In addition, members are allowed to depart from national treatment provided this is aimed at ensuring equitable collection of direct taxes. Departures from the MFN treatment to accommodate differences among signatories arising from existing double taxation agreements are also permitted. Article XIV bis allows several exceptions on security grounds.

3.9 Issues for Future Negotiations: Emergency Safeguards, Subsidies and Government Procurement

Articles X, XIII and XV deal with emergency safeguards, government procurement and subsidies, respectively. No agreement could be reached in these areas and GATS simply left the issues to future negotiations. Article XIII explicitly excludes services purchased by government for governmental (rather than commercial) purposes from being subject to the MFN, national treatment and market access provisions of GATS.

3.10 Developing-Country-Specific Provisions

Though there are some special provisions for developing countries in GATS, they are weaker than those in GATT. For example, there is no provision for one-way, preferential market access by developed to developing countries comparable to the GSP under GATT. As already described, partial preferences by developing countries to each other are permitted. Also in PTAs with developed countries under Article V, they can participate with less than full preferences.

Article IV, which may be viewed as the GATS equivalent of Part IV of GATT, offers some general statements about increasing the participation of developing countries but commits members to very little. It entreats all members to undertake specific commitments beneficial to developing countries. Among measures that might be adopted are liberalization of market access in sectors and supply modes of interest to developing countries and better access to technology, distribution channels, and information networks. The article calls on developed country members, and to the extent possible developing country members, to establish contact points within two years to facilitate the access of

developing country members' service suppliers to information related to their respective markets.

Article XIX on market access also carries a general statement allowing "appropriate flexibility for individual developing country members for opening fewer sectors, liberalizing fewer types of transactions," and so on. But since actual liberalization is a matter of negotiation, it is doubtful that this provision is of any practical value. The provision in the Annex on Telecommunications that a developing country member may place reasonable conditions on access to public telecommunications networks is similarly of dubious value.

3.10 Other Provisions

The remaining articles may be summarized as follows:

- (i) Article XIX establishes a continuing program of future negotiations. The first of these negotiations was to begin by January 1, 2000 but has failed to be launched due to the failure of the Seattle conference.
- (ii) Article XXI sets out procedures for the withdrawal or modification of commitments in the schedules.
- (iii) Articles XXII and XXIII contain dispute settlement provisions. Article XXII provides for consultations at the bilateral level as well as through the Council for Trade in Services or the Dispute Settlement Body. Article XXIII establishes the right of members to use the WTO Dispute Settlement mechanism.
- (iv) Article XXIV establishes the Council for Trade in Services, Article XXV deals with technical cooperation and Article XXVI concerns the relationship with other international organizations.

(v) Part VI has three articles, XXVII to XXIX. Article XVII states that a country can deny the benefits of the agreement to a service if it originates in the territory of a nonmember. Article XXVIII defines several terms used in the agreement. For instance, “supply” is defined to include production, distribution, marketing, sale, and delivery of the service. A juridical person is considered “owned” by a member if more than 50 percent of the equity is owned by persons of the member. Article XXIX makes the annexes a part of the agreement.

3.11 Annexes

Article XXIX consists of eight annexes that are integral part of GATS. These relate to the MFN exemptions, movement of natural persons, telecommunications, financial services, air transport services and maritime services.¹⁹ The sectoral annexes spell out in greater detail provisions specific to the sectors under consideration. For instance, the annex on financial services (largely banking and insurance) lays down the right of parties to take prudential measures for the protection of investors, deposit holders and policyholders, and to ensure the integrity and stability of the financial system. Similarly, the annex on telecommunications relates to measures that affect access to and use of public telecommunications services and networks. It requires that such access be provided to another party on reasonable and non-discriminatory terms, to permit the supply of a service included in the member’s schedule. The annex on air-transport services excludes from GATS traffic rights (principally bilateral air-service agreements conferring landing rights) and directly related activities.

¹⁹ There are two annexes each on financial services and telecommunications.

4. Intellectual Property Rights

In addition to trade in goods and services, WTO rules cover intellectual property (IP) rights. The inclusion of this subject into the WTO was and remains a source of considerable controversy. The relationship between intellectual property rights and trade is at best indirect. Moreover, whereas trade liberalization is beneficial to the country undertaking liberalization as well as its trading partners, the extension of IP protection to poor countries redistributes income from the rich to poor countries without necessarily increasing the world welfare. We will return to this controversy later. Presently, let us look at the main provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) which governs the WTO regime on IP protection.

The Agreement on TRIPs has wide ranging provisions as it covers the entire gamut of issues related to the protection of intellectual property. These include patents, copyrights, trademark and geographical indications, layout designs of integrated circuits, industrial designs, and protection of undisclosed information (trade secrets). The agreement incorporates the provisions of the four previous IPR agreements: the Paris Convention covering inventions, trade names, trade marks, industrial designs and appellation of source; Berne Convention on copyrights, Rome Convention on sound recordings and the Washington Treaty on layout design of integrated circuits. The agreement specifies the standards defining key issues of protection in each area and includes commitments on national enforcement procedures. The agreement binds the contracting parties to a dispute settlement mechanism, administered by the WTO.

The agreement has six parts which contain 73 articles. Here I provide a summary treatment of the main provisions, with the details left for Table 2.

4.1 General Obligations and Basic Principles

Part I has eight articles that set out general obligations of members. The key obligations relate to the national status and most favored nation treatment by each member to other members. According to Article 3, each member must treat the nationals of other member countries no less favorably than its own on all IP matters including standards, enforcement and acquisition. According to Article 4, members must not treat the nationals of another member country less favorably than those of another country.

4.2 IP Standards

Part II is divided into eight sections which are, in turn, divided into 32 articles. This part contains the standards of intellectual property right in different areas in succession. Provisions on copyright in Section 1 protect the rights of authors of books, music and films. Members are required to comply with the substantive provision for the Berne Convention on the Protection of Literary and Artistic Works in its latest version (Paris 1971). The agreement provides that computer programs be protected as literary works under the Berne Convention and lays down criteria for the protection of data bases by copyright. The agreement also requires that authors of computer programs and producers of sound recordings be given the exclusive right to authorize or prohibit the commercial rental of their works to the public. A similar exclusive right applies to films.

Section 5 of Part II covers patents. In this area, members must comply with the substantive provisions of the 1967 Paris Convention on the Protection of Industrial Property.

In addition, the agreement requires that 20-year patent protection be available for all inventions, whether of products or processes, in almost all fields of technology including pharmaceuticals. Plant varieties are to be protected either by patents or by a specific system such as the breeder's rights provided in the International Convention for the Protection of New Varieties of Plants of 1978. Furthermore, rights conferred in respect of processes must extend to the products directly obtained from the process.

Section 6 of Part II deals with the protection of layout designs of integrated circuits and goes beyond the Washington Treaty (1989) by adding further provisions. Accordingly, protection to layout designs of integrated circuits is to be provided for at least ten years, the rights extend to articles containing the chip, an "innocent infringer," though free from liability, must pay a suitable royalty on the use or sale of stock in hand and ordered before learning of the infringement, and compulsory licensing and use by the government can be permitted only under a number of strict conditions.

On trademarks and service marks, covered in Section 2 of Part II, the agreement provides the first full set of key standards that include the definition of signs that must be eligible for protection. It requires that protection be granted for a minimal period of seven years and should be renewable indefinitely. In the area of geographical indications (Section 3), the agreement lays down that members should prevent the use of any indication that misleads the consumer as to the origin of goods. Industrial designs (Section 4) are protected under the agreement for a period of ten years. Owners of protected designs would be able to prevent the manufacture, sale, or importation of articles bearing or embodying a design that is a copy of the protected design. Finally, trade secrets and expertise (Section 7) that have a

commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices.

4.3 *Enforcement*

Part III of the agreement deals with the important issue of enforcement of TRIPs. The broad objective of the enforcement provisions is to ensure effective national enforcement of IP laws without the procedure becoming abusive. The primary responsibility for initiating action for enforcement falls on the *private* right holders, not the country. The country can be challenged by WTO only if it can be shown that it has failed to fulfill its obligations under the TRIPs agreement.

4.4 *Dispute Settlement and Transition Arrangements*

Part IV, containing just one article (Article 62), recognizes that the acquisition and maintenance of IP rights may require reasonable compliance with procedures and formalities. Part V deals with dispute prevention and settlement. Members are required to satisfy certain transparency requirements and the strengthened WTO dispute settlement procedures apply to the TRIPs agreement. Part VI describes the transitional arrangements. Accordingly, national treatment and the MFN provision were to come into force in all countries beginning 1 January 1996. Developed countries were also to implement the rest of the agreement by that date. Developing and transition economies were given until January 1, 2000 to implement the rest of the agreement with additional leeway as follows: (i) Any member not providing *product* patent in certain areas at the time of the signing of the agreement, could delay the introduction of product patent in those areas until January 1, 2005. This meant countries such as India, which provided only process patent in the area of

pharmaceuticals, got until January 1, 2005 to introduce product patent in this area. (ii) Least developed countries were given until January 1, 2006 to implement all provisions other than Articles 3, 4 and 5. Part VII of the agreement describes the institutional arrangements including the delegation of the charge of monitoring of the agreement to the Council on TRIPs.