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1. Introduction

1.1. The need for international rules on international trade

The economic prosperity of many countries largely depends on international trade. In 2006, for example, 57% of the gross domestic product (GDP) of the Netherlands and 53% of the GDP of South Africa depended on international trade. The increasing prosperity of China and India is without doubt largely the result of the explosive increase in their exports. There is broad consensus among economists and policy-makers that economic globalisation in general, and international trade in particular, offer an unprecedented opportunity to stimulate economic development and significantly reduce poverty worldwide.

However, to ensure that this opportunity is realised, economic globalisation and international trade have to be managed and regulated at the international level. If not, economic globalisation and international trade are likely to aggravate economic inequality, social injustice, environmental degradation and cultural dispossession instead of improving the current situation.

Developed as well as developing countries need international rules on trade in order to:

• prevent trade-restrictive measures in situations where they are neither necessary nor desirable, yet are imposed due to pressure from well organised interest groups;

• give security and predictability to traders with regard to the national rules that apply to international trade in their products or services;

• ensure that important societal values and interests, such as public health, the environment, the consumer safety, minimum labour standards, economic development and public morals, can be sufficiently protected and promoted.

1.2. International trade law: bilateral, regional and multilateral agreements

The legal rules governing trade relations between countries are part of international economic law. International trade law, i.e. international rules on trade in goods and services, forms the ‘hard core’ of international economic law. This field of law consists of:

• Bilateral trade agreements;

• Regional trade agreements;

• Multilateral trade agreements.

There are a multitude of bilateral trade agreements, examples of which comprise the Agreement on Trade in Wine between the European Union and Australia, as well as the Trade Agreement between the United States and Israel. Regional trade agreements comprise, for example, the North American Free Trade Agreement (NAFTA), a free trade area between Canada, Mexico and the US, and the MERCOSUR Agreement, a customs union between Argentina, Brazil, Paraguay, Uruguay and Venezuela.

The most important and broadest of all multilateral trade agreements is the Marrakesh Agreement Establishing the World Trade Organization. It is the law of this Agreement – the law of the World Trade Organisation (WTO) - that forms the subject matter of this introduction to international trade law. The general principles that are set out in this introduction are, however, also applicable to a large extent to bilateral and regional trade agreements.

1.3. WTO law

As discussed in section 7.1, the WTO was established on 1 January 1995, by the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the WTO Agreement). The substantive law of the WTO can be divided into five categories:

• rules on non-discrimination;

• rules on market access;

• rules on unfair trade;

• rules on conflicts between free trade and other societal values and interests; and

• rules promoting the harmonisation of national legislation in specific areas.

WTO law further consists of institutional and procedural rules, including rules on decision making and dispute settlement. All these WTO rules form the multilateral trading system.

1.4. Sources of WTO law

The principal source of WTO law is the WTO Agreement (mentioned in section 1.3) and its Annexes. The WTO Agreement consists of only sixteen articles that concisely describe the WTO’s functions, its bodies, its membership and its decision-making procedures. However, attached to this short agreement are nineteen international agreements that form an integral part of the WTO Agreement. These agreements contain:

• multilateral agreements on trade in goods (Annex 1A), comprising:

  o the General Agreement on Tariffs and Trade 1994 (hereinafter the GATT 1994) (see sections 2.2, 2.4, 3.3, 3.4, 4.2, 4.3, 5.2, 5.4, 5.5, 5.6, and 5.7); and

  o twelve agreements on specific aspects of trade in goods, such as:

    ▪ the Agreement on Agriculture (see sections 4.3 and 5.5);

    ▪ the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter the SPS Agreement) (see section 6.3);

    ▪ the Agreement on Technical Barriers to Trade (hereinafter the TBT Agreement) (see section 6.2);

    ▪ the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter the Anti-Dumping Agreement) (see section 4.2);

    ▪ the Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement) (see section 4.3); and

    ▪ the Agreement on Safeguards;

  o the General Agreement on Trade in Services (hereinafter the GATS) (Annex 1B) (see sections 2.3, 2.5, 3.5, 3.3, 3.4, and 5.6);

  o the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the TRIPS Agreement) (Annex 1C) (see section 6.4);

  o the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the DSU) (Annex 2) (see sections 8.1-8.5);

  o the Trade Policy Review Mechanism (hereinafter the TPRM) (Annex 3) (see section 7.2); and

• two plurilateral agreements on government procurement and trade in civil aircraft (Annex 4).
The agreements in Annexes 1, 2 and 3 are multilateral agreements and are binding upon all WTO Members. Annex 4 contains two plurilateral agreements that are only binding upon those WTO Members that have expressly agreed to them. The WTO Agreement comprises more than 25,000 pages, including its Annexes. Of this, 95% consists of Schedules of Concessions (concerning trade in goods) and of Schedules of Specific Commitments (concerning trade in services). These lists can be consulted on the WTO website (see sections 3.2 and 3.5).

The WTO Agreement is not the only source of WTO law. Another important source is WTO case law in international trade disputes and in particular the reports of the WTO dispute settlement panels and the WTO Appellate Body (see sections 8.1-8.5). Rulings of WTO panels and the Appellate Body are, in principle, only legally binding on the parties to the dispute in question. However, especially the rulings of the Appellate Body have great authority and are, in practice, followed in later disputes on the same matter. Additionally, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law and general principles of law are also recognised sources of WTO law.

1.5. WTO law in context

1.5.1. WTO law and international law

In the past, international trade law, and in particular GATT law (the predecessor of WTO law), was often considered to be an independent body of legal rules in the margins of international law. In the current era of economic globalisation, it is uncontested that WTO law is an integral part of international law, and its role is steadily increasing in importance. However, the relationship between WTO rules and other rules in international law is not always clear. It is generally accepted that customary international law and general principles of law are applicable within WTO law, unless WTO law expressly contains clearly deviating rules. It is also generally accepted that international law plays an important role in the interpretation of the provisions of WTO law. Nevertheless, it is extremely controversial whether provisions of international agreements on the environment, human rights or minimum labour standards can be relied upon in trade disputes as justifications for violations of WTO obligations.

1.5.2. WTO law in the European and national legal orders

With respect to the role of WTO law in the national legal order, it should be observed that most WTO Members do not allow WTO provisions to be directly invoked in disputes before national courts. In other words, WTO law has no direct effect in the national legal orders of most WTO Members. The European Court of Justice has repeatedly refused to grant direct effect to WTO provisions. The Court referred in this context to the specific nature of the WTO dispute settlement system (see sections 8.1-8.5) and to the fact that the most important trading partners of the European Union also do not grant direct effect to WTO law. Only in exceptional cases is direct effect given to WTO law, for example when European legislation explicitly refers to WTO provisions. The national courts of several Member States of the European Union have granted direct effect to a number of WTO provisions concerning the protection of intellectual property rights, a policy area that still falls to a large extent within the competence of the Member States. A natural or legal person in these Member States can therefore directly invoke provisions of the TRIPS Agreement in proceedings before national courts.
2. Rules on non-discrimination

2.1. Prohibition of discrimination

The prohibition of discrimination is a key concept in WTO law and is often the subject of trade disputes between WTO Members. This prohibition finds expression in two obligations:

- the ‘most-favoured-nation’ (MFN) treatment obligation; and
- the national treatment obligation.

In simple terms, the MFN treatment obligation prohibits discrimination between goods, services or service suppliers of different foreign origins (or with different foreign destinations). The European Communities and its Member States may therefore not grant more favourable treatment to Australian wine than to wine from the United States, or treat American banks less favourably than Australian banks. The national treatment obligation prohibits discrimination between foreign goods, services and service suppliers and local goods, services and service suppliers. Accordingly, under this obligation, the European Communities and its Member States may not treat wine from the United States less favourably than wine of European origin, once this wine has been imported and is traded on the European market. Neither may they treat American banks established in the European Union less favourably than local European banks.

The most important non-discrimination rules in the WTO Agreement are:

- Article I of the GATT 1994 (MFN treatment obligation for trade in goods);
- Article III of the GATT 1994 (national treatment obligation for trade in goods);
- Article II of the GATS (MFN treatment obligation for trade in services);
- Article XVII of the GATS (national treatment obligation for trade in services).

The WTO Agreement also contains other non-discrimination provisions, such as Articles 3 and 4 of the TRIPS Agreement concerning the MFN treatment obligation and national treatment obligation for the protection of intellectual property rights. These provisions will not be discussed further in this short overview of the prohibition on discrimination in WTO law.

2.2. The MFN treatment obligation concerning trade in goods

Article I:1 of the GATT 1994 contains the MFN treatment obligation for trade in goods. The principal purpose of the MFN treatment obligation of this Article is to ensure equality of opportunity to import ‘like’ products from, or export ‘like products’ to all WTO Members.

From this, it follows that if the United States lowers the customs duties on Australian beer from 15% to 10% ad valorem, it must also decrease the customs duties on beer from the European Communities (and other WTO Members) to 10% ad valorem.

According to GATT and WTO case law, de jure as well as de facto discrimination fall under the prohibition on discrimination in Article I:1 of the GATT 1994. Therefore, not only measures that expressly refer to the national origin or destination of products are prohibited, but also measures that have the same impact in practice.

A classic example of de facto discrimination is giving more favourable treatment to milk from cows that graze more than six months per year at an altitude above 1000 meters.

To determine whether a measure imposed by a WTO Member is inconsistent with the MFN treatment obligation of Article I:1 of the GATT 1994, three questions must be answered:

- whether the measure at issue confers a trade ‘advantage’ of the kind covered by Article I:1;
- whether the relevant products are ‘like products’; and
- whether the advantage at issue is not granted ‘immediately and unconditionally’ to all like products concerned.

2.2.1. ‘Advantage’

An ‘advantage’ within the meaning of Article I:1 of the GATT 1994 can involve import duties (as seen in the previous example), but also customs procedures and formalities, internal taxes and internal regulation on the sale, purchase, transportation, distribution or use of products. The term ‘advantage’ is broadly interpreted and has, so far, rarely been cause for dispute.

An advantage can, for example, be a national arrangement that allows advertising of Australian beer, while advertising of beer from other WTO Members is prohibited.

2.2.2. ‘Like products’

The concept of ‘like products’, in contrast, is problematic. A violation of the MFN treatment obligation can occur only when the products in question are ‘like products’. The concept of ‘like products’ is not only used in Article I:1 of the GATT 1994, but also in Articles III:2 and III:4 of the GATT 1994, which are discussed in section 2.4. Although the term ‘like products’ is key to the application of the non-discrimination provisions of the GATT 1994, the GATT 1994 does not provide a definition of this term. GATT and WTO case law on ‘like products’ has clarified the concept to some extent through the years, but has not yet resulted in one clear definition. On the contrary, in the Japan–Alcoholic Beverages II and EC-Asbestos cases, the Appellate Body compared the concept of ‘like products’ to an accordion whose width varies depending on the provision in which the term is encountered. Products that are ‘like’ within the meaning of Article III:4, are not necessarily ‘like’ in terms of Article I or Article III:2 of the GATT 1994. In any case, the determination of whether products are ‘like products’ is, fundamentally, a determination about the nature and the extent of the competitive relationship between those products on a particular national market. As the extent to which the products compete increases, so does the possibility that they will be considered ‘like products’. The factors that are taken into account to determine the nature and extent of the competitive relationship between products are, amongst others:

- the physical characteristics of the products;
- consumer habits and preferences regarding the products;
-
the end use of the products; and
- the international tariff classification of the products.

Whether the products in question are ‘like’ is established on a case-by-case basis.

2.2.3. ‘Immediately and unconditionally’

Finally, any advantage given by a WTO Member to products originating in or destined for a particular country must be given ‘immediately and unconditionally’ to all ‘like products’ originating in or destined for all WTO Members. A WTO Member may therefore not impose an additional condition for the granting of an advantage to other WTO Members, and neither may the Member temporarily delay the granting of that advantage.

2.2.4. An obligation with many exceptions

Although the MFN treatment obligation is a fundamental principle of WTO law, it should be noted that there is, in practice, an increasing number of arrangements that deviate from the MFN treatment obligation and which grant products of some WTO Members more favourable treatment than is granted to ‘like products’ from other Members.

Examples of such arrangements are the preferential treatment of developing countries and regional trade agreements that establish a free trade area or a customs union. The European Union, for example, has concluded so many arrangements and agreements that it only upholds the MFN treatment obligation with nine other WTO trade partners. Exceptions to the MFN treatment obligation that are in conformity with WTO law will be discussed in paragraphs 5.2-5.6.

2.3. The MFN treatment obligation concerning trade in services

Article II:1 of the GATS contains the MFN treatment obligation concerning trade in services. As is the case with the MFN treatment obligation in Article I:1 of the GATT 1994, the principal purpose of the MFN treatment obligation of Article II:1 of the GATS is, to ensure equality of opportunity for ‘like’ services and ‘like’ service suppliers, regardless of the WTO Member of origin or destination of the services or service suppliers.

From this provision it follows that if Japan allows European banks to establish branch offices in Tokyo, Kobe and Nagasaki, Japan is obliged, in accordance with the MFN treatment obligation, to grant this right to banks of all other WTO Members under the same conditions.

According to the Appellate Body, the prohibition on discrimination in Article II:1 of the GATS covers de jure as well as de facto discrimination. To determine whether a measure of a WTO Member is inconsistent with the MFN treatment obligation of Article II:1 of the GATS, three questions must be answered:
- whether the GATS is applicable to the measure at issue;
- whether the relevant services or service suppliers are ‘like services’ or ‘like service suppliers’; and
- whether the services or service suppliers of other WTO Members are immediately and unconditionally accorded treatment no less favourable than the like services and service suppliers of any other country.

2.3.1. Measures ‘affecting trade in services’

The GATS applies to ‘measures by Members affecting trade in services’. The GATS does not define the term ‘services’, but it does state that ‘services as meant under the GATS includes ‘any service in any sector’. The only exceptions are ‘services supplied in the exercise of governmental authority’, such as the tasks carried out by the police. The GATS defines the term ‘trade in services’ as the supply of a service through one of four defined modes of supply:

1. The cross border mode of supply, where the service supplier and the service receiver remain in their respective countries, but the service itself crosses the border.

An example of this kind of service is the legal advice that an American lawyer gives by telephone or through e-mail to a client residing in Europe.

2. The consumption abroad mode of supply, where the service consumer travels to the service supplier’s country to receive the service.

An example of this mode of service supply is a patient from Australia who travels to India to undergo cardiac surgery.

3. The commercial presence mode of supply, where the service supplier is established in the country of the service receivers.

An example of this mode of service supply is the establishment of a branch office of a European bank in Brazil.
4. The presence of natural persons mode of supply, where the service supplier travels to the country of the service consumer to provide the service.

An example of this mode of service supply is a Japanese architect who travels to the United States to supervise the construction of a hotel.

The GATS is applicable to all measures of WTO Members that ‘affect’ trade in services. For a measure to affect trade in services, this measure is not required to regulate trade in, i.e. the supply of, services. A measure affects trade in services when the measure bears upon the conditions of competition in supply of a service, even though the measure may regulate other matters. Therefore, it follows that the scope of application of the GATS, and GATS obligations such as the MFN treatment obligation of Article II:1, is extremely broad. It should be noted that also international investments in the service sector fall within the scope of application of the GATS.

2.3.2. ‘Like services’

Similar to ‘like products’, ‘like services’ and ‘like service suppliers’ are essential but problematic terms in the context of the MFN treatment obligation of Article II:1 of the GATS. These concepts are not defined in the GATS and, to date, there is almost no relevant case law. It is clear that these terms raise even more complicated conceptual questions than the term ‘like products’. The case law on the concept of ‘like products’, already discussed in section 2.2, is probably a useful source of inspiration when answering these questions.

Examples of such questions: Are European art house films and American action movies ‘like services’? Are Canadian and Congolese doctors ‘like service suppliers’?

2.3.3. ‘Immediately and unconditionally’

Finally, every advantage accorded by a WTO Member to services and service suppliers originating in or destined for any other country, must be accorded ‘immediately and unconditionally’ to all ‘like services’ and ‘like service suppliers’ originating in or destined for all WTO Members. In general, it is accepted that treatment of services or service suppliers is less favourable when the measure at issue alters the conditions of competition in favour of like services or service suppliers from any other country.

2.3.4. Exemption from the MFN treatment obligation

During a short period before the entry into force of the WTO Agreement, WTO Members had the opportunity to protect certain national measures that affected trade in services from the application of the MFN treatment obligation of Article II:1 of the GATS. This one-time opportunity is recorded in Article II:2 of the GATS and further elaborated on in the Annex on Article II Exemptions. WTO Members could exempt measures from the MFN treatment obligation by listing them in the Annex. In principle these exemptions would expire on 1 January 2005, i.e. ten years after their introduction, but in practice many WTO Members continue to apply them, and they remain in force.

2.4. National treatment obligation concerning trade in goods

The prohibition on discrimination finds expression, aside from in the MFN treatment obligation, also in the national treatment obligation. Article III of the GATT 1994 contains the national treatment obligation, also in the national treatment obligation. Article III:2, first sentence. Whether imported and domestic products are ‘like products’ (Article III:2, first sentence) as well as to ‘directly competitive or substitutable products’ (Article III:2, second sentence).

2.4.1. Article III:2, first sentence

The determination of whether an internal tax of a WTO Member inconsistent with the national treatment obligation of Article III:2, first sentence, of the GATT 1994, requires an examination of whether:

• the measure at issue is an ‘internal tax’ that is directly or indirectly applied on the products in question;
• the imported and domestic products are ‘like products’; and,
• the imported products are taxed in excess of the domestic products.

2.4.1.1. ‘Internal taxes’

The taxes referred to in Article III:2 are internal taxes and other internal charges on products, and therefore not customs duties (because these are not internal charges) or income taxes (because these are not taxes on products). A tax is applied directly on a product if it is applied on the product as such. A tax is applied indirectly when something that is related to the product, such as the production process, is taxed.

Typical examples of internal taxes in the sense of Article III:2 are value added taxes (VAT) and excise duties.

2.4.1.2. ‘Like products’

As mentioned above, the term ‘like products’ is also used in Article III:2 of the GATT 1994, first sentence. Whether imported and domestic products are ‘like’ must be determined on a case-by-case basis, based on the nature and extent of the competitive relationship between the
products concerned. During this determination, the factors previously discussed in section 2.2 with regard to Article I:1 (physical characteristics, end use, customer habits and preferences, international tariff classification) are examined. According to established case law, the term ‘like products’ as understood in Article III:2, first sentence, must be interpreted narrowly. Products will only be considered ‘like’, as meant under Article III:2, first sentence, when there is a strong competitive relationship between the imported and domestic products. If a broad interpretation were given to this concept, Article III:2, second sentence, which concerns directly competitive or substitutable products, would become superfluous to large extent.

2.4.1.3. Taxes ‘in excess of’
With respect to the requirement that the internal taxes on imported products may not be ‘in excess of’ the internal taxes applied to ‘like products’, it should be noted that, according to established case law, even the slightest additional tax on imported products is prohibited.

> From Article III:2, first sentence, of the GATT 1994, it follows that Korea may not impose a VAT of 22.1% on imported passenger cars when the VAT on cars produced in Korea is 22%.

2.4.2. Article III:2, second sentence
According to Article III:2, second sentence, of the GATT 1994, the national treatment obligation with regard to internal taxes is also applicable to directly competitive or substitutable products. To examine whether an internal tax of a WTO Member is inconsistent with the national treatment obligation as set out in Article III:2, second sentence, of the GATT 1994, four questions must be answered:

- whether the measure at issue is an ‘internal tax’ that is directly or indirectly applied on the relevant products;
- whether the imported and domestic products are directly competitive or substitutable;
- whether these products are not similarly taxed; and,
- whether the dissimilar taxation is applied so as to afford protection to domestic production.

2.4.2.1. ‘Internal taxes’
As discussed above, under section 2.4.1.1, with regard to Article III:2, first sentence.

2.4.2.2. ‘Directly competitive or substitutable products’
Like the term ‘like products’, the term ‘directly competitive or substitutable products’ has not been defined in the GATT 1994. It is clear, however, that this concept is broader than the concept of ‘like products’ as understood in Article III:2, first sentence. Article III:2, second sentence, thus concerns a broader category of products than Article III:2, first sentence. Whether imported and domestic products are ‘directly competitive or substitutable products’ is determined on a case-by-case basis, taking into account the factors discussed previously. The determination primarily consists of an examination of the competitive relationship between the imported and domestic products, including the price elasticity of demand for the products in question.

2.4.2.3. ‘Similarly taxed’
According to case law, the requirement of similar taxation of imported and domestic products does not imply that the same taxes must be imposed on these products. Contrary to the obligation in Article III:2, first sentence, a small difference in taxes is permitted.

2.4.2.4. ‘So as to afford protection to domestic production’
The taxes on imported and domestic products may not be applied in such a way that domestic products are granted protection. To determine whether this is the case, a complete and objective analysis of the structure and overall application of the tax measure concerned must be made.

> From Article III:2, second sentence, of the GATT 1994 it follows that the United Kingdom may not impose a VAT of 30% on imported mountain bikes if the VAT on domestic city bikes is only 19%.

2.4.3. Article III:4
As mentioned above, the national treatment obligation of Article III of the GATT 1994 concerns not only internal taxation, but also internal regulation. The relevant provision is Article III:4 of the GATT 1994.

To determine whether a measure is inconsistent with the national treatment obligation of Article III:4, there is a three-tier test which requires the examination of whether:

- the measure at issue is a law, regulation or requirement covered by Article III:4;
- the imported and domestic products are ‘like products’; and,
- the imported products are accorded less favourable treatment.

2.4.3.1. ‘Laws, regulations and requirements’
The measure at issue is a law, regulation or requirement within the meaning of Article III:4 when the law, the regulation or the requirement affects the internal sale, offering for sale, purchase, transportation, distribution or use of products. It is clear that the scope of application of Article III:4 with respect to the national treatment obligation is broad, also because – according to the case law – for a measure to fall under Article III:4 it is not required that the measure regulates sales, offer, purchase, etc. It is sufficient that the measure influences the conditions for competition between imported and domestic products.

> Examples of measures that, according to the case law, fall within the scope of the obligation of Article III:4 of the GATT 1994, are: minimum prices for beer; the limitation of the number of points of sale for imported alcoholic beverages; regulations that result in higher transportation costs for imported grain; and a prohibition on cigarette advertising.
2.4.3.2. ‘Like products’

In respect of the question whether imported and domestic products are ‘like products’, please refer to the discussion of this term in section 2.2. According to the case law, the concept of ‘like products’ within the meaning of Article III:4 is broader than the concept within the meaning of Article III:2, first sentence.

It is possible that apples and pears are ‘like products’ on the European market within the meaning of Article III:4 of the GATT 1994, while they are not ‘like products’ within the meaning of Article III:2, first sentence, of the GATT 1994.

2.4.3.3. ‘Treatment no less favourable’

Imported products are accorded ‘less favourable’ treatment than domestic products when there is no effective equality of opportunity for the products in question to compete with each other on the market of the country at issue. ‘Less favourable’ treatment exists when the competitive position of imported products is modified by internal regulation to the advantage of domestic products. Note that according to case law, less favourable treatment of an imported product in one situation cannot be compensated by more favourable treatment in another situation. Also note that according to the Appellate Body in the Dominican Republic – Importation and Sale of Cigarettes case, ‘less favourable’ treatment of imported products is not inconsistent with Article III:4 if the ‘less favourable’ treatment can be explained by factors unrelated to the foreign origin of the imported products.

2.5. National treatment obligation concerning trade in services

The national treatment obligation for measures that affect trade in services is set out in Article XVII of the GATS. This national treatment obligation is fundamentally different from the GATT national treatment obligation discussed in section 2.4. While the national treatment obligation of Article III of the GATT 1994 is applicable to all measures affecting trade in goods, the national treatment obligation of Article XVII of the GATS applies only to the extent that WTO Members have explicitly committed themselves to grant ‘national treatment’ in respect of specific service sectors. Members set out such commitments in the national treatment column of their ‘Schedule of Specific Commitments’. Whether a Member makes a commitment to provide national treatment to banking services (see the Schedule of Specific Commitment)
increase market access for products. The eight Rounds of trade negotiations under the GATT 1947 were very successful in reducing the average customs duties of developed countries on industrial products from 40% to less than 4% \textit{ad valorem}. Nevertheless, customs duties remain an important barrier to international trade for several reasons and further negotiations on the reduction on tariffs are thus necessary. In the past, the basic principles and rules governing tariff negotiations were:

- the principle of reciprocity and mutual advantage; and

This principle and obligation are still at the basis for tariff negotiations, but these negotiations are now all concerned with reaching agreement on a formula that will lower all customs duties of all Members. In the current tariff negotiations in the context of the Doha Development Round, efforts are being made to reach agreement on the so-called Swiss-formula:

$$t_i = \frac{t_b \times (1 + a - b \times 10)}{(a + b) \times 10} + t_o$$

where,

- $t_i$ = Final bound rate of duty
- $t_o$ = Base rate of duty
- $a = [8-2]$ = Coefficient for developed Members
- $b = [19-2]$ = Coefficients for developing Members

### 3.2.2. Tariff concessions

The results of successful tariff negotiations are referred to as ‘tariff concessions’ or ‘tariff bindings’. A tariff concession, or a tariff binding, is a commitment not to raise the customs duty on a certain product above an agreed level. The tariff concessions or bindings of a Member are set out in that Member’s Schedule of Concessions. The Schedules resulting from the Uruguay Round negotiations are all annexed to the Marrakesh Protocol to the GATT 1994 and are an integral part thereof. They can be consulted on the WTO website (see <http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm>).

Article II:1(a) of the GATT 1994 provides that Members must accord to products against imports generally allowed by the GATT 1994. Article XXVIII bis of the GATT 1994 does, however, call upon WTO Members to negotiate the reduction of customs duties to

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**For example, the customs duty of the European Communities on cocoa powder is 8\% \textit{ad valorem}. Therefore, in principle, for the importation of cocoa powder to the value of €10.000, a customs duty of €800 must be paid.**

The customs duties or tariffs imposed by a country (or an autonomous customs territory) which are due on importation are set out in the country’s (or an autonomous customs territory’s) ‘tariff’. A tariff is a structured list of product descriptions and their corresponding customs duties. The tariff of the European Communities, wherein the above mentioned customs duties on cacao powder are laid down, is called the Common External Tariff. The customs duties imposed by the European Communities on a product can easily be determined with the help of the TARIC database (see <http://ec.europa.eu/taxation_customs/dds/tarhome_en.htm>). TARIC is the abbreviation for ‘Tarif Intégré des Communautés Européennes’. The TARIC database is updated daily by the European Commission.

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**The Schedule of Concessions of the European Communities (see WTO website) provides that the tariff concession for cocoa powder from the European Union is of 8\% \textit{ad valorem}. That means that the currently imposed customs duty of 8\% \textit{ad valorem} (see above and the TARIC database) is consistent with the European Communities’ obligations under Article II:1(a) and Article II:1(b), first sentence, of the GATT 1994.**
The objective of both provisions is to protect the commitments on the reduction of customs duties that have been made during the tariff negotiations and to provide certainty as to the maximum customs duties that a WTO Member can impose on a product. Naturally, WTO Members may impose customs duties that are lower than their tariff concessions, which is often the case. Tariff concessions can be amended or withdrawn. The applicable requirements and procedure are set out in Article XXVIII of the GATT 1994.

### 3.2.3. Imposition of custom duties

In addition to the rules to protect tariff concessions, WTO law also provides for rules on the manner in which customs duties must be imposed. The imposition of customs duties may require three determinations to be made:

- the determination of the proper classification of the imported good;
- the determination of the customs value of the imported good; and
- the determination of the origin of the imported good.

#### 3.2.3.1. Customs classification

WTO law does not specifically address the issue of customs classification. However, in classifying products for customs purposes, Members have of course to consider their general obligations under the WTO agreements, such as the MFN treatment obligation. Specific rules on customs classification can be found in the International Convention on the Harmonised Commodity Description and Coding System signed in Brussels in 1983 and most recently amended in 2007. Almost all WTO Members are a party to this international convention and therefore follow the same rules for customs classification.

#### 3.2.3.2. Customs valuation

Because customs duties are often ad valorem (see the previous example: the customs duty on cocoa powder is 8% ad valorem), the value of imported products must be determined to be able to calculate the customs duties due. The WTO agreements do provide for rules on customs valuation. These are set out in Article VII of the GATT 1994, entitled ‘Valuation for Customs Purposes’ and in the Agreement on the Implementation of Article VII of the GATT 1994. The primary basis for the determination of the customs value of imported goods is the ‘transaction value’ of these goods i.e., the price actually paid for the goods when they were sold for export to the importing country.

#### 3.2.3.3. Rules of origin

The determination of the origin of an imported product can be important because the applicable customs duties may vary accordingly. For example, good originating in developing countries commonly benefit from lower customs duties or even duty-free importation (see section 5.7). The determination of the origin of a product is not always an easy task.

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The WTO Agreement on Rules of Origin provides for an ambitious but as yet not completed work programme for the harmonisation of national rules of origin, meant to facilitate the determination of a product’s country of origin. National rules of origin, which have not yet been harmonised, often determine the origin of a product based on the country where the product has undergone its last substantial transformation.

### 3.2.3. Other duties and charges

In addition to ordinary customs duties, imported products are sometimes subject to ‘other duties and charges’. According to Article II:1(b), second sentence, of the GATT 1994 (and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994), these other duties and charges are prohibited, except if – and to the extent that - the WTO Member involved has properly recorded them in its Schedule of Concessions.

There are, however, a number of exceptions to the rule that Members may not impose ‘other duties or charges’. Pursuant to Article II:2 of the GATT 1994, Members may - in spite of their obligations under Article II:1(b), second sentence - impose on imported products:

- any financial charge that is not in excess of the internal tax imposed on the like domestic product;
- WTO consistent anti-dumping or countervailing duties; or
- fees or other charges ‘commensurate’ with, i.e., matching, the cost of the services supplied.

### 3.3. Quantitative restrictions on trade in goods

Unlike customs duties, which are not prohibited, Article XI:1 of the GATT 1994, sets out a general prohibition on quantitative restrictions, whether on imports or exports. A quantitative restriction is a measure which limits the quantity of a product that may be imported or exported. A quantitative restriction can take the form of a quota but may also be a general import or export prohibition. According to firmly established case law, quantitative restrictions that do not actually impede trade (e.g. because the level of imports allowed is high), as well as quantitative restrictions of a de facto nature, are prohibited under Article XI:1 of the GATT 1994.

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A European regulation that limits the amount of imported of cars to a million per year or an Australian law that prohibits the importation of fur coats, are quantitative restrictions within the meaning of Article XI of the GATT 1994 and are therefore prohibited in principle.

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A European regulation that provides that 500 000 cars may be imported per year at a customs duty of 7% ad valorem and that on all imported cars exceeding this limit a customs duty of 15% is due, sets a tariff quota.

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Note that a tariff quota, i.e. a quantity that can be imported at a specific customs duty, is not a quantitative restriction and is therefore not prohibited under Article XI of the GATT 1994.
The rules of Article XIII of the GATT 1994 on the non-discriminatory administration of quantitative restrictions, which are discussed below, are applicable to tariff quotas.

3.3.1. Non-discriminatory administration
While quantitative restrictions are, as a general rule, prohibited, there are many exceptions to this prohibition. This explains why Article XIII of the GATT 1994 sets out rules on the administration of quantitative restrictions (and tariff quotas). Article XIII:1 of the GATT 1994 provides that quantitative restrictions, when applied, must be administered in a non-discriminatory manner. Article XIII:1 requires that if a Member imposes a quantitative restriction on products to or from another Member, ‘like products’ to or from all other countries are ‘similarly prohibited or restricted’. According to Article XIII:2 of the GATT 1994, the distribution of trade still allowed should be as close as possible to what would have been the distribution of trade in the absence of the quantitative restriction (or tariff quota). Furthermore, Article XIII:2 sets out a number of requirements to be met when imposing quotas (or tariff quotas). Article XIII:2(d) provides that, if no agreement can be reached with all Members having a substantial interest in supplying the product concerned, the quota (or tariff quota) must be allocated among these Members on the basis of their share of the trade in that product during a previous representative period.

3.3.2. Import licensing
Quotas and tariff quotas are habitually administered through import licensing procedures. A trader who wishes to import a product that is subject to a quota or tariff quota, must apply for an import license, i.e., a permit to import. The Agreement on Import Licensing Procedures sets out general and detailed rules for automatic and non-automatic import licensing.

3.4. Other non-tariff barriers to trade in goods
In addition to customs duties and other duties and charges and quantitative restrictions, trade in goods is also impeded by ‘other non-tariff barriers’, including:

- technical barriers to trade in goods and sanitary and phytosanitary measures;
- lack of transparency in national regulation;
- unfair and arbitrary application of national trade laws and regulations; and
- customs formalities and procedures.

The rules concerning technical barriers to trade as well as sanitary and phytosanitary measures will be discussed in sections 6.1 and 6.2.

3.4.1. Lack of transparency
Ignorance, uncertainty or confusion with respect to the trade laws, regulations and procedures applicable in actual or potential export markets is an important barrier to trade in goods. To ensure a high level of transparency of its Members’ trade laws, regulations and procedures, WTO law provides for rules (e.g. in the GATT 1994, the GATS, the TBT Agreement and the SPS Agreement) that require Members to:

- continuously inform the WTO Secretariat of new rules or modifications in existing rules (notification requirement);
- promptly publish their trade rules before applying them (publication requirement);
- provide for enquiry points where other Members and their traders can acquire information on the laws and regulations affecting trade.

Some rules, such as sanitary and phytosanitary measures, must be notified to the WTO Secretariat before they are adopted, to give other WTO Members the opportunity to express any objections in time.

3.4.2. Unfair and arbitrary application of national trade laws and regulations
It is clear that the unfair and arbitrary application of national trade measures, and the degree of uncertainty and unpredictability this generates for other Members and traders, also constitutes a significant barrier to trade in goods. Therefore, the GATT 1994 provides for:

- a requirement of uniform, impartial and reasonable administration of national trade rules; and
- a requirement of procedures for the objective and impartial review, and possible correction, of the administration of national customs rules by judicial, arbitral or administrative tribunals.

3.4.3. Customs formalities and procedures
Finally, one should note that the losses that traders suffer through delays at borders and complicated and/or unnecessary documentation requirements and other customs procedures and formalities are estimated to exceed the costs of tariffs in many cases. However, WTO law currently contains few rules on customs formalities and procedures aimed at mitigating their adverse impact on trade. Currently there are negotiations, in the context of the Doha Development Round, to establish specific rules that will simplify customs formalities and procedures, commonly referred to as ‘trade facilitation’.

3.5. Restrictions on trade in services
As is the case with trade in goods, trade in services is often subject to restrictions. Unlike trade in goods, however, trade restrictive measures applied at the border are barely significant for trade in services. The production and consumption of services are subject to a vast range of domestic regulations. Barriers to trade in services primarily result from these domestic regulations. WTO law and the GATS in particular, provide rules and disciplines on barriers to trade in services. A distinction must be made between market access barriers and other barriers to trade in services.

3.5.1. Market access barriers
The rules on market access barriers are laid down in Article XVI of the GATS. Article XVI:2 of the GATS contains an exhaustive list of market access barriers. This list includes:

- five types of quantitative restrictions such as limitations on the number of service suppliers that may be active on a specific market, limitations on the total number of
service operations and limitations on the participation of foreign capital in enterprises supplying services;

- one type of measure that restricts the supply of services to specific forms of legal entity or joint venture.

These market access barriers sometimes specifically restrict market access for foreign services and service suppliers. However, often market access barriers restrict access for both foreign and domestic services and service suppliers. Therefore, also non-discriminatory measures are covered by the concept of ‘market access barriers’. However, measures that impede market access by imposing requirements as to the quality of services or the qualifications of service suppliers are not barriers to market access within the meaning of Article XVI.

A regulation that limits the number of foreign fast food restaurants in a city to ten for every million inhabitants as well as a regulation that limits the number of fast food restaurants (whether foreign or domestic) to fifty for every million inhabitants are barriers to market access within the meaning of Article XVI of the GATS.

The GATS does not provide for a general prohibition of the market access barriers listed in Article XVI. Whether a Member may maintain or adopt such market access barriers with regard to a specific service depends on whether, and if so to what extent, that Member has made market access commitments with regard to that service or the relevant service sector in its Schedule of Specific Commitments (as discussed in section 2.5). When a Member makes a market access commitment, it binds the level of market access specified in its Schedule (see Article XVI:1) and agrees not to impose any market access barrier that would restrict access to the market beyond the level specified (see Article XVI:2). Market access commitments are often accompanied by requirements and limitations (for specific services). It is therefore possible that some market access barriers are permitted despite the fact that a market access commitment has been made in the relevant service sector. If a WTO Member has not made any commitment in a specific service sector, then there is indeed no prohibition on market access barriers in the sector concerned.

Suppose that Brazil has made a market access commitment for insurance services and that Brazil’s Schedule of Specific Commitments does not mention any market access limitations for the first, second and fourth modes of service supply (i.e. cross-border supply of services, consumption abroad and the presence of natural persons), but does limit market access for the third mode of service supply (i.e. commercial presence) by limiting the number of foreign insurance companies that may establish themselves in Brazil to ten. In that case, Article XVI of the GATS would prohibit Brazil to limit the number of fire insurance policies that may be sold on the internet to a million per year. Article XVI would also prohibit Brazil to refuse to allow the establishment of a foreign insurance company as long as there are still less than ten insurance companies established in Brazil. Brazil could, however, refuse to allow the establishment of the eleventh foreign insurance company.

Current market access commitments, such as those negotiated in the context of the Uruguay Round, are not very far-reaching. Most WTO Members have only committed themselves to maintaining the existing level of market access. It is therefore not surprising that Article XIX of the GATS calls on Members to begin new negotiations on the liberalisation of trade in services, or negotiations on market access (and national treatment) commitments no later than five years from the entry into force of the WTO Agreement. Currently, these negotiations form part of the Doha Development Round.

3.5.2. Other barriers to trade in services

In addition to market access barriers within the meaning of Article XVI of the GATS, trade in services can also be impeded directly or indirectly by a wide array of other barriers. With regard to a number of these other barriers, WTO law, and in particular, the GATS, provides for specific rules. Some of these rules have general application (e.g. the transparency obligation) and others apply if, and to the extent that, the WTO Member concerned has made market access or national treatment commitments (e.g. the obligation to apply trade regulations in a reasonable, objective and impartial manner). The relevant GATS rules (see Article III and Article VI:1 of the GATS) strongly resemble the GATT rules set out in section 3.4.

With regard to domestic regulations imposing licensing and qualification requirements and technical standards, in sectors in which a Member has undertaken specific commitments, Article VI:5 of the GATS provides certain disciplines, namely that these measures must, amongst others:

- be based on objective and transparent criteria such as competence and the ability to supply the service; and
- not be more burdensome than necessary to ensure the quality of the service.
4. Rules on unfair trade practices

4.1. Introduction

WTO law provides for detailed rules with respect to dumping and certain types of subsidisation - two specific practices commonly considered to be unfair trade practices. The following sections will shortly delve into the rules concerning unfair trade practices.

4.2. Rules on dumping

‘Dumping’ is defined in Article II:1 of the Anti-Dumping Agreement as bringing a product onto the market of another country at a price less than the ‘normal value’ of that product. WTO law does not prohibit dumping. However, WTO Members are allowed to take measures to protect their domestic industry from the injurious effects of dumping. Pursuant to Article VI of the GATT 1994 and the Anti-Dumping Agreement, WTO Members are entitled to impose anti-dumping measures if:

- there is dumping;
- the domestic industry producing the like product in the importing country is suffering material injury (or there is a threat of such material injury); and
- there is a causal link between the dumping and the injury.

These requirements have been worked out in detail in Articles 2 to 4 of the Anti-Dumping Agreement. The Anti-Dumping Agreement further provides for rules concerning anti-dumping investigation and concerning the imposition and collection of the anti-dumping duties.

For many years, it was mainly the United States and the European Communities that made use of the possibility to impose anti-dumping duties on products from Japan and developing countries. Recently, other countries such as India have also made much use of this instrument in trade policy. Other important users are now China and Korea. About two thousand anti-dumping measures have been put in place by WTO Members since the establishment of the WTO. This instrument has, however, often been misused in the past, and this continues in the present. Anti-dumping measures are therefore regularly the subject of trade disputes between WTO Members.

4.2.1. Dumping

In order to determine whether dumping has taken place, generally a price-to-price comparison of the ‘normal value’ with the ‘export price’ of the product must be conducted. The difference between these two prices is the margin of dumping. This margin is important, since the anti-dumping measure may not exceed this margin.

The ‘normal value’, according to Article II:1 of the Anti-Dumping Agreement, is the price of the like product in the home market of the exporter or producer. For domestic sales transactions to be used in the determination of the normal value of a product, according to established case law:

- the sale must be in the ordinary course of trade;
- the sale must be of the ‘like product’;
- the product must be destined for consumption in the exporting country; and
- the prices of the products at issue must be comparable.

There is, for example, no question of a sale ‘in the ordinary course of trade’ if products are sold below production costs or when they are sold at extremely high or extremely low prices. Sales transactions conducted under such circumstances must be disregarded in the determination of the normal value of the product. Unlike the GATT 1994, the Anti-Dumping Agreement does provide for a definition of ‘like products’. According to Article 2.6, a ‘like product’ is a product that is identical or, in the absence of such a product, a product which has characteristics closely resembling those of the product under consideration.

If it is not possible to determine the normal value of a product using this method, Article 2.2 of the Anti-Dumping Agreement provides that this value can be determined using one of two alternative methods:

- using the export price to a third country as the normal value; or
- constructing the normal value.

The export price is ordinarily based on the transaction price at which the producer in the exporting country sells the product to an importer in the importing country. The Anti-Dumping Agreement provides for an alternative rule where this method of price determination is not appropriate. In these cases, Article 2.3 permits a WTO Member to construct the export price based on certain information.

The normal value and export price are subsequently compared to establish the margin of dumping. This comparison needs to be fair. Therefore, Article 2.4 of the Anti-Dumping Agreement provides for a principal rule and alternative methods for the comparison. Margins of dumping can be positive as well as negative: positive where the export price is lower than the normal value (in which case dumping exists) and negative where the export price is higher than the normal value (in which case no dumping exists).

The so-called ‘zeroing’ practice was the main issue in a number of recent anti-dumping cases (such as EC – Bed Linen (India) (2003), US – Zeroing (EU) (2006) and US – Zeroing (Japan) (2007)). Some WTO Members treated negative dumping margins as zero (‘zeroing’), whereby the determination of the final anti-dumping margin resulted in higher values. Consequently, this permitted the imposition of higher anti-dumping duties. Panels and the Appellate Body have repeatedly concluded that this ‘zeroing’ practice (and its variants) is contrary to the Anti-Dumping Agreement.

4.2.2. Material injury or the threat thereof

After having established dumping and the margin of dumping, it must be determined whether the domestic industry is suffering material injury or is under threat thereof.

The Anti-Dumping Agreement defines the ‘domestic industry’ generally as ‘the domestic producers as a whole of the like products or … those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products’. According to well established case law, a ‘major proportion of the total domestic production’ is not the same as the ‘majority’ of the production; 30% of the production can be a major proportion.

To determine whether the domestic industry is suffering material injury, Article 3.1 provides that WTO Members must investigate the volume of the dumped imports of the products at issue and the effect of the dumped imports on the domestic market price for ‘like products’. In addition, Members must investigate the impact of these imports on the domestic industry. They must examine the following factors and consider them in the final determination: sales volumes, profits, output, market share, productivity, return on investments, utilisation of the production capacity of the domestic industry, factors affecting
domestic prices, the magnitude of the margin of dumping, negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list of factors is not exhaustive, but it is considered a mandatory minimum.

A determination of a threat of material injury must be based on facts and not merely on allegation, conjecture or remote possibility.

4.2.3. Determination of causal link
Finally, the Anti-Dumping Agreement requires the demonstration of a causal link between the dumped imports and the injury to the domestic industry. According to Article 3.5 of the Anti-Dumping Agreement, the dumping must be responsible for the threatened injury. The dumping does not need to be the only or the principal cause of the injury, but the part of the injury that is caused by other factors may not be attributed to the dumped imports.

4.2.4. National procedures
The Anti-Dumping Agreement also sets out, in considerable detail, rules according to which the investigating authorities of a Member must initiate and conduct an anti-dumping investigation. The competent authority for the European Union is the European Commission. Articles 5 and 6 set out the requirements that govern national anti-dumping investigations and the evidentiary rules that apply in these investigations. Furthermore, notification and publication obligations that must be complied with by the competent authority are provided in Article 12.

4.2.5. Imposition of anti-dumping measures
Articles 9 to 11 of the Anti-Dumping Agreement regulate the imposition and collection of anti-dumping duties. It is important that an anti-dumping duty:
- never exceeds the margin of dumping (or the difference between the export price and the normal value of the product at issue);
- is only applied as long as, and to the extent that, it is needed to counteract injurious dumping;
- is terminated at the latest five years after having been imposed, unless it is established that this would be likely to lead to a continuation or repetition of the injurious dumping.

When anti-dumping duties are imposed, the investigating authorities must, in principle, calculate a dumping margin for each exporter individually. However, in practice, when the number of exporters is too large, this is not always done, unless it is explicitly requested by the exporter. Duties are collected on a non-discriminatory basis, in other words they are imposed on all imports, regardless their origin, found to be dumped and causing injury.

Note that Articles 7 and 8 of the Anti-Dumping Agreement provide for:
- provisional anti-dumping measures (that can be adopted during the investigation by the competent authority);
- price undertakings (that exporters and producers can make to avoid the imposition of anti-dumping duties).

4.3. Rules on subsidies
In addition to rules on dumping, WTO law includes rules on subsidies and subsidised trade in the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement). A distinction must be made between:
- rules concerning the subsidies themselves (see Article XVI of the GATT 1994 and Articles 3 to 9 of the SCM Agreement); and
- rules concerning measures that WTO Members may impose to protect a domestic industry that produces like products from the negative consequences of the import of subsidised products (see Article VI of the GATT 1994 and Articles 10 to 23 of the SCM Agreement).

Article 1:1 of the SCM Agreement defines a ‘subsidy’ as:
- a financial contribution by a government or public body,
- which confers a benefit.

Furthermore, Article 2 of the SCM Agreement provides that the WTO rules on subsidies and subsidised trade only apply to ‘specific’ subsidies, i.e., subsidies granted to an enterprise or industry, or a group of enterprises or industries. Subsidies that are widely available, and therefore not ‘specific’, do not fall within the scope of application of the SCM Agreement.

4.3.1. Prohibited subsidies
As discussed in section 2.2, WTO law does not prohibit dumping. However, WTO law does prohibit certain subsidies. Article 3 of the SCM Agreement explicitly prohibits:
- export subsidies, meaning subsidies that are, in law or in fact, whether solely or as one of several conditions, contingent upon export performance; and
- import substitution subsidies, meaning subsidies that are, solely or as one of several conditions, contingent upon the use of domestic over imported products.

Article 4 of the SCM Agreement provides for faster dispute settlement procedures than usual when a dispute on forbidden subsidies arises (see section 8.4). If a panel and/or the Appellate Body finds a measure to be a prohibited subsidy within the meaning of Article 3 of the SCM Agreement, that subsidy must be withdrawn, i.e., removed, by the WTO Member without delay. If a recommendation for withdrawal is not followed within the time period set
by the panel, the Dispute Settlement Body of the WTO must, upon the request of the original complainant(s) and by reverse consensus, authorise ‘appropriate countermeasures’ (rather than the ‘suspensions of concessions or other obligations’) against the subsidising Member.

4.3.2. Subsidies that cause injury

Unlike export subsidies and import substitution subsidies, most subsidies are not prohibited. However, in terms of Article 5 of the SCM Agreement, they are subject to challenge (i.e. actionable) in the event that they cause adverse effects to the interests of another Member. There are three types of ‘adverse effects’ to the interests of other Members:

- injury to the domestic industry of another Member (see Article 5(a));
- nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994 (see Article 5(b)); and
- serious prejudice, including a threat thereof, to the interests of another Member (see Article 5(c)).

The concept of ‘injury’ to a domestic industry within the meaning of Article 5(a) of the SCM Agreement covers material injury or the threat thereof to a domestic industry producing the like product. As in the Anti-Dumping Agreement, ‘like product’ is defined in footnote 46 of the SCM Agreement as a product that is identical or, in the absence of such a product, has characteristics closely resembling those of the product under consideration. The definitions of ‘domestic industry’ ‘material injury’ and ‘threat of material injury’ as well as the requirement to demonstrate a causal link between the subsidy and the injury, are mutatis mutandis, very similar to the definitions and the requirements of the Anti-Dumping Agreement discussed in section 4.2.

The nullification or impairment of benefits of a WTO Member, provided in Article 5(b), concerns above all the tariff concessions bound under Article II:1 of the GATT 1994. It is clear that subsidies can undermine improved market access reached through tariff negotiations.

‘Serious prejudice’ to the interests of another Member, as provided in Article 5(c), may arise in the following situations according to Article 6.3 of the SCM Agreement:

- where a subsidy impedes the import of a like product of another Member into the market of the subsidising Member;
- where the subsidy impedes the export of a like product of another Member into the market of a third country;
- where the subsidy results in a significant price undercutting by the subsidising product in comparison to the like product of another Member in the same market, or in significant price depression or lost sales;
- where the subsidy leads to an increase in the world market share of the subsidising WTO Member in a particular primary product or commodity.

In the category ‘subsidies that cause injury’ fall, for example, the provision of an interest-free loan by a WTO Member (e.g. Korea) to a domestic steel producer when imports of this producer’s steel cause considerable injury to the domestic steel industry of another WTO Member (e.g. Japan) or when imports of the Korean producer’s steel displaces the steel of another WTO Member’s producer (e.g. Japan) on a third country’s market (e.g. China).

If a panel and/or the Appellate Body finds that the subsidy at issue indeed causes adverse effects to the interests of another WTO Member, then the subsidising WTO Member must, according to Article 7 of the SCM Agreement:

- take appropriate steps to remove the adverse effects of the subsidy; or
- withdraw the subsidy.

This must occur within six months. If no such steps have been taken, the Dispute Settlement Body of the WTO must authorise ‘commensurate countermeasures’ against the subsidising WTO Member, upon the request of the complaining Member.

4.3.3. Countervailing measures

Besides rules on subsidies, WTO law also provides for rules on measures that WTO Members may take to protect a domestic industry that produces like products against the negative consequences from the import of the subsidised products. Article VI of the GATT 1994 and Articles 11, 12, 13 and 32 of the SCM Agreement allow WTO Members to impose what are known as ‘countervailing duties’ when:

- there are subsidised imports, i.e., imports of products from producers who benefited from specific subsidies, within the meaning of Articles 1 and 2 of the SCM Agreement;
- there is material injury or the threat thereof to the domestic industry producing the like products; and
- there is a causal link between the subsidised imports and the injury to the domestic industry and injury caused by other factors is not attributed to the subsidised imports.

The SCM Agreement provides detailed rules regarding the determination of subsidisation (Articles 1, 2 and 14), of material injury or threat thereof to the domestic industry (Articles 15 and 16) and of a causal link between them. These requirements are, mutatis mutandis, very similar to the rules of the Anti-Dumping Agreement discussed in section 4.2.

Articles 11, 12, 13 and 22 of the SCM Agreement provide detailed procedural requirements regarding the initiation and conduct of a countervailing investigation by the competent authorities of the Member imposing the countervailing duties on the subsidised imports. The competent authority for the European Union is the European Commission. These rules are largely the same as the previously discussed rules for an anti-dumping investigation set out in the Anti-Dumping Agreement. Finally, Articles 19, 20 and 21 of the SCM Agreement regulate the imposition and collection of countervailing duties. In this regard, it is important that the countervailing duty:

- never exceeds the amount of the subsidy;
- is only applied as long as, and to the extent that, it is necessary to counteract the injurious subsidy;
- is terminated at the latest five years after having been imposed, unless it is established that this would be likely to lead to a continuation or repetition of the injurious subsidy.

Note that Articles 17 and 18 of the SCM Agreement provide for:

- provisional countervailing measures (that can be adopted during the investigation by the competent authorities);
- voluntary undertakings concerning subsidies (that the subsidising WTO Member or the exporters can make to avoid the imposition of countervailing measures).
4.3.4. Agricultural subsidies

The Agreement on Agriculture provides for special rules on agricultural export subsidies and domestic agricultural support measures. In case of conflict, these special rules prevail over the rules of SCM Agreement. In contrast to export subsidies on other products, export subsidies on agricultural products are not prohibited, provided that they are specified in Section II of Part IV of a Member’s GATT Schedule of Concessions. Members may not provide listed export subsidies in excess of the budgetary outlay and quantitative commitment levels specified in their Schedules. These export subsidies are subject to reduction commitments. Also with respect to domestic agricultural support measures, Members have agreed to reduce the level of support in the context of the Uruguay Round.

5. Trade liberalisation and other important societal values and interests

5.1. Introduction

Trade liberalisation often facilitates the promotion and protection of other important societal values and interests, such as public health, consumer safety, the environment, employment, economic development and national security. More trade liberalisation often means that more, cheaper, better, healthier, safer and/or environmentally friendlier products and services will be available on the domestic market. More trade liberalisation also means more employment and economic development. Trade liberalisation, and its principles of non-discrimination and rules on market access, however also regularly conflicts with the aforementioned other societal values and interests. Governments frequently adopt legislation or take measures that restrict trade in goods and/or services in order to protect, for example, public health, public morals, employment or national security.

WTO law provides rules to reconcile trade liberalisation with these other important societal values and interests. These rules take the form of wide-ranging exceptions to the basic WTO disciplines discussed in sections 2.2-4.2 (the non-discrimination obligations and the market access rules). There are five main categories of exceptions:

• the ‘general exceptions’ of Article XX of the GATT 1994 and Article XIV of the GATS;
• the national and international ‘security exceptions’ of Article XXI of the GATT 1994 and Article XIV bis of the GATS;
• the ‘economic emergency exceptions’ of Article XIX of the GATT 1994 and the Agreement on Safeguards;
• the ‘regional integration exceptions’ of Article XV of the GATT 1994 and Article V of the GATS; and
• the ‘balance of payments exceptions’ of Articles XI and XVIII:B of the GATT 1994 and Article XII of the GATS.

These exceptions allow Members, under specific conditions, to adopt and maintain legislation and measures that protect other important societal values and interests, even though this legislation or these measures conflict with the substantive disciplines imposed by the GATT 1994 or the GATS. These exceptions clearly allow Members, under specific conditions, to give priority to certain societal values and interests over trade liberalisation. These exceptions will be discussed further in the following sections.

5.2. General exceptions under Article XX of the GATT 1994

The most important exceptions ‘reconciling’ trade liberalisation with other societal values and interests, are the ‘general exceptions’ of Article XX of the GATT 1994 and Article XIV of the GATS. In determining whether a measure that is otherwise GATT-inconsistent can be justified under Article XX of the GATT 1994, one must always examine:

• first, whether this measure can provisionally be justified under one of the specific exceptions listed in paragraphs (a) to (j) of Article XX; and, if so,
• second, whether the application of this measure meets the requirements of the introductory clause, commonly referred to as the ‘chapeau’ of Article XX.

Article XX of the GATT 1994 sets out, in paragraphs (a) until (j), a limited number of justification grounds, each with different application requirements. Article XX can be relied upon to justify measures that, amongst others:

• are necessary for the protection of public morals (Article XX(a));

• are necessary for the protection of the life of humans, animals or plants (Article XX(b));

• are necessary to secure compliance with national law, such as customs law or intellectual property law, which is in itself not GATT-inconsistent (Article XX (d)); and

• relate to the ‘conservation of exhaustible natural resources’ (Article XX(g)).

WTO Members cannot rely on justification grounds other than those listed in Article XX. According to well established case law, the balance to be realised between trade liberalisation on the one hand and other societal values and interests on the other, is central to the interpretation of Article XX. This means that a (too) narrow interpretation is as inappropriate as a (too) broad interpretation.

5.2.1. Article XX(b) of the GATT 1994

For a measure to be provisionally justified under Article XX(b):

• the policy objective pursued by the measure must be the protection of the life or health of humans, animals or plants; and

• the measure must be necessary to fulfil that policy objective.

The first condition is relatively easy to apply. To determine whether a measure has been designed to achieve a health policy objective, the express provisions, design and structure of the measure at issue must be considered. Article XX(b) covers public health policy measures as well as environmental policy measures.

The second requirement, namely that the measure is necessary to protect the health of humans, animals or plants, is much more problematic. First of all, it is important to note that the question is not whether the policy objective aimed at by the Member, or the level of protection of health it wishes to provide, is necessary. The question is only whether the measure at issue is necessary to achieve that policy objective and provide that level of protection.

According to the well established case law of the Appellate Body, a measure is necessary when no alternative measure exists that would achieve the same objective and is less restrictive to trade than the measure at issue. In determining the existence of such an alternative measure, the following must be considered:

• the importance of the societal value pursued by the measure at issue (human health is indeed a more important value than the health of animals and/or plants);

• the impact of the measure at issue on trade (an import prohibition is more trade restrictive than a labelling obligation); and

• the extent to which the alternative measure will contribute to the protection or promotion of the value at issue.

The more important the societal value protected by the measure at issue and the less trade restrictive the measure, the easier the measure at issue may be considered to be necessary.

In the EC – Asbestos case, for example, the Appellate Body found that the French ban on the importation and sale of asbestos and asbestos-containing products was necessary to ensure the level of public health protection when no alternative measure existed that would achieve the same objective and is less trade restrictive, but would be just as effective in protecting public health. The Appellate Body did not agree with Canada.

5.2.2. Article XX(d) of the GATT 1994

Another frequently used ground of justification is that contained in Article XX(d) of the GATT 1994. For a measure to be provisionally justified under Article XX(d):

• the measure must be designed to secure compliance with national laws, such as customs laws or intellectual property laws, which, in themselves, are not GATT-inconsistent; and

• the measure must be necessary to ensure compliance.

Regarding the second requirement, Article XX(d) gives examples of the kind of laws and regulations concerned. It explicitly refers to customs legislation, laws for the protection of intellectual property rights and laws for the protection of consumers against deceptive practices. It is important that these national laws or regulations, with which the measure at issue ensures compliance, are consistent with the GATT 1994. Furthermore, the measure must ensure compliance with an obligation as defined in national law; it is not sufficient that the measure ensures the fulfilment of the national law’s policy objective. Note also that the measure at issue does not need to be imposed exclusively to ensure compliance; it is sufficient this was one of the reasons to impose the measure.

Regarding the second requirement, namely the necessity of the measure at issue to ensure compliance with national laws, refer to the analysis set out above for this condition in the context of Article XX(b).

In the EC – Trademarks and Geographical Indications case, the European Communities wanted to use the exception in Article XX(d) to justify measures imposed to ensure compliance with Regulation 2081/92. The Panel found the regulation not to be GATT-consistent and concluded that the European Communities therefore could not make use of the Article XX(d) exception.
5.2.3. Article XX(g) of the GATT 1994

This exception is important because, together with Article XX(b), it offers WTO Members the possibility to take measures for the protection of the environment. A measure must meet three requirements in order to be justifiable under Article XX(g):

- the policy objective of the measure must be the ‘conservation of exhaustible natural resources’;
- the measure must ‘relate to’ this policy objective; and
- the measure must be made effective ‘in conjunction with’ restrictions on domestic production or consumption.

The term ‘exhaustible natural resources’ brings to mind things like oil, gas, coal and minerals. However, this term has been interpreted by the Appellate Body in 1998 in a broad, evolutionary manner to include not only minerals and other non-living resources, but also living resources, and, in particular, endangered species. In the US – Shrimp case, the Appellate Body noted that the text of Article XX(g) was drafted more than fifty years ago, and that it must be interpreted in the light of present conditions. The case concerned an import prohibition on shrimp that were caught in nets in which sea turtles often got entangled and consequently died. The Appellate Body remarked that during the past decennia, it had become clear that living species, though in principle capable of reproduction and in that sense ‘renewable’, are in practice susceptible to depletion and may be threatened by extinction, or, in other words, are ‘exhaustible’. Referring to the objectives of the WTO as contained in the preamble to the WTO Agreement, and in particular the objective of sustainable development, as well as to multilateral environment agreements, the Appellate Body found that the term ‘exhaustive natural resources’ also includes living resources, such as sea turtles. Therefore, Article XX(g) may be relied upon in respect of a measure aimed at the protection of sea turtles.

The second condition for the use of Article XX(g) is that the measure at issue must ‘relate to’ the conservation of natural resources. It is clear that to ‘relate to’ is not the same as to ‘be necessary for’. According to well established case law, a measure ‘relates to’ the conservation of exhaustive natural resources if the measure is ‘primarily aimed’ at the conservation of these resources. The relationship between the means, i.e., the measure, and the end, i.e., the conservation of exhaustible resources, must be a real and close relationship. The measure may also not be disproportionately wide in its scope in relation to the policy objective pursued.

In the US – Shrimp case, the American measure required the use of a specific type of net that would prevent the entrapment of sea turtles. The Appellate Body concluded that this measure was related to the objective, namely the protection of sea turtles, and that the measure was not disproportionate. The Appellate Body noted that the United States had not simply prohibited all shrimp imports, but that the measure imposed requirements with regard to the mode of harvesting of the imported shrimp.

The third condition, namely that the measure must be made effective ‘in conjunction with’ restrictions on domestic production or consumption, was interpreted by the Appellate Body as a requirement of ‘even-handedness’ in the imposition of restrictions on imported and domestic products. Article XX(g) does not demand that domestic and imported products are given the same treatment, but that measures related to the protection of exhaustible natural resources must be imposed on both groups of products. In other words, the ‘inconvenience’ of measures taken to preserve exhaustible natural resources may not only weigh on imported products, but must be equally spread over imported and domestic products.

In the US – Shrimp case, the Appellate Body held that the measure at issue complied with this third condition because the United States did not prohibit only imported shrimp caught by harvesting methods that were sea turtle unfriendly, but also prohibited American shrimp trawlers from using these types of harvesting methods.

5.2.4. Article XX of the GATT 1994, other paragraphs

A specific exception of Article XX of the GATT 1994 that still deserves to be mentioned is the exception in subparagraph (a), with regard to measures necessary for the protection of public morals. This exception has, as yet, not been the subject of a dispute and there is therefore no case law that clarifies the scope of this provision. Article XIV of the GATS provides for a similar exception, which was invoked in the recent case US – Gambling (see section 5.3). The case law on Article XIV(a) of the GATS is undoubtedly of importance when determining the scope of Article XX(a) of the GATT 1994.

Saudi Arabia justifies its import prohibition on alcoholic beverages, pork and the Koran on grounds of Article XX(a) of the GATT 1994.

5.2.5. The chapeau of Article XX of the GATT 1994

Measures provisionally justified under one of the exceptions of Article XX (a) to (j), must subsequently meet the requirements of the chapeau of Article XX. The object and purpose of the chapeau is to avoid that the application of the measures provisionally justified constitute a misuse or abuse of the exceptions of Article XX. The interpretation and application of the chapeau in a particular case is a search for the appropriate line of equilibrium between the right of Members to adopt and maintain trade restrictive measures that pursue certain legitimate societal values, on the one hand, and the right of other Members to market access and non-discriminatory treatment, on the other. The requirements set out in the chapeau do not apply to the measure itself but to the manner in which the measure is applied. According to the chapeau, the application of the trade restrictive measure may not constitute:

- an arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
- a disguised restriction on international trade.

The measure at issue in the US – Shrimp case was found to be arbitrarily discriminatory by the Appellate Body because the measure was applied by the United States in a very strict and inflexible manner, and without any regard for the conditions in the importing country. There was also unjustifiable discrimination, because the United States imposed unilateral trade restrictive measures to protect sea turtles without first attempting to reach the same objective by negotiating a multilateral agreement. A measure which is provisionally justified under Article XX, will be considered to constitute ‘a disguised restriction on international
trade’ if the design, architecture or structure of the measure at issue reveals that this measure does in fact not pursue the legitimate policy objectives on which the provisional justification was based but, in fact, pursues trade-restrictive, i.e., protectionist, objectives.

### 5.3. General exceptions under Article XIV of the GATS

The similarities between Article XX of the GATT 1994 and Article XIV of the GATS are striking. However, there are also differences. On grounds of Article XIV (a) to (e) of the GATS, WTO Members can justify otherwise GATS-inconsistent measures that are, amongst others:

- necessary to protect public morals or to maintain public order (Article XIV(a));
- necessary to protect of human, animal or plant life or health (Article XIV(b)); or
- necessary to secure compliance with laws or regulations that are not inconsistent with the GATS (Article XIV(c)).

A WTO Member may also rely on Article XIV of the GATS to justify measures that:

- are inconsistent with Article XVII of the GATS, when the difference in treatment between foreign and domestic services and service suppliers is aimed at the equitable and effective imposition or collection of direct taxes (Article XIV(d)); or
- are inconsistent with Article II of the GATS, when the difference in treatment between services and service suppliers from different countries results from an international agreement on the avoidance of double taxation (Article XIV(e)).

The case law on Article XIV of the GATS is currently limited: the US – Gambling case has shed some light on the interpretation of subparagraphs (a) and (c). The remaining subparagraphs have not been the subject of a dispute yet.

#### 5.3.1. Article XIV(a) of the GATS

Article XIV(a) sets out a two-tier test to determine whether a measure is provisionally justified under this provision. The Member invoking the Article must establish that:

- the policy objective pursued by the measure at issue is the protection of public morals or public order; and
- the measure is necessary to fulfill that policy objective.

With regard to the first requirement, the Panel in the US – Gambling case clarified that what relates to ‘public morals’ or falls under ‘public order’ can differ from Member to Member. According to the Panel, the term ‘public morals’ refers to ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’, while the term ‘public order’ refers to ‘the preservation of the fundamental interests of a society, as reflected in public policy and law’. What these terms encompass exactly is determined by every WTO Member individually and for its own territory. As noted by the Panel, a Member can only invoke the ‘public order’ exception when there is a genuine and sufficiently serious threat to one of the fundamental interests of society. These fundamental societal interests can relate to standards of law, security and morality. The concepts ‘public morals’ and ‘public order’ may partially overlap with each other.

### In the US – Gambling case, the United States prohibited the provision of remote gambling services, and in particular internet gambling. It argued that this form of gambling posed (possible) risks with regard to organised crime, fraud and money laundry practices, as well as risks to children and the risk of the development of a gambling addiction. The Panel and the Appellate Body readily recognised the prohibition on remote gambling services as a measure taken to protect public morals and public order.

Regarding the second requirement, namely whether the measure is necessary to protect public morals or public order, please refer to the well established case law on Articles XX(b) and XX(d) of the GATT, discussed in section 5.2.

#### 5.3.2. Article XIV(c) of the GATS

Article XIV(c) can be used as a ground for justification of an otherwise GATS-inconsistent measure if:

- the measure has been designed to secure compliance with national laws or regulations;
- the national laws and regulations are not inconsistent with the GATS;
- the measure at issue is necessary to ensure compliance with those national laws and regulations.

The requirements for the use of Article XIV(c) as justification are largely similar to the requirements for the use of Article XX(d) of the GATT 1994. It is therefore not surprising that in the US – Gambling case, the Panel and the Appellate Body had recourse to case law on Article XX(d) of the GATT 1994 for the interpretation of Article XIV(c) of the GATS (see section 5.2).

#### 5.3.3. The Chapeau of Article XIV of the GATS

In the same way as the chapeau of Article XX of the GATT 1994, the chapeau of Article XIV of the GATS requires that the application of the measure at issue does not constitute:

- arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
- a disguised restriction on trade in services.

The interpretation and application of these requirements are the same as those of Article XX of the GATT 1994. The Panel in US – Gambling stated that a lack of consistency in the application of the measure at issue, might lead to the conclusion that ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on trade’ are present. This interpretation has been confirmed by the Appellate Body.
5.4. Exceptions for national and international security

The GATT 1994 in Article XXI and the GATS in Article XIV bis, provide for exceptions relating to national and international security. According to these Articles, WTO Members may take measures that are otherwise GATT- or GATS-inconsistent, in order to protect national or international peace and security. Article XXI(b) of the GATT 1994 and Article XIV bis (b) of the GATS allow a Member to adopt or maintain measures it considers necessary for the protection of its essential security interests:

- relating to fissionable materials; or
- relating to trade in arms or in other materials, or the provision of services, directly or indirectly, for military use.

WTO Members are also allowed to take GATT- or GATS-inconsistent measures:

- in time of war or other emergency in international relations; or
- to comply with their obligations under the UN Charter for the maintenance of international peace and security (e.g. economic sanctions imposed by the UN Security Council).

Article XXI of the GATT was at issue in a few disputes under the GATT 1947 regime, but neither Article XXI of the GATT 1994 nor Article XIV bis of the GATS have been, to date, the subject of Panel or Appellate Body rulings. It is still an open question to what extent these exceptions are susceptible to control by the WTO dispute settlement organs. The security exceptions of Article XXI of the GATT 1994 and Article XIV bis of the GATS are extremely broadly formulated. Furthermore, these security exceptions have not been provided with a chapeau to avoid misuse by WTO Members (see the function of the chapeau of Article XX of the GATT 1994 and Article XIV of the GATS).

5.5. Economic emergency exceptions

WTO law also provides for ‘economic emergency exceptions’. These exceptions, set out in Article XIX of the GATT 1994 and the Agreement on Safeguards, allow Members to adopt otherwise WTO-inconsistent measures, in situations where a surge in imports causes, or threatens to cause, serious injury to the domestic industry. These measures are not provided for under the GATS, but the possibility to ‘complete’ the GATS on this issue in the future has been explicitly left open.

When a WTO Member wants to take a safeguard measure, the strict requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards must be met. The reason for the strictness of these requirements is that safeguard measures are applied to fair trade. The exporter is blameless; the imported products are not being dumped nor are they being subsidised. Instead, the imported products are ‘only’ so competitive that they oust the domestic products from the market. There are three categories of rules that apply to safeguard measures, namely rules relating to:

- the characteristics of safeguard measures;
- the substantive requirements that must be fulfilled in order to take a safeguard measure; and
- the procedural requirements at the national and international level that a WTO Member must meet when taking a safeguard measure.

5.5.1. Characteristics of safeguard measures

Safeguard measures typically take the form of:

- customs duties above the binding; or
- quantitative restrictions.

Generally speaking, these measures conflict with, respectively, Article II and Article XI of the GATT 1994, but they can be justified under Article XIX of the GATT 1994 if they meet the requirements of this provision and the requirements of the Agreement on Safeguards. The objective of a safeguard measure is to give some ‘breathing space’ to the domestic industry, and to allow it to adapt to new market conditions.

5.5.1.1. Requirements

A WTO Member may only apply a safeguard measure as long as it is necessary to prevent or remedy the injury or threat thereof and to give the domestic industry the opportunity to adjust (see Article 7 of the Agreement on Safeguards).

The maximum initial duration of a safeguard measure is four years. It is possible to extend this duration, but only if:

- the measure continues to be necessary to prevent or remedy serious injury to the domestic industry; and
- there is evidence that the domestic industry is adjusting.

5.5.1.2. Term

The total duration of a safeguard measure, including extension, may not be longer than eight years. Once the import of a product has been subjected to a safeguard measure, this product cannot be subjected to such a measure again for a period of time equal to the duration of the previously applied safeguard measure.
Furthermore, the Agreement on Safeguards requires that every safeguard measure applied for a period longer than one year, must be progressively liberalised, meaning that it must be made gradually less trade restrictive. For a safeguard measure that was applied for a period of more than three years, the WTO Member applying the measure is obliged to carry out a mid-term review of whether the measure still meets the requirements for the imposition of a safeguard measure. If this is not the case, the WTO Member involved must withdraw the safeguard measure (or, in any case, speed its progressive liberalisation).

5.5.2. Substantive requirements

As provided in Article XIX of the GATT 1994 and Article 2 of the Agreement on Safeguards, safeguard measures may only be applied when three requirements are met, namely:

- the requirement of ‘increased imports’;
- the requirement of ‘serious injury or threat thereof’; and
- the requirement of a ‘causal link’ between the increased imports and the serious injury.

5.5.2.1. Increased imports

The required ‘increased imports’ must be recent; sudden, i.e., over a relatively short period of time; sharp; and significant (see Article 2 of the Agreement on Safeguards). Furthermore, the increase in imports must be ‘unforeseen’ (see Article XIX of the GATT 1994). In this way it is determined whether the situation is in fact an emergency situation. If the increase in imports took place some time ago, or has been taking place for an extended period, or is rather limited, or was foreseeable, then there is no emergency situation within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards.

The required increase in imports does not need to be an increase in absolute terms; it is sufficient that there is an increase in imports compared to domestic production, in others words, a relative increase.

5.5.2.2. Serious injury

For a safeguard measure to be permissible, the domestic industry must be suffering serious injury or be under threat thereof. The required ‘serious injury’ exists when there is a significant overall impairment in the position of a domestic industry (see Article 4 of the Agreement on Safeguards). ‘Serious injury’ is a stricter requirement than the requirement of ‘material injury’, which applies for the imposition of an anti-dumping measure or a countervailing measure (see sections 4.2 and 4.3). This is not surprising, as a safeguard measure is applied to fair trade, while an anti-dumping measure or a countervailing measure is applied to unfair trade. To determine whether there is (threat of) serious injury, the following factors must be considered:

- the rate and amount of the increase in imports, of the product at issue, in absolute and relative terms;
- the share of the domestic market taken by increased imports; and
- changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.

This list of factors is not exhaustive. All factors having a bearing on the situation of the domestic industry can and must be examined. It is not required, however, that all factors point towards ‘serious injury’. Even when some factors do not point towards ‘serious injury’, a WTO Member can still conclude that the domestic industry is suffering from, or under the threat of suffering from, serious injury. Note that the term ‘domestic industry’ in this context}

If the American car industry suffers serious injury as a consequence of massive importation of cheap Korean cars and the United States wants to take a safeguard measure to temporarily protect its car industry by increasing the import duties on cars (above the tariff binding), the United States must also impose the higher duties on cars of Japanese or European origin, even if the importation of these cars has not increased.
has the same meaning as it has in the context of anti-dumping and countervailing measures (see sections 4.2 and 4.3).

5.5.2.3. Causation
The third and last substantive requirement for the application of a safeguard measure is the ‘causation’ requirement. The test for establishing ‘causation’ is twofold:

- a demonstration of the causal link between the ‘increased imports’ and the ‘serious injury’ or threat thereof (the ‘causal link’ element); and
- an identification of any injury caused by factors other than the increased imports and the non-attribute of this injury to these imports (the ‘non-attribute’ element).

It is not necessary that the increase in imports is the only cause for the injury suffered by the domestic industry. However, the injury that is caused by other factors (such as technological developments and decreasing customer demand for the product at issue) may not be attributed to the increase in imports (and may thus not be considered in the determination of what, in this case, would be an appropriate safeguard measure).

5.5.3. Procedural requirements
In order to establish whether the substantive requirements for safeguard measures have been met, the competent authorities of the relevant WTO Member must conduct an investigation. Article 3 of the Agreement on Safeguards sets out procedural requirements which these competent authorities must meet in their investigations. In this respect, it is important that all interested parties are offered the opportunity to be heard by the competent authorities and that these authorities publish a detailed report containing all their findings and conclusions concerning the substantive requirements for the imposition of safeguard measures. If these procedural requirements are not met, the safeguard measure applies in violation of WTO law.

Article 12 of the Agreement on Safeguards further requires that a WTO Member wishing to take a safeguard measure, informs the WTO Committee on Safeguards of all decisions concerning the safeguard measure (such as the decision to start an investigation, the decision to apply a safeguard measure and the decision to extend a safeguard measure). The WTO Member concerned must make all relevant information available to the WTO Committee and in particular provide a description of the product at issue, evidence of serious injury to domestic industry due to increased imports, a description of the proposed safeguard measure, the expected duration of the measure and the timetable for the progressive liberalisation of the measure.

5.5.4. Special safeguard measures
WTO Members can take ‘special safeguard measures’ in a couple of special cases. The Agreement on Agriculture allows for the imposition of a safeguard measure limited to agricultural products under less strict requirements. The Protocol on the Accession of the People’s Republic of China to the WTO also provides for such special safeguard measures. Until 2013, WTO Members can take safeguard measures for products imported from China under less strict requirements than those discussed above.

5.6. Regional integration exceptions
WTO Law also provides for regional integration exceptions. Article XXIV of the GATT 1994 (elaborated on further in the Understanding on Article XXIV) and Article V of the GATS allow WTO Members to liberalise trade more rapidly among a limited group of Members. When WTO Members form, for example, a customs union, they grant each more favourable treatment in trade matters (such as the abolition of all customs duties) that they do not grant WTO Members which are not part of that customs union. This conflicts with the MFN obligation of Article I of the GATT 1994. The exceptions for regional economic integration can be relied upon to justify a violation of the MFN obligation (and other obligations) under the GATT 1994 and the GATS.

In recent years, regional integration agreements between Members have proliferated. Currently, over 200 regional trade agreements are in force, and this number is likely to double by 2010. There is great concern that this large number of customs unions and free trade areas (that by their nature discriminate against WTO Members that are not part of them) forms a threat for the multilateral trading system (which is based on non-discrimination).
Article V of the GATS has similar requirements to Article XXIV of the GATT 1994. According to these provisions, a measure otherwise GATS-inconsistent, and in particular inconsistent with the MFN obligation of the Article II of the GATS, is justified:

- if the measure is introduced as part of an agreement liberalising trade in services that meets all the requirements set out in Article V (such as the requirement that a substantial part of the service sectors must be covered and the requirement that the agreement does not lead to more and/or higher barriers to trade for third countries); and
- if WTO Members would be prevented from entering into such an agreement liberalising trade in services, if the measure concerned were not allowed.

In practice, the requirements of Article XXIV of the GATT 1994 and Article V of the GATS are often ignored, despite the fact that there is an obligation of notification on WTO Members that form a regional integration agreement and that the WTO Committee on Regional Trade Agreements must review every new agreement for WTO-consistency. This Committee has, until now, only once come to a decision concerning the WTO conformity of a regional trade agreement. The Committee must make decisions by consensus (see no. 33), which makes it almost impossible to come to a decision on the WTO-consistency of a regional trade agreement. WTO Members have, to date, also been very hesitant to bring a WTO-consistency issue before a panel or the Appellate Body and to start a WTO dispute settlement procedure. In view of the fact that all WTO Members (except for Mongolia) are part of one or more regional trade agreements (of which WTO-consistency is often doubtful), this is probably not surprising.

5.7. Economic development exceptions

Finally, WTO law provides for ’economic development exceptions’ in favour of developing countries. Almost all WTO agreements provide for special and differential treatment provisions for developing-country Members to facilitate their integration into the world trading system and to promote their economic development. These provisions, also referred to as ’S&D treatment’ provisions, can be divided into six categories:

- provisions aimed at increasing the trade opportunities of developing-country Members;
- provisions under which WTO Members should safeguard the interests of developing-country Members;
- flexibility of commitments, of action, and use of policy instruments;
- transitional time periods;
- technical assistance; and
- provisions relating to least-developed-country Members.

A developing country Member has the right to temporarily impose higher import duties than its tariff bindings to promote the establishment of a new industry (see the ’infant industry’ exception of Article XVII of the GATT 1994). Furthermore, a developing country Member may take a safeguard measure with a maximum duration of longer than eight years (see Article 9 of the Agreement on Safeguards and paragraph 5.5) and some developing countries have been exempted from the prohibition on export subsidies (see Article 27 of the SCM Agreement and paragraph 4.3).

The Enabling Clause, which is now part of the GATT 1994, allows developed country Members to grant preferential tariff treatment to imports from developing countries. This exception thus allows Members to deviate from the basic MFN treatment obligation of Article I:1 of the GATT 1994 in order to promote the economic development of developing country Members. Examples of the arrangements allowed under the Enabling Clause are:

- The Generalised System of Preferences (GSP), under which the European Union grants preferential tariff treatment to developing countries under certain conditions;
- The Everything But Arms arrangement, under which the European Union does not impose import duties or quotas on products of least-developed countries.

As the Appellate Body ruled in EC – Tariff Preferences, a WTO Member can, under the Enabling Clause, grant additional preferential tariff treatment to some developing countries (e.g. the developing countries that respect minimum labour standards or sufficiently protect the environment) and not to other developing countries, on the condition that the WTO Member involved treats all similarly situated developing countries equally.
6. Rules for the promotion of harmonisation of national regulation

6.1. Introduction

As import duties decrease as a consequence of successful tariff negotiations and therefore provide less protection against foreign products, and as the prohibition of quantitative limitations is applied more strictly (especially with respect to agricultural and textile products), other forms of protectionism gain steadily in importance. Technical regulations and standards as well as sanitary and phytosanitary measures are often misused to protect domestic products against better and/or cheaper imported products. The TBT Agreement and the SPS Agreement concentrate on avoiding such misuse. In addition, especially in developed countries, there is growing support for the view that insufficient protection of intellectual property rights impedes the development of international trade. The TRIPS Agreement addresses this insufficient protection of intellectual property rights.

The three WTO agreements mentioned above, namely the TBT Agreement, the SPS Agreement and the TRIPS Agreement, have one aspect in common: the obligations concerning national regulation (and in particular to technical regulations, sanitary and phytosanitary measures and intellectual property rights) go further under these agreements than the traditional GATT obligations discussed above (namely the MFN treatment obligation and the national treatment obligation) (see sections 2.2 and 2.4). These WTO agreements promote the harmonisation of national regulation on the basis of international standards or rules. Harmonisation based on international standards and rules also limits the misuse of national regulation for protectionist purposes.

6.2. The TBT Agreement

WTO Members have many regulatory requirements in place regarding the composition, quality, safety, production process, packaging, labelling, etc., of products that are traded on their territories. These national regulations often form so-called ‘technical barriers to trade’.

The Agreement on Technical Barriers to Trade, in short the TBT Agreement, is applicable to these requirements. In particular, the TBT Agreement applies to:

- technical regulations;
- standards; and
- conformity assessment procedures.

According to Annex 1.1 of the TBT Agreement and the relevant case law, a measure is a ‘technical regulation’ if:

- the measure applies to an identifiable product or group of products;
- the measure lays down product characteristics and/or product-related production processes and methods; and
- compliance with the product characteristics laid down in the measure is mandatory.

A standard differs from a technical regulation within the meaning of the TBT Agreement on only one important point; in contrast with a technical regulation, compliance with a standard is not mandatory (see Annex 1.2 of the TBT Agreement). According to Annex 1.3 of the TBT Agreement, a conformity assessment procedure is a procedure, such as inspection, sampling or testing, used to verify compliance with the requirements set out in technical regulations or standards.

The legal obligation that a packet of cigarettes must display a health warning on its label and the prohibition of lead-based paint in the manufacture of children’s toys are examples of technical regulations. Examples of standards are Forest Stewardship Council labels for wood and the CENELEC standards for, amongst others, cellular phones. Assessments and inspections to establish that no lead based paint was used in the manufacturing of children’s toys or that cellular phones indeed meet CENELEC standards are examples of conformity assessment procedures.

6.2.1. Obligations and requirements

The TBT Agreement requires that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade. To this end, Article 2.2 further requires that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, such as the protection of public health and the environment, taking account of the risks non-fulfilment would create. Conformity assessment procedures are subject to similar obligations.

Technical requirements, standards and conformity assessment procedures have to be withdrawn when the particular circumstances that give rise to their application (such as a threat to public health or the environment) no longer exist.

The most innovative obligation of the TBT Agreement is the requirement that, where relevant international standards exist or will be established soon, national technical requirements, standards and conformity assessment procedures must be based on these international standards. Only when the international standards would be an ineffective and/or inappropriate means for the fulfilment of the abovementioned legitimate objectives (e.g. due to specific climatic conditions), the technical regulations, standards, and conformity assessment procedures are not required to be based on international standards.

The TBT Agreement also requires WTO Members to consider accepting as equivalent the different technical regulations and conformity assessment procedures of other WTO Members, if these measures adequately fulfil the objectives of their own technical regulations or conformity assessment procedures (such as the protection of public health).

Finally, the TBT Agreement also imposes transparency and notification obligations, and further requires that technical requirements, standards and conformity assessment procedures are adopted and applied in conformity with the MFN treatment obligation and national treatment obligation, discussed above in the context of the GATT 1994 (see sections 2.2 and 2.4).

6.3. The SPS Agreement

In WTO law, a specific category of measures can be identified within the general category of technical barriers to trade, namely sanitary and phytosanitary measures. In broad terms, according to Annex A of the SPS Agreement, an ‘SPS measure’ is a measure that:

- aims at the protection of human or animal life or health from food-borne risks; or
aims at the protection of human, animal or plant life or health from risks from pests or diseases.

The SPS Agreement applies to all SPS measures that affect international trade. The SPS Agreement, in Article 2.1, explicitly acknowledges the sovereign right of WTO Members to take SPS measures to protect human, animal or plant life or health on their territories. At the same time, however, the SPS Agreement subjects Members who make use of the right to certain obligations.

6.3.1. Obligations and requirements

WTO Members may only apply SPS measures to the extent necessary for the protection of human, animal or plant life or health. SPS measures must be based on scientific principles and not be maintained without sufficient scientific evidence. WTO Members may not impose SPS measures that arbitrarily or unjustifiably discriminate or that constitute a disguised restriction on trade.

As is the case for technical regulations, standards and conformity assessment procedures covered by the TBT Agreement, SPS measures must, in principle, also be based on international standards. A WTO Member may however deviate from an international SPS standard when it chooses a higher level of sanitary or phytosanitary protection than the one achieved by the international SPS standard.

The substantive obligations provided for in the SPS Agreement also include obligations with respect to risk analysis, i.e., risk assessment and risk management. With regard to risk assessment, Article 5.1 of the SPS Agreement requires that Members ensure that their SPS measures are ‘based on’ a scientific assessment of the risks to human, animal or plant life or health. A WTO Member may only take an SPS measure if such a risk exists. With regard to risk management, the SPS Agreement primarily requires that Members must:

- ensure that SPS measures are not more trade-restrictive than required to achieve their appropriate level of protection (Article 5.6 of the SPS Agreement);
- avoid arbitrary or unjustifiable distinctions in the levels of protection deemed appropriate in different situations, if these distinctions lead to discrimination or disguised restrictions on trade (Article 5.5 of the SPS Agreement).

If there is insufficient scientific evidence at hand to conduct a risk assessment, Article 5.7 of the SPS Agreement allows Members to take provisional SPS measures under certain conditions. In this way, the SPS Agreement incorporates the precautionary principle.

Like the TBT Agreement, the SPS Agreement contains provisions regarding the recognition of the equivalence of other Members’ SPS measures and regarding transparency and notification obligations on Members who impose, amend or maintain SPS measures.

6.4. The TRIPS Agreement

At first sight, the TRIPS Agreement seems to be a ‘foreign element’ in WTO law: while other WTO agreements address trade and trade regulation, the TRIPS Agreement focuses on the protection of intellectual property rights. Intellectual property rights, or rather the lack of protection of those rights, are viewed by many, especially in developed countries, as a barrier to trade. The economic value of many products is determined to a large extent by the idea and the knowledge contained by the product and/or the reputation and consumer awareness of the product or the producer. The protection of intellectual property rights, such as copyright, patents and trade marks, is of great importance, especially to producers from developed countries. Without sufficient protection of intellectual property rights, international trade will not flourish. The TRIPS Agreement therefore provides rules on the minimum standards of protection of seven categories of intellectual property rights, of which the most important are:

- copyright (such as the right of Dan Brown on The Da Vinci Code);
- trademarks (such as Coca Cola and Blackberry);
- geographical indications (such as Prosciutto di Parma and Champagne);
- patents (such as those on a new medicine).

Each intellectual property right has different content and other characteristics, depending on the subject matter of its protection. The minimum protection provided for by the TRIPS Agreement therefore differs considerably from intellectual property right to intellectual property right. An example of minimum protection as prescribed by the TRIPS Agreement is that WTO Members must protect copyright during the author’s entire lifetime and during a period of at least fifty years after his or her death.

6.4.1. Exceptions

There are no general exceptions to the obligations of the TRIPS Agreement (as in the case of Article XX of the GATT 1994 and Article XIV of the GATS discussed above). Every intellectual property right has its own specific exceptions. For example, by way of exception to the rights of a patent holder, a WTO Member may, under certain conditions, grant a producer a compulsory license to enable the producer to manufacture a product that is protected by a patent, and which would thus normally not be able to be produced and traded without the permission of the patent holder. The issue of compulsory licences came to the forefront of public attention with respect to anti-retroviral drugs used against HIV/AIDS, on which large pharmaceutical companies have patent, and which were marketed by these companies at excessively high prices in developing countries.

6.4.2. Incorporating existing agreements

A remarkable aspect of the TRIPS Agreement is the fact that this Agreement incorporates, and builds upon, provisions of existing conventions of the World Intellectual Property Organisation (WIPO). Many provisions of the Paris Convention for the Protection of Industrial Property, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the Treaty on Intellectual Property in respect of Integrated Circuits and the Berne Convention for the Protection of Literary and Artistic Works are therefore an integral part of the TRIPS Agreement and must be respected by WTO Members.

6.4.3. Obligations

The TRIPS Agreement does not only provide for rules for the minimum protection of intellectual property rights. The Agreement also contains an MFN treatment obligation and a national treatment obligation for the protection of intellectual property rights. It is therefore not allowed for Japan to grant less protection to the intellectual property rights of an American enterprise than to those of a European enterprise (MFN treatment obligation) or to those of a Japanese enterprise (national treatment obligation).

The TRIPS Agreement also contains transparency obligations. As in other WTO agreements, WTO Members must publish the national laws, regulations and judicial decisions they adopt that are relevant to intellectual property protection.
The TRIPS Agreement does not provide for rules on the issue of ‘exhaustion’ of intellectual property rights, i.e. the question whether an intellectual property right is ‘exhausted’ world-wide when the holder of this right brings the product to a certain market or, on the contrary, this right is only ‘exhausted’ on that specific market. This issue has explicitly been excluded from multilateral rules and WTO Members are therefore free to determine their own rules on the exhaustion of intellectual property rights.

6.4.4. Enforcement of intellectual property rights

Finally, the TRIPS Agreement is unique (and differs from other agreements for the protection of intellectual property rights) because of the fact that it imposes specific obligations on WTO Members for the effective enforcement of intellectual property rights.

The TRIPS Agreement requires WTO Members to guarantee the protection of intellectual property rights through civil and criminal procedures so as to permit effective action against infringements of intellectual property rights. WTO Members are not required to provide a separate judicial system for the enforcement of intellectual property rights: they may make use of already existing enforcement procedures if these are sufficient to provide the required level of enforcement specified in the TRIPS Agreement.

7. The institutional aspects of the WTO

7.1. Introduction

The World Trade Organisation (WTO) is a young international organisation which was established and became operational on 1 January 1995 in terms of the WTO Agreement. This Agreement was signed on 15 April 1994 in Marrakesh, Morocco by the countries and customs territories that had participated in the Uruguay Round of multilateral trade negotiations (hereinafter the Uruguay Round) from 1986 to 1993.

The establishment of the WTO is seen by many as the most important result of the Uruguay Round. The WTO replaced the General Agreement on Tariffs and Trade 1947 (GATT 1947), which had functioned for almost fifty years as a de facto intergovernmental organisation for international trade. Since the international community had not succeeded in establishing an intergovernmental organisation for international trade, alongside the existing international economic organisations namely the World Bank and the International Monetary Fund, at the end of the forties, the GATT had gradually and very pragmatically taken on this role. The Havana Charter for an ‘International Trade Organisation’ of 1948 never became operational because of the refusal of the United States to approve this agreement. The GATT, which was conceived as a multilateral agreement for the reduction of tariffs, and not an international organisation - took over the central tasks of the ‘stillborn’ International Trade Organisation. It did so with much success, particularly with regard to the reduction of customs duties. During the Uruguay Round, however, the conviction gradually grew that the international community needed a fully-fledged intergovernmental organisation to efficiently guide and regulate the increasingly complex and intensive trade relations between countries.

This conviction, which for a long time was not shared by the United States and many developing countries, finally led to the establishment of the WTO. Pursuant to the Preamble of the WTO Agreement, the ultimate objectives of the WTO are:

- the increase of standards of living;
- the attainment of full employment;
- the growth of real income and effective demand; and
- the expansion of production of, and trade in, goods and services.

However, it is clear from the Preamble that in pursuing these objectives, the WTO must take into account the need for sustainable development and the needs of developing countries.

7.2. Tasks and organs

The primary function of the WTO is to provide the common institutional framework for the conduct of trade relations among its Members. More specifically, the WTO, as set out in Article III (and Article V) of the WTO Agreement, has been assigned the following functions:

- to facilitate the implementation, administration and operation of the WTO agreements, as well as to further the objectives of these agreements;
- to be a forum for the negotiation of new multilateral trade agreements;
- to settle trade disputes between its Members;
- to review the trade policies of its Members;
• to cooperate with other international organisations and non-governmental organisations; and
• to give technical assistance to developing country Members to allow them to integrate into the world trading system and to reap the benefits of international trade (though this task is not explicitly stated in the WTO Agreement, its importance is emphasised in the Doha Ministerial Declaration of December 2001).

The WTO has a complex institutional structure with permanent and temporary organs to carry out its tasks. At the highest level is the Ministerial Conference, which consists of representatives at cabinet level of all WTO Members and which is in session for only a few days every two years. The Ministerial Conference is competent to make decisions on all WTO matters. At the second level, there is the General Council, which exercises the powers of the Ministerial Conference in between its sessions and which consists of ambassador-level diplomats of all WTO Members. The General Council normally meets every two months in Geneva. The Chairperson of the General Council holds the highest elected office within the WTO. When the General Council convenes to discharge its responsibilities relating to dispute settlement, it convenes as the Dispute Settlement Body (DSB), which has its own chairperson and its own procedural rules. When the General Council convenes to discharge its responsibilities relating to the review of a WTO Member’s trade policies, it convenes as the Trade Policy Review Body (TPRB), which also has its own chairperson and procedural rules. The DSB and the TPRB meet more frequently than the General Council. The Ministerial Conference and the General Council are supported by a Council for Trade in Goods, a Council for Trade in Services, and a Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council). The institutional structure of the WTO further comprises around thirty permanent committees and working parties, amongst others the Committee on Trade and Development and the Committee on Trade and Environment. The current negotiations conducted in the context of the Doha Development Round are supervised by the temporarily established Trade Negotiations Committee (or TNC). Figure 1 sets out the institutional structure of the WTO as can be found in Article VI of the WTO Agreement:

The institutional structure of the WTO also includes ad hoc dispute settlement panels and the permanent Appellate Body, as well as the WTO Secretariat, which is headed by the WTO Director-General. The current WTO Director-General is Mr. Pascal Lamy, previously European Commissioner for Trade. WTO Members often emphasise that the WTO is ‘a Member-driven’ organisation. The Members - and not the Director-General or the WTO Secretariat - set the agenda, make proposals and make decisions. The Director-General and
the WTO Secretariat act primarily as an ‘honest broker’ in, or a ‘facilitator’ of, the political decision-making processes in the WTO. Although the WTO Secretariat is of limited size (630 regular staff) and possesses limited financial resources (budget of 2008: circa € 120 million), a Director-General with vision and stamina plays an important role in the WTO.

Unlike other international organisations with a large membership, the WTO does not have an executive body, comprised of a limited number of representative WTO Members, to facilitate the process of negotiation and decision-making. Furthermore, the WTO does not have a permanent body through which the ‘dialogue’ between the WTO and civil society, such as employee and employer organisations, environmental organisations and human rights organisations, can take place.

Every year, an average of one thousand meetings of WTO councils, committees and working parties take place at the WTO headquarters in Geneva. It is nearly impossible for developing countries without or with a limited diplomatic representation in Geneva to attend all meetings in which important issues are discussed. Furthermore, the often very technical nature of trade issues and of WTO rules is highly demanding on national representatives active in the WTO.

### 7.3. Membership

Since the accession of the People’s Republic of China in December 2001, the WTO is a quasi-universal organisation. Its 153 Members account for more than 95% of all international trade. Three quarters of WTO Members are developing countries. It is noteworthy that not only States but also autonomous customs territories such as Hong Kong, China; Macau, China; and Chinese Taipei can be, and are, Members of the WTO. Equally noteworthy is that both the European Communities and all 27 Member States of the European Union are Members of the WTO. In practice, it is the European Commission that speaks and acts for the European Communities and all Member States of the European Union in WTO matters.

Accession to the WTO is a long and difficult process since candidates for membership have to negotiate an ‘entrance ticket’ of market access concessions, in addition to bringing their national legislation and practice into conformity with the obligations under the WTO Agreement. At this moment, 29 countries are negotiating their accession to the WTO. Accession negotiations can drag on for years.

China’s accession negotiations lasted fifteen years. Russia has been negotiating its accession to the WTO since the beginning of the nineties.

Article XVI:4 of the WTO Agreement requires that every Member ensure that its laws, regulations and administrative procedures comply with the obligations of the WTO agreements. Members can, in exceptional circumstances, be granted a waiver from an obligation by the Ministerial Conference of the General Council.

A good example of such a waiver was the one granted to the European Communities to give preferential tariff treatment –contrary to the MFN treatment obligation– to ACP countries (in particular to previous colonies of European Union Member States in Africa, the Caribbean and the Pacific). The exemption terminated on 31 December 2007.

Members can unilaterally withdraw from the WTO in terms of Article XV of the WTO Agreement. However, no Member has done so to date. With one exception of minor importance, the WTO Agreement does not provide for the possibility to expel Members from the WTO. There is no procedure to expel from the WTO countries that systematically act inconsistently with their obligations under the WTO agreements or that are guilty of gross violations of human rights or acts of aggression.

### 7.4. Decision-making procedures

In terms of Article IX of the WTO Agreement, WTO Members take decisions by consensus. A decision is considered to be taken by consensus if no Member present at the meeting when the decision is taken formally objects to the proposed decision. In theory, when a decision cannot be taken by consensus, it may be taken by majority voting. The required majority varies with the subject matter of the decision. Each Member has one vote, except for the European Communities which has as many votes as the European Union has Member States (currently 27). When the European Communities exercises its voting right, the EU Member States, which are all full Members of the WTO (see section 7.3), may not participate in the voting. In practice, however, this matters little, because the WTO seldom resorts to voting. WTO decisions are made almost exclusively by consensus.

Although the consensus requirement renders decision-making by the WTO difficult and susceptible to paralysis, decision-making by consensus is at the heart of the WTO system and is regarded as a fundamental democratic guarantee and at the same time as a guarantee of the presence of sufficient economic and political support for the decision made.
8. The WTO dispute-settlement system

8.1. Introduction

The WTO possesses a system for the settlement of disputes between its Members that is in many respects unique and successful. The system is provided for in the WTO Dispute Settlement Understanding (or DSU). Since the WTO’s establishment in 1995, more than 380 disputes have been brought to the WTO dispute settlement system. Some of these disputes were or are politically sensitive and have received extensive media attention. It should be added that developing country Members have frequently used the system to resolve their trade disputes and have often achieved considerable success in disputes against developed country Members.

Cases that have received much attention from the media are, amongst others, US – Gambling (a dispute between tiny Antigua and Barbuda (68,000 inhabitants) and the United States on the American prohibition of internet gambling), EC – Approval and Marketing of Biotech Products (a dispute on the European treatment of GMOs), EC and Certain Member States – Large Civil Aircraft and US – Large Civil Aircraft (disputes on European and American export subsidies to Airbus and Boeing respectively), EC – Hormones (a dispute on the European ban on meat from hormone-treated cattle), US – Shrimp (a dispute on the American ban on shrimp caught in ways result in the incidental deaths of many sea turtles), US – Foreign Sales Corporations (FSC) (a dispute on a system of tax exemption for foreign income of American companies) and EC – Bananas III (a dispute on the European import regime for bananas).

According to Article 3.7 of the DSU, the prime object and purpose of the WTO dispute settlement system is to secure a positive solution to a dispute. The system therefore has a strong preference for solutions to disputes reached through consultations rather than adjudication. Only if these consultations fail, may the dispute be brought before a WTO dispute settlement panel. According to Article 3.2 of the DSU, the WTO dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements. These clarifications must take place in accordance with the customary rules of interpretation of public international law, which the Appellate Body interpreted as a reference to the rules of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The DSU warns, in Articles 3.2 and 19.2, against judicial activism by specifying twice that WTO dispute settlement may not add to or diminish the rights and obligations of the WTO Members.

8.2. Jurisdiction and access

The jurisdiction of the WTO dispute settlement system is very broad in scope. It covers all disputes arising under all the multilateral WTO agreements (except for the Trade Policy Review Mechanism). Disputes can thus concern customs duties as well as anti-dumping duties as well as measures for the protection of public health. Furthermore, the jurisdiction of the WTO dispute settlement system is compulsory, exclusive and contentious in nature. A WTO Member has, under Article 4.2 of the DSU, no choice but to accept the system’s jurisdiction when another WTO Member has brought a dispute. Unlike the situation before the International Court of Justice, the responding party does not need to accept the jurisdiction of the WTO dispute settlement system to settle a specific dispute. According to Article 23 of the DSU, a WTO Member that wants to bring a dispute under WTO law may only bring it to the WTO dispute settlement system. A WTO dispute can thus not be brought to the International Court of Justice.

Access to the WTO dispute settlement system is limited to WTO Members. Non-members, international organisations, companies, civil society organisations and individuals cannot bring disputes before the WTO dispute settlement system. In practice, however, many disputes are brought by Member at the instigation of an affected industry or company. A WTO Member can have recourse to the system if it considers that a benefit accruing to it under one of the covered agreements has been nullified or impaired. A complainant will almost always argue that the respondent violated a provision of WTO law (violation complaint), but the nullification or impairment could also be the consequence of a measure or situation that is not in conflict with WTO law (a non-violation complaint or a situation complaint).

8.3. Dispute settlement organs

Among the institutions involved in WTO dispute settlement one can distinguish between a political institution, the DSB, and two independent, judicial-type institutions, the ad hoc dispute settlement panels and the permanent Appellate Body. The DSB, which was referred to in section 7.2, is composed of all WTO Members and administers the dispute settlement system. According to Article 2.1 of the DSU, it has the authority:

- to establish panels;
- to adopt panel and Appellate Body reports (through which the ‘recommendations and rulings’ in these reports become legally binding);
- to supervise the implementation of the ‘recommendations and rulings’ made in panel and Appellate Body reports;
- to authorise the suspension of concessions and other obligations under the covered agreements (or the taking of retaliation measures) if a WTO Member does not implement the adopted ‘recommendations and rulings’.

This could lead to the conclusion that, even though the settlement of disputes is conducted by panels and the Appellate Body, the DSB (i.e. the political organ) controls the whole process. It must be noted, however, that the decisions on the establishment of panels, on the adoption of panel and Appellate Body reports and on the authorisation of the suspension of concessions and other obligations are taken by the DSB by reverse consensus. This means that the DSB is considered to have taken these decisions, such as the decision to establish a panel,
except if there is consensus amongst Members not to establish the panel. It is clear that such a consensus will never exist, because the Member who puts a request for the establishment of a panel on the agenda of the DSB will certainly object to the decision not to establish it. In other words, the decisions made by the DSB on these matters are for all practical purposes made automatically.

8.3.1. Panels

Panels are ad hoc bodies established for the purpose of adjudicating a particular dispute and are dissolved once they have accomplished this task. As specified in Article 6 of the DSU, panels are established by the DSB at the request of the complainant.

After the establishment of the panel, the parties decide on its composition. However, if they fail to reach agreement on the composition of the panel within twenty days after its establishment, the complainant can ask the Director-General of the WTO to appoint the panellists. In general, panels are composed of three well-qualified governmental and/or non-governmental individuals (such as diplomats, academics or lawyers). As a rule, panel members are not nationals of the parties (or third parties) to the dispute (see Article 8 of the DSU).

Almost all panels have standard terms of reference, which refer back to the complainant’s request for the establishment of a panel. The request for the establishment of a panel must therefore carefully identify the measure at issue and set out the claims of violation of WTO law. A measure or a claim falls within the panel’s terms of reference, i.e. within the mandate of the panel, only if that measure or that claim is identified in the panel request (see Article 7 of the DSU). Measures and/or claims that are not referred to in this request, fall outside of the panel’s jurisdiction. The function of a panel, as set forth in Article 11 of the DSU, is ‘to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements’.

8.3.2. Appellate review

In terms of Article 17 of the DSU, a party to a dispute can initiate appellate review proceedings against a panel report before the Appellate Body by means of a notice of appeal. The Appellate Body is a standing, i.e., permanent, international tribunal of seven independent persons of recognised authority in law, international trade and the subject of the covered agreements. The Members are appointed by the DSB for a term of four years, renewable only once. The composition of the Appellate Body must be broadly representative of the WTO membership.

Since June 2008, the Appellate Body is composed of Luiz Baptista (Brazil), Lilia Bautista (Philippines), Jennifer Hillman (United States), Shotaro Oshima (Japan), Giorgio Sacerdoti (European Communities), David Unterhalter (South Africa) and Yuejiao Zhang (China).

The Appellate Body hears and decides appeals in Divisions of three of its Members. An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. Issues of fact cannot be appealed.

When a panel or the Appellate Body finds a measure inconsistent with a WTO agreement, it recommends that the relevant Member bring its measure into conformity with that agreement. As mentioned above, when a panel and/or Appellate Body report containing the recommendation has been adopted by the DSU, the recommendation becomes legally binding.

8.4. Procedural arrangements

The WTO dispute settlement process comprises four major steps:

- compulsory consultations between the parties to a dispute to try to reach a mutually agreed solution;
- panel proceedings;
- appellate review proceedings; and
- implementation and enforcement of the recommendations and rulings adopted by the DSB.

The WTO dispute settlement proceedings are characterised by:

- their confidential nature (panel meetings and the oral hearing of the Appellate Body mostly take place behind closed doors); and
- the strict time limits to which many aspects of the proceedings are subject.

When a panel or the Appellate Body has recommended that a WTO Member bring its measure into conformity with WTO law, the Member must do so promptly in terms of Article 21.1 of the DSU. If that is impracticable, the Member concerned must do so within a ‘reasonable period of time’ (in practice, this varies between six and fifteen months). If the respondent fails to implement the recommendations and rulings within the ‘reasonable period of time’ and agreement on compensation cannot be reached, the complainant may request authorisation from the DSB to suspend concessions or other obligations, in other words authorisation to take retaliation measures (see Article 22 of the DSU). As mentioned in section 8.3, the DSB gives its authorisation by reverse consensus, thus automatically.

Retaliation measures usually take the form of a drastic increase in customs duties on strategically selected products of the respondent Member (see EC – Bananas III, EC – Hormones and US – Foreign Sales Corporations). The producers of these products then heavily pressure their government to withdraw or amend the WTO-inconsistent measure as fast as possible. Retaliation measures can also take the form of a suspension of the complainant’s obligations concerning the protection of the intellectual property rights of companies of the WTO Member that has not amended or withdrawn a WTO-inconsistent measure in time (see EC – Bananas III and US – Gambling where the DSB authorised respectively Ecuador and Antigua and Barbuda to take such retaliation measures against the European Communities and the United States). The level of retaliation may not exceed the level of the benefit being nullified or impaired by the WTO-inconsistent measure. Disputes regarding the level of retaliation are brought before an arbitration panel, which is usually composed of the members of the original panel (see Article 22 of the DSU).

In US – Foreign Sales Corporations, the DSB authorised the European Communities to take retaliation measures to the value of $4 billion per year against the United States. When the European Communities took retaliation measures to the value of $600 million in the form of higher customs duties on products from the United States, the American Congress amended the measure at issue and brought it into conformity with WTO law.
It is also possible that the parties to a dispute disagree as to the existence or the WTO-consistency of the measures taken to implement the ‘recommendations and rulings’ of a panel or the Appellate Body. The complainant may hold the view that the WTO-inconsistent measure has been replaced by another equally WTO-inconsistent measure. These disputes are referred to the original panel (see Article 21.5 of the DSU). It is now generally accepted (though not so provided in the DSU) that such disputes must first be adjudicated, before the original complainant may request the DSB to authorise retaliation measures.

8.5. Developing Countries and Dispute Settlement

Although developing countries actively make use of the WTO dispute settlement system, their lack of knowledge of, and experience in, WTO law form an important barrier to their use of this system.

In recognition of the difficulties developing country Members may encounter when they are involved in WTO dispute settlement; the DSU contains some special rules for developing country Members. For example, developing countries can, under certain circumstances, be granted more time to hand in their written submissions to a panel; they have the right to have a developing country national as a member of the panel; and the WTO Secretariat has appointed two advisors that can assist developing countries in their disputes to a certain extent.

Most of these rules are, however, of limited practical significance. Effective legal assistance to developing country Members in dispute settlement proceedings is given by the Advisory Centre on WTO Law (the ‘ACWL’). The ACWL is a Geneva-based, independent, international organisation, established and financed by a number of developed countries and developing countries. The ACWL gives its developing country members and all least developed countries legal advice on WTO law at discounted rates and it regularly represents a developing country in a procedure before a panel or the Appellate Body.

In 85% of all disputes in which a WTO-inconsistent measure must be amended or withdrawn, this amendment or withdrawal takes place within the ‘reasonable period of time’ provided. In only 15% of these disputes, the implementation of the ‘recommendations and rulings’ is a problem and more time is needed.