D SIXTY YEARS OF THE MULTILATERAL TRADING SYSTEM: ACHIEVEMENTS AND CHALLENGES

Earlier Sections in this Report have sought to understand why international cooperation in trade matters seems to make sense to governments and how such cooperation translates into institutions and rules. We will now focus on the main achievements of multilateral trade cooperation over the last six decades and explore some of the core challenges and issues that the system faces today. The Section begins with a brief historical journey from the birth of the GATT to the establishment of the WTO. Subsection 2 records the efforts of governments over the years to reduce tariffs and address non-tariff measures. It also discusses briefly what can be said about the relationship between the GATT/WTO's role in reducing and consolidating tariffs and the growth of trade. Subsection 3 analyses the evolution of dispute settlement in the GATT/WTO, focusing on how the system has developed and performed during the last six decades. The theme of subsection 4 is developing country participation in the multilateral trading system. The subsection focuses on how developing country issues have increasingly found their way onto the multilateral agenda and the systemic challenges posed by a heterogeneous membership with divergent needs, interests and priorities. Subsection 5 addresses the phenomenon of regionalism and how the multilateral trading system has attempted to address burgeoning regional and bilateral trade policy tendencies. Subsection 6 deals with two procedural issues that have far-reaching systemic implications and go to the heart of legitimacy questions confronting the WTO. The subjects at hand are decision-making processes in the WTO and the relationship between the WTO and the outside world – specifically, non-state actors. Finally, subsection 7 explores the complex question of what can be said about how the WTO agenda is shaped and whether there exists a meaningful sense in which limits may be set to subject areas for cooperation under the WTO.

1. FROM GATT TO WTO: THE BUILDING OF AN ORGANIZATION

Here we examine the history of the trading system as it moved from the GATT to the WTO, including the seven rounds of trade negotiations prior to the Uruguay Round. Some of the key themes during this period will be taken up in more detail later.

A mix of economic and political factors conditioned the evolution of the trading system between 1947 and 2007. The six decades of the GATT/WTO can be divided roughly into four time periods. The first period is between 1947 and 1963 when the Contracting Parties were gaining experience with the rules to which they had committed as well as establishing procedures for negotiations. By 1963, two specific challenges faced the trading system – how to deal with non-tariff measures and the concerns of developing countries. We shall examine how the GATT responded to these challenges in the second period between 1963 and 1979. The third period, from 1980 to 1995, was dominated by efforts to launch a new trade negotiation, then by the Uruguay Round negotiations, and finally the birth of the WTO. The fourth period deals with life so far under the WTO, marked in particular by the launch of the Doha Round and the negotiations which continue today.

(a) The emergence of an Organization: The GATT between 1947-1963

(i) A difficult birth

The United States emerged as the leading political and economic power after World War II. In contrast to the aftermath of World War I the United States was now willing to take over a large share of responsibility in building a new international economic system. Concerning international trade policy, the United States wanted to avoid at any cost a renewed protectionist battle, as happened in the 1930s (see Section B.1). Trade was an essential component of the Bretton Woods plan.

As in the case of the other Bretton Woods institutions, the first negotiations between the United States and the British government over the design of a post-war trade system had already begun in 1941 (Atlantic Charter). During these negotiations two major disagreements emerged. First, whereas the

Americans advocated non-discrimination without exception, the British wanted to continue with their system of preferential treatment of Commonwealth countries (Low, 1993). Second, in contrast to the Americans the British wanted to see the inclusion of rules that would have allowed the use of temporary import barriers. In the end, the two parties agreed in the suggested "Charter for the International Trade Organisation" that preference systems in existence at a specific date be excepted from the general rule, but that members of the forthcoming organisation pledge themselves not to increase existing margins but to reduce them through negotiation, the ultimate aim being total elimination (Kock 1969:44) and that trade restrictions could be imposed in the case of balance-of-payment difficulties.

Based on this American-English proposal, the Economic and Social Council of the United Nations called for a conference to establish the International Trade Organization (ITO). Eighteen countries joined the preparatory committee that held four meetings to draft the ITO Charter from October 1946 to March 1948. The last meeting took place from November 1947 until March 1948 in Havana[1] and the Charter for an International Trade Organization (ITO) was signed by 53 nations. The ITO Charter contained 106 Articles and 16 annexes covering not only trade policy, but agreements on employment and economic activity, restrictive business practices and inter-governmental commodity agreements.

A majority in the United States Congress opposed the Charter. Several business groups in the United States judged the Charter overloaded with topics only indirectly related to trade (e.g. employment and antitrust). Others were concerned that foreign investment was inadequately protected under the Charter (Ostry, 1997). At the end of 1950, President Truman decided not to submit the ITO for congressional approval. Even though the ITO was a stillbirth, this did not man the demise of the multilateral trading system.

The GATT emerged as a by-product of the negotiations around the ITO Charter. Originally, it was intended to serve as a temporary agreement until the ratification of the ITO Charter. Once the Charter was to have come into existence, GATT would automatically expire. The provisional character of GATT was also reflected in the fact that the signatories were called "Contracting Parties" in order to dispel any concern that an international organization had been established. The GATT was signed by 23 countries[2] on October 30, 1947, during one of the meetings of the preparatory committee for the ITO held in Geneva, and entered into force on January 1, 1948.

The GATT consisted mainly of the commercial policy provisions of the ITO Charter, with minor formal adjustments. The overall objective of the GATT was to reduce barriers to trade, especially tariffs, and to limit the use of certain trade barriers, such as quotas. The negotiating parties agreed that substantial tariff cuts could only be achieved if certain exceptions were included in the structure of trade rules. The GATT therefore contains several escape clauses and contingent provisions. Among these are remedies against dumping and subsidies (Article VI), balance-of-payment exceptions (Article XII), and safeguards against import surges (Article XIX). A cornerstone of the GATT system was the principle of non-discrimination or the most-favoured nation (MFN) principle. Again, several exceptions from this principle were permitted, mainly to facilitate reconstruction of postwar Europe and a continuation of existing preference systems. Compared to the ITO Charter, the commitments of the GATT were less binding and the coverage of topics much narrower. However, flexibility and a more concentrated focus facilitated the adoption and ratification of GATT.

(ii) A hopeful beginning: the Geneva, Annecy, and Torquay Rounds

The negotiation leading to the creation of the GATT provided the first major step toward tariff reductions. In this first round of multilateral trade negotiations the Contracting Parties concluded 123 agreements covering around 15,000 tariff items, affecting about 40 per cent of world trade (see subsection 2.(a).(i)).

[1] For this reason the ITO Charter later became known as Havana Charter.

[2] Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom and the United States.

It is interesting to note that the tariff negotiations had taken place on a bilateral and product-by-product basis.[3] This meant that prior to the negotiations countries would establish lists of "requests" for tariff concessions on various products from each trading partner. The negotiating parties would then exchange these requests and attempt to match them with offers. If a country agreed to reduce a tariff in a negotiation with one trading partner, the tariff reduction would automatically be extended via MFN to all other parties. We lack appropriate data to gauge the precise extent of the tariff cuts. Only for the United States is a detailed analysis available (see Section D.2.(a) below). However, it is generally recognized that the United States made the most generous tariff concessions reflecting its strong economic situation and relatively high level of tariff protection. Improved access to the US market allowed Western European countries to expand their exports and in return buy US capital goods.

The second tariff conference was held in Annecy in October 1949 and resulted in the accession of eleven countries. The original 23 Contracting Parties did not negotiate tariff concessions with each other, but only with the acceding countries. As a consequence, the negotiations delivered tariff commitments on only 5000 items, delivering a modest reduction in overall tariff levels (ICITO, 1952). Another boost for growth of world trade came from the Organization for European Economic Cooperation (OEEC), which had been founded in 1948 mainly to help administer the Marshall Plan for the reconstruction of Europe after the second World War. OEEC members decided to launch a programme to eliminate progressively trade barriers within Europe, such as licenses, quotas, and exchange restrictions. The first move towards the elimination of quotas in 1949-50 led to a strong recovery of intra-European trade volumes, helping to clear the way for the creation of a Common Market some years later (Irwin, 1994).

All tariff reductions and bindings agreed upon in Geneva and Annecy were supposed to expire by January 1, 1951. In light of this approaching deadline, the Contracting Parties met again in the fall of 1950. They first decided that any renegotiations of tariff concessions made during the previous rounds should be consolidated at Torquay. The new tariff schedules resulting from the negotiations should then be extended for another three years. The negotiations took place among existing Contracting Parties and between the Contracting Parties and six acceding countries, – most importantly the Federal Republic of Germany. The outcome of the Torquay Round was impressive. The Contracting Parties agreed to leave the vast majority of commitments made during the Geneva and Annecy Rounds intact, and even decided to add another 8700 tariff items to the agreement (ICITO, 1952).

Despite this success, progress in certain negotiations was disappointing. The Commonwealth countries were hesitant to grant substantial tariff cuts because they would have reduced the preference margins they accorded one another. Disparities in tariff levels constituted another problem. A number of European countries with relatively low tariff levels felt they had exhausted their bargaining power in the last two rounds and were unable to offer more in order to obtain further concessions from other countries. Finally, President Truman's decision not to submit the ITO to Congress also cast a shadow over the Torquay negotiations.

(iii) Development issues, the Review Session, and the Geneva and Dillon Rounds

With the ITO definitely dead, the Contracting Parties in 1954 decided to discuss the long-term future of the GATT. They therefore convened an extraordinary session, the so-called Review Session, to undertake a review of the GATT. One proposal was to try again to create a formal international organization, this time to be called the Organization for Trade Cooperation (OTC). However, once again the US Congress refused to ratify the OTC charter, and the Contracting Parties had to agree on less ambitious reforms. The participating governments conducted a thorough review of the GATT's provision and came up with three basic changes (Hudec, 1987). First, it was agreed to rewrite Article XVIII which contained the infant-industry exceptions. The introduction of Article XVIII was rephrased to characterize the exceptions as part of GATT policy and not from derogation of it. The provision that granted a veto against the use of exceptions by certain affected countries was removed and rules regarding the use of quantitative

[3] The same principle was applied during subsequent rounds of multilateral trade negotiations.

restrictions for infant-industry purposes were relaxed. The second major change concerned the use of quantitative restrictions by developing countries in times of balance-of-payments difficulties. The Contracting Parties agreed on more flexible provisions for developing countries facing a balance-of-payments crisis. The third modification was a further attempt to accommodate the special needs of developing countries. A new Article XXVIII(*bis*) was introduced which requested Contracting Parties when calculating reciprocity to take into account "the needs of less developed countries for a more flexible use of tariff protection.". This meant that the principle of full reciprocity did not apply to developing countries.

Despite the more favourable treatment accorded developing countries, their share in world trade declined (see Appendix Tables 4 and 5). Developing countries tried to curb this trend by applying policies of import substitution and, later on, export promotion. They increasingly resorted to balance-of-payment restrictions. They were also able to raise many tariffs without violating the GATT, since very few developing countries had bound their tariffs in previous negotiations. While many developed countries were critical of what they saw as an absence of real GATT obligations, they also recognized that the overall success of GATT depended on its capacity to take into account the needs and concerns of developing countries. Against the backdrop of the Cold War, the developed country Contracting Parties were eager to avoid a failure of the GATT in this regard. The Soviet Union was pushing for the creation of a global trade organization within the United Nations as an alternative to the GATT.

Against this background, 22 of the Contracting Parties met in Geneva for a fourth round of multilateral trade negotiations. Further progress was made in reducing and binding tariffs. About two-fifths of international trade was now bound against tariff increases. Despite this success, concerns persisted about the position of developing countries in the system. Ministers of GATT Contracting Parties therefore decided to commission a panel of experts to analyse the challenges facing developing countries in integrating into the world trading system. The expert group summarized their findings in a report entitled "Trends in International Trade", which was published in October 1958 and later became known as the Haberler Report.[4] Among its conclusions, the Report states "We think that there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them".[5]

Besides the difficult question of how better to integrate developing countries into the world trading system, the GATT faced another mounting challenge. Since the beginning of the 1950s, six European countries (Belgium, Luxembourg, France, Federal Republic of Germany, Italy and the Netherlands,) had made considerable efforts to achieve deeper economic integration. After the successful creation of a common market for coal and steel in 1951, the six countries adopted the Treaty of Rome in 1957 which established the European Economic Community. For the GATT the question was how to manage trade relations between the members of this upcoming customs union and the other Contracting Parties. The fear was that an unsatisfactory adjustment would undermine the multilateral trading system (ICITO, 1957).

The emergence of a strong movement towards an integrated European market was one of the main driving forces behind the fifth round of multilateral trade negotiations which opened in September 1960. The negotiations were named the Dillon Round in honour of United States Under-Secretary of State, Douglas Dillon who proposed the negotiations. The main objective of this round was to transform the tariffs of the six EEC members into a common schedule applied by all six towards non-member countries. In accordance with Article XXIV of GATT, the new common external tariff could be no higher on average than the separate tariffs of the six countries. Whenever the EEC members wanted to deviate from this rule, they had to offer tariff concessions on other items as compensation. The negotiations made satisfactory progress, except in the field of agriculture.

4 In honour of Professor Gottfried Haberler, the Chairman of the Panel of Eminent Economists.

5 GATT (1958:11) Trends in International Trade. A Report by a Panel of Experts. This feeling was one of the major forces behind the creation of the United Nations Conference on Trade and Development (UNCTAD) in 1964.

Until the Dillon Round, trade negotiations dealt almost exclusively with industrial products. The major economic powers in the GATT, namely the United States and the EEC, were hesitant to include agriculture in the negotiations, since their agricultural policies were designed to detach domestic prices from global market mechanisms. In the Dillon Round negotiations, the EEC did not want to agree to new bindings on several agricultural products and argued that they needed underdetermined rates for the design of the future Common Agricultural Policy (CAP). Because of the sensitivity of the issue, the six EEC members had not yet agreed among themselves upon a common external tariff for these products (Curtis and Vastine, 1971). The United States was very concerned about this decision since they had previously enjoyed low or even zero duties for these agricultural products. Differences between the EEC and the United States on this issue brought the negotiations to the brink of failure, but finally the United States decided that the further integration of the European market should take priority over certain US agricultural export interests.

The Dillon Round also included traditional tariff negotiations. By the time the Round was concluded in July 1962, about 4000 tariff concession had been made by the Contracting Parties covering $4.9 billion of trade. Another important outcome of the negotiations was the Arrangement on Cotton Textiles which was agreed upon as an exception to the GATT rules. The Arrangement permitted the negotiation of quota restrictions with cotton exporting countries.[6] A success for developing countries was that developed countries accepted the idea that duty-free entry for tropical products should be a priority objective, but the Dillon Round brought only meagre advances in this regard. Overall the Round gave a flavour of the challenges that would mark the future rounds, namely agriculture and the integration of developing countries into the world trade system.

(b) Consolidating the GATT: 1963-86

(i) The Kennedy Round: 1964-67

The push for a new round of multilateral trade negotiations in the early 1960s came from two sides. After the relatively modest outcome of the Dillon Round, developing countries were eager to shape the trading system in a way that would open up new export opportunities for them. The second force behind launching a new round came from the United States. In a Special Message to Congress, President John F. Kennedy enumerated five challenges that had made previous United States trade policy obsolete.[7] Out of the five, the growth and steady integration of the European Common Market was perceived as the biggest threat to United States trade interests. The total volume of US exports to the EEC that constituted the Common Market amounted to $3.55 billion, about 17 per cent of total US exports and the second largest export market after Canada. Moreover, it was expected that other European countries would join the Common Market.

The United States was not against the expansion and further integration of the Common Market. On the contrary, the United States had two major reasons for supporting this process. First, enhancing economic and political cooperation among European countries, and especially between France and Germany, would minimize the risk of war. Second, the US government believed that Western European unification was an effective bulwark against communist expansion. However, the United States also had economic interests in Europe and did not want to be on the wrong side of a European tariff wall. In addition to this economic reason for promoting new multilateral negotiations, President Kennedy saw a new round as an important step in promoting the strength and the unity of the Atlantic Community. Liberalizing trade between Western Europe and the United States would result in a greater sharing of economic and political interests, and thus also help combat the expansion of communism.

[6] This arrangement lasted until 1974 when the Multifibre Arrangement entered into force.

[7] Special Message to the Congress on Foreign Trade Policy, January 25, 1962. Public Papers of the Presidents,1962,pp 68-77. (reproduced in Preeg (1970)) .The five factors were: i) the growth of the European Common Market; ii) growing pressure on the balance of payments position; iii) the need to accelerate US economic growth; iv) the communist aid and trade offensive, and v) the need for new markets for Japan and developing nations.

Invoking both economic and political arguments, President Kennedy was able to convince Congress of the necessity to start a new round of trade negotiations. The corresponding authority was contained in the 1962 Trade Expansion Act. It gave the President almost five years, until July 1, 1967, to achieve an agreement. The Act authorized the President to decrease tariffs by 50 per cent with certain product-specific exclusions. All communist countries or countries under communist influence were excluded from any tariff concessions. Even though the Trade Expansion Act remained silent on the method of bargaining, it granted the President a variety of techniques to negotiate tariff reductions. This meant, that in contrast to previous rounds, bargaining could encompass broad categories of goods rather than requiring an item-by-item approach.

The Kennedy Round was launched at a GATT Ministerial meeting in May 1963, but negotiations started officially only one year later. The negotiating parties agreed to aim at a 50 per cent linear tariff cut across-the-board, but confirmed that exceptions to the 50 per cent cut were possible. Such exceptions should be kept to a bare minimum and "be subject to consultation and justification".[8] The Kennedy Round put several new topics on the negotiating table, including the liberalization of agricultural commodities, the inclusion of non-tariff measures, and the special treatment of developing countries. Another novelty was that countries bargained with the EEC on its common external tariff and no longer with individual countries. It was important for the negotiations that the EEC had become a prominent economic player by the 1950s, perceived by the United States as a bargaining partner of comparable strength during the Kennedy Round (Preeg 1970:262; Curtis and Vastine, 1971).

The Kennedy Round ended in 1967. In the field of tariff reductions on industrial goods the results achieved were substantial, amounting to an average cut of 38 per cent covering two-thirds of developed countries' tariff-bound industrial imports, worth some $40 billion. The tariff reductions for textiles products, however, remained much below the average cuts for industrial products. In respect of other sectors and issues (e.g. agricultural products, quantitative restrictions, internal taxes), the outcome of the negotiations was meagre (Kock 1969; UNCTAD, 1968).

For the first time, the negotiating parties agreed on the inclusion of agricultural products as a major negotiating topic. Previous rounds had shied away from agriculture. At the launch of the Kennedy Round, governments had acknowledged that trade in agriculture was distorted by highly interventionist policies. The intention to address this issue was frustrated by fundamental differences between the United States and the EEC. In the end, the EEC managed to keep its CAP largely intact, but its proposal to conclude world commodity agreements for certain agricultural products, came to nothing, with the one exception of cereals.

The Kennedy Round was the first round that went beyond tariffs and dealt with certain non-tariff measures. From the beginning the negotiating parties showed some reluctance to "plunge into this rather novel field"[9] and as a consequence the results were rather modest. Only one basic code resulted, namely the 1967 International Anti-Dumping Code, which tackled the complex problem of dumping and provided a valuable model for future negotiation on similar problem areas. Another outcome of these negotiations was a separate protocol agreement embodying several non-tariff measures.

The Kennedy Round was the first GATT trade negotiation that explicitly addressed the concerns of developing countries. From the outset, the developed countries had expressed their willingness to take into account the special interests of developing countries in the negotiations. However, these negotiations were complicated by the fact that several European countries maintained and expanded preferential trade arrangements with former colonies. By the beginning of the 1960s the EEC had entered into preferential trade agreements with numerous developing countries.[10] Typically, the EEC arrangements with former

8 GATT, TN. 64/28, 21 May 1964.

9 GATT, TN. 64/28, 21 May 1964.

10 As a consequence of this policy, by 1970 the EEC had potential association agreements with six country groups making up half of the countries of the non-Communist world (Curtis and Vastine, 1971).

colonies not only granted preferential market access, but also guaranteed substantial financial aid. The most prominent example was the Yaoundé Convention which was signed in 1963 between the EEC and 18 francophone African countries. This triggered demands from developing countries outside this association for equal treatment.

While the idea of preferential market access was not opposed by developed countries, they argued that asymmetries should be avoided. Raul Prebisch, the first Secretary-General of UNCTAD, followed this idea and at the first UNCTAD conference in 1964 proposed that developed countries grant all developing countries preferential market access. This suggestion became known as the Generalized System of Preferences (GSP) and was adopted four years later at UNCTAD II in New Delhi. Under the GSP, developing countries received preferential treatment (reduced or zero tariff rates over the MFN rates) for selected products.[11]

A major objective for developing countries was that commitments made by them were not required to be fully reciprocal with those of developed countries. The idea of non-reciprocity had been formulated for the first time in the Ministerial Resolutions of GATT Contracting Parties in May, 1963. Some criticism was voiced against the adoption of the principle of non-reciprocity. The United States argued that the 1962 Trade Act obliged them to obtain reciprocity from all parties. Leading economists pointed out the possible distortionary effects of non-reciprocal market access concessions (e.g. Johnson, 1967).[12] The principle of non-reciprocity was nevertheless adopted and found its final formal expression in part IV of the GATT. The application of the principle was reflected in the fact that developing countries generally offered very few tariffs cuts and left the vast majority of tariffs unbound.

(ii) The Tokyo Round: 1973-79

Pleas made by the Director-General of GATT, Sir Eric Wyndham White to build upon the momentum of the successful conclusion of the Kennedy Round and launch a new negotiation were not supported by the GATT Members. The timing was not right for new steps in trade liberalization as governments were fighting to hold off protectionist demands. Recourse to voluntary export restraints and the unwillingness of the United States to abolish the American Selling Price (ASP) system in US customs valuation reflected the mood in the late 1960s. At the beginning of the 1970s the international monetary system faced significant challenges which eventually led to the break-up of the Bretton-Woods system of fixed exchange rates. The Nixon Administration, under protectionist pressure, imposed a temporary import surcharge of 10 per cent to moderate the growing US merchandise trade deficit. In Congress, a view emerged that the United States had paid too high a price in the past trade negotiations, helping other economies more than their own to expand exports (Low, 1993; Ostry, 1997). A major motivation for the United States to start multilateral trade negotiations was the wish to rectify this perceived imbalance and to reduce the trade deficit. Furthermore, the US administration feared that the enlargement of the EEC would have a negative impact on US trade and investment. It was believed that the possible application of the Common Agricultural Policy (CAP) in the three new member countries would hamper US exports of agricultural goods. In particular, the membership of the United Kingdom, which accounted for three-quarters of total US investment in the EEC, was perceived as a threat.[13] Another concern shared by other GATT Contracting Parties, was the growing importance of non-tariff measures, which became more prominent as industrial tariffs came down.

The EEC was less enthusiastic, in the first instance, than the United States about starting another round of multilateral trade negotiations. The focus of European concern was primarily the integration of the common market and the inclusion of new members. However, the break up of the Bretton Woods

[11] Since GSP schemes violated the MFN principle, in 1971 the Contracting Parties approved a waiver to Article I of GATT for a period of 10 years. UNCTAD became the focal point within the UN system for monitoring and assessing the GSP.

[12] Subsequent empirical studies found evidence for this scepticism (Cooper 1972; Murray 1973; Baldwin and Murray 1977).

[13] On 1 January, 1973 Denmark and Ireland joined the EEC along with the United Kingdom.

System and the subsequent weakening of the US dollar put the EEC under mounting pressure. The EEC was looking to introduce exchange rate discussions into the negotiation and sought the definitive abolition of the ASP in US customs valuation.[14]

When the Tokyo Round was launched in 1973, it was regarded as the most comprehensive and wide-ranging of all rounds since the inception of GATT. Tokyo was chosen strategically as the location to initiate a new multilateral round of trade negotiations. Japan had become one of the biggest world exporters and several other Asian economies were gaining expanding shares of world trade. In the Tokyo Declaration of September 12, 1973 the Contracting Parties committed to the "progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade". The Declaration recognized "the need for special measures to be taken in the negotiations to assist the developing countries in their efforts to increase their export earnings and to promote economic development". Mention was made of the special needs of the least-developed countries. The main protagonists of the round were again developed countries, in particular the United States, the EEC and Japan. However, since the agenda also included a variety of development issues, countries not Contracting Parties of GATT were invited to participate in the negotiations. Nearly thirty developing countries took up this invitation increasing the number of participants to over 100 countries.

Soon after the launch of the negotiations a number of political and economic factors emerged that brought negotiations almost to a standstill. Developed countries experienced an economic downturn and increasing difficulties with their balance of payments. Rising unemployment and inflation fuelled protectionist tendencies and greater liberalization suddenly seemed an insurmountable challenge (Commonwealth Secretariat, 1978). As a consequence, the developed countries agreed to focus on making world trade fairer rather than freer, thus putting non-tariff measures in the spotlight of the negotiations. It was recognized that tariffs were only one factor influencing international trade, and that the trading system needed greater discipline in the application of non-tariff measures.

The negotiations on agriculture presented the greatest difficulty from the beginning. Attempts to reconcile the positions of the United States and the EEC failed during 1975 and 1976 and held up progress in almost every other area of the negotiations. In July 1977 both parties agreed to drop most substantive questions dividing them, such as market access and subsidies. This at least allowed the negotiations to go forward. At the end of the round, the negotiations in the Group on Agriculture resulted in two agreements (bovine meat and dairy products) and a proposal to establish a multilateral agricultural framework. Agriculture had, once again, proved intractable. (UNCTAD, 1982; Ostry, 1997).

The negotiations on tropical products were more successful. Tropical products had been singled out in the Tokyo Declaration as a priority sector, given the particular interest of developing countries. In the negotiations, developing countries requested the removal of all trade barriers faced by tropical products in developed countries. A majority of developed countries acceded to this request and liberalized trade on many of those products without seeking reciprocity from developing countries.[15] The liberalization measures were a combination of preferences and MFN tariff reductions. The most significant measures affected coffee, tea, and cocoa, while markets for fishery products, sugar, and tobacco were opened to a lesser degree.

In the tariff field the agreed cuts were far from the 60 per cent average originally envisaged. However, the tariff reductions covered about $126 billion or some 90 per cent of industrial trade in 1976 (US Department of Commerce, 1982). The United States agreed to reduce its average tariff on industrial products from 6.3 to 4.3 per cent, and the EEC from 6.5 to 4.6 per cent (see Table 7). In order to calculate the amount of tariff reduction, Switzerland suggested a mathematical (non-linear) formula which would cut high tariffs to a greater extent than lower tariffs and thereby contribute to a greater

[14] A comprehensive account of the preparation for and conduct of the Tokyo Round negotiations, together with an evaluation of its results, is found in Winham, 1986.

[15] Only the United States asked for some reciprocity (Kemper, 1980).

harmonization of the tariff schedule. This formula, which later became known as the Swiss formula, was used by the major participants and applied to a wide range of products.[16] The vast majority of the tariff cuts were to be implemented in eight equal annual instalments. Several exceptions were agreed upon. For example, the United States lowered its tariffs on imports (except for textile and clothing products) from least-developed countries in one step on 1 January, 1980.

Despite these substantial cuts, the outcome of the Tokyo Round with respect to tariffs fell short of the expectations of developing countries. Developing countries had requested that the GSP be maintained or even improved. Developed countries argued that MFN tariff cuts also benefited developing countries because of their binding and unconditional nature. They further pointed out that efforts had been made to avoid the erosion of preferences (Commonwealth Secretariat, 1978). However, the Tokyo Round generally reduced preference margins that developing countries enjoyed under GSP. On the imports of the EEC, Japan, and the United States from beneficiaries of their respective preferential schemes, which amounted to $19.4 billion in 1976, the trade-weighted average preference margin declined from 9.2 to 6.7 per cent (UNCTAD, 1982). In addition, MFN tariffs were cut by less than average on products not covered by the GSP and which were of particular export interest of developing countries. The average MFN tariff on non-GSP products decreased from 17.4 to 13.5 per cent and thus the tariff cut only amounted to about 22 per cent compared to the roughly 33 per cent overall reduction (UNCTAD, 1982). Despite this criticism from developing countries, it should be noted that tariffs for a large number of products of potential export interest for developing countries experienced larger cuts (Kemper, 1980).

Paragraph 9 of the Tokyo Declaration stated that "consideration shall be given to improvements in the international framework for the conduct of world trade which might be desirable in the light of progress in the negotiations". The first item in the programme of the Group "Framework" was the question of how to create a legal framework for the special and differential treatment for developing countries. The negotiating parties agreed on a clause that allows GATT Members to accord differential and more favourable treatment to developing countries without according the same treatment to other countries, notwithstanding the MFN provisions of Article I of the GATT. This provision became known as the "Enabling Clause". The Enabling Clause constituted a comprehensive specification of special and differential treatment for developing and least-developed countries and it amounted to a permanent waiver from the MFN clause.

Developed countries insisted that the Enabling Clause was linked to the question of reciprocity. More precisely, developed countries wanted language indicating that developing countries were expected to accept greater obligations under GATT as their economic situation improved. Moreover, the extent of special and differential treatment was to become more limited as the development, financial and trade needs of developing countries changed. Despite strong resistance from developing countries, the so-called "graduation provision" entered the final agreement. Some observers feared that this graduation could be used by developed countries to discriminate among developing countries in an arbitrary manner (UNCTAD, 1982).

A major accomplishment of the Tokyo Round was the introduction of several agreements on non-tariff measures, known as "codes". The codes covered the following :

(1) The Customs Valuation Agreement provided greater uniformity in the methods of calculating the value of goods on which *ad valorem* duties were based. It therefore limited the arbitrary valuation of imported goods which in many cases restricted trade;

(2) The Agreement on Import Licensing Procedures was designed to simplify the administration of import licensing and to prevent licensing from becoming an import barrier in its own right;

[16] It may be noted that the coefficient used differed from country to country. Japan, Switzerland and the United States used 14, whereas Australia, EEC and the Scandinavian countries used 16. Canada used a slightly modified formula. Other countries such as Iceland and New Zealand did not follow the formula approach and offered item-by-item based tariff reductions.

(3) The Agreement on Government Procurement aimed at promoting greater competition in the government procurement market by opening it up to foreign firms;

(4) The Agreement on Subsidies and Countervailing Measures sought to control the use of subsidies and ensure they were not an unwarranted distortion of trade. Countervailing duties should not impede trade in an unjustifiable way;

(5) The Agreement on Technical Barriers to Trade (Product Standards) aimed to prevent governments from establishing standards that created unnecessary obstacles to international trade. Furthermore, countries were encouraged to use existing international standards and to be transparent in establishing and applying national standards;

(6) The Antidumping Agreement regulated the use of anti-dumping duties and associated procedures when governments decided to impose such duties in situations where exports were sold at less than their normal value.

The Tokyo Round did not produce an agreement on safeguard measures although discussions had taken place in relation to the concept of selectivity. Safeguard measures could be taken under Article XIX of GATT where increased imports threatened or caused serious injury to a domestic injury. Certain countries sought the right to apply discriminatory safeguard measures whereas others argued that the MFN rule should apply. Some observers considered the lack of agreement on safeguards as a major shortcoming of the Tokyo Round (UNCTAD, 1982).

In the event, only a handful of developing countries subscribed to the codes.[17] Some authors argued that it would have been in the interest of developing countries to subscribe to these agreements. Opting out of the codes reduced the opportunity to participate effectively in shaping them. The list of signatories differed for all the codes leading to a patchy coverage in terms of legal disciplines. The codes were drafted as stand-alone agreements that obliged only those countries that had signed and ratified them to abide by their provisions. However, since GATT obligations were generally applied on a MFN basis, GATT Members that had not signed the codes generally received the same treatment from the signatories as those who had signed.

Finally, the Tokyo Round did not tackle some non-tariff measures in areas of interest to developing countries. It left intact the NTMs on imports of agricultural goods and foodstuffs, textiles and clothing products, iron and steel products, consumer electronics, and shipbuilding. These barriers were substantial in the majority of developed countries and impeded considerably the exports of developing countries. The emerging economies in Asia were especially hurt by these measures. Several observers (UNCTAD, 1982; Deardorff and Stern, 1982) came to the conclusion that the Tokyo Round was only of limited significance to developing countries.

Despite these limitations, the negotiations on non-tariff measures demonstrated the willingness of governments to deepen and to an extent broaden the scope of the GATT. The negotiations provided an important impetus for the Uruguay Round some years later. However, the failure to reform the safeguard provisions and to eliminate quantitative restrictions, such as voluntary export restraints (VERs), fed protectionist tendencies at the time.

The overall results of the negotiations did not meet the expectations of developing countries. Not only was the outcome on NTMs disappointing, the effects of the tariff reductions for developing countries were also considered as modest (Deardorff and Stern, 1982). The spokesman for the developing countries at the thirty-fifth session of the Contracting Parties held at the end of the Tokyo Round in November 1979 expressed this frustration, stating that "it was difficult for the developing countries to determine what additional benefits were obtained in the negotiations, since the results did not correspond to their aspirations as expressed in the Tokyo Declaration" (GATT, 1979). Despite these misgivings, observers of the negotiations agree that the Tokyo Round marked an important change in the structure of the trade

[17] See Table 13 in subsection 2.(c).

negotiations (Winham, 1986 and 1990; Ostry, 1997). Even though developed countries dominated by and large the Round's agenda, developing countries participated actively and, for the first time, made a significant impact on GATT negotiations. The economic weight of developing countries in the world economy would further increase in following years, and hence also their role in the GATT.

(iii) The post-Tokyo Round period

The decade of the 1980s began with a radical swing in US economic policy which had far-reaching consequences for the entire international economic system. In 1981, the new United States' President Ronald Reagan announced drastic tax cuts to stimulate the United States' economy which had stagnated in 1980 and recorded a sharply rising federal budget deficit. The Reagan administration, under increasing protectionist pressure, persuaded Japan to apply voluntary export restraints (VERs) on automobiles in 1981. In the following years, the United States' steel industry brought a group of largely successful countervailing duty and antidumping petitions against suppliers from Brazil, the EEC, Japan, Mexico and Republic of Korea. President Reagan announced a negotiating programme to limit steel imports to 18.5 per cent of the United States' market. The United States was not the only one to make extensive use of trade remedies. The EU, followed by Canada and Australia, invoked "unfair trade" arguments and launched numerous antidumping investigations.

In order to fight double-digit inflation the Chairman of the US Federal Reserve System, Paul Volcker, introduced a strict monetary policy which had severe repercussions for the international macroeconomic system. As US interest rates surged, several developing countries found themselves unable to finance their debt obligations and were pushed into a debt crisis. In 1981 it became evident that increased protectionism and a growing North-South divide needed to be addressed and that the world trade system had to be put back on track again. The Contracting Parties, therefore, agreed to hold a first Ministerial meeting in 1982, the first since the 1973 meeting that had launched the Tokyo Round.

The meeting was not a success and brought the GATT close to a breakdown (Croome, 1995). Agriculture, in particular, proved to be a major source of conflict. The United States' delegation, backed by Australia and New Zealand, voiced the complaints of United States' farmers that they were not only denied access to the European market, but also third-country markets because of massive European subsidies (Ostry, 1997). The EEC argued that the CAP was compatible with the GATT and that the United States itself intervened heavily in its agricultural market. Another area of conflict concerned the inclusion of services as a new topic for trade negotiations. Developing countries strongly opposed this project, which had been put forward by the United States.

The final Ministerial Declaration achieved barely more than an expression of the determination to create "a renewed consensus in support of the GATT system". This meagre outcome was a clear signal that a fresh and wide-ranging round of multilateral negotiations was needed. The work programme established by the Ministerial meeting provided important guidelines for the preparation of future negotiations (Low, 1993; Croome, 1995). The GATT started to work on agriculture, services, trade in counterfeit goods and other issues, and thus set the main parameters for the subsequent round.

In the light of these rather mixed results, the US government abandoned its overriding commitment to multilateralism and started making active use of regional approaches to trade. The first United States Regional Trade Agreement, the Caribbean Basin Initiative, was proposed by President Reagan in February 1982 and one year later the United States started negotiating a free trade area with Israel. The reasons for this shift in approach were several. Fundamentally, the view in the United States was that while the US economy was the most open in the world, many others were imposing obstacles on trade, most notably Japan. It would require bilateral and multilateral approaches to trade relations to redress these asymmetries (Ostry, 1997). Furthermore, the US government had increasing doubts about the viability of the multilateral process. A multi-track approach to policy was regarded as the most appropriate strategy, particularly in terms of securing buy-in from others to multilateral negotiations, which were seen as part of the solution to the existing difficulties.

In high-level meetings following the Ministerial Meeting of 1982, support for a new round grew among developed countries. In contrast, developing countries showed considerable reluctance, fearing that the trade topics which were vital for them, such as textiles and agriculture, would not receive the necessary attention. In April 1985, the trade ministers of OECD countries agreed that a preparatory meeting should take place to launch a new round. They also stressed the importance of developing country participation in the preparations (European News Agency, 1986). A GATT Council meeting was held in July 1985 in order to set the date for a preparatory meeting for a new round. Several developing countries, most prominently Brazil and India, established a list of conditions which had to be fulfilled for the negotiations to take place. Among the numerous conditions were the recognition of the undesirability of the Multifibre Agreement and an agreement on safeguards. These conditions were unacceptable to the supporters of the new round and it proved impossible to reach agreement. The United States considered that the only way out of this impasse was to organize a session of the Contracting Parties. Decisions in this highest GATT body did not have to be taken by consensus, but could also be approved by a two-thirds majority of votes. The session reached agreement that "a preparatory process on the proposed new round of multilateral trade negotiations has now been initiated". And shortly afterwards, the Contracting Parties decided that a Preparatory Committee should start organizing a ministerial meeting, which was to be held in September, 1986.

(c) From the GATT to the WTO

(i) The Uruguay Round Negotiations: 1986-94

The preparations for the Ministerial Meeting turned out to be as painful as the decision to launch a new round. In nine meetings, from January to July 1986, the Preparatory Committee discussed all topics on the list for the new round of negotiations without making significant progress. Several major developing countries opposed the inclusion of new subjects, such as services, trade aspects of intellectual property rights, and trade-related investment measures. They regarded the inclusion of these new issues as a threat to the ability of governments to intervene in the economy (Ostry, 1997). As the July deadline for recommendations by the Preparatory Committee approached and no substantive results had been achieved, a small group of developed countries (EFTA countries, Australia, Canada and New Zealand) decided to form an informal working group. They invited 20 developing countries who were supposedly eager to see the new round launched to join them. The EC, Japan and the United States first stood back and joined the group only in the last stages. At the end of July, the group, led by Switzerland and Colombia, presented a draft declaration for the Ministerial Meeting, which was to become the basis for negotiation.

On 14 September, 1986 the Ministerial Meeting opened in Punta del Este, Uruguay.[18] Two major issues still had to be settled. First, on the topic of agriculture the final text called for "greater liberalization", as requested by developing countries, and at the same time for "more discipline and predictability," taking into account the position of the EC. The negotiations sought a balance between the two objectives. The second source of conflict was about the new issues – services, intellectual property rights, and investment. The participants eventually agreed to cover all three aspects, but in a way such that they were sufficiently separated from the traditional areas of GATT negotiations. After a week of intensive negotiations, the Punta del Este meeting was concluded on 20 September. The Punta del Este Declaration was adopted and the Uruguay Round had finally been launched.

The Punta del Este Declaration contained mandates for negotiations on tariffs, non-tariff measures, tropical products, natural resource-based products, textiles and clothing, agriculture, GATT Articles, safeguards, the codes of the Tokyo Round, subsidies and countervailing measures, dispute settlement, trade-related aspects of intellectual property rights, trade-related investment measures, the functioning of the GATT system and trade in services. The wide range of topics made the Uruguay Round the most

[18] A developing country venue had been chosen to underscore the development aspect of the Round.

ambitious trade negotiation ever undertaken. Overall, 15 negotiating groups were formed and began their work in February 1987.

The Ministerial Meeting in Montreal in December 1988 was supposed to serve as a mid-term review of the negotiations. Six negotiating groups were able to report substantial progress, but all the others were blocked by the diverse interests among participants. The most contentious issues in Montreal proved to be agriculture, safeguards, TRIPS, and textiles and clothing. The negotiations were under additional strain on account of the fact that a new President had been elected in the United States and in the EC new commissioners were being installed.

The negotiating group on agriculture was dominated by disagreements between the United States and the EC. The United States insisted on the abolition of all trade-distorting subsidies in agriculture and proposed an agreement on short-term reform measures. The EC was only prepared to make limited and gradual reductions of agricultural subsidies. The blockage on agriculture brought to a halt the negotiations on the other unresolved subjects. In order to avoid the loss of progress made on other issues, the Ministers decided at the end of the Montreal meeting to give more time to seek agreement. They set a new deadline of four months, until April 1989. Little progress was made in this interval and governments agreed to continue the negotiations.

Agriculture dominated the debate in the 18 months between April 1989 and the Ministerial Meeting in Brussels in December 1990, but did not bring the EC and the United States any closer. During the meeting the positions of both parties remained far apart and all efforts to find a compromise remained fruitless. The failure of this Ministerial Meeting was a severe blow to the GATT's credibility and implied that the overall deadline for 1 June 1991, would not be met. Fortunately, in May 1991, President Bush was successful in lobbying for an extension of his fast-track negotiating authority by two years, so that the negotiations could continue in the summer of the same year.

The negotiations received fresh impetus with the decision of the EC Commission to reform the CAP. In the hope of an impending deal in agriculture the negotiations made considerable progress and soon the shape of a final agreement began to emerge. The draft agreement contemplated a unified dispute settlement mechanism and a new multilateral trade organization to replace GATT. In December 1991 the Secretariat issued a version of the Draft Final Act, but once again, governments were not ready to adopt it. The disagreement was again between the EC and the United States on the issue of agriculture. For the EC the compromise on agriculture was not acceptable since it threatened the foundation of the CAP, whereas for the United States, supported by a range of agricultural exporting economies, it did not go far enough. This deadlock was only broken nearly one year later, when both parties met in Washington and agreed on a set of changes to the Draft text.

In the meantime, other participants began to express their fatigue and frustration with the Uruguay Round. With the agricultural blockage solved, they feared that the EC and the United States would overlook their concerns and therefore presented additional demands. The situation became further complicated by the signing of NAFTA in December 1992 and the inauguration of Bill Clinton as new US President in January 1993. Time to find a final agreement grew shorter and shorter as the US administration's fast track authority was to expire on June 1, 1993. The Uruguay Round had again reached a low point and some observers concluded that the Round would continue to 1994 and beyond.

At this critical moment, the climate for the Round began to improve. In March 1993, 37 developed and developing countries sent a letter to the Governments of the United States, EC, and Japan asking them "to display leadership at this critical time and to give the Round the priority it so clearly deserves" (cited in Croome, 1995). In April, the United States and the EC reached an agreement on market access for heavy electrical equipment and settled a bilateral dispute on government procurement. Finally, the US Congress extended President Clinton's fast-track negotiating authority until 15 April, 1994, which required the completion of substantive negotiations by 15 December, 1993. This deadline gave the participants the necessary push to go forward with the negotiations.

In the summer and fall of 1993 the Round made considerable progress, especially in the area of market access, institutions, and services. However, it became obvious that on the most sensitive issues a settlement between the United States and EC was needed. The two parties started to negotiate bilaterally and after several meetings in Washington and Brussels they presented their results to the other partners at the beginning of December. Developing countries showed some reluctance, but since few days were left before the final deadline, they returned to the negotiating table. More and more pieces of the Uruguay Round puzzle began falling into place. The last days were marked by frenzied activity and the negotiations continued until the morning of 15 December. The same day in the afternoon the Director-General, Peter Sutherland, announced the end of substantive negotiations and a consensus among all participants. Seven long years of multilateral trade negotiations had finally succeeded and brought the most massive reform of the multilateral trading system since the inception of GATT.

(ii) The outcome of the Uruguay Round

The amount of ground covered by the Uruguay Round was impressive: twenty-five thousand pages detailed all aspects of the Agreement. The legal structure of the Agreement reflects the main contributions of the Round. The WTO Charter, a mere ten pages long, precedes the whole document and is the umbrella that embraces all parts. It establishes the WTO as international organization and defines its functions and structure. Furthermore, it has four important annexes which contain all of the other negotiated texts of the Round. Annex 1 to Annex 3 are part of a "single-undertaking" approach and thus binding on all Members. Annex 1 contains the three major agreements, namely on goods (GATT 1994 and eighteen related agreements), services (GATS and Annex 1 B), and trade-related aspects of intellectual property rights. Annex 2 covers the Dispute Settlement Understanding and Annex 3 the Trade Policy Mechanism. Annex 4 departs from the single-package idea since it contains four plurilateral agreements that only apply to those Members who signed them.

In the field of tariffs, developed countries agreed to cut their tariffs on industrial goods from an average of 6.3 to 3.8 per cent, with most of the cuts to be phased in over five years starting from 1 January, 1995.[19] Another major achievement was the increase in bindings of tariffs by all parties. Measured by the number of bound product lines, developed countries increased their percentage from 78 to 99 per cent, economies in transition from 73 to 98 per cent, and developing countries from 21 to 73 per cent. This increase was in some measure due to the fact that all tariffs on agricultural goods were bound. The high percentage of bound tariffs rendered the world trading system more stable and predictable.

The Uruguay Round was the first time that the multilateral trading system succeeded in covering agricultural trade in a substantive manner. The programme for liberalizing agriculture was set for ten years and the policy approach was to divide measures into three categories – market access, domestic support and export subsidies. As already indicated, all agricultural tariffs were bound. Domestic support was measured as a composite of interventions called the Aggregate Measure of Support. In each of the three pillars, Members undertook specific reduction commitments. A "peace clause" was intended to guard against legal action that might otherwise have been feasible under WTO provisions on subsidies. In retrospect, many commentators have suggested that while the Uruguay Round Agreement on Agriculture may not have occasioned much trade liberalization, it had the virtue of incorporating agriculture into the multilateral trade rules and set the scene for future liberalization.

Another success of the Uruguay Round was the Agreement of Textiles and Clothing which brought to an end the exceptional treatment of this sector. The parties agreed that all quantitative trade restrictions would be phased out over a period of ten years and hence, in the end, the textiles and clothing sector would become fully integrated into the multilateral trading system. This was a major positive result for the developing countries as textiles and clothing accounted for a similar share to that of agricultural products in their merchandise exports. On the other hand, it should be noted that many tariffs in this sector remained well above the average tariff on industrial products in developed countries.

[19] GATT, The Results of the Multilateral Uruguay Round Negotiations, Geneva, November 1994.

The Uruguay Round introduced strengthened disciplines in the field of trade remedies.[20] The Agreement on Safeguards provided stricter rules on the temporary use of safeguard measures as well as dealing with compensation issues. In addition, it eliminated the use of so-called "grey-area" measures, such as voluntary export restraints. The provisions on subsidies established for the first time a definition of subsidies and developed clearer rules and procedures. The new rules on anti-dumping further clarified the rules on the determination of dumping, the use of anti-dumping measures and causality between dumping and injury. Furthermore, the Agreement elaborated upon the procedures to be followed in initiating and conducting anti-dumping investigations, and in implementing anti-dumping measures.

The Dispute Settlement System underwent a major overhaul in the Uruguay Round. All trade disputes between Members were to be handled by the Dispute Settlement Body (Annex 2). The previous agreements on dispute settlement had no fixed timetables and rulings could easily be blocked. The new Agreement introduced a more structured process with stricter deadlines in order to ensure prompt settlement of disputes. In addition, it was made impossible for countries losing a case to block the adoption of a ruling. It was hoped that the strengthened disciplines would limit trade frictions and contribute to the predictability and efficiency of the multilateral trading system.

Annex 3 introduced the Trade Policy Review Mechanism (TPRM) as an instrument to review trade policies and practices of WTO Members and thereby to contribute to improved adherence to WTO rules through greater transparency. It was agreed that the reviews would be conducted on a regular basis, but the frequency of review depends on a Member's share in world trade. Each review consists of two documents – a policy statement prepared by the government under review, and a detailed report written independently by the WTO Secretariat.

The Agreement on Trade in Services (GATS)

Two very important results of the Uruguay Round were the establishment of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS). Neither of these additions to the multilateral trading rules at the time of the establishment of the World Trade Organization in 1995 have been dealt with fully in this Report. This omission is a reflection of space limitations and not a view on the significance of these additions to the trading system. On the contrary, both Agreements have taken the system in new and significant directions.

The GATS[21] was inspired by essentially the same objectives as its counterpart in merchandise trade. Services transactions account for over 60 per cent of global production and employment, but represent no more than 20 per cent of total trade (measured on a BOP basis).[22] Many services, which have long been considered genuine domestic activities, have increasingly become internationally mobile. This trend is likely to continue, owing to the introduction of new transmission technologies (e.g. electronic banking, tele-health or tele-education services), the opening up in many countries of long-entrenched monopolies (e.g. voice telephony and postal services), and regulatory reforms in hitherto tightly regulated sectors such as transport. Combined with changing consumer preferences, such technical and regulatory innovations have enhanced the "tradability" of services and, thus, created a need for multilateral disciplines.

The GATS applies in principle to all service sectors, with two exceptions. Article I(3) of the GATS excludes "services supplied in the exercise of governmental authority". These are services that are supplied neither on a commercial basis nor in competition with other suppliers. Cases in point are social security schemes and any other public service, such as health or education, that is provided under non-market conditions. Further, the Annex on Air Transport Services exempts from coverage measures affecting air traffic rights and services directly related to the exercise of such rights.

20 See the discussion in subsection 2.

21 This material is largely taken from http://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

22 Statistics on trade in services are highly incomplete. A proper reckoning of services in international trade, based on the definition of services under the GATS, would certainly amount to more than 20 per cent of world trade.

The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons. Cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail). Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service. Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains). Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

The reason for this seemingly complicated set of distinctions regarding modes of supply reflects the fact that many services may be supplied only through the simultaneous physical presence of both producer and consumer. There are thus many instances in which, in order to be commercially meaningful, trade commitments must extend to cross-border movements of the consumer, the establishment of a commercial presence within a market, or the temporary movement of a service provider. Even where suppliers can choose among modes of supply, the modal taxonomy of the GATS is necessary in order to capture the use of different options by suppliers.

The GATS expressly recognizes the right of Members to regulate the supply of services in pursuit of their own policy objectives, and does not seek to influence these objectives. Rather, the Agreement establishes a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner and do not constitute unnecessary barriers to trade. A major difference between trade in goods and trade in services concerns regulation – services are typically more intensively regulated than goods. This relates not only to the various options in regard to modes of delivery. It is also to do with the intangibility of services, the fact that consumption and production may be simultaneous, and that many seemingly similar or even identical services are highly heterogeneous. These factors are among the reasons that account for the relative regulation-intensity of many service sectors.

Obligations contained in the GATS may be categorized into two broad groups. First, there are general obligations, which apply directly and automatically to all Members and services sectors. Second, there are obligations triggered by specific commitments relating to market access and national treatment in specifically designated sectors. Such commitments are laid down in individual country schedules whose scope may vary widely among Members. The relevant terms and concepts are similar, but not necessarily identical to those used in the GATT. For example, national treatment is a general obligation in goods trade and not negotiable as under the GATS.

Among the general obligations are MFN treatment (although certain time-bound exemptions are permitted), transparency obligations, the establishment of administrative review and appeals procedures, and disciplines on the operation of monopolies and exclusive suppliers. Obligations contingent on specific commitments include market access and national treatment, which are negotiated commitments in specified sectors. Market access commitments may be made subject to various types of limitations. For example, limitations may be imposed on the number of services suppliers, service operations or employees in the sector, the value of transactions, the legal form of the service supplier, or the participation of foreign capital. National treatment commitments imply that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the Member's own service industry. Again, the extension of national treatment in any particular sector may be made subject to conditions and qualifications.

Members are free to tailor the sector coverage and substantive content of such commitments as they see fit. The commitments of Members thus tend to reflect national policy objectives and constraints, overall

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

Each WTO Member is required to have a Schedule of Specific Commitments which identifies the services for which the Member guarantees market access and national treatment and any limitations that may be attached. The Schedule may also be used to assume additional commitments regarding, for example, the implementation of specified standards or regulatory principles. Commitments are undertaken with respect to each of the four different modes of service supply.

Most schedules consist of both sectoral and horizontal sections. The "Horizontal Section" contains entries that apply across all sectors subsequently listed in the schedule. Horizontal limitations often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. The "Sector-Specific Sections" contain entries that apply only to the particular service.

The Agreement on Trade-Related Intellectual Property Rights (TRIPS)

The TRIPS Agreement[23] covers copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations), trademarks including service marks, geographical indications including appellations of origin, industrial designs, patents including the protection of new varieties of plants, the layout-designs of integrated circuits, and undisclosed information including trade secrets and test data. The Agreement comprises three main features – substantive intellectual property standards, domestic enforcement provisions, and dispute settlement.

In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the minimum standards of protection are specified. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement.

The enforcement provisions of the TRIPS Agreement deal with domestic procedures and remedies for the enforcement of intellectual property rights (IPR). The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify the procedures and remedies that must be available so that right holders can effectively enforce their rights. The Agreement's dispute settlement provisions makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition the Agreement provides for certain basic principles, such as national and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. Finally,

[23] This material is taken from http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm. See this site for further details.

Article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Members may adopt, consistently with the other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive.

(iii) The aftermath of the Uruguay Round

Despite the considerable success of the Uruguay Round in reforming the multilateral trading system, it was evident that in many fields more work was needed. As part of the Uruguay Round agreements an ambitious timetable was established for future negotiations on more than 30 items. In some areas, the timetable detailed the assessments or reviews of certain commitments, most importantly the Agreement of Textiles and Clothing. In other areas, it included the time and date for new or further negotiations. Negotiations on services took the most prominent place in the schedule. Many of the market commitments of GATS did little more than consolidate the status quo in some sectors. The United States, in particular, pushed for more. In 1996 and 1997, GATS negotiations were successfully extended to include liberalization involving more than 95 per cent of the global market in telecommunication services as well as to large parts of the financial services industry. Important regulatory innovations were also secured in the telecommunications sector. The completion of the financial services negotiations in the midst of the Asian financial crisis demonstrated the determination of WTO members to close an agreement in spite of difficult market conditions One may also note that this same spirit of international cooperation, based on established commitments, contributed to the maintenance of open trade notwithstanding the challenges posed by financial turmoil.

In addition to pursuing the built-in Uruguay Round agenda, further efforts were promoted by some Members to accommodate new issues that emerged. One issue that was brought up by civil society concerned the transparency of the WTO as an international organization. Starting in 1995, proposals were made on how to eliminate GATT procedures which denied public access to documents, until action had been taken to de-restrict the access. Following this initiative, the WTO adopted new procedures on document access in 1996 and 2002 establishing that all WTO documents are in principle unrestricted. Other initiatives were also taken to improve transparency. (See subsection 6 below for a more detailed discussion).

Another concern taken up by the WTO was regionalism. During, and following the Uruguay Round, regionalism had exerted a growing influence on international trade relations. Prior to the 1980s, regional arrangements in international trade were largely concentrated on the EC and EFTA. There were other agreements as well, but these implicated much smaller shares of trade. After the failure of the GATT Ministerial Meeting in November 1982, the United States abandoned its long-standing opposition to PTAs and opened negotiations with Canada which were successfully concluded in 1989. The United States had also concluded a free trade agreement earlier with Israel. The view was increasingly gaining ground that regional agreements complemented rather than undermined multilateral trade liberalization. By the end of the Uruguay Round almost all WTO members had signed one or several regional agreements. The continued growth of such agreements around the world led to increasing fears about their inherent discrimination and their impact on world trade. In February 1996, the WTO established a Committee on Regional Trade Agreements (CRTA) with the task of examining these agreements and assessing whether they are consistent with WTO rules. The CRTA had limited success in focusing attention on this issue and it was carried forward into the Doha negotiations (see subsection 5 for a further discussion of regionalism).

The WTO Agreement required that Ministerial meetings be organized at least every two years. The Singapore Ministerial Meeting in December 1996 provided an opportunity to start discussions over the items that would be added to the agenda of the upcoming round. The United States proposed the launch of negotiations on transparency in government procurement, while the EU pushed for the inclusion of trade facilitation. The Clinton administration tried to include talks on trade and labour rights, but was

not able to overcome the fierce resistance of developing countries. The EU wanted to see the topics of trade and investment as well as trade and competition on the agenda, although the United States voiced scepticism on both topics. In the end, WTO Members decided to set up three working groups on trade and investment, trade and competition, and transparency in government procurement. Together with trade facilitation, the four subject areas became known as the "Singapore issues." These issues were taken up again in the context of the Doha negotiations and only trade facilitation survives on the Doha agenda. One major achievement of the Singapore Ministerial Meeting was the Information Technology Agreement (ITA), which had been promoted by the United States. The ITA provided for further tariff cuts on IT products and was signed by all major traders in this sector, including Chinese Taipei, which was not yet a WTO Member.[24]

The next Ministerial Meeting took place in Geneva in May 1998 and was mainly devoted to marking the 50th anniversary of multilateral trading system. The notion that it was time to launch a new round of negotiations met considerable opposition from a number of developing countries. Led by India, several developing countries requested a review of the outcome of the Uruguay Round before launching a new round. They argued that they were unable to meet the obligations undertaken in the Uruguay Round. Tensions were heightened when the Cairns group insisted on the elimination of agricultural subsidies as a precondition for a new round. The EC refused to agree to any such commitment up front and pushed, together with Japan, for negotiations on trade and investment as well as trade and competition. Several weeks of discussion in Geneva did not bring the negotiating parties closer on a range of outstanding issues. As a consequence, the Seattle Ministerial Meeting in late 1999 was not able to agree on an agenda. As no new schedule for negotiations was accepted, the Seattle Meeting was largely perceived as a failure. The multilateral trading system needed to take a breath and await a more favourable political environment.

New negotiations were eventually launched in Doha in November 2001. The Doha Round encompassed a wide range of negotiating issues and a work programme, including market access in agriculture and manufactured goods, trade in services, TRIPS, trade and investment, trade and competition, transparency and government procurement, trade facilitation, WTO rules, dispute settlement, trade and environment, electronic commerce, small economies, trade, debt and finance, transfer of technology, special and differential treatment, and implementation-related issues and concerns. Not all these issues were slated for negotiations, and some of them have been dropped as the negotiations have proceeded. At the time of writing (early 2007), the Doha Round is still in progress and it will not therefore be subject to further analysis in the present context.

[24] China joined the ITA when it became a WTO Member in 2001.

Table 4
GATT/WTO Trade Rounds, 1947-2007

Name of round or meeting	Period and number of parties	Subjects and modalities	Outcome
Geneva	1947 23 countries	Tariffs: item-by-item offer- request negotiations	Concessions on 15,000 tariff lines
Annecy	1949 33 countries	Tariffs: item-by-item offer- request negotiations	5,000 tariff concessions; 9 accessions
Torquay	1950 34 countries	Tariffs: item-by-item offer- request negotiations	8,700 tariff concessions; 4 accessions
Geneva	1956 22 countries	Tariffs: item-by-item offer- request negotiations	Modest reductions
Dillon Round	1960-1 45 countries	Tariffs: item-by-item offer- request negotiations, motivated in part by need to rebalance concessions following creation of the EEC	4,400 concessions exchanged; EEC proposal for a 20 percent linear cut in manufactures tariffs rejected
Kennedy Round	1963-1967 48 countries	Tariffs: formula approach (linear cut) and item-by-item talks. Non-tariff measures: antidumping, customs valuation	Average tariffs reduced by 35 percent; some 33,000 tariff lines bound; agreements on customs valuation and antidumping
Tokyo Round	1973-1979 99 countries	Tariffs: formula approach with exceptions. Non-tariff measures: antidumping customs valuation, subsidies and countervail, government procurement, import licensing, product standards, safeguards, special and differential treatment of developing countries	Average tariffs reduced by one-third to six percent for OECD manufactures imports; voluntary codes of conduct agreed for all non-tariff issues except safeguards. guards.
Uruguay Round	1986-1994 103 countries in 1986 117 as of end-1993	Tariffs: formula approach and item-by-item negotiations. Non-tariff measures: all Tokyo issues, plus services, intellectual property, preshipment inspection, rules of origin, trade-related investment measures, dispute settlement, transparency and surveillance of trade policies.	Average tariffs again reduced by one-third on average. Agriculture and textiles and clothing subjected to rules; creation of WTO; new agreements on services and TRIPs; majority of Tokyo Round codes extended to all WTO Members.
Doha Round	2001-? 150 countries as of beginning 2007	Tariffs: formula approach and item-by-item negotiations. Non-tariff measures: trade facilitation, rules, services, environment,	

Source: Hoekman and Kostecki (2001) and authors' extensions.

Appendix Table 4
World merchandise exports by region and selected economy, 1948-2005
(Billion dollars and percentage)

	1948	1953	1963	1973	1983	1993	2003	2005
					Value			
World	59	84	157	579	1838	3675	7369	10159
					Share			
World	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
North America	28.1	24.8	19.9	17.3	16.8	18.0	15.8	14.5
United States	21.7	18.8	14.9	12.3	11.2	12.6	9.8	8.9
Canada	5.5	5.2	4.3	4.6	4.2	4.0	3.7	3.5
Mexico	0.9	0.7	0.6	0.4	1.4	1.4	2.2	2.1
South and Central America	11.3	9.7	6.4	4.3	4.4	3.0	3.0	3.5
Brazil	2.0	1.8	0.9	1.1	1.2	1.1	1.0	1.2
Argentina	2.8	1.3	0.9	0.6	0.4	0.4	0.4	0.4
Europe	35.1	39.4	47.8	50.9	43.5	45.4	46.0	43.0
Germany [a]	1.4	5.3	9.3	11.7	9.2	10.3	10.2	9.5
France	3.4	4.8	5.2	6.3	5.2	6.0	5.3	4.5
United Kingdom	11.3	9.0	7.8	5.1	5.0	4.9	4.1	3.8
Italy	1.8	1.8	3.2	3.8	4.0	4.6	4.1	3.6
Commonwealth of Independent States (CIS)	-	-	-	-	-	1.5	2.6	3.3
Africa	7.3	6.5	5.7	4.8	4.5	2.5	2.4	2.9
South Africa [b]	2.0	1.6	1.5	1.1	1.0	0.7	0.5	0.5
Middle East	2.0	2.7	3.2	4.1	6.8	3.5	4.1	5.3
Asia	14.0	13.4	12.6	15.2	19.1	26.1	26.1	27.4
China	0.9	1.2	1.3	1.0	1.2	2.5	5.9	7.5
Japan	0.4	1.5	3.5	6.4	8.0	9.9	6.4	5.9
India	2.2	1.3	1.0	0.5	0.5	0.6	0.8	0.9
Australia and New Zealand	3.7	3.2	2.4	2.1	1.4	1.5	1.2	1.3
Six East Asian traders [c]	3.4	3.0	2.4	3.4	5.8	9.7	9.6	9.7
Memorandum items:								
GATT/WTO Members [d]	63.4	68.7	72.8	81.8	76.5	89.5	94.3	94.4
European Union [e]	-	-	27.5	38.6	30.4	36.1	42.4	39.4
USSR, former	2.2	3.5	4.6	3.7	5.0	-	-	-
Developing countries	31.4	28.3	22.6	20.2	26.8	25.2	30.3	34.1
Developed countries	66.4	68.2	72.9	76.3	68.2	73.3	67.1	62.6

[a] Figures refer to the Fed. Rep. of Germany from 1948 through 1983.

[b] Beginning with 1998, figures refer to South Africa only and no longer to the Southern African Customs Union.

[c] Comprising Hong Kong, China; Malaysia; Republic of Korea; Singapore; Taipei, Chinese and Thailand.

[d] Membership as of the year stated.

[e] Figures refer to the EEC(6) in 1963, EEC(9) in 1973, EU(10) in 1983, EU(12) in 1993, EU(15) in 2003 and EU(25) in 2005. Intra-EU trade is always included.

Note: Between 1973 and 1983 and between 1993 and 2003 export and import shares were significantly influenced by oil price developments.

Source: WTO, International Trade Statistics

Appendix Table 5
World merchandise imports by region and selected economy, 1948-2005
(Billion dollars and percentage)

	1948	1953	1963	1973	1983	1993	2003	2005
				Value				
World	62	85	164	594	1882	3769	7647	10511
				Share				
World	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
North America	18.5	20.5	16.1	17.2	18.5	21.5	22.6	21.7
United States	13.0	13.9	11.4	12.3	14.3	16.0	17.0	16.5
Canada	4.4	5.5	3.9	4.2	3.4	3.7	3.2	3.0
Mexico	1.0	0.9	0.8	0.6	0.7	1.8	2.3	2.2
South and Central America	10.4	8.3	6.0	4.4	3.8	3.3	2.5	2.8
Brazil	1.8	1.6	0.9	1.2	0.9	0.7	0.7	0.7
Argentina	2.5	0.9	0.6	0.4	0.2	0.4	0.2	0.3
Europe	45.3	43.7	52.0	53.3	44.2	44.8	45.3	43.2
Germany [a]	2.2	4.5	8.0	9.2	8.1	9.1	7.9	7.4
United Kingdom	13.4	11.0	8.5	6.5	5.3	5.6	5.1	4.9
France	5.5	4.9	5.3	6.4	5.6	5.8	5.2	4.7
Italy	2.5	2.8	4.6	4.7	4.2	3.9	3.9	3.6
Commonwealth of Independent States (CIS)	-	-	-	-	-	1.2	1.7	2.1
Africa	8.1	7.0	5.2	3.9	4.6	2.6	2.1	2.4
South Africa [b]	2.5	1.5	1.1	0.9	0.8	0.5	0.5	0.6
Middle East	1.8	2.1	2.3	2.7	6.2	3.4	2.7	3.1
Asia	13.9	15.1	14.2	15.1	18.5	23.3	23.1	24.7
China	0.6	1.6	0.9	0.9	1.1	2.8	5.4	6.3
Japan	1.1	2.8	4.1	6.5	6.7	6.4	5.0	4.9
India	2.3	1.4	1.5	0.5	0.7	0.6	0.9	1.3
Australia and New Zealand	2.9	2.3	2.2	1.6	1.4	1.5	1.4	1.4
Six East Asian traders [c]	3.5	3.7	3.2	3.9	6.1	9.9	8.2	8.6
Memorandum items:								
GATT/WTO Members [d]	58.6	66.0	74.2	89.1	83.9	88.7	96.1	96.1
European Union [e]	-	-	29.0	39.2	31.3	34.3	41.6	39.3
USSR, former	1.9	3.3	4.3	3.6	4.3	-	-	-
Developing countries	31.3	28.3	22.0	18.7	25.6	26.5	26.3	28.9
Developed countries	66.7	68.4	73.8	78.0	70.1	72.3	71.9	69.1

[a] Figures refer to the Fed. Rep. of Germany from 1948 through 1983.

[b] Beginning with 1998, figures refer to South Africa only and no longer to the Southern African Customs Union.

[c] Comprising Hong Kong, China; Malaysia; Republic of Korea; Singapore; Taipei, Chinese and Thailand.

[d] Membership as of the year stated.

[e] Figures refer to the EEC(6) in 1963, EEC(9) in 1973, EU(10) in 1983, EU(12) in 1993, EU(15) in 2003 and EU(25) in 2005. Intra-EU trade is always included.

Note: Between 1973 and 1983 and between 1993 and 2003 export and import shares were significantly influenced by oil price developments.

Source: WTO, International Trade Statistics.

2. MARKET ACCESS NEGOTIATIONS: LIBERALIZATION AND CONSOLIDATION

Tariff reductions are seen by many observers as one of the main success stories of the GATT/WTO.[25] This section assesses the GATT/WTO's actual contribution to lower tariffs and more open markets. It starts with an examination of developed countries' market access commitments in the GATT/WTO system. The GATT has played a core role in the reduction of non-agricultural tariffs in developed countries. A careful examination of the immediate post-World War II situation, however, suggests that some of the oft-quoted trade liberalization figures may be misleading. Subsection (b) then examines how developing countries have used the GATT/WTO system to reduce their tariffs. Evidence suggests that for many decades prior to the Uruguay Round they made little use of the GATT to reduce or bind their tariffs. As for the centrally planned economies, the USSR, China and most other planned economies remained outside the orbit of the GATT/WTO multilateral trading system for five decades.[26] Uruguay Round commitments have mostly extended the binding coverage, sometimes at levels far above the applied rates. This does not mean that developing countries have not liberalized their tariff regimes – only that they have not made much use of the multilateral system to do so. Most tariff reductions were unilateral and remained unbound. The WTO, however, has been instrumental in the reduction of tariffs of some of the newly acceded Members (since 1995). The Information Technology Agreement (ITA) has also had a significant effect for some of its signatories. Subsection (c) turns to non-tariff measures. The architects of the GATT had broadly in mind a system that would inhibit the use of border barriers other than tariffs and then organize negotiations to reduce tariffs. Having examined achievements on the tariff front, it is thus important to evaluate the effect of the GATT/WTO on other border measures. Here again, the multilateral system can claim partial success. Subsection (e) considers the GATT/WTO's contribution to world trade growth and subsection (f) concludes with a brief discussion on challenges ahead in the market access area.

(a) Tariff negotiations: developed countries

In order to situate the beginning of the tariff negotiations under GATT in their general historical context a few observations might be useful to recall the economic situation in 1947. The repercussions of World War II on the world economy were still omnipresent and the level of international trade was very depressed. For example, in 1948 global trade flows were still below their level in 1938 and 1929 in real terms, even though inflation had lifted the value of global trade to $57 billion, twice the level in 1938.[27] The low level of trade went together with major trade imbalances. The United States, Canada and most Latin American countries recorded substantial trade surpluses while the war-afflicted European countries and Japan recorded large deficits. The United Kingdom, which up to 1931 had followed a very liberal trade policy with minimal protection for almost one hundred years (except during the World War I period), had retreated via the Ottawa Agreement into a preferential trading system reinforced by a common clearing system for sterling balances. The United Kingdom, still the world's largest importer[28], tried to regain the convertibility of the British pound by returning to the gold standard in 1947, but this attempt ended in a financial crisis and had to be abandoned.

On the other hand, the Unites States had shifted away from its extreme protectionist trade policies in the early 1930s through the conclusion of reciprocal bi-lateral trade agreements with 17 countries between 1934 and 1939. As these agreements were applied on an unconditional MFN basis the bi-laterally agreed reductions benefited all countries within the system. These agreements significantly reduced the Smoot-

[25] See for instance Jackson (1997).

[26] China had been a founding member of the GATT but departed after its revolution in 1949. The USSR declined the invitation to participate in the drafting of the ITO charter (London Conference) and stayed outside the tariff negotiations. See Hoda (2001) for an interesting discussion of Poland's and Romania's market access commitments in accession and further negotiations.

[27] According to Maddison (2001) the ratio of world merchandise exports to world output was even in 1950 still lower than in 1913.See Appendix Table 3 and Appendix Chart 3.

[28] The share of the United Kingdom in world imports was 13.4 per cent in 1948, exceeding still that of the United States (Appendix Table 5).

Hawley protection level for many of America's major trading partners. In addition, the extensive use of specific duties in the US tariff schedule[29], in combination with the strong price increases between 1939 and 1947, had sharply reduced the *ad valorem* equivalent of these rates.[30] Despite these reductions, the average US tariff in 1947 was still considered to be among the highest in the major industrial countries. The relative large share of duty-free trade in the United States reflected the highly skewed protection pattern, with duty-free imports of raw materials not produced domestically and high tariffs on imports of processed agricultural and industrial products.[31]

Another important feature of the trade situation was the extensive use of non-tariff trade barriers by the European countries and widespread government control of international transactions in order to manage scarce foreign exchange reserves of US dollars.

With regard to the participation of countries in the first GATT negotiations, one should recall that Germany and Japan had not been given back sovereignty in the conduct of their trade policy and that the USSR did not accept the invitation to join the tariff negotiations.

(i) The start of the GATT tariff negotiations[32]

The UN Economic and Social Council, which had organized the London Conference to prepare for the ITO Charter, had no mandate for tariff negotiations. Nevertheless the participants of this conference agreed, at the suggestion of the United States, to hold tariff meetings in parallel to the preparatory work for the ITO charter. Various reasons have been given for the start of tariff negotiations at such an early stage.

First, it was thought that concrete actions in tariff negotiations might facilitate the discussions of non-tariff trade issues. Second, the US President's authority to reduce tariffs expired in June 1948 and the United States wanted to dispel the mistrust of other countries as to the sincerity of the United States intention to depart definitively from its high tariff protection policy of the past and reduce significantly its own tariffs. Third, the separation of tariff negotiations from negotiations on the institutional framework was also meaningful as the US President already had the authority to sign an agreement on tariff reduction, while the new trade charter would still need the approval of the Congress in the future.

The London conference set out both the objective and the procedures for the tariff negotiations. The objective was "to bring about a substantial reduction of tariff and the elimination of tariff preferences". The basic rules of the negotiations were the same as those "tested" in the negotiations under the US Reciprocal Trade Agreement Act. Thus, benefits of the negotiations should be: (a) "reciprocal" and "mutually advantageous"; and, (b) conducted according to the "principal supplier" rule through requests and offers. However, this time the negotiations had to be conducted among 23 countries more or less simultaneously. The challenge for the negotiating teams was to achieve tariff reductions with an overall balance of concessions and a larger tariff cut than that which would be possible if concessions had to be balanced bi-laterally.

The technique consisted in a three-step approach. Firstly, each country put forward a list of products for which it intended to request concessions from the participants before the negotiations started. Secondly, at the beginning of the negotiation each participant presented an offer list of the concessions it was willing to grant. Thereafter, negotiations could start bilaterally or among a group of countries.

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29 According to the 1959 Report of the Secretary of the Treasury more than three-quarters of US dutiable imports were subject to specific and compound duties in 1948.

30 According to the United States Tariff Commission (1948) about half of the decline of the tariff incidence between 1930-33 and 1948 can be attributed to higher prices and the other half to the negotiations in the various trade agreements. Irwin (1996) reports on the impact of price developments on United States' average tariffs in a historical perspective(1821 to 1973).

31 The share of duty free imports in total US imports stood at 61 per cent in 1947. For the unprocessed goods (comprising crude materials and crude foodstuffs and food animals) the share was 74 per cent while for processed and manufactured goods (comprising manufactured foodstuffs, semi- and finished manufactures) the share was 48 per cent. US Department of Commerce, 'Statistical Abstract of the United States, 1955'. Calculations are based on Table 1130 (p.927) .

32 The overview on the first years of GATT tariff liberalization draws heavily on Gardner (1969) and Kock (1969).

The potential benefits from the negotiations for each participant were not limited to the results of a participant's own bi-lateral negotiations but depended also on the indirect benefits obtained through the application of the MFN rule on tariff cuts agreed among third parties. In order to encourage more generous concessions each country could ask for information on the progress made in negotiations among third parties in respect of products on which it also had a strong interest. The principal supplier rule limited the number of trading partners with which a country had to enter into negotiations and ensured under the reciprocity rule that the requesting countries would grant substantial concessions in return. A major disadvantage of the principle supplier rule was that small traders might have a strong interest in a given product but could not ask to enter into negotiations for concessions as their import share remained too small to qualify as a principal supplier. The rule of "reciprocity" and "mutually advantageous benefits" also caused some difficulties in their application as countries with a relatively low level of tariffs had difficulties in offering enough "concessions" in negotiations with high tariff countries. These difficulties were attenuated by the recognition that the binding of a low tariff could be considered a concession equivalent to the partial reduction of a high tariff rate. This recognition is found later in part of GATT Article XXVII *bis*.

The five-month long negotiations faced a major obstacle to their successful conclusion at the final stage, when the US proposal on the gradual elimination of the Commonwealth Imperial Preferences was rejected by Great Britain.[33] In the United States, the elimination of the discriminatory preferential trade regime was considered a major objective of the negotiations, which would justify the tariff concessions the United States was willing to grant, namely reductions of up to 50 per cent from the pre-agreement rates of 1934. In the United Kingdom, political and economic considerations, (i.e. maintenance of the Commonwealth solidarity and the British external financial crisis in June 1947) led to a hardening of the negotiating position. In order to save the negotiations and avoid adverse effects on its foreign policy, the United States agreed to be content with rather modest concessions in respect to the reduction and elimination of preferences which the Commonwealth members granted to each other.[34]

The results of the Geneva tariff negotiations are laid down in 20 tariff schedules which are an integral part of the GATT.[35] The schedules enumerate the detailed tariff bindings, and the prevailing preferential rates are also bound and included in the schedules. The evaluation of this first GATT round of tariff negotiations consolidated in the 20 schedules presented in two volumes and a total of 1265 pages is not an easy task. The schedules report only the new bound rates and not the previously applied rate, which precludes the calculation of the tariff reductions undertaken. The total number of tariffs bound does not provide a reliable indicator of the "binding coverage" as the total number of tariff positions, including the unbound, is not shown. The diversity of classification systems used for the various national tariff schedules also complicates comparisons. International (mainly European) efforts to harmonize tariff classifications started to bear fruit only from 1950 onward. Another difficulty in the evaluation is the widespread use of specific duties which define the duty as a fixed amount per unit (weight, number) for which an *ad valorem* equivalent can only be determined when the average import value is known. This information on imports is not contained in the GATT schedules. The calculation is further complicated by the fact that duties on some products have been bound at a higher rate than prevailed before the World War II, when protection primarily took the form of quantitative restrictions, which were lifted after the war.[36] This last feature reminds the reader that even if one could establish with precision the binding coverage and the exact size of the average tariff reduction, one would still not know the impact on overall trade restrictiveness. The latter would require knowledge of protection for each product during a period when non-tariff measures were widespread, especially in European countries. Given these difficulties, no overall rate of average tariff reductions has been calculated.

33 The United States' proposal was a three year moratorium and afterwards a staged elimination of preferences over a maximum period of ten years.

34 For a detailed discussion on the negotiation over Imperial preferences in 1947 see Zeiler (1997) and Gardner (1969: 348-361).

35 General Agreement on Tariffs and Trade, 'Schedules of Tariff Concessions (in two volumes)', Geneva October 1947.

36 France bound its tariffs for clothing items at 20 per cent while its corresponding pre-war tariffs did not exceed 16 per cent. However, the pre-war quantitative restrictions were lifted. (Documentation Française, 1948: 14) .

The US Department of State summarized the result of the first round as follows: the Agreement "covers more than 45000 items and accounts for two-thirds of the import trade of the negotiating countries and for substantially half of total world imports".[37] These summary results were often taken up in other publications but they could not be confirmed by our own recent calculations. While no details of the calculations underlying the Department of State estimates are available, an examination of the original sources suggests that the number of items bound is considerably smaller than indicated (less than half those indicated).[38] With the 23 negotiating countries accounting for about 60 per cent of world merchandise imports in both 1938 and in 1948, a binding coverage in the order of two-thirds would imply that less than 40 per cent (and not substantially a half) of world imports were affected.[39] This latter calculation still overestimates the scope of the Agreement as it does not take into account that MFN treatment was not automatically extended to imports from GATT Members that did not participate in the negotiations (especially the centrally planned economies in Europe and Asia). Box 12 reports on estimates of tariff bindings at the time of the birth of GATT.

Box 12: Estimates of tariff bindings of major developed countries in 1948

What do we know from other sources about the binding levels and can we confirm the overall binding coverage of two thirds indicated above? Very few estimates exist in the literature which indicate the binding coverage in the form of the share of tariff lines bound to total tariff lines. For the United States the earliest estimate we found refers to the situation in early 1953 (which incorporates the results of two further negotiations) and indicates that out of a total of 3337 tariff lines 76 per cent had been reduced and bound and 4 per cent had been bound but not modified. In other words, on the basis of the tariff schedule applied in 1952, 80 per cent of US tariffs had been bound. Assuming that all the reduced rates were actually bound and that the 3337 lines also include the duty-free lines, our own estimates of the US binding coverage in 1948 resulted not in a precise share but in a range with an upper limit of 70 per cent and a minimum level of 49 per cent. The upper limit is based on a comparison of all 408 tariff paragraphs for which at least one tariff item was bound in the GATT schedules (including the 33 revenue code sections) with the total of all 727 tariff paragraphs shown in the US tariff schedule of 1948.[40] The lower bound limit is based on a comparison of the number of 1733 bound tariff items shown in the GATT schedules in 1947, with all the 3505 tariff items reported in the USTC tariff schedule for 1948. The result based on tariff items understates the true binding coverage as the USTC tariff schedule is somewhat more detailed than the GATT schedule as various single tariff items reported in the GATT schedule have been split further into several tariff items in the USTC schedule of 1948. With respect to the binding coverage expressed in terms of import values of 1946, USTC figures indicate that it reached 83 per cent for imports from all sources and 94 per cent for imports from Contracting Parties.[41]

For France, the third largest importer, it is reported that the binding level achieved was "about 50 per cent of the tariff positions but represented more than 85 per cent of the trade volume (import value) of the trade before the war".[42] This statement shows that there can be a large

37 United States Department of State, 'The United States reciprocal trade –agreements program and the proposed International Trade Organization', in *Department of State Bulletin, Vol.XVIII ,No455, Publication 3094*, March 21, 1948.

38 A detailed account of each of the 20 tariff schedules suggest that the items listed in both parts of the schedules (Part I refers to MFN rates and Part II refers to preferential tariffs rate) do not exceed 15000 items.

39 For the evolution of the share of GATT Contracting Parties' imports in world merchandise imports since 1948 see Appendix Table 5.

40 United States Tariff Commission, *'United States Import Duties(1948)'*, Miscellaneous Series TC1.10:Im7/4/1948. This report does not specify which rates are bound while the GATT schedules report the bound rates but not the unbound rates.

41 United States Tariff Commission (1949:138) Table 43.

42 Documentation Françaises (1948) 'La France et les accords tarifaires de Genève'. in Notes Documentaires et Études No.780 p.12.

difference between the coverage measured by tariff lines and that by import values, the latter being in general larger than the former.

The tariff concessions made by the United Kingdom, still the largest importer in 1948, are particularly difficult to evaluate as they comprise MFN and substantial preferential trade flows. A government report to Parliament[43], indicates that imports from foreign countries (i.e. all those not belonging to the Commonwealth) under rates which have been bound without any change (including duty free rates) amounted to £67.1 million in 1938. Imports under tariff rates subject to reduction and binding accounted for £30.4 million in 1938. Altogether, the binding agreed by the United Kingdom covered 36 per cent of the corresponding import value in 1938 (or 24 per cent of total imports). In addition, the United Kingdom had to bind all its preferential rates granted on one half of its imports from Commonwealth countries, which accounted for about one-third of its total imports.[44]

A particular feature of the United Kingdom concessions is the acceptance – in agreement with the other Commonwealth countries – of a reduction or elimination of the preferential margin it enjoyed on its exports to Commonwealth countries. Only 30 per cent of the United Kingdom exports to Commonwealth countries (£94 million in 1938) were affected by these changes.

Summing up the pieces of information on binding levels of the three major developed countries above, the binding coverage measured by import values has most likely somewhat exceeded 60 per cent for the major industrial countries.[45] Assuming a share of binding coverage for the developing countries at 20 per cent (about the ratio observed for India and Brazil), brings the average binding level for all GATT Contracting Parties to 55 per cent. Taking into account that GATT Members accounted for 59 per cent of world imports, one has to conclude that nearly one-third of world merchandise trade was bound through the GATT 1948 tariff schedules.

What about the information on tariff reductions? To our knowledge the only comprehensive estimate concerning the average tariff reduction rate in the first GATT Round of tariff negotiations is provided by the United States Tariff Commission for US tariffs.[46] According to this source, the average reduction rate of US tariffs for all products between 1947 and 1948 was 21 per cent (and 26 per cent if agricultural products covered by US tariff schedule 7 are excluded). If the US tariffs of 1948 are compared with the level before the start of the reciprocal trade agreements (i.e. the level corresponding to the Smoot-Hawley Tariff Act) the decline is 47 per cent.

This calculation of average tariff cuts uses US import values as weights. The risk of this approach is that tariff peaks and their changes are not well taken into account as import values under these tariff lines

43 President of the Board of Trade to Parliament by Command of His Majesty, *Report on the Geneva Tariff Negotiations*. November 1947, Cmd 7258.

44 UK imports from Commonwealth countries accounted for about one-third of its total imports in both 1937 and 1948. The proportion of these imports from the Commonwealth enjoying preferential treatment was about one half in 1948 and the average preferential rate had fallen to 6 per cent on all goods by 1948 and about twice the rate on those goods enjoying preferences. Imperial preferences increased markedly through the Ottawa Agreement in 1932 but were lowered subsequently through the US/UK Trade Agreement of 1938 and thereafter through the impact of inflation on the *ad valorem* incidence of specific duties. The latter development is estimated to have been more important than the impact of the trade agreements including the GATT 1947 Agreement according to Macdougall and Hutt (1954).

45 Aggregating the binding coverage of the United Kingdom, the United States and France by using the 1948 import values results in a combined binding coverage of 63 per cent. The share of developed countries in total imports of GATT Contracting Parties imports was 82 per cent in 1948.

46 United States Tariff Commission(1949), Operation of the Trade Agreements Program, June 1934 to April 1948, Report No 160. Table 4 p.16.

tend to be small. It is therefore worth recalling that the US tariff contained a significant number of very high tariffs until the late 1950s.[47]

There are strong indications that overall, tariff reductions by other developed countries were less pronounced than in the case of the United States. First, the United Kingdom and France were in a difficult economic situation in 1947 and therefore had hardly been prepared for a significant reduction in protection levels. For the United Kingdom, the Economist reports that imports covered by tariff reductions accounted for less than 6 per cent of UK imports.[48] In France, the new tariff rates of 1948 were in a few cases sharply reduced (e.g. cars (42 per cent) and also toys), and in many other cases lowered by 20 to 25 per cent (e.g. chemical products), or maintained unchanged (e.g. pulp and paper). In a few cases tariffs were increased (e.g. up by 37 per cent for clothing in order to compensate for the lifting of quantitative restrictions). For France and the United Kingdom, no average rate of reduction has been provided in the various government reports dealing with the results of these negotiations. The tariffs of the Benelux countries at the time had been recognized to be well below the average prevailing in the other industrial countries and therefore these countries made concessions principally by binding most of their tariffs at the already low levels. It is therefore plausible to assume that the average tariff reduction on industrial products of all industrial countries achieved in 1947 was somewhat less than the reduction observed for the United States.

This might look like a meagre result, but one might see it also in a more favourable light if one takes into account that between the mid-thirties and 1947 the prices of internationally traded goods had increased by more than 100 per cent, which implied a significantly lower *ad valorem* incidence of the specific duties at the time of negotiations.[49] Thus, keeping these applied rates unchanged implied a significantly lower protection level for imports subject to specific duties.[50]

What about the tariff levels prevailing before and after the first GATT round? Is it possible to confirm that the average tariff level for industrial countries was around 40 per cent before the first GATT negotiation in 1947? Woytinski and Woytinski (1955) reports estimates for (applied) tariff averages in 1950 for 13 West European countries, covering agricultural and industrial products (see Appendix Table 6). The results confirm the existence of a low tariff country group (comprising Denmark, Norway, Sweden, and the Benelux countries) with tariffs somewhat below 10 per cent and a high tariff group with tariffs averaging close to 20 per cent (comprising France, Italy, Portugal and the UK).[51] The average applied tariff rate among European countries thus ranged somewhere between 10 and 20 per cent. Note that these rates include the rather limited tariff cuts negotiated during the second round of tariff negotiations in 1950 (e.g a supplementary tariff cut of 3 per cent in the case of the United States).

Another reference to prevailing tariff levels in the early 'fifties can be found in the GATT report *International Trade 1952*. In 1952, the GATT Secretariat asked the Contracting Parties to provide estimates of the tariff

47 A tabulation of US peak tariffs rates (i.e. defined by the authors as those exceeding 45 per cent ad valorem) contained 373 tariff items (statistical import classes) for which at least some imports were recorded. Total imports subject to these peak tariffs accounted for 1.3 per cent of dutiable and 0.5 per cent of total imports. Unfortunately, the really prohibitive tariffs for which no import transactions took place could not be reported as no *ad valorem* equivalent rate could be calculated from US trade returns. This marginal share of trade under peak tariffs contrasts with an estimated share of more than 10 per cent of all tariff lines (373 out of roughly 3400 tariff lines). See United States Tariff Commission (1953), 'Effect of the Trade Agreement Concessions on United States Tariff Levels based on Imports in 1952', Table 12, Washington.

48 'Trade under the new Tariff' in the Economist, November 22, 1947. The same issue of the Economist makes the following summary comments: an observer "would take due note, in the first place, that for many countries involved – and not least for the United Kingdom – customs tariffs are at present without any influence on the volume of trade (page 827).

49 See Appendix Chart 2.

50 Unfortunately we have no information on the difference between bound and applied rates. In later periods it is known that bound and applied tariff rates had been very similar for the industrial countries.

51 A recalculation of the Woytinski results showed several inaccuracies. For some of the low rate countries errors in the averaging calculations were found which imply that the, relatively low, average rate for Denmark and Norway had been actually somewhat higher than reported. For Austria, Germany and Greece, however, the estimates are upward biased, as the underlying trade flows (and prices) refer not to 1950 but to pre World War II imports with their much lower average prices. Therefore the actual average tariff rates of Austria and Germany (both not yet Contracting Parties in 1950) had been far less above the country group average than indicated by Woytinski and Woytinski (1955).

incidence on a specific list of products.[52] Although the data are not strictly comparable with those of Woytinski, they nevertheless confirm the general view of the existence of a low tariff country group (rates varying between 5 and 9 per cent, comprising the Benelux countries, Denmark and Sweden) and another group with distinctively higher tariff rates, ranging from 16 to 24 per cent (including the United States, Germany, the United Kingdom, France and Italy in ascending order). The industrial countries' arithmetic average of applied tariff rates was still between 10 and 20 per cent (see Appendix Table 7). These estimates also include in principal the cuts made in the third round (Torquay).

These average tariff rate estimates reported in 1950 and 1952 permit a plausible guess about the tariff average prevailing before the first Round. On the assumption that the average tariff cut of the industrial countries did not exceed that of the United States (i.e 27 per cent cumulative between 1947 and 1950 or 31 per cent cumulative between 1947 and 1952) it is most likely that in 1947 the average tariff rate was situated in a range between 20 and 30 per cent. This estimate differs sharply from the widely quoted 40 per cent tariff average for industrial countries. Although this estimate is frequently reported there is no study to the knowledge of the authors of this report which indicates the source and the method (country coverage, product coverage, type of tariff) of how this average rate was estimated.[53]

Table 5
GATT/WTO – 60 years of tariff reductions
(MFN tariff reduction of industrial countries for industrial products (excl. petroleum))

Implementation Period	Round covered	Weighted tariff reduction	Weights based on MFN imports (year)
1948	Geneva (1947)	-26	1939
1950	Annecy (1949)	-3	1947
1952	Torquay (1950-51)	-4	1949
1956-58	Geneva (1955-56)	-3	1954
1962-64	Dillon Round (1961-62)	-4	1960
1968-72	Kennedy Round (1964-67)	-38	1964
1980-87	Tokyo Round (1973-79)	-33	1977(or 1976)
1995-99	Uruguay Round (1986-94)	-38	1988(or 1989)

Note: Tariff reductions for the first five rounds refer to the United States only. The calculation of average rates of reductions are weighted by MFN import values.

Source:
Geneva (1947): US Tariff Commission, Operations of the Trade Agreements Program, June 1934-April 1948, Part III Table 16 (non-agricultural products).

Annecy (1949): US Tariff Commission, Operations of the Trade Agreements Program, April 1949-June 1950, Chapter 5, Tables 7 and 8. Refers to all products.

Torquay (1950-51): United States Tariff Commission, Fifth Report, July 1951-June 1952, Chapter 4, pp.149-170, Tables 5 and 6.

Geneva (1955-56): Estimates based on United States Tariff Commission, Ninth Report, July 1955-June 1956, Chapter 3, pp.100-108 and US Department of State Publication 6348, Commercial Policy Series 158, released June 1956.

Dillon Round (1961-62): Estimates based on United States Tariff Commission, 13th Report, July 1959-June 1960, pp.17-29 and US Department of State Publication 7408, Commercial Policy Series 194, released July 1962.

Kennedy Round (1964-67): Preeg, E.(1970), *Traders and Diplomats*, Tables A2 and A3. Refers to four markets: United States, Japan, EEC(6) and United Kingdom. Own calculations for the aggregate based on 1964 M.F.N. import values.

Tokyo Round (1973-79): GATT, COM.TD/W/315, 4.7.1980, p.20 and 21 and own calculations. Refers to eight markets (United States, EEC(9), Japan, Austria, Finland, Norway, Sweden and Switzerland).

Uruguay Round (1986-94): GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, November 1994, Appendix Table 5 and own calculations. Refers to eight markets (United States, EU(12), Japan, Austria, Finland, Norway, Sweden and Switzerland).

[52] Tariff average for the same products retained in the League of Nations tariff estimates for 1913 and 1925 and based on arithmetic average for these 78 commodities (corresponding to 530 items).

[53] To our knowledge this pre-GATT average tariff rate was reported for the first time in the World Bank Development Report 1987 (p. 134): "successive rounds of negotiations in GATT had cut tariffs on trade in manufactures from an average level of 40 per cent in 1947 to between 6 per cent and 8 per cent for most industrial countries even before the last round of multilateral trade negotiations (the Tokyo Round, 1973-79) had taken place". No details are provided on sources and methods used to arrive at this number of 40 per cent. Thereafter, this number was taken up by many other authors in books, articles and pamphlets, but no one gives a hint at methods or data used to arrive at this implausible estimate of 40 per cent.

The tariff reductions in the next four Rounds brought a cumulative reduction in US tariffs of about 15 per cent. More important than the tariff reductions in the early GATT years was the enlargement of the membership. Negotiating the accession of new Contracting Parties such as Germany, Sweden, Austria and Japan implied further tariff reductions and consolidation.[54]

After the fourth GATT Round in 1956 little progress was made on the multilateral tariff level. However, the formation of the EEC brought a substantial tariff liberalization among the six EEC member countries. Progress in European integration brought the risk that non-EEC traders would be at a disadvantage in the EEC market. This spurred the launch in 1964 of the fifth GATT Round named after US President Kennedy. In the course of the negotiations, the 39 participants made concessions affecting trade valued at $41 billion, which represented two-thirds of their imports and about one quarter of world trade. The results of the Kennedy Round were implemented between 1968 and 1972 and brought substantial tariff reductions at the multilateral level. For the major industrial countries (United States, Japan, the EEC(6) and the United Kingdom) the average reduction in tariffs for industrial products (excluding petroleum) was 38 per cent (see Tables 5 and 6).

Table 6
Tariff reductions of the Kennedy Round
(Import weighted bound tariff averages of industrial products and change)

Trader	Pre-	Post-	Reduction	Imports(MFN)
	Kennedy Round rate		in %	Billion $(1964)
United States	9.2	5.9	-36	12
Japan	7.3	4.5	-39	5
EEC(6)	7.7	4.8	-37	16
United Kingdom	12.0	7.2	-40	7
TOTAL of above	**8.9**	**5.5**	**-38**	**41**

Source: Preeg, E.(1970), Traders and Diplomats, Tables A2 and A3.

While the average tariff reductions were quite similar in size for the major importers they differed significantly between sectors. Broadly based and sharp tariff cuts were agreed for the following sectors: chemicals, pulp and paper, machinery, and transport equipment. For iron and steel and textiles (including clothing), however, the concessions affected a smaller share of trade and reductions were less pronounced than the average.[55]

The Tokyo Round started in 1973 but the economic turbulence linked to the first oil price hike and the global recession in 1975 postponed serious negotiations for years. The Round could only be concluded in 1979 and succeeded in lowering substantially the industrial tariffs of industrial countries. The reduction of industrial tariffs were accompanied by a harmonization of tariffs (achieved through the application of the 'Swiss formula') and an increase in their binding coverage. The tariff concessions concentrated largely on industrial products, which accounted for 90 per cent of the import value of $141 billion affected by concessions. In the agricultural sector, tariff action on products of interest to developing countries has mainly taken the form of improvements of the GSP for tropical products. The average tariff reduction for industrial products was 34 per cent if weighted by import values and 39 per cent if measured by simple or arithmetic averages.

As regards import-weighted tariff reductions by stage of processing, the steepest cuts were observed for raw materials (64 per cent) followed by a 34 per cent reduction for finished products and a 30 per cent decrease for semi-manufactures. The depth of tariff cuts for industrial products in which developing countries had an export interest differed sharply among categories. The reduction in tariffs for articles of metal, wood and electrical machinery ranged between 32 per cent and 39 per cent, while the reduction for textiles and clothing was limited to 22 per cent and 18 per cent respectively. For footwear and travel goods, the tariffs remained almost unchanged as the average decreased by 0.1 percentage point to 13.1 per cent. The implementation of the Tokyo Round results stretched over the 1980-87 period (see GATT 1980: 33-41).

54 See Hoda (2001) for a discussion of tariff negotiations for accessions.

55 GATT (1967), GATT Trade Negotiations. Brief Summary of Results. Press Release GATT/992; 30 June 1967.

During the Tokyo Round negotiations a significant increase was achieved in the binding level of industrial products for a number of countries including Austria, Canada, Finland, Japan, and Norway. For the United States and the EU, the binding level for industrial products was close to 100 per cent before the start of the Tokyo Round (Appendix Table 8). The binding level for agricultural products after the Tokyo Round remained in a range of 44 to 69 per cent for Japan and the European countries (Appendix Table 9). The full binding of industrial countries' agricultural tariffs was only achieved in the Uruguay Round.

Table 7
Tariff reductions of the Tokyo Round
(Import weighted bound tariff averages of industrial products and change)

Trader	Pre-	Post-	Reduction	Imports(MFN)
	Tokyo Round rate		in %	Billion $(1977)
United States	6.3	4.3	-32	78
Japan	5.4	2.7	-50	32
EEC(9)	6.5	4.6	-29	62
TOTAL of above	**6.2**	**4.1**	**-34**	**172**

Source: GATT, COM.TD/W/315, 4.7.1980, p.20 and 21 and own calculations.

The Uruguay Round brought another substantial tariff reduction in industrial products, estimated at close to 40 per cent, and leading to an average rate of less than 4 per cent in industrial countries (eight major markets). The share of duty-free tariff lines increased from 20 to 44 per cent after the implementation of the Uruguay Round results. The share of peak tariff lines (defined as a rate above 15 per cent) dropped from 14 to 10 per cent. Tariff reductions by sector varied markedly. Three product categories – textiles and clothing, leather, rubber and footwear, and transport equipment – recorded the smallest tariff cuts (ranging from 18 to 26 per cent). These product categories continued to the highest average levels after the Uruguay Round, at 15.5 per cent, 8.9 per cent and 7.5 per cent respectively. In contrast, five other product categories (wood, pulp, paper, metals, non-electric machinery, mineral products and manufactured articles n.e.s.) recorded above-average tariff cuts in the range of 52 to 69 per cent which led to average tariff rates by product category of between 1.1 and 2.4 per cent. (GATT,1994: Table II.3). The tariff escalation observed on products of interest to the developing countries was, in general, reduced (GATT, 1994:15). One of the major gains in liberalization – of particular to the developing countries – was the phasing out of the quantitative restrictions in the textiles sector, which is discussed in more detail below.

For agricultural products, the liberalization gains in developed markets were two-fold: firstly, the tariffication of the remaining agricultural import quotas and the complete binding of all agricultural tariffs, and secondly, a tariff reduction of 37 per cent on all agricultural tariffs (GATT, 1994: Table II.8) Tropical products (part of the agricultural product category) recorded a tariff decrease of 43 per cent.

Table 8
Tariff reductions of the Uruguay Round
(Import weighted bound tariff averages of industrial products and change)

Trader	Pre-	Post-	Reduction	Imports(MFN)
	Uruguay Round rate		in %	Billion $(1988)
United States	5.4	3.5	-35	297
Japan	3.9	1.7	-56	133
EU(12)	5.7	3.6	-37	197
TOTAL of above	**5.2**	**3.1**	**-39**	**627**

Source: GATT, The Results of the Uruguay Round of Multilateral Trade Negotiations, November 1994, Appendix Table 5 and own calculations.

Multilaterally agreed tariff reductions did not come to a standstill after the Uruguay Round. In 1997 the Information Technology Agreement (ITA) was concluded, establishing duty-free trade for a list of about 300 products (including computers, parts and accessories, semi-conductors, semiconductor equipment and telecommunications). For the six major developed importers[56] of ITA products the pre-ITA (1996) average unweighted bound and applied tariff rates were reduced from 5 per cent and 2.3 per cent respectively to zero. These reductions were implemented from mid-1997 onwards and terminated in 2000. Trade in ITA products world-wide is estimated to be in the order of 1.4 trillion dollars in 2005.

Although in most advanced economies tariff rates had been already very low, this was not the case in a number of developing countries. These developing countries agreed to a staged implementation of tariff cuts, lasting eight years for some initial participants (e.g. India). By the first half of 1997, 29 economies had become participants in the ITA. By the end of April 2007, the ITA had 70 participants, counting the EU member countries individually. The share of ITA participants in world imports of ITA products increased from 90 per cent in 1997 and to 96 per cent in 2006 (see Chapter I of this report for a detailed discussion of the ITA).

(ii) Concluding observations

Industrial countries have substantially reduced their tariffs since 1947. Only in a few categories can they still be considered a significant trade barrier. The liberalization progressed in waves associated with the various tariff negotiations. The tariff reductions differed by sector, with less progress in labour-intensive industrial products and agricultural products. The tariff reductions agreed in the GATT negotiations discussed above relate to bound tariffs. MFN applied tariffs have tended to decline somewhat earlier than bound rates. While the tariff reductions of the industrial countries reported above reflect multilateral liberalization in the GATT/WTO framework, one should not lose sight of tariff reductions effected through regional integration agreements and preferential schemes in favour of developing countries. The EU and NAFTA in particular have accounted for major (preferential) tariff reductions in developed countries. Preferential tariff treatment in favour of the least-developed countries has brought duty-free access for most of them in respect of most of their products in major developed markets. A number of other non-reciprocal preference schemes have also benefited many other developing countries.

(b) Tariff negotiations: developing countries

This subsection assesses the impact of the multilateral system on developing country tariffs. Both tariff negotiations for accession and commitments negotiated during rounds are examined. A distinction is made between the GATT years and the WTO period. For the GATT years, because of the scarcity of data and the costs of calculating tariff statistics from paper sources, a number of case studies are used to illustrate the evolution of binding coverage and tariff levels. The regime under which developing countries acceded to the GATT/WTO is of particular importance. Depending on this regime, countries did or did not have to negotiate market access commitments to become parties to the agreements. With developing countries, it is also important to consider both bound and applied tariffs as in many cases they have drifted apart over time, with applied rates coming down faster than bound rates.

(i) Pre-Uruguay Round

Of the original 23 Contracting Parties of the GATT, 12 were developing countries: Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, South Africa, Southern Rhodesia, and Syria.[57] Among those countries which participated in the 1947 round of negotiations, three (China, Lebanon and Syria) withdrew subsequently, while four others did not conduct the negotiations themselves. The United Kingdom negotiated on behalf of Burma, Ceylon, and Southern Rhodesia, while the results of the

[56] Australia, Canada, EU(15), Japan, Norway and the United States.

[57] Note that South Africa, which considered itself a developed country until after the Uruguay Round, is sometimes counted as such.

negotiations carried out by India were accepted by both India and Pakistan.[58] The colonial powers also negotiated tariffs for their colonies. The schedules of Benelux, France and the United Kingdom include sections relating to the tariffs of 17 dependent overseas territories, and six of these record the results of negotiations on preferential as well as most-favoured-nation duties.[59]

Brazil, Chile, Cuba, India and South Africa conducted negotiations amongst themselves and with the other parties. Boxes 13 and 14 examine in detail the tariff commitments of two developing original contracting parties: Brazil and India. These case studies also document the evolution of Brazil's and India's tariff commitments and their applied tariffs over the GATT period. Estimates suggest that Brazil and India bound approximately 20 per cent of their tariff lines in 1947, a figure which compares with a coverage ranging somewhere between 49 per cent and 80 per cent for the United States and 50 per cent for France, but that their binding coverage fell over time.

Box 13: Case study 1: Brazil, 1947-94

In 1947, Brazil bound 18 per cent of its tariff lines, that is 1047 out of a total of 5936 lines. All the bindings were specific as were almost all applied tariff rates. In the late 1940s, the Brazilian tariff schedule listed three different tariffs. The "general tariff" was applied to goods originating in countries with which Brazil had no commercial agreement. The "minimum tariff" was accorded to products of countries which also guaranteed their minimal tariff in favour of Brazilian products. The "conventional tariff" which corresponded to the MFN binding, was defined as the tariff reserved exclusively to products of countries to and from which Brazil not only accorded and received unconditional and unlimited MFN treatment, but with which Brazil also negotiated on the basis of special advantages and tariff reductions on the minimum tariff.[60] The conventional tariff was thus lower or equal to the minimum tariff. The fact that most tariffs were specific and the existence of general and minimum tariffs makes it difficult to assess and compare the level of Brazilian bound and applied tariffs. However, there are good reasons to believe that it afforded a high level of protection to Brazilian industries. Brazil had shifted towards a strict form of industrial protectionism in 1874 to become one of the three to five most highly protectionist countries in the world.[61] Moreover, our estimates of average tariffs for various groups of products in the 1950s are high. As can be seen in Appendix Table 11, among the 35 product groups distinguished in the nomenclature used by Brazil in 1949-1950, the highest binding coverage ratios are for clocks, watches and scientific and medical apparatus and the lowest for wood, cotton and aluminium, lead, tin and zinc.

In the mid-1950s, the Government of Brazil engaged on a major project of tariff reform which substantially affected its obligations under the General Agreement. The new tariff replaced an out-of-date nomenclature with the Brussels nomenclature, substituted *ad valorem* for specific duties and substantially increased their incidence. Changes in the price levels and a decline in the value of the local currency had eroded the protective effect of the existing specific tariffs and protection had increasingly been given to domestic producers in the form of import restrictions or through exchange control operating on payments for imported goods. The government also wished to increase tariff revenue. The Brazilian Government argued that the revision of the tariff was associated with other urgent measures of fiscal reform, that it amounted to the transfer of various protective measures to the tariff, and that it should not reduce the volume of trade, increase

58 See GATT (1950) The attack on trade barriers, A progress report on the operation of the GATT from January 1948 to August 1949.

59 See the case studies of Senegal and Nigeria below.

60 See International Customs Tariffs Bureau (1949) The International Customs Journal, Year 1949-1959, No 6, Brazil, Brussels: International Customs Tariffs Bureau.

61 See Clemens and Williamson (2001), Bairoch (1989).

the cost of imported goods or alter the composition of imports.[62] The reform affected a number of bound duties and therefore involved renegotiations under Article XXVIII.[63] Recognizing the need for the revision of an "out-moded" tariff and the desirability of a simplified system of controls and taxes, the Contracting Parties agreed to waive Brazil's tariff commitments on the understanding that other Contracting Parties would be free to regard as suspended the concessions which they had previously granted to Brazil. The negotiations for the new schedule of bound rates were to be completed within a year of the enactment of the tariff.

With the introduction of its new tariff in 1957, Brazil substantially reduced the coverage of its bindings which subsequently remained around less than 5 per cent until the Uruguay Round. Appendix Table 12 shows that between 1949 and 1958, the number of bound lines dropped from 1047 to 234 while the total number of lines in the nomenclature increased from less than 6000 to slightly more than 6300. Figures for the 1970s and 1980s show a considerably higher number of bound lines which is largely offset by an increase of the total number of lines.[64]

Brazil: Simple average of applied *ad valorem* tariff rates in percentage, selected product groups, selected years

Section	Description	1957	1979	1986	1997	2001
3	Animal and vegetable fats	58.2	76.5	54.0	11.6	11.4
4	Prepared foodstuffs, beverages and vinegar	132.9	138.3	84.9	17.4	17.0
7	Artificial resins and plastic materials	58.4	107.4	71.1	16.3	15.6
9	Wood and articles of wood	62.0	130.2	61.3	12.4	11.8
11.61[a]	Articles of apparel and clothing accessories of textiles fabrics	120.0	203.5	104.9	23.0	22.5
12	Footwear, headgear, umbrellas	116.0	186.0	85.6	24.8	21.9
17	Vehicles, aircraft and associated equipment	42.3	71.9	57.7	24.0	17.4
Total number of lines of selected products		804	1478	1641	1357	1551

[a] Subsection 61 of section 11.

Note: Because of changes in nomenclature, tariff averages are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, Brazil (1957-1958), Brazil (1979-1980); Brazil (1986-1987); WTO-IDB; WTO estimates.

Brazilian applied tariffs were already quite high in the late 1950s, but they were even higher in the late 1970s and only started decreasing in the first half of the 1980s. The Table shows simple applied tariff averages for selected groups of products across six decades.[65] The definition of product groups is kept constant over time.[66] Among the groups selected for this case study, two had particularly high tariffs in the late 1970s. The average tariff on clothing and footwear reached respectively 203 per cent and 186 per cent in 1979/1980. Four product groups – clothing, footwear, food products and vehicles – still had averages exceeding 50 per cent in the late 1980s.

62 See GATT (1956) International Trade 1956, Geneva: GATT.

63 Brazil also initiated Art. XXVIII renegotiations in 1960, 1977 and 1991. See GATT documents Secret/135(1960), Secret/238(1977) and Secret/334(1991).

64 Estimates of binding coverage for different periods are not strictly comparable because of changes in nomenclature. See technical appendix.

65 Post 1994 estimates are provided for comparison but are not discussed.

66 Changes in tariff averages over time should be interpreted cautiously because of changes in nomenclature and methodology. See technical appendix.

For developing countries which became Contracting Parties to the GATT after 1947, a relevant distinction is whether they acceded under Article XXVI:5(c) or under Article XXXIII. Article XXVI:5(c) provided for automatic accession of newly independent States or independent customs territories upon sponsorship through a declaration by the responsible Contracting Party, if the stated conditions were fulfilled. A government becoming a Contracting Party under XXVI:5(c) did so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question, including any applicable Schedule of Concessions. Box 15 presents two case studies – Senegal and Nigeria – of countries that have succeeded to Contracting Party status under Article XXVI:5(c). The case studies discuss the evolution of market access commitments from accession until the Uruguay Round. Article XXXIII, on the other hand, stated that the terms of accession had to be negotiated between the acceding government and the Contracting Parties. The case studies of Argentina and the Republic of Korea (see Box 16) provide illustrations of accessions under this provision.

Four developing countries acceded during the Annecy Round in 1949: The Dominican Republic, Haiti, Liberia and Nicaragua.[67] In 1953, Liberia withdrew and Uruguay who had participated in the Annecy Round became a Contracting Party. Indonesia acceded in 1950 upon achieving independence. It was the first country to accede under Article XXVI:5(c). Peru and Turkey negotiated their accession under Article XXXIII during the Torquay Round in 1951. Ghana and Malaysia acceded in 1957 under Article XXVI:5(c) and so did Guinea in 1958.

In the 1950s, the GATT more or less managed to safeguard the stability of import duties bound by Contracting Parties but there were important changes, mainly in an upward direction, in the unbound tariffs of Contracting Parties and the tariffs of other countries. In its annual review of changes in barriers and controls in international trade in 1954, the GATT Secretariat notes a few instances where bound tariff rates were raised by special arrangement or negotiation.[68] It is interesting to note that the review of tariff changes in the early 1950s included discussions of both tariff reductions and duty increases. In the 1953 review for instance, a distinction is made between on the one hand negotiated tariff reductions and unilateral reductions and, on the other hand, tariff increases aimed at offsetting the withdrawal of quantitative import restrictions, those aimed at affording added protection for domestic industries, and those prompted by the desire to increase tariff revenue. Most reviews note that the usual motive for tariff increases was the desire to give more effective protection to domestic producers at a time of keen international competition. The 1953 review also observes an increased tendency in the period under review to impose additional charges of one kind or another on imported goods. In 1953, only very few tariff reductions were brought about by negotiation. Cuba accorded a reduction of tariff on a range of products to Germany in exchange for an assured market for sugar. These reductions involved the disappearance of the preferences previously granted on these products to the United States. At the same time, a number of developing countries unilaterally reduced or removed duties on imports of capital goods required for the development of industry.

Box 14: Case study 2: India, 1947-94

As can be seen from Appendix Table 13, India bound about 20 per cent of its tariff lines in 1947 but its binding coverage decreased progressively to reach about 4 per cent in the wake of the Uruguay Round.[69] The decline of the binding coverage in the first decade reflects an increase in the total number of lines in the tariff schedule and three renegotiations under Article XXVIII.[70]

67 See Appendix Table 10.

68 See GATT (1954) International Trade 1954 (general annual report).

69 Because of repeated changes in nomenclatures, changes in the level of binding coverage over time should be interpreted with caution. See technical appendix.

70 See GATT documents Secret/3(1953), Secret/7(1954), Secret/39(1955). India also initiated Art XXVIII renegotiations in 1969, 1975 and 1976. See Secret/188(1969), Secret/227(1975) and Secret/232(1976).

The absolute number of bound lines did not change much until the late 1960s. A second drop in the level of the binding coverage in the early seventies reflects a drop by two-thirds of the number of bound tariff lines. The distribution of binding coverage across product groups also changed significantly over time. While in the forties, machinery apparatus, footwear, hats, etc, and scientific and precision instruments had the highest binding coverage, in the seventies and eighties, all bindings were concentrated on a few number of products, mainly vegetables and fats, and to a lesser extent chemicals and pharmaceuticals.

Indian applied tariff averages for a sample of selected product groups followed an upward trend from the late forties to the late eighties.[71] The Table below shows simple averages of applied tariffs for selected groups of products and selected years. While Brazilian tariffs reached a peak in the late seventies and started declining in the eighties, Indian tariffs continued to increase until the end of the eighties.

India: Simple average of applied *ad valorem* tariff rates in percentage, selected product groups, selected years

Section	Description	1948	1958	1964	1979	1987	1997	2001
3 [a]	Animal and vegetable fats	29.5	29.7	30.1	57.1	200.0	35.5	63.3
4 [b]	Prepared foodstuffs, beverages and vinegar	35.4	40.8	49.4	122.0	104.0	50.3	45.2
7	Artificial resins and plastic materials	25.0	72.8	72.8	80.0	150.0	38.4	34.4
9	Wood and articles of wood	25.5	42.2	45.0	65.0	63.5	31.4	28.8
11.61[c]	Articles of apparel and clothing accessories of textiles fabrics	25.0	100.0	66.8	100.0	100.0	45.0	35.0
12 [d]	Footwear, headgear, umbrellas	27.0	49.2	54.1	100.0	100.0	44.7	34.8
17	Vehicles, aircraft and associated equipment	25.8	49.7	47.0	58.0	70.4	36.6	36.7
Total number of lines of selected products		110	152	155	72	802	943	1077

[a] The share of specific tariff lines in section 3 ranges from 7.1 to 38.4 per cent in the first three years.

[b] The share of specific tariff lines in section 4 ranges from 3.3 to 38.8 per cent during the period 1948-1987.

[c] Subsection 61 of section 11. The share of specific lines in this section is 62 per cent in 2001.

[d] Share of specific lines in section 12 are 11.1 and 25 per cent respectively in 1958 and 1964.

Note: Because of changes in nomenclature, tariff averages are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, India (1948), India (1957), India (1964), India (1979); India (1987); WTO-IDB; WTO estimates.

In the fifties, India modified its tariffs relatively frequently. In 1954 for instance, the rates on certain uncut precious stones were reduced while in 1955 reduced rates were provided for a limited period on sugar for refining. At the same time, some fiscal tariff rates were increased and reclassified as protective duties. Rates of 15 per cent were imposed on bleaching powder and paste and 85 and 92.5 per cent on spark plugs. There was an increase for leather manufactures, cotton rope, cutlery, metal furniture and fur skins, while for tiles, vacuum bottles and zip fasteners a specific duty was added to the *ad valorem* duty. India also negotiated some increases of bound duties such as for instance on safety razor blades, wines, glass beads and false pearls. In 1956, India increased the duty on a range of products to protect foreign currency reserves which had declined as a consequence of the increasing requirements for the development of domestic industry.

[71] Changes in tariff averages over time should be interpreted cautiously because of changes in nomenclature and methodology. See technical appendix.

In the 1960s, a number of developing countries acceded to the GATT and two rounds of negotiations were organized. Twenty-nine newly independent states succeeded to Contracting Party status on the basis of Article XXVI:5(c) while only seven negotiated their accession under Article XXXIII.[72] The simplified procedures for the acquisition of Contracting Party status under Art XXVI:5(c) adopted in 1963 provided for a certification by the Director-General to the effect that the government concerned had become a Contracting Party.[73] Spain and Portugal, which claimed developing country status at this time, were among the seven countries which had to negotiate the terms of their accession with the Contracting Parties, together with Argentina, Israel, the Republic of Korea, the United Arab Republic and Yugoslavia. Tunisia acceded provisionally in 1959 and a dozen other countries declared they were applying the GATT on a de facto basis. In the early days, accession negotiations entailed an exchange of concessions with both the Contracting Parties and the applicant countries making concessions (Hoda, 2001). In the sixties however non-reciprocity ruled in relation with developing countries. A GATT Secretariat pamphlet entitled "The role of GATT in relation to trade and development" summarized the approach to accession negotiations as follows: "While less-developed countries have made some tariff concessions on their accession, relatively little reciprocity is expected from them and it is accepted that they must, in general, retain freedom to use their tariff flexibility in the light of their development needs".[74]

The case studies of Argentina and the Republic of Korea suggest that even the countries which acceded under Article XXXIII in the 1960s did not bind a large share of their tariffs. As shown in Box 16, Argentina bound around 5 per cent of its tariff lines while the Republic of Korea only bound 60 lines. Just before the Uruguay Round, the binding coverage of the Republic of Korea had increased to 9.5 per cent.

Twenty-five developing countries declared themselves participants in the Kennedy Round (1964-1967). Special procedures were established to give attention to the concerns of developing countries. Developing countries were mainly concerned with improving their access to developed country markets. Except for some attempts by the United States, developed countries made no effort to extract more than token concessions from developing countries, which did not make any significant market access commitments (Hudec, 1987).

Box 15: Case studies 3 and 4: Senegal and Nigeria

Case study 3: Senegal

Senegal became an independent country on 20 June, 1960. On 27 June, 1960 the Government of France advised that as from the day of its independence the Government of Senegal had acquired full responsibility for matters covered by the General Agreement in its territory. The French Government thereby established the fact that Senegal qualified, in the sense of paragraph 5(c) of Article XXVI, to become a Contracting Party. The Government of Senegal which had been applying the General Agreement on a de facto basis since November 1960 advised the Executive Secretary of GATT that it wished to be deemed a Contracting Party under Article XXVI:5(c). Since the conditions were met, Senegal became a Contracting Party. Its rights and obligations date from the day of its independence.

The pre-existing concessions in the French schedule that related to Senegal were continued and a new schedule comprising those concessions was established by using the procedure of certification

[72] A total of 63 countries acceded on the basis of Article XXVI:5(c). See Appendix Table 10.

[73] Before 1963, it was customary to refer requests under Art XXVI:5(c) to the Contracting Parties even though accession under this article is automatic providing that the stated conditions are fulfilled. At its meeting of April/May 1963, the Council agreed to a Secretariat proposal for a simplified procedure for the admission of newly-independent States. See WTO (1995a) Guide to GATT law and practice, Geneva: World Trade Organization.

[74] Quoted in Hudec (1987), p. 59.

of changes to GATT schedules.[75] The concessions made on behalf of Senegal in Geneva in 1947 covered approximately 70 products. The binding levels range from 4 per cent to 30 per cent (cars and car parts) with two exceptions at 75 per cent for cigars and cigarettes. They also bound preferential rates for a dozen of products – mainly petroleum products – imported from the French Union. Six products were added during the Annecy Round (with bindings at 5 per cent and 7 per cent) and another 70 or so were added during the Torquay Round (most bindings at 5 per cent).

Senegal: Simple average of applied *ad valorem* tariff rates in percentage, selected product groups, selected years

Section	Description	1969	1977	1985	2002
3	Animal and vegetable fats	20.8	19.4	58.9	11.9
4[a]	Prepared foodstuffs, beverages and vinegar	23.7	24.2	83.7	16.9
7	Artificial resins and plastic materials	23.2	21.9	56.1	10.7
9	Wood and articles of wood	15.2	20.0	58.5	12.4
11.61[b]	Articles of apparel and clothing accessories of textiles fabrics	35.0	30.0	65.0	20.0
12	Footwear, headgear, umbrellas	21.8	28.8	54.1	17.8
17	Vehicles, aircraft and associated equipment	14.3	13.7	66.4	8.7
Total number of lines of selected products		404	797	900	1116

[a] The share of specific tariff lines in section 4 is 14.7 per cent in 1969 and 12.7 per cent in 1977.

[b] Subsection 61 of section 11.

Note: Because of changes in nomenclature, tariff averages are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, Senegal (1969), Senegal (1977), Senegal (1985); WTO-IDB; WTO estimates.

As shown in the Table above, until the late 1970s, applied tariffs remained relatively low with the exception of clothing and footwear. In the mid-eighties, however, tariffs rose to considerably higher levels before being reduced again in the 1990s. Note that the reduction of applied tariffs went far below the level of the UR bindings which average 30 per cent for both agricultural and non-agricultural products.

Case study 4: Nigeria

Nigeria also succeeded to Contracting Party status under Article XXVI:5(c). Its rights and obligations date from October 1960, the date of Nigeria's independence. For several decades, Nigeria's schedule covered one single product: stockfish.[76] As shown in the Table below, applied tariffs were relatively high in the 1960s, they increased slightly in the 1970s but had already started to decline by the mid-1980s. In the Uruguay Round, Nigeria bound all its agricultural tariff lines at a simple average level of 150 per cent. However only 6.9 per cent of industrial tariff lines were bound at an average level of 48.8 per cent. These bindings impose limited constraints on Nigeria's tariff policy.

75 See Schedule XLIX established in GATT (1964) Second Certification of Rectifications and Modifications of Schedules to the GATT, 29 April 1964.[Instrument No 92].

76 See GATT (1962) Protocol to the GATT embodying the results of the 1960-61 tariff conference, 16 July 1962.

Nigeria: Simple average of applied *ad valorem* tariff rates in percentage, selected product groups, selected years

Section	Description	1965	1970	1987	1999	2003
3 [a]	Animal and vegetable fats	35.5	44.4	20.0	25.5	37.6
4 [b]	Prepared foodstuffs, beverages and vinegar	50.8	56.5	33.4	39.9	68.6
7 [c]	Artificial resins and plastic materials	41.6	39.5	21.4	25.4	24.5
9	Wood and articles of wood	53.5	85.2	28.5	28.5	30.1
11.61 [d]	Articles of apparel and clothing accessories of textiles fabrics	40.0	42.7	14.6	50.0	50.0
12	Footwear, headgear, umbrellas	43.4	49.5	35.5	32.6	32.6
17	Vehicles, aircraft and associated equipment	24.8	28.6	33.3	18.3	18.3
Total number of lines of selected products		236	250	248	960	988

[a] Share of specific tariff lines in section 3 are 33.3 and 25 per cent respectively in 1965 and 1970.

[b] Shares of specific tariff lines in section 4 are 28 to 31.8 per cent respectively in 1965 and 1970.

[c] Shares of specific lines in section 7 are 3.2 and 5 per cent respectively in 1965 and 1970.

[d] Subsection 61 of section 11.

Note: Because of changes in nomenclature, tariff averages are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, Nigeria (1965), Nigeria (1970); Zoll- und Handelsinformation by the Bundesstelle für Aussenhandelsinformation, Nigeria (1987); WTO-IDB; WTO estimates.

Box 16: Case studies 5 and 6: Argentina and the Republic of Korea

Case study 5: Argentina

Argentina became a Contracting Party to the GATT at the end of the Kennedy Round in September 1967. Like the Republic of Korea, Argentina gained admission under Article XXXIII by negotiating tariff concessions. As shown in Appendix Table 14, Argentina accepted to bind about 5.5 per cent of its tariff lines. Binding coverage differed across product groups reaching 23 per cent for live animals and 12.1 per cent for vehicles and aircrafts while other product groups such as footwear and wood and articles of wood remained totally unbound.[77] Overall, less than 10 per cent of the bound lines concerned agricultural products. The binding levels for agricultural products ranged from zero for sugar-beet seeds to 140 per cent for whisky or sugar confectionery. Industrial bindings covered mainly capital goods and intermediary inputs amongst others metals and machinery as well as pharmaceuticals. Tariffs on machinery were typically bound at 80 per cent or even higher with peaks at more than 200 per cent for certain products. It is interesting to note that the final bound rates of duty are not systematically lower than the base rates that are indicated in the schedule. In a significant number of cases, the bound rate is higher or equal to the base rate. Argentina scheduled further concessions covering a total of 31 lines in the Tokyo Round.[78] In some cases, the new commitments were further reductions of already bound rates. In other cases, new lines were bound. As with earlier bindings, the level of the bound rate of duty was higher, equal or lower than the base rate.

[77] See Schedule LXIV annexed to the Protocol of accession of Argentina in GATT (1967) Legal instruments embodying the results of the 1964-67 trade conference, vol. V, 30 June 1967.

[78] See GATT (1979) Geneva Protocol. [Instrument_No_156].

Argentina: Simple average of applied *ad valorem* rates in percentage, selected product groups, selected years

Section	Description	1967	1971	1987	1996	2001
3	Animal and vegetable fats	73.1	68.2	21.8	8.9	11.5
4	Prepared foodstuffs, beverages and vinegar	99.6	108.5	26.6	14.3	16.8
7	Artificial resins and plastic materials	66.9	62.2	24.7	13.8	15.7
9	Wood and articles of wood	61.6	60.7	32.2	10.3	11.9
11.61 [a]	Articles of apparel and clothing accessories of textiles fabrics	140.0	194.5	38.0	20.7	22.5
12	Footwear, headgear, umbrellas	125.0	156.3	24.7	21.9	21.4
17	Vehicles, aircraft and associated equipment	79.6	60.5	27.4	15.3	19.3
Total number of lines of selected products		713	842	1249	1350	1387

[a] Subsection 61 of section 11.

Note: Because of changes in nomenclature, tariff averages are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, Argentina (1967), Argentina (1971), Argentina (1987); WTO-IDB; WTO estimates.

The applied tariff averages for groups of products shown in the Table above, suggest that Argentina's applied tariffs were high in the 1960s and 1970s. Our calculations for the second half of the 1980s however show that tariffs had already been substantially reduced in the early 1980s. As shown in the Table, tariffs were further reduced in the early 1990s. Argentina most likely did not use the Uruguay Round negotiations to reduce its applied tariffs. The average of Uruguay Round final bound rates for Argentina is somewhat above 30 per cent.

Case study 6: The Republic of Korea

Like Argentina, the Republic of Korea became a Contracting Party to the GATT in 1967 around the end of the Kennedy Round of trade negotiations. The Republic of Korea also negotiated its accession under Article XXXIII. The schedule annexed to the protocol for the accession of the Republic of Korea to the GATT covered 60 products.[79] Around 15 per cent of those concerned agricultural products. The level of the agricultural bindings ranged between zero for bovines and 80 per cent for certain prepared food products. Industrial bindings covered a variety of product groups including some clothing products and machinery. A number of bindings were set at zero and a few at 80 per cent. During the Kennedy Round, the Republic of Korea bound another 18 products.[80] For those new bindings, the concession rates were all lower than or equal to the corresponding base rates. In the Tokyo Round, the Republic of Korea made 143 concessions.[81] Some were further reductions of already bound rates while others were new bindings. About 30 per cent of the Tokyo Round commitments concerned agricultural products. No clear pattern emerges from the concessions on non-agricultural products. The level of the bindings ranges between 20 per cent and 40 per cent with a few exceptions at 50 per cent or 60 per cent.

79 See GATT (1967) Protocol for the accession of Republic of Korea to the GATT, 2 March 1967, Geneva.

80 See Schedule LX in GATT (1967) Legal instruments embodying the results of the 1964-67 trade conference, vol. V, 30 June 1967.

81 See Schedule LX in GATT (1979) Protocol supplementary to the Geneva (1979) protocol to the GATT, 22 November 1979, Geneva.

Republic of Korea: Simple average of applied *ad valorem* rates in percentage, selected product groups, selected years

Section	Description	1974	1982	1997	2001
3 [a]	Animal and vegetable fats	41.7	27.0	9.2	8.7
4 [b]	Prepared foodstuffs, beverages and vinegar	61.5	44.5	23.5	22.9
7	Artificial resins and plastic materials	39.1	33.3	9.0	8.8
9	Wood and articles of wood	32.0	12.1	6.5	6.4
11.61 [c]	Articles of apparel and clothing accessories of textiles fabrics	100.0	50.0	8.0	12.5
12	Footwear, headgear, umbrellas	79.2	48.5	8.0	10.4
17	Vehicles, aircraft and associated equipment	67.7	25.1	6.0	5.5
Total number of lines of selected products		495	344	2496	2522

[a] The share of specific tariff lines is 0.87 in 1997 and in 2001 in section 3.

[b] The share of specific tariff lines range from 0.4 to 8 per cent in section 4.

[c] Subsection 61 of section 11.

Note: Because of changes in nomenclature, tariff averages are not strictly comparable across years. See technical appendix for further details.

Source: Korean Customs Association (1974); International Customs Journal, Korea (1982); WTO-IDB; WTO estimates.

The simple averages of applied tariffs for selected product groups shown in the Table above suggest that Korean tariffs were still relatively high by the mid-1970s but that already in the early 1980s, they had been significantly reduced. Tariffs were further reduced as shown by the averages for 1996 and after. At the same time as the averages were reduced, the dispersion between groups was also reduced. In the Uruguay Round, the Republic of Korea bound all its agricultural tariffs at an average rate of more than 50 per cent and 93.8 per cent of its non-agricultural tariffs at 10 per cent on average.

Developing countries did not make many market access concessions in the 1970s or 1980s either. Between 1970 and 1985, six developing countries plus Romania and Hungary negotiated their accession under Article XXXIII and six succeeded to Contracting Party status under Article XXVI:5(c). During the same period, the number of developing countries applying the GATT provisionally or de facto reached 30. The participation of developing countries in the Tokyo Round was not subject to the reciprocity rule. According to Hudec (1987), developed countries pressed a little harder for reciprocity from the larger developing countries but not very much. Nevertheless, 19 developing countries offered tariff reductions or bindings of prevailing tariff rates on 5 per cent of their total MFN imports.[82]

In the late 1980s and early 1990s, that is just before or during the Uruguay Round negotiations, the number of accessions increased significantly. About 25 countries succeeded to Contracting Party status under Article XXVI:5(c) while 13 countries acceded to the GATT under Article XXXIII. Eight of the 13 countries were Latin American (Mexico, Bolivia, Costa Rica, El Salvador, Venezuela, Guatemala, Paraguay and Honduras), three were countries in transition (Czech Republic, Slovak Republic and Slovenia) and two were North African (Morocco and Tunisia).[83] It is interesting to note that the dispersion in the level of commitments undertaken by acceding countries increased significantly during this period. Except for Tunisia and Morocco, all of the countries that acceded under Article XXXIII bound all or almost all their tariff lines. In most cases, the tariffs were bound at an across-the-board ceiling level with a list of exceptions. The level of the ceiling varied between 27 per cent in the case of Slovenia and 55 per cent in the case of Costa Rica. This evolution probably reflects a progressive change in views regarding the role of international trade in promoting growth and development that could be observed during this period.

[82] Or about $3.9 billion of their 1976 or 1977 imports.

[83] See the details regarding accession in Appendix Table 10.

International financial institutions and developed Contracting Parties were pushing harder in favour of trade reforms in developing countries.[84]

For most of the 13 countries that acceded to GATT after 1986, accession was part of a broader reform agenda. The report of the Working Party on the Accession of Costa Rica describes the tariff reform introduced as part of a Structural Adjustment Program. Costa Rica simplified its tariff structure and significantly reduced its applied rates. Taxes on customs values, surtaxes and surcharges were reduced and unified within the customs tariff. The maximum tariff level for most finished products was set at 40 per cent. At the same time, however, the government bound its entire tariff schedule at 55 per cent *ad valorem* with a few exceptions specified in an annex to its schedule. Most exceptions to the ceiling were set below 55 per cent with only a few bindings set above 55 per cent.

Tables 10 and 11, in the next subsection, show the pre-Uruguay Round binding coverage for agricultural and non-agricultural products for a set of 20 developing countries. Except for the countries which acceded in the late 1980s, all the other countries in the sample have binding coverages for both agricultural and non-agricultural products that are below one third. In agriculture, eight countries had bound less than 5.4 per cent of their tariff lines while for industrial products, 10 countries had bound less than 10 per cent of their lines.

As of 1 January, 1995, the total number of Contracting Parties to the GATT was 128, of which about 100 were developing countries. GATT Contracting Parties which accepted the Marrakesh Agreement and the Multilateral Trade Agreements, and for which the relevant Schedules of Concessions and Commitments are annexed to GATT 1994 and the GATS, became original Members of the WTO.

(ii) The Uruguay Round and after

The 1980s and the early 1990s saw a dramatic change in approaches towards the role of international trade in development strategies.[85] Slowly at first, but rapidly by the late 1980s, many developing countries, encouraged and supported by the World Bank, turned away from earlier import substitution strategies and undertook sometimes radical liberalizations of their trade regimes.[86] This change in strategies was also reflected in the participation of developing countries in the Uruguay Round. Many of them participated actively throughout the Round, while others increased their participation as the Round evolved. Developing countries made offers on market access for both agricultural and non-agricultural products.[87] At the same time, however, they liberalized unilaterally. This subsection attempts to isolate the changes in access to developing country goods markets that were negotiated at the multilateral level. In the same perspective, this subsection also examines the ITA negotiation which took place after the Uruguay Round as well as the market access component of accessions that were negotiated under Article XII of the Marrakesh Agreement.[88]

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84 Hoda (2001) notes that industrialized Contracting Parties have been the principal players in the accession negotiations of developing countries. World Bank (2006) shows that Bank lending for trade liberalization peaked in the period 1987-1994.

85 Winters (2000) discusses both the evolution of the thinking about trade policy and the intellectual and experiential factors behind the thinking.

86 See the evaluation of World Bank support for trade (World Bank, 2006).

87 The discussion in this subsection is restricted to market access for goods. While the focus is on industrial products, agricultural market access issues are also covered although in less detail. For a discussion of services commitments, see GATT (1994), Hoekman (1996) and WTO (2001a).

88 Members also conducted sectorial negotiations in services (finance and basic telecommunications) which are not discussed in this section. On financial services, see Sorsa (1997), Dobson and Jacquet (1998), Mattoo (2000), Qian (2000), Woodrow (2000, 2001) and Barth et al. (2006). On basic telecommunications services, see Sherman (1998).

Uruguay Round commitments

With the Uruguay Round, the data situation improved considerably.[89] With regard to tariffs in particular, the GATT/WTO Secretariat's Integrated Data Base allowed detailed calculations to be made electronically for 27 out of a total of 94 developing economy participants. Using these data, a comparison can be made between pre- and post-Uruguay Round binding coverage. On average, the developing countries in the sample substantially increased their binding coverage. Their share of bound lines in all agricultural tariff lines increased from 17 per cent before the Uruguay Round to 100 per cent. For non-agricultural products, the binding coverage expressed in percentage of all non-agricultural tariff lines increased from 21 to 73 per cent. As can be seen from Table 9, these averages hide considerable differences between regions.[90] While almost all Latin American countries bound all their industrial tariff lines at a generally uniform ceiling level, African and Asian countries adopted more diverse strategies. Most of them left a significant number of lines unbound.

Table 9
Pre- and post-Uruguay Round binding coverage for agricultural and non-agricultural products

	Agricultural products				Non Agricultural products			
	Percentage of tariffs lines bound		Percentage of imports under bound rates		Percentage of tariffs lines bound		Percentage of imports under bound rates	
	Pre UR	Post UR	Pre UR	Post UR	Pre UR	Post UR	Pre UR	Post UR
Developing economies	17	100	22	100	21	73	13	61
Transition economies	57	100	59	100	73	98	74	96
Latin America	36	100	74	100	38	100	57	100
Central Europe	49	100	54	100	63	98	68	97
Africa	12	100	8	100	13	69	26	90
Asia	15	100	36	100	16	68	32	70

Source: GATT (1994).

Comparisons of tariff levels over time raise a number of difficulties. While comparisons between pre-Uruguay Round and post-Uruguay Round applied tariffs are relatively straightforward, changes in binding coverage complicate comparisons between pre- and post-Uruguay Round averages of bound rates. In the 1990s, averages of bound tariffs were typically calculated across all tariff lines, bound and unbound, using the applied duty in the base period for unbound lines. Nowadays, averages of bound rates are calculated on bound rates only. These issues warrant for considerable caution in interpreting the statistics, in making comparisons across countries and over time and in making comparisons with previous estimates.

A major achievement of the Uruguay Round was the Agreement on Agriculture and the progress made towards bringing agriculture back into the realm of multilateral trade rules. Although agriculture had always been covered by the GATT, prior to the WTO, the rules that applied to agricultural primary products deviated from the general rules.[91] In the lead up to the Uruguay Round negotiations, it became increasingly evident that the causes of disarray in agriculture went beyond problems with market access strictly defined. To get to the root of the problem, Members decided to tackle market access, domestic support and export subsidies jointly. A comprehensive discussion of the effects of the Agreement on Agriculture on developing countries is beyond the scope of this Report. This subsection focuses on changes in tariff bindings and tariff levels. However, it is important to keep in mind that this only

[89] Uruguay Round market access commitments have been extensively documented elsewhere. See for instance WTO (2001a), OECD (1999), Martin and Winters (1996), GATT (1994).

[90] Averages calculated on a sample of 55 countries (counting the 12 Members of the EU individually) including 27 of the 93 developing economy participants in the Uruguay Round. See the discussion in GATT (1994).

[91] See the discussion in WTO (2001a).

provides a partial picture of the disciplines that developing countries took up in this area when they signed the Marrakesh Agreement.

Table 10
Uruguay Round commitments, agricultural products, selected developing countries

	Binding coverage		Simple average of bound tariffs		Simple average of applied tariffs			
	Pre UR	Post UR [a]	Pre UR	Post UR [a]	Pre UR year	Pre UR Average	Post UR year	Post UR Average
Brazil	5.4	100.0	17.2	35.5	1989	36.4	1997	12.6
Chile	100.0	100.0	35.0	26.0	...	...	1996	11.0
Colombia	100.0	100.0	16.7	91.9	1991	14.1	1996	14.2
El Salvador	100.0	100.0	53.7	42.1	...	...	1996	13.0
Hong-Kong, China	2.2	100.0	0.0	0.0	1992	0.0	1996	0.0
India	14.3	100.0	102.7	114.5	1988	76.3	1996	38.0
Indonesia	4.7	100.0	55.5	47.0	1989	22.0	1998	8.8
Jamaica	...	100.0	...	97.4	1991	28.5	1999	17.3
Korea, Rep. of	20.5	99.1	52.1	52.9	1988	27.2	1996	50.1
Macao, China	...	100.0	...	0.0	1991	0.0	1996	0.0
Malaysia[b]	4.7	99.9	28.3	12.2	1988	9.8	1999	3.8
Mexico	100.0	100.0	54.5	35.1	1988	12.8	1998	20.6
Philippines	3.2	99.4	33.1	34.7	1991	34.3	1996	19.5
Singapore	1.7	100.0	7.3	9.5	1989	0.1	1996	0.0
South Africa[b]	33.1	99.5	54.6	39.8	1988	11.2	2000	9.0
Sri Lanka	4.9	100.0	50.0	49.7	1991	36.1	1998	25.6
Thailand[b]	4.9	100.0	42.0	...	1988	44.3	1999	38.0
Tunisia	...	98.8	...	116.0	1989	32.7	2000	76.6
Turkey[b]	12.4	100.0	23.0	60.1	1989	50.1	1996	42.2
Venezuela	100.0	99.0	71.1	55.7	1990	18.5	1997	14.6

[a] Including post UR rectifications and modifications.

[b] Countries with shares of non-ad valorem tariffs in their agricultural post-UR applied rates exceeding 5 per cent.

Source: WTO Secretariat.

The data in Table 10 show pre-and post-Uruguay Round binding coverages, bound tariff averages and applied tariff averages for agricultural products for 20 developing countries for which information was available.[92] With the exception of 5 countries which had acceded to the GATT in the 1980s, developing countries extended their binding coverage from less than one third of their tariff lines to full coverage. The un-weighted average of post Uruguay Round bound rates across all 20 countries is around 50 per cent. Two countries set their bound tariffs at rates on average higher than 100 per cent. At the other end if one excludes Hong-Kong, China; Macau and Singapore; and Malaysia because of its large share of non *ad valorem* rates, Chile and the Philippines set the lowest agricultural bindings on average. In all cases except Hong-Kong, China; Macao, China; Singapore and Thailand with its large share of non-*ad valorem* rates, applied tariffs in the late 1990s were on average substantially lower than post-UR tariffs. A large majority of countries lowered their applied tariffs during the period under consideration but they went far beyond their commitments.

[92] Because non-*ad valorem* tariff rates are not taken into account in the calculations, countries with shares of non-*ad valorem* tariffs in their agricultural or non-agricultural post-UR applied rates exceeding 5 per cent are signalled with a note.

Table 11
Uruguay Round commitments, non-agricultural products, selected developing countries

	Binding coverage		Simple average of bound tariffs		Simple average of applied tariffs			
	Pre UR	Post UR [a]	Pre UR	Post UR [a]	Pre UR year	Pre UR Average	Post UR year	Post UR Average
Brazil	6.8	100.0	28.0	30.8	1989	40.3	1997	14.9
Chile	100.0	100.0		25.0			1996	11.0
Colombia	0.8	100.0	51.3	35.4	1991	11.5	1996	11.2
El Salvador	100.0	100.0	44.5	35.7			1996	8.4
Hong-Kong, China	1.2	37.5	0.0	0.0	1992	0.0	1996	0.0
India	4.6	69.8	44.7	34.3	1988	78.7	1996	38.8
Indonesia	11.4	96.1	32.7	35.6	1989	26.6	1998	9.6
Jamaica	0.0	100.0		42.5	1991	18.3	1999	7.1
Korea, Rep. of	9.5	93.8	31.2	10.1	1988	19.7	1996	7.7
Macao, China	0.0	15.6		0.0	1991	0.0	1996	0.0
Malaysia	0.4	81.2	31.0	14.9	1988	19.7	1999	10.2
Mexico	100.0	100.0	49.0	34.9	1988	13.1	1998	12.6
Philippines	6.4	61.8	23.4	23.4	1991	26.7	1996	13.5
Singapore	0.3	64.5	10.0	6.3	1989	0.5	1996	0.0
South Africa [b]	16.6	96.0	10.4	15.8	1988	20.3	2000	6.1
Sri Lanka	4.1	28.3	17.1	19.3	1991	25.9	1998	9.4
Thailand [b]	2.6	70.9	24.6	24.2	1988	43.7	1999	39.8
Tunisia	0.0	51.1		40.6	1989	28.7	2000	25.6
Turkey	34.4	39.3	23.3	17.5	1989	45.2	1996	7.5
Venezuela	100.0	100.0	50.0	33.9	1990	17.0	1997	11.6

[a] Including ITA and post UR rectifications and modifications.

[b] Countries with shares of non-ad valorem tariffs in their non-agricultural post-UR applied rates exceeding 5 per cent.

Source: WTO Secretariat.

In the non-agricultural market access negotiations, only a subset of all developing countries agreed to bind all their tariff lines. As shown in Table 11, seven out of the 20 developing countries in the sample, that is all Latin American countries plus Jamaica, bound all their industrial tariffs. Indonesia, the Republic of Korea, Malaysia and South Africa bound more than 80 per cent of their industrial tariff lines. Macao, China and Sri Lanka on the other hand bound less than one third of their lines. All the countries in the sample bound their tariffs at levels that are on average lower than the ones negotiated for agriculture. For all countries except two, there is a large gap between bound and applied tariffs.[93] A large majority of the countries reduced their applied tariffs between the early and the late 1990s. However, as in the case of agricultural products, they went beyond what their commitments would have required.

The Information Technology Agreement

As mentioned in subsection 2.(a) above, developing economies participated actively in the ITA. The number of developing country participants increased from 6 out of a total of 28 participants in 1997 to 32 out of a total of 70 by the end of April 2007.[94] A number of developing economies, including large countries such as Brazil, Mexico and South Africa have preferred to stay outside the agreement.[95] While Central America is well represented, not a single South American country participates in the ITA. Similarly, two North African countries participate, but no Sub-Saharan country has signed the Agreement.

Protection levels in developing economies for products covered by the ITA differed widely in 1997. Some developing economies, notably in East Asia, a region heavily involved in global trade of ITA products,

93 Bound averages must be interpreted jointly with the corresponding figure for the binding coverage. When the binding coverage is incomplete, the bound and the applied averages are not strictly comparable.

94 Developing country participants include countries in transition.

95 Note that South Africa was considered a developed Member in the Uruguay Round.

had already very low applied rates (e.g. Hong-Kong, China and Singapore). Others had moderate tariffs and granted generous duty drawbacks for domestic IT industries (e.g. Malaysia or Costa Rica) while a third group had relatively high tariff levels (e.g. India and Egypt). For the latter group it was of particular importance that the staged implementation could be as long as 8 years for some products (e.g. India). While for the major developed economies the average bound tariff on ITA products was typically below 5 per cent, the same average typically ranged between 10 per cent and 20 per cent for developing economies with the important exception of India (66 per cent) on the upward side and Hong-Kong, China and Chinese Taipei (0.0 per cent and 4.7 per cent) on the downside.

Accessions

Since 1995, a total of 22 countries acceded to the WTO under the provisions of Article XII of the Marrakesh Agreement. A majority of those countries were in a process of transition from a planned to a market economy when they joined. A number of them were also on accession track for the European Union. This means that they were engaged in a substantive program of unilateral reforms which significantly complicates any assessment of the role of the WTO in tariff reductions.

Article XII provides that accession to the WTO is on terms negotiated between the WTO and the applicant. Because each accession is a negotiation between the WTO and a different economy, each accession is unique. However, most commentators observe that the price of accession has increased over time.[96] Pursuant to the Agreement on Agriculture, all agricultural tariff lines have been bound by countries that have acceded under Article XII. Newly acceded Members have also bound 100 per cent, or very close to 100 per cent of their non-agricultural tariff lines, which is more than many incumbent Members. They have bound their tariffs at levels that are lower than those at which most incumbent developing members have bound theirs. The commitments of the new Members are difficult to compare with pre-accession tariffs. First, data on pre-accession tariffs are not necessarily available. Second, as countries would in principle be supposed to implement reforms before joining the WTO, it is not clear exactly which point in time would be relevant for the comparison.[97] However, the comparison of commitments with post-accession applied averages in Table 12 clearly shows that in a number of cases commitments must have induced a reduction of applied tariffs. Several Members either have their bound and applied tariffs at the same level, or have their applied tariffs above their bound tariffs, which indicates that they are still in the process of phasing-in their tariff reduction commitments. Most of the newly acceded transition countries are also participants to the Information Technology Agreements, as well as to a substantial part of the sectoral initiatives.

96 See Evenett et al. (2004), Langhammer and Lücke (1999) or Milthorp (1997).

97 Article XIV.2 of the WTO Agreement states that a Member which accepts the Marrakesh Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force. Transition periods are thus by no means made automatically available to acceding governments. Article XII on the other hand offers Members a margin of manoeuvre. In practice, Members have made it clear that transition periods will only be granted if the applicant is successful in making a strong enough case to prove that such a period is necessary.

Table 12
Simple average of bound and applied *ad valorem* import tariffs of newly acceded economies

	Agricultural Products		Industrial Products	
	Bound	Applied	Bound	Applied
Albania [a]	9.4	9.0	6.6	7.2
Republic of Armenia	14.7	6.6	7.5	2.3
Bulgaria	35.6	18.4	23.0	8.8
Cambodia [c]	28.1	19.5	17.7	15.9
China	15.8	16.2	9.1	9.5
Croatia [c]	9.4	9.3	5.5	4.1
Ecuador	25.5	14.7	21.1	11.5
Estonia [b]	17.5	12.2	7.3	0.1
FYR of Macedonia	11.3	12.7	6.2	8.7
Georgia	11.7	11.7	6.5	6.9
Jordan	23.7	19.6	15.2	12.1
Kyrgyz Republic [c]	12.3	7.0	6.7	4.3
Latvia [a]	34.6	11.8	9.4	2.2
Lithuania [b]	15.2	9.7	8.4	2.4
Moldova [a]	12.2	10.2	6.0	4.1
Mongolia [c]	18.9	5.1	17.3	4.9
Nepal [c]	41.4	13.5	23.7	13.7
Oman [a]	28.0	10.2	11.6	5.0
Panama [b]	27.7	14.8	22.9	7.4
Saudi Arabia [d]	22.4	7.8	10.5	4.8
Chinese Taipei [c]	15.3	16.3	4.8	5.5
Viet Nam [d]	18.5	24.2	10.4	4.7

Note: Year of applied tariff is 2004 except where indicated as follows: [a] 2001, [b] 2002, [c] 2003, [d] 2006.
Source: WTO-IDB and UNCTAD.

(iii) Summary observations

Overall, a number of lessons can be drawn from this brief overview of the evolution of developing country tariffs and their utilization of the multilateral system. First, for several decades, developing countries did not make much use of the multilateral system to reduce their tariffs. Typically, commitments made in accession negotiations or during the rounds were limited. Binding coverage remained low and in some cases it decreased over time. In the 1950s and 1960s, tariffs were subject to frequent changes. Governments reduced some tariffs and increased others on a yearly basis. Until the mid-1980s, the applied tariffs of a number of developing countries tended to increase rather than to decrease. Second, the GATT contributed significantly to improve transparency in market access conditions and played an important role as a forum for the discussion of trade policies. GATT documents report discussions among Contracting Parties on tariffs, quasi tariffs and non-tariff measures. For most of the period, tariffs were only part of the story. Quantitative restrictions played a very important role and developing countries had all sorts of other restrictive measures in place. The role of GATT in this area is examined below. Third, when views regarding the role of trade in development changed in the second half of the 1980s and external pressure for developing countries to take more commitments grew, their participation in the GATT intensified. A number of countries which acceded to the GATT after 1986 bound all their tariff lines. The bindings, however, were set at a ceiling level, which introduced a significant gap between their bound and applied rates.

Fourth, with the Uruguay Round, the role of the GATT/WTO was further reinforced. Many developing countries significantly extended their binding coverage in the Uruguay Round. They all bound 100 per cent of their agricultural tariff lines and a number of them, in particular in Latin America, extended their binding coverage of non-agricultural products. However, in most cases the bindings were set at levels far above applied rates. In other words, applied tariffs continued to be set independently from bound tariffs. Liberalization was mainly unilateral, whether encouraged by international financial institutions or not. The multilateral binding process followed. After the Uruguay Round, the trend continued. A number of mostly Asian countries used the ITA negotiations to reduce their tariffs on information technology products. While an assessment of the role of accession negotiations is more difficult, evidence suggests that they were instrumental in reducing the tariffs of the new Members. In a number of cases, there is only very little "water" in the tariffs.

(c) Non-tariff measures

This subsection will complement the examination of tariff negotiations with a discussion of the impact of the GATT/WTO on non-tariff measures (NTMs).[98] For two main reasons, however, a comprehensive discussion of the treatment of NTMs in the GATT/WTO is beyond the scope of this subsection. First, given their nature and the lack of quantitative information, the evolution of NTMs over time is difficult to measure. Second, the GATT/WTO system has addressed NTMs in so many different ways ranging from negotiations, to rule making and to dispute settlement that setting the boundaries of the discussion would be difficult. The analysis is thus selective in its attempt to identify some trends in the incidence of NTMs and to provide some sense for the nature of the role played by the multilateral system in addressing those measures.

Non-tariff measures played an important role in GATT times, as mentioned in subsections (a) and (b), and their presence on the Doha agenda testifies to the fact that they are still alive. This however does not mean that the GATT/WTO has failed in its attempt to discipline NTMs. As stated by Jackson:

> "The ingenuity of man to devise various subtle as well as explicit ways to inhibit the importation of competing goods is so great that any inventory of such measures quickly becomes quite large. In addition, it is clear that this ingenuity will never cease: like ways to avoid income tax, human invention of non-tariff barriers will undoubtedly go on for ever." [99]

Over its 60 years of existence, however, the GATT/WTO has fought many battles against NTMs and it can claim a number of successes. The focus here is on quantitative restrictions which played a dominant role in the early years of GATT and on a number of other NTMs that progressively grew in importance with the reduction of tariffs and quantitative restrictions.

(i) Quantitative restrictions

Trade restrictions other than duties, taxes and other charges were pervasive in the immediate post-World War II period. The low post-war level of monetary reserves and the limited earnings of foreign exchange, combined with the general inconvertibility of currencies, had deprived many countries of means of payments. Therefore, they maintained a strict control of imports to ensure that their limited resources would be devoted to what they saw as the needs commanding highest priority. Trade flows were regulated by bilateral agreements and direct government intervention which took the form of state trading, foreign exchange control, licensing requirements and quantitative restrictions. Each government had its own mix of instruments to control trade flows and the measures were readjusted with a considerable frequency. The GATT played different roles for different measures. As discussed below, it played a substantive role in the elimination of quantitative restrictions. Members on the other hand chose a unilateral or regional

[98] The term "non-tariff measure" rather than "non-tariff barrier" is used in this Report. This term includes all traditional measures, such as quotas, licenses and contingent protection measures, whether or not they may be regarded as protectionist in intent.

[99] See Jackson (1997), p. 154.

approach for the elimination of state trading enterprises. As explained in Box 17, GATT's contribution was to discipline the activities of the remaining state-trading enterprises.

Box 17: State trading in the GATT

State-trading occurs when a government or a government-backed agency determines the prices or quantities at which exports and imports have to be traded. Such activity was prevalent during World War II, however, following the cessation of hostilities, a large proportion of state controlled industries were returned to private hands. Whilst this reduction in state-trading generally took place on a unilateral basis, the issue of state-trading has been tackled more formally in the GATT in two ways: disciplining their use, and, limiting the extent of State-trading enterprises (STEs) by former Centrally Planned Economies (CPEs) upon their accession to the GATT.[100]

The GATT 1947 contains several provisions for disciplining the use of STEs. Article XVII states that STEs are to be subject to the GATT principles of non-discrimination[101] and MFN treatment and should be constrained to act only on the basis of "commercial considerations". Article II:4 states that, in the case of importing countries, they should not maintain mark-ups higher than the tariff levels bound in the GATT. In addition to this, the Interpretative Note to Articles XI, XII, XIII, XIV, and XVIII ensures that the prohibition of quantitative restrictions also applies to STEs. Moreover, the issue of transparency is tackled in Article XVII:4. It stipulates that Members should report the products imported or exported by STEs and that Member countries have the right to request information relating to the operations of another Member's STE where they feel that they are adversely affected by such operations. The Uruguay Round Understanding on the Interpretation of Article XVII reinforced the transparency obligations under Article XVII, including by mandating the creation of a new standard questionnaire for STE notifications.

Special attention was paid to the issue of STEs when former CPEs acceded to the GATT/WTO. For example, given the extent of residual state-trading in Poland and Romania, when these countries sought GATT membership in 1967 and 1971 respectively, minimum annual import growth commitments were demanded of them by existing Members and special mechanisms were retained to safeguard existing Members against potentially damaging export behaviour.

When the GATT was drawn up in 1947, Contracting Parties which employed import restrictions accepted the general rule, contained in Article XI, that imports from other Contracting Parties should not be prohibited and should not be controlled by means of restrictions other than duties, taxes and other charges. The Agreement provides exceptions for the use of restrictions in certain circumstances and under defined conditions. The exception contained in Article XII, which allows a Contracting Party to restrict imports, either by quantity or by value, in order to safeguard its external financial position and balance of payments was considered to be the most important in the early 1950s.[102] The Agreement required Contracting Parties which applied restrictions under Article XII to relax them progressively as conditions improved, maintaining them only to the extent that the position of their balance of payments and the level of their monetary reserves still justified their application and to eliminate them altogether when conditions no longer justified their maintenance. Another important exception was the one included in Article XVIII for infant-industry protection.

Balance-of-payments restrictions were a major presence during the first decade of GATT. In 1951, 27 of the 38 Contracting Parties stated that they were resorting to the provisions of Article XII and were

100 For a discussion of state-provided services under the GATS, see Adlung (2006).

101 It has been clarified through dispute settlement that this non-discrimination obligation includes the concept of national treatment.

102 GATT (1951) The use of quantitative import restrictions to safeguard balances of payments, Geneva: GATT.

employing quantitative import restrictions to redress their balance of payments.[103] Nine Contracting Parties, namely, Belgium, Canada, Cuba, Dominican Republic, Haiti, Luxemburg, Nicaragua, Peru and the United States reported that they were not taking action under these provisions. As of January 1954, 16 of the 20 developed Contracting Parties were restricting their imports for balance-of-payments reasons and nine of the 14 developing countries were doing likewise. Of the 25 countries applying balance-of-payments restrictions, 23 were applying them in a discriminatory manner.

Developed countries

By the late 1950s, developed GATT Contracting Parties, which were emerging from the post-war balance-of-payments crisis started to harden the legal pressure from GATT disciplines in order to progressively eliminate their remaining restrictions.[104] The program which was put in place in 1958, when the major western European trading nations established external currency convertibility, had some success, but it was least successful with respect to agricultural products, partly because the United States continued to use agricultural quotas under the 1951 statute for which it had obtained a waiver. Other countries argued that if the United States could use such quotas, they would also use them (Jackson, 1997). Eventually, for developed countries, balance-of-payments restrictions lost their distinctive character and became merged with the general problem of non-tariff measures.[105] Box 18 describes the phasing-out of quantitative restrictions in Europe.

Box 18: The elimination of quantitative restrictions in Europe

The data collected by the OEEC in respect to OEEC member countries in the framework of the European Payments Union provide a good illustration of how quantitative restrictions were progressively phased out in Europe. Among the various measures to help the European reconstruction the European Payments Union intended to facilitate the liberalization among its Members on a non-discriminatory basis of trade and invisible transactions.

Only in late 1949 when the basic recovery of output had taken place, inflation was under control and exchange rate adjustment made, could the (West) European countries agree on coordinated steps for the progressive elimination of quantitative restrictions among themselves. In October 1949 a timetable was agreed according to which the 16 OEEC members should eliminate the quantitative restrictions applied in intra-European trade and conducted on private account. (A separate timetable was established to free from quantitative restrictions, at a later stage, European imports from Canada and the United States).

The agreed timetable for the elimination of quantitative restrictions was the following:

15 December 1949	50 per cent
1 July 1950	60 per cent
1 February 1951	75 per cent
14 January 1955	90 per cent

103 These are: Australia, Austria, Brazil, Ceylon, Chile, Czechoslovakia, Denmark, Finland, France, Germany, Greece, India, Indonesia, Italy, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Sweden, Turkey, Union of South Africa and the United Kingdom. The governments of Burma and Liberia did not inform the Contracting Parties of their position.

104 See GATT (1955) International Trade 1955, pp.158-159.

105 For a full description of how developed-country residual restrictions were progressively eliminated, see Hudec (1975) The GATT legal system and world trade diplomacy, New-York: Praeger.

Various developments (Korean War and a number of national crises) led to a postponement of the 90 per cent target to the 30 June, 1959[106]. This was only six months after the external convertibility of European currencies (27 December, 1958) was achieved.

At the end of June 1958, 12 countries had attained the 90 per cent target on private intra-European trade while four countries (e.g. France, Iceland, Norway and Turkey) still missed it by a large margin.

Available evidence clearly shows how already in the 1950s liberalization of developed countries' quantitative restrictions was easier for non-agricultural products than for agricultural products. A 1953 GATT Secretariat report discussing the liberalization of intra-European trade notes that in the agricultural sector the percentages of liberalized trade were significantly lower than those reached in the other sectors and that the relationship between the external financial position of countries and the degree of liberalization in this sector is much less clear.[107] In 1954, at the proposal of Western European countries, which were concerned that the sudden abandonment of protection afforded by quantitative restrictions may lead to serious economic and social consequences, the Contracting Parties adopted a decision which provided a transitional period during which the necessary adjustments could be made. Quantitative restrictions were progressively phased out by developed countries. However, they survived for many years in agriculture and in the textiles and clothing sector. As explained below, the Uruguay Round Agreement on Agriculture required the tariffication of most non-tariff measures including quantitative restrictions and prohibited their use. Similarly, as explained in Box 19, the Uruguay Round Agreement on Textiles and Clothing provided for the progressive phasing out of quantitative restrictions affecting trade in textiles and clothing products.

Box 19: Textiles: long exempt from GATT rules

Textiles and clothing were, until recently, the only industrial products derogated from the rules of the GATT. Instead they were subject to the Agreement Regarding International Trade in Textiles (more commonly referred to as the Multi-Fibre Arrangement, or "the MFA") (1974-94) and thereafter to the WTO Agreement on Textiles and Clothing (ATC) (1995-2005). The MFA involved the extensive application of quotas by major industrialized importers at the expense of the most efficient developing country exporters. It thus contravened the MFN principle and the prohibition of quantitative restrictions (QRs), and it discriminated against developing countries. Eventually, the ATC was negotiated in the Uruguay Round as a measure to gradually integrate the textiles sector into the GATT, with the last quota being lifted on the 1 January, 2005. This box charts the history of the MFA and the ATC and discusses the role of the GATT/WTO in bringing an end to quantitative restrictions to textile trade. It is important to highlight that textiles have been one of the hardest-fought issues in the WTO, as it was in the former GATT system; congruency with GATT principles was initially very weak in this area but, with the conclusion of the ATC, it has been significantly strengthened.

The ancestors of the MFA were the Short Term Agreement on cotton textiles (STA) of 1961 and its 1962 successor, the Long Term Agreement Regarding International Trade in Cotton Textiles (LTA). These agreements allowed importing countries to impose restraints on textile imports from their trading partners whenever such imports caused, or threatened to cause, "market disruption", the definition of which was left to the discretion of the importing country. Impetus for the formation of these agreements came from industrial countries, where protectionist pressure from influential textile industry lobbies was highly potent (Khanna, 1991).

106 30 June, 1958 82.6 per cent of private imports in the reference year (generally 1948) was attained were free from quantitative restrictions. See OEEC (1958).

107 The same report also describes the protection of agriculture by means of import restriction in the US. See GATT (1953) International Trade 1953.

During the term of the LTA, developing country exporters sought to circumvent QRs by switching from cotton to the newly developed man-made fibres, which remained outside the ambit of the LTA. Even though the North American and European producers initially had a lead in textiles of man-made fibres, the nature of the clothing industry meant that they could not compete with their developing country counterparts who benefited from low labour costs. Due to the increased import competition and the strong productivity gains through technological changes, textile and clothing industries in industrial countries suffered a fall in employment during this period. This galvanised renewed protectionist pressure which lead to the development of several *supra*-LTA restrictions on textile trade. Seeking to legitimize such departures from existing international legislation, the MFA was introduced in 1973 so as to bring restrictions against imports of wool and synthetic fibres into the category of exceptions to the GATT. Whilst the agreement was conducted within the environment of the GATT, and deposited with the Director-General of the GATT, it is pertinent to note that its members constituted only a proportion of GATT Contracting Parties and that the text of the GATT itself made no mention of special treatment of textile trade.

The MFA was in many ways similar to the LTA. Essentially it facilitated a framework for bilateral agreements or unilateral actions that established quotas limiting imports into countries facing an actual (or imminent) sharp, substantial and measurable increase in imports causing or threatening to cause serious damage to domestic producers. Such QRs were usually to be maintained for up to one year, and, if extended, were to be subject to an allowance of no less than 6 per cent annual growth in imports, compared with 5 per cent under the LTA. A Textiles Surveillance Body was created to ensure the functioning of the Agreement.

The MFA was renewed several times throughout its 20-year reign, with an increasing number of Contracting Parties. By 1994, MFA-IV had 45 signatories, including 31 developing and Central and Eastern European country (CEECs) exporters, and eight industrialized importers: Austria, Canada, the EU, Finland, Norway, the US, Japan and Switzerland. Increasing developing country disquiet regarding the trade restricting measures of the MFA culminated in the inclusion of negotiations to bring about the end of the MFA in the Uruguay Round. The result was the creation of the ATC, which came into force on 1 January, 1995 and which stipulated *inter alia* that all MFA restrictions were to be phased out in successive liberalization phases by 1 January, 2005. Hoekman and Kostecki (2001) argue that an implicit *quid pro quo* link was established in the Round between the demands of the developed countries to address such issues as services and TRIPs, and the textile market access requests of developing countries.

The ATC involved four phases of liberalization in 1995, 1998, 2002 and 2005. The percentage of textile and garment products to be brought under GATT rules was 16 per cent, 17 per cent, 18 per cent and 49 per cent in each of the four years respectively and the quotas that remained in the intervening periods between stages were subject to annual expansions of 6.96 per cent, 8.7 per cent and 11.05 per cent, respectively. It was stipulated that the products brought into the GATT in each phase should include items from four categories: tops and yarn; fabrics; made-up-textiles; and, clothing. While the rationale underlying the sequential phasing out of restrictions was to allow both importers and less efficient exporters time to adjust with the minimum amount of disruption, the developed countries chose to back load their liberalizations by leaving the most sensitive products until last.[108]

It is important to highlight that the ATC provided for transitional safeguard mechanisms to allow, under strict circumstances, restrictions to be imposed on textile and clothing goods not subjected to quotas and not included in the GATT. These safeguards were not the same as the safeguard measures normally allowed under GATT because they could be applied on imports from specific

[108] In the United States the combined employment of the textiles and apparel industry decreased from 1.53 million people in the first quarter of 1995 to less than 0.67 million people in early 2005 when these industries accounted for 0.5 per cent of US non-farm employment. Under the MFA, the EU sought no restrictions on exports from the poorest countries, such as Bangladesh, hence textiles industries prospered there.

exporting countries. However, the importing country had to show that its domestic industry was suffering serious damage or was threatened with serious damage, and it had to show that the damage was the result of two things: increased imports of the product in question from all sources, and a sharp and substantial increase from the specific exporting country. The safeguard restriction could be implemented either by mutual agreement following consultations, or unilaterally and was subject to review by the Textiles Monitoring Body which oversaw the functioning of the agreement, reviewed requests for the use of safeguards, and facilitated dispute settlement.

Developing countries

For the developing countries, instead of becoming fewer, the use of balance-of-payments restrictions expanded in the second half of the 1950s. A GATT report in November 1959 showed that 13 of the GATT's 16 developing country members were using balance-of-payments restrictions.[109] According to Hudec (1987), emergency restrictions increasingly looked like they would become a permanent feature of developing-country trade regimes, making other GATT obligations irrelevant. Over the course of the next four decades, more than a dozen developing countries invoked the provisions of Article XVIII:B and the duration of their import restrictions ranged from several years to more than three decades in a number of cases (see Appendix Table 15). The process of consultations within the Committee on Balance-of-Payments Restrictions allowed trading partners to exercise surveillance over the consulting country's trade policy and apply "peer pressure" towards adopting more liberal policies, with varying results.

As mentioned above, two exceptions to the general prohibition of quantitative restrictions under Article XI were initially available to developing countries: Article XII and Article XVIII.[110] In the first years and indeed throughout the history of the multilateral trading system, the use of infant-industry exceptions under Section C of Article XVIII was limited partly because the review procedure was very strict. In 1949 and 1950, Cuba, Haiti and India each had a single product quota approved. Ceylon also used Article XVIII in the early 1950s and was the only country ever to use it after 1954. The 1954 review session offered developing countries an opportunity to renegotiate GATT rules. As explained in subsection (a), three major changes were introduced. In particular, the requirements that developing countries had to satisfy in order to use quantitative restrictions to safeguard their balance of payments were relaxed. The new provisions of Article XVIII:B were less stringent than those of Article XII and the language "to ensure a level of reserves adequate for the implementation of its program of economic development" (XVIII:9) permitted the use of this exception on a very wide basis. In tandem, strict surveillance by the IMF over exchange restrictions may have led countries to use trade restrictions where the multilateral surveillance was looser (Frank, 1987).

In 1970, detailed consultation procedures were introduced followed by "simplified" consultation procedures in 1972. Simplified consultations, designed to alleviate excess administrative burden on the developing countries, were held on the basis of a written statement, citing the balance-of-payments situation and the system and effect of the restrictions and without the participation of the IMF.[111] Under simplified procedures, the Committee is only called upon to recommend whether full consultations are desirable.[112] Most of the developing countries exercised this option. Over a 20-year period, Pakistan consulted under full procedures only in 1969, 1978 and 1989; in the interim, it engaged in consultations under simplified procedures.

[109] BISD (1960) 8th Supplement, p. 66, cited in Hudec (1987), p.29.

[110] Article XII is available to all Members.

[111] A particular feature of the balance of payments rules is that the Contracting Parties/Members are required to "consult fully" with the IMF in accordance with Article XV of the GATT. In addition to providing an assessment of the Member's balance of payments situation and prospects, the Fund's advice typically took the form "the restrictions do not go beyond the extent necessary to safeguard the external financial position".

[112] It is interesting to read what was said at the time of the adoption of this simplified procedure: "Some delegations feel that detailed discussion of the external financial justifications of the restrictions every two years may not be necessary in all cases and a consultation may become a formality for which adequate preparation may require an amount of energy and attention disproportionate to its value" L/3772/Rev.1)

Following the Tokyo Round, the "1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes" came into effect. In this Declaration, Contracting Parties stated that they were "convinced that restrictive trade measures are in general an inefficient means to maintain or restore balance-of-payments equilibrium". Furthermore, while the full consultation procedures already provided for "expanded" consultations whereby the Committee could draw attention to alleviating and correcting balance-of-payments problems of developing countries through measures that Contracting Parties might take to facilitate the expansion of export earnings, the 1979 Declaration reiterated this point. It also extended the examination of balance-of-payments measures beyond QRs to all trade measures taken for balance-of-payments purposes, called for prompt notification of new or intensified measures, and introduced the additional conditions of (i) giving preference to measures with the least disruptive effect on trade (i.e. price-based measures); (ii) the submission of a timetable for phasing out restrictions; and, (iii) the need to avoid incidental sectoral protection.

Finally, in the course of the Uruguay Round, there was considerable discussion on strengthening and tightening the provisions, especially (i) notification requirements; (ii) the presentation of a timetable for the removal of the restrictions; and, (iii) the avoidance of the use of quantitative restrictions; the "1994 Understanding" reflects this consensus. In addition, the DSU became the ultimate method of enforcement and, in a case where consensus could not be reached, served as the vehicle by which one WTO Member finally removed its balance-of-payments measures.[113]

Box 20 presents two case studies which illustrate how the discipline of the balance-of- payments principles and provisions were used to aid the process of integration into the multilateral trading system.

Box 20: The phasing out of balance-of-payments restrictions by developing countries: two case studies

Indonesia

In 1967, following the adoption of a stabilization package after a period of hyper-inflation in the mid-1960s, Indonesia had removed import licensing on raw materials[114] and abandoned a system of classified goods for import into separate categories; only imports of passenger vehicles and ceramic tiles were prohibited. Also, an additional duty on imports bound under GATT had been removed. At the time of its consultations, Members of the Committee "appreciated the considerable effort which the Government of Indonesia had recently made to simplify its complex restrictive system."[115]

Following a successful stabilization policy, increased confidence in the rupiah had made possible the reforms of April 1970. By the time of its consultations in 1970, the currency had been made fully convertible, import policy had been revised and simplified and average tariffs lowered from 64 to 58 per cent. A small number of imports (tyres, cars, motor cycles, radio and TV sets) were under conditional import prohibition in order to protect local industry. If a number of conditions (e.g. volume, quality and prices of domestic production) were not met, the prohibition could be revoked. During the consultations, Members "suggested that consideration should be given to other methods, preferably those operating through the price mechanism, but that even quotas would be preferable to outright prohibition.".[116] While a number of surcharges were still levied, their

[113] See India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R and WT/DS90/AB/R.

[114] Import licensing has typically been the principal instrument for effecting quantitative restrictions; import regimes were often very complex with licenses designated by end-user or industry.

[115] BOP/R/16, para. 18.

[116] BOP/R/51, 20 November 1970, para 13.

total had been reduced, and the whole system was to undergo a major reform when Indonesia's tariff was converted to the Brussels Tariff Nomenclature the following year.[117]

At its next consultation in 1975, under simplified procedures, Indonesia's statement reflected that domestic industries were protected mainly through tariffs and surcharges and no quantitative restrictions were in force. By 1979, the Committee took note that Indonesia had ceased to apply trade restrictions for balance of payments reasons.[118]

Pakistan

In the case of Pakistan, the phasing out of quantitative restrictions was very gradual. Prior to 1959, all categories of imports were subject to quantitative restrictions, "the trend since then had been to relax restrictions on imports of certain basic materials, consumer goods and a few agricultural and industrial products".[119] In the 1967 consultations, the government representative confirmed that the main feature of the country's import policy since 1960 had been a trend towards liberalization, moving away from direct administrative controls towards fiscal and monetary instruments. The licensing procedure had been simplified and a large number of items restored to the free list.[120] Meanwhile, the IMF commented that Pakistan's import regime remained restrictive and complex.

In 1978, the Committee noted that despite difficulties Pakistan had pursued its efforts towards trade liberalization begun in 1972 and welcomed the intention of the Pakistan authorities to pursue simplification and rationalization of their trade regime. Drawing attention to the external environment, the Committee "recognized that a number of external factors [...] import restraints faced by some exports of Pakistan [...] affected [...] its balance of payments...".[121]

In 1989, the Committee recognized that Pakistan continued to face balance-of-payments difficulties which warranted the imposition of trade measures under Article XVIII:B. Members welcomed the changes which had taken place in Pakistan's import regime since 1983; in particular, the move to a negative list system, the reduction in the number of commodities covered by import restrictions, the simplification of the import system and the rationalization of the tariff structure. One Member noted that even although progress had been made in the reduction of trade barriers, there were still a large number of banned or restricted goods.[122]

Further consultations were held in 1997 and 2000: in 1997, the Committee recognized that Pakistan faced a serious balance-of-payments problem and welcomed the lowering of tariffs and the reduction of items on the negative list.[123] However, they requested a clearer notification in accordance with paragraph 11 of the Understanding and questioned the recourse to QRs when price-based measures were preferable. By 2000, Members appreciated Pakistan's decision to implement its phase-out plan in spite of the fragility of the balance-of-payments situation.[124] Pakistan, in fact, completed the phase-out of its balance-of-payments restrictions ahead of schedule in 2002.[125]

117 Ibid, para 11.

118 BOP/R/108, 15 November 1979.

119 BOP/4/Rev.1.

120 BOP/R/12, 10 August 1967.

121 BOP/R/98, 13 February 1978.

122 BOP/R/181, 28 April 1989, para 8.

123 BOP/R/27, 15 July 1997.

124 BOP/R/56, 22 December 2000.

125 BOP/N/59, 17 December 2001.

(ii) Other non-tariff measures

As already mentioned, customs tariffs and quantitative restrictions under Articles XII and XVIII:B were the most important trade restrictions in place in the early days of GATT. The GATT Secretariat, however, also published some information on other duties and charges. This information illustrates the role of the GATT in improving transparency in the area of non-tariff measures. A 1953 GATT Report for instance observed an increased tendency to impose additional charges of various kinds on imported goods.[126] Among various examples of changes in supplementary charges, the Report mentions the replacement by the Dominican Republic of a complicated system of additional charges by a single tax of 23 per cent. A 1955 Report mentions, amongst others, that France increased its customs stamp tax from 2 to 3 per cent, to provide funds for family allowances for agricultural workers. In 1956, a Secretariat Report notes that in the field of import charges, changes indicated in most instances a tendency towards increased rates.

In the second half of the 1950s, a section on custom formalities was introduced in the GATT Secretariat reports on developments in commercial policy. The 1956 Report, for instance, discusses consular formalities, certificates of origin, marks of origin, temporary importation, valuation for customs purposes and special treatment of product samples. The Report notes that the Contracting Parties decided to reaffirm their recommendation that all such formalities should be suppressed but that nine Contracting Parties still normally required consular invoices or visas.

The first five Rounds of the GATT were primarily devoted to tariff reductions and dedicated very little attention to non-tariff measures. The Kennedy Round which was launched in 1963 was predominantly a tariff negotiation, but some NTMs were addressed. The inclusion of NTMs in the negotiations took place at an early stage. In an effort to identify existing NTMs, Contracting Parties shared information on the NTMs they encountered in their trade relations through a notification system. They came up with a non-exhaustive list including 18 measures: escape clauses, anti-dumping practices, customs valuation, government procurement policies, state trading, border tax adjustments, dumping and restrictive import policies on coal, bilateral quotas, residual quantitative restrictions, mixing regulations, variable levies, administrative and technical regulations, administrative guidance, subsidiaries' trading policies, import collateral, subsidies, internal fiscal charges, and the US system of wine gallon assessment on imported bottled spirits. A working group was established to deal with the items on the list and to proceed with the process of identification and the elaboration on related agreements. Overall, the Round's achievements on NTMs were limited to an optional code on anti-dumping, an agreement on the American Selling Price Procedure and provisions regarding State Trading Enterprises included in the Protocol of Accession of Poland to the GATT.[127] One of the main difficulties faced by Contracting Parties in the negotiation was to distinguish between general issues which could be disciplined through new rules and product specific or other particular measures that necessitated bilateral or multilateral negotiations.

Shortly after the Kennedy Round, an inventory of non-tariff barriers (NTBs) was drawn up on the basis of a list of measures notified by exporting countries.[128] Five working groups were established to examine problems related to the following five topics: government participation in trade, customs and administrative entry procedures, standards, specific limitations to trade and charges on import.

One of the major differences between the Kennedy Round and the Tokyo Round was the extensive negotiations on NTMs in the latter round. The progress achieved by negotiators during the Tokyo Round was considered one of the major accomplishments in trade negotiations since the creation of GATT. Identification of the NTMs to be covered in the negotiations was based on the inventory drawn up after the Kennedy Round and updated on a yearly basis. As explained in subsection 1, five main agreements, the so-called codes, pertaining to NTMs were negotiated. These codes covered respectively subsidies and countervailing duties, customs valuation, government procurement, standards and licensing procedures.

126 See GATT (1953) International Trade, p. 89.

127 See document LT/KR/A/1, dated 30 June 1967.

128 This was the first published inventory of NTMs. UNCTAD later created a comprehensive database on NTMs.

In addition, the Antidumping Code which had originally been negotiated as part of the Kennedy Round was amended. Legal arrangements covering further non-tariff measures were negotiated in the context of various other agreements. Provisions on non-tariff measures were included in the Code on Civil Aircrafts, the Agricultural Agreements, the International Dairy Arrangement, and the Arrangement Regarding Bovine Meats. Only a subset of the 65 or so developing Contracting Parties signed the Codes. The number of developing country signatories in February 1982 was: 15 for the Standards Code, 8 for the Subsidies Code, 11 for the Import Licensing Code, 7 for the Customs Valuation Code, 9 for Anti-Dumping and 1 for the Procurement Code. As shown in Table 13, the number of signatories increased over the years, both because some Contracting Parties extended their participation to more Codes and because countries which acceded between the early eighties and 1995 signed some Codes. A number of countries also became observers to some of the Codes.

Table 13
Number of developing and developed Contracting Parties having signed selected Tokyo Round Agreements, 1982-1995

	Developing		Developed	
	Feb-82	Dec-95	Feb-82	Dec-95 [a]
Standards	15	24	21	21
Government Procurement	1	3	10	10
Subsidies and countervailing duties	8	16	12	10
Customs valuation	7	25	11	11
Import licensing	11	19	12	11
Anti-dumping	9	17	11	10

[a] The United States withdrew from the standards, subsidies, import licensing effect and anti-dumping Agreements on 29 February 1995, after the new corresponding WTO Committees came into effect.

Source: GATT (1982) GATT Activities in 1981 and GATT (1996) GATT Activities 1994-1995.

Part A of the Punta del Este Ministerial Declaration established as one of the objectives of the Uruguay Round negotiations the reduction and elimination of non-tariff measures and obstacles. A Negotiating Group on NTMs focused on product specific measures which were not covered in other negotiating groups but the negotiations on NTMs went much further than those encompassed by the Negotiating Group. As a whole, the Uruguay Round negotiations produced extremely broad and detailed results on NTMs. First, eleven developing-country Members made commitments on NTMs under Part III of their Schedules. Those commitments cover inter alia: the removal of import licensing requirements, elimination of quantitative restrictions, elimination of tendering requirements, reform of import licensing systems, assurance of absence of quantitative restrictions and import ban and phasing out of tariff rate quotas.[129] Second, the NTB Codes established during the Tokyo Round were revised. Third, other agreements were reached and NTMs were regulated in areas such as services and intellectual property. Fourth, a number of provisions regulating NTMs were scattered all around WTO Agreements, Ministerial and other declarations, understandings and recommendations. WTO rules addressed NTMs mainly through specific provisions regulating NTMs or transparency requirements.

Provisions addressing particular NTMs can be found in most WTO Agreements. A number of important measures were taken to discipline the use of NTMs in the agricultural and textiles and clothing sectors. The Agreement on Textiles and Clothing required the phasing out of all MFA quotas restricting imports from the most competitive producers into industrial country markets.[130] The Agreement on Agriculture required the replacement of agriculture-specific non-tariff measures with tariffs affording an equivalent level of protection and prohibited the use of agriculture-specific trade-restrictive measures except tariffs.

[129] The 11 countries are respectively Belize, Cameroon, China, Egypt, El Salvador, Indonesia, Malta, Saudi Arabia, Senegal, Chinese Taipei and Trinidad and Tobago.

[130] See Box 19.

Many countries, both developed and developing had been using NTMs, sometime in conjunction with tariffs, to limit or control imports of agricultural products. The prohibition and tariffication of NTMs represented a major change in the trade rules relating to agriculture, notably by contributing to more transparency. Whether it contributed to liberalization is a controversial question, the answer to which largely depends on one's assessment of the tariffication process. A number of experts consider that the Uruguay Round contributed little to lower the actual protection levels for agricultural products in most countries. The major exceptions were Japan and other high income Asian countries, which exhibited a consistent pattern of liberalization.[131] The Agreement on Agriculture also included provisions phasing down export subsidies and certain domestic support measures. Similarly, in this area it was more the framework for future liberalization that it created than the actual reduction of subsidies to which it contributed that was seen as the main contribution of the Agreement on Agriculture to the liberalization of agricultural markets.

Other important measures taken towards the elimination or regulation of NTMs were included in the Safeguards Agreement which prohibited voluntary export restraints, orderly marketing arrangements and any other similar measures affecting imports and exports.[132] Box 21 below discusses voluntary export restraints. As discussed in more detail below, the SPS and TBT Agreements imposed disciplines respectively on the use of sanitary and phyto-sanitary measures and technical regulations. Other WTO Agreements disciplined or improved the disciplines on the use of trade related investment measures, anti-dumping (see below), customs valuation, pre-shipment inspection, rules of origin, import licensing procedures, subsidies and countervailing measures. In addition, plurilateral agreements were signed on government procurement, trade in civil aircraft, dairy products and bovine meat.

A major change compared to the Tokyo Round, was the principle of the single undertaking whereby all signatories had to accept all the annexed agreements plus all the appended documents. Members did not have the possibility to opt out of some agreements. As discussed in subsection 4 below, a number of special and differential treatment provisions were included in the new agreements, but these provisions did not in most cases dispense developing countries from the main disciplines in the agreements. An assessment of the impact of the UR on the use of NTMs by individual Members is clearly beyond the scope of this Report. However, most experts would probably agree that compulsory adherence to all the agreements introduced tighter disciplines on the use of NTMs by most if not all of the WTO Members.

Box 21: Voluntary export restraints (VERs)

Beginning in the mid-1950s, voluntary export restraints (VERs) began to emerge as elements of some industrial countries' trade policies (McClenehan, 1991). This coincided with the reappearance of Japan as an important player in international trade. A VER is an agreement, explicit or tacit, between exporting and importing countries, where the former "voluntarily" limit the quantity or the growth of their exports. VERs are known by other names, including "orderly marketing arrangements". A VER has the same economic effect as a quota. VERs are contrary to some GATT provisions, especially Articles XI and XIII on export and import quotas.

VERs provided a convenient way of protecting low-tariff industries that were increasingly being subject to competition from low-cost countries, without a country being required to furnish proof of serious injury or to pay compensation. These would have been conditions of safeguard protection under Article XIX of the GATT. For exporting countries, the VER was often a more attractive alternative compared to other import-restricting measures at the disposal of the importing country.

131 See for instance Hathaway and Ingco (1996).

132 See the discussion of the safeguards agreement in subsection 2.(d).

Many of the industries where VERs became prominent restrictions were those where Japan, and subsequently the East Asian tigers and other developing countries, built-up competitiveness – textiles and clothing, footwear, iron and steel, and motor vehicles. VERs became a major feature of the international trading system, reaching their pinnacle in the decades of the 1970s and 1980s. VERs could be considered "safeguard" measures brought in through the back door, not subject to any form of international discipline or oversight. They were selective, and thus discriminatory, and since they were "voluntary", they did not require compensation.

Attempts to deal with the proliferation of VERs by negotiating an international agreement on safeguards took place during both the Tokyo and Uruguay Rounds. The negotiations in the Tokyo Round did not produce a breakthrough in the manner of a safeguards code to stand alongside those completed in the area of antidumping and subsidies and countervailing duties. The Contracting Parties were divided on a range of issues including the non-discriminatory application of safeguards, surveillance, dispute settlement, the definition of "serious injury" and issues of structural adjustment (Jackson, 1997). The Contracting Parties could only agree on continuing to negotiate. It was left to the Uruguay Round to complete the negotiations and produce the Agreement on Safeguards. The Agreement phased out existing VERs, orderly marketing arrangements and similar measures whether on exports or imports.

Why did countries find no more need for these extra-legal measures? The availability of a new multilateral agreement on safeguards was certainly a key factor. But there were a number of economic factors that contributed to the demise of VERs. In the case of footwear, industrial countries removed the restraints because they found them either superfluous (the expected employment effect failed to materialize) or ineffective (the principal exporters maintained their market share during the height of the restrictions), or else because the industry was able to adjust (see Hamilton et al. 1992). Some of these same factors accounted for the demise of United States' restraints on Japanese automobiles – the big three American automakers recovered (or adjusted successfully) after the recession of the early 1980s and Japanese manufacturers evaded the possibility of future trade restrictions by establishing their manufacturing plants in the United States. Finally, one needs to take into account the economic costs of the measures themselves. Economic research on VERs suggested that they exacted a high cost on consumers with part of the benefits being transferred to the exporters (as quota rents) and part to the import competing domestic industry (see for example Berry et al., 1999).

The multilateral trading system successfully weathered an important challenge in the form of VERs. These measures operated outside the boundaries of the rules-based multilateral trading system. They extracted a high economic cost on consumers of importing countries. And by being directed at some of the key exports of developing countries, they also had a strong anti-development effect.

Technical barriers to trade and sanitary and phytosanitary measures

If technical measures differ across countries they can represent significant barriers to trade. They may do so simply because it is costly for exporters to obtain accurate and up-to-date information on technical measures abroad and on related conformity assessment procedures. They can also hinder trade if adjusting to foreign technical measures engenders significant costs. In the latter case, technical measures – like tariffs – can result in discrimination between foreign and domestic products. But while a tariff clearly has the purpose and effect of discriminating, it can in practice be quite difficult to establish the purpose and effect of a technical measure. Indeed, technical measures may well have the aim to correct for market failures like information asymmetries or network externalities and well-designed standards can play an important role in guaranteeing the smooth functioning of markets. Technical measures, however, are also likely to affect the outcome of international transactions and thus trade. If they are designed to

do so, i.e. if technical measures are employed as a "disguised" form of protectionism, this would be in conflict with the principles of the multilateral trading system. The challenge for the system is to find ways to distinguish between legitimate and illegitimate measures.

It is difficult to measure the actual incidence of technical measures and even more difficult to measure their impact on trade. Counts of tariff lines affected by technical measures compiled for a number of markets indicate that the share of imports covered by technical measures ranges, at the high end, from about half of total imports in the case of Brazil to about a third in the case of the United States and China. By contrast, only 2 per cent of Japan's imports and less than one per cent of the EU's imports are covered by technical measures.[133]

As mentioned above, during the Uruguay Round negotiations took place on how to improve, clarify or expand agreements negotiated in the Tokyo Round and in this context negotiations also took place on the Tokyo TBT Agreement. The revamped Uruguay Round TBT Agreement was largely based on the earlier version of the Agreement, but its scope was altered.[134] The Uruguay Round TBT Agreement covers technical regulations, standards and conformity assessment and applies to a wide range of bodies and systems, local, national, regional and international, governmental and non-governmental. The TBT Agreement recognizes that governments employ technical regulations to attain legitimate objectives such as national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment. But technical regulations must not be prepared, adopted or applied with a view to, or have the effect of, creating unnecessary obstacles to international trade. So technical regulations should not to be more trade-restrictive than necessary to fulfil a government's legitimate objective(s).

In order to enhance transparency on the use of technical measures, the TBT Agreement requires Members to notify relevant measures to the Secretariat.[135] In this particular aspect, the Uruguay Round TBT Agreement goes further than its predecessor. The role of national enquiry points on TBT-related measures has, for instance, been expanded and in cases where more than one national enquiry point exist, Members are obliged to assist other Members in finding their way through the different enquiry points. If requested, Members are required to provide documents relevant for national TBT-related measures, and the Uruguay TBT Agreement added that developed-country Members can be asked to provide English, French or Spanish translations of relevant documents.[136]

Chart 5 below shows the number of notifications received by the Secretariat since 1995 on technical barriers to trade. The number of notifications increased quite significantly after the conclusion of the Uruguay Round, decreased afterwards and appears to have been following an upward trend in recent years.

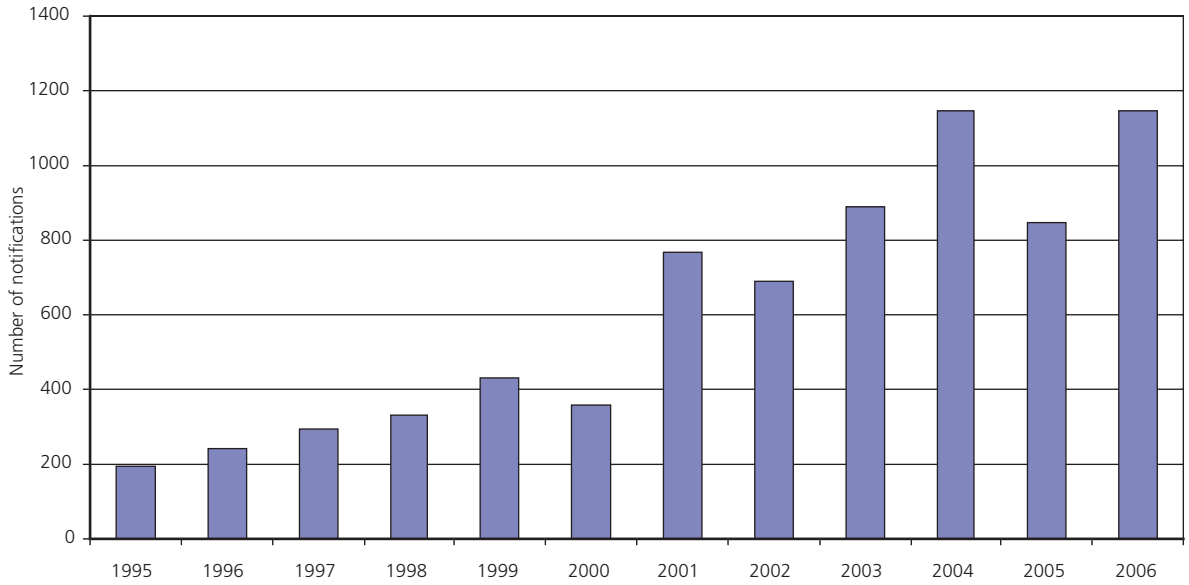
133 This information is based on data from UNCTAD's Trade Analysis and Information System (TRAINS). See WTO (2005) for a more detailed description of the relevant data and of their limitations.

134 See the discussion in section IVG.

135 See TBT Articles 2.9.2, 2.10.1, 3.2, 5.7.1 and 7.2.

136 Article 10.5 TBT Agreement.

Chart 5
Total number of circulated SPS notifications since 1995



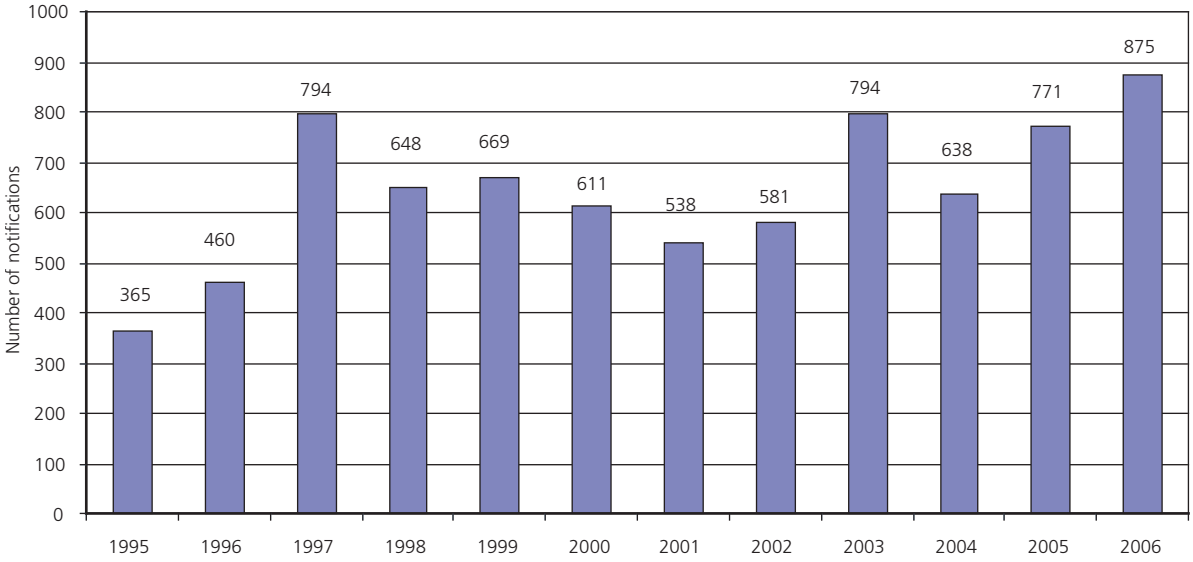
Source: WTO Secretariat.

The GATT legal texts and the Tokyo Round TBT Agreement were not considered satisfactory to deal with sanitary and phytosanitory measures and the Punta del Este Declaration asked for separate negotiations on the latter issue. The outcome was the SPS Agreement. This Agreement covers all measures whose purpose is to protect human or animal health from food-borne risks; to protect human health from animal- or plant-carried diseases; to protect animals and plants from pests or diseases or to prevent or limit other damage to a country from the entry, establishment or spread of pests. The TBT Agreement, instead, covers all technical regulations, voluntary standards and conformity assessment procedures to ensure that these are met, except when these are sanitary or phytosanitary measures as defined by the SPS Agreement. Thus it is the type of measure which determines coverage by the TBT Agreement, but the purpose of the measure which is relevant in determining whether a measure is subject to the SPS Agreement. Most labelling requirements, nutrition claims and concerns, and quality and packaging regulations are generally not considered to be sanitary or phytosanitary measures and hence are normally subject to the TBT Agreement.

The two Agreements have some common elements, such as the basic obligation of non-discrimination and similar requirements for the advance notification of proposed measures and the creation of information offices ("Enquiry Points"). Nevertheless, many of the substantive rules are different. For example, both agreements encourage the use of international standards. However, under the SPS Agreement scientific arguments resulting from an assessment of potential health risks are required to justify the choice of standards which are more stringent than those advocated by international standard-setting bodies. In addition, governments may impose SPS measures only to the extent necessary to protect human, animal or plant health, on the basis of scientific information. Under the TBT Agreement, WTO Members may derogate from international standards when they deem them to be either inappropriate or ineffective in the fulfilment of a legitimate objective, for instance, due to fundamental climatic or geographic factors, or fundamental technological problems. Scientific evidence may be relevant, depending on the specific legitimate objective pursued, and the specific reason for which a Member has derogated from an international standard.

Chart 6 reflects the evolution over time of the number of notifications circulated. Unlike the notifications under TBT, notifications under SPS have increased quite steadily over time and have reached their peak in recent years.

Chart 6
Total number of TBT notifications since 1995



Source: WTO (2007) Twelfth Annual Review of the Implementation and Operation of the TBT Agreement G/TBT/21/Rev.1.

Although notification requirements contributed to reducing information cost related to sanitary and phytosanitory measures in export markets, developing countries continued to face problems to implement relevant measures, including international standards set by bodies explicitly referred to in the SPS Agreement.[137] There was an increasing awareness that developing countries need assistance to develop the expertise and capacity to implement sanitary and phytosanitary standards, particularly for agricultural products destined for international markets.

At the WTO Ministerial Meeting in Doha in November 2001, the Executive Heads of the FAO, OIE, World Bank, WHO, and WTO issued a joint communiqué committing the institutions to explore new technical and financial mechanisms for coordination and resource mobilization to assist developing countries in the establishment and implementation of appropriate SPS measures. This led to the creation of the Standards and Trade Development Facility (STDF), a financing and a co-ordinating mechanism providing grant financing for developing countries that seek to comply with international SPS standards and hence gain or maintain market access. The STDF also provides a forum for dialogue on SPS technical assistance issues among its five partner organizations and interested donors.

Today the multilateral trading system is thus equipped with two agreements that explicitly deal with non-tariff measures of a technical nature: the TBT and the SPS Agreement. Both provide Members with legal texts that give guidance on how to distinguish between legitimate measures and those that are in conflict with the spirit of multilateral trade collaboration. The transparency requirements contained in the Agreements have contributed to lowering information costs related to technical measures with possible positive effects on trade flows. With the SDTF the system has equipped itself with a mechanism that involves collaboration among relevant international institutions and donor countries, to provide technical assistance to those WTO Members that find it difficult to implement international standards or other standards prevalent in export markets.

Antidumping

In Section C of this Report, contingency measures were described as necessary tools of temporary protection in a trade agreement to allow countries to commit to deeper liberalization. Contingency measures allow a country to trade off short-term protection for long-term commitment to market

[137] See the discussion in subsection 7.

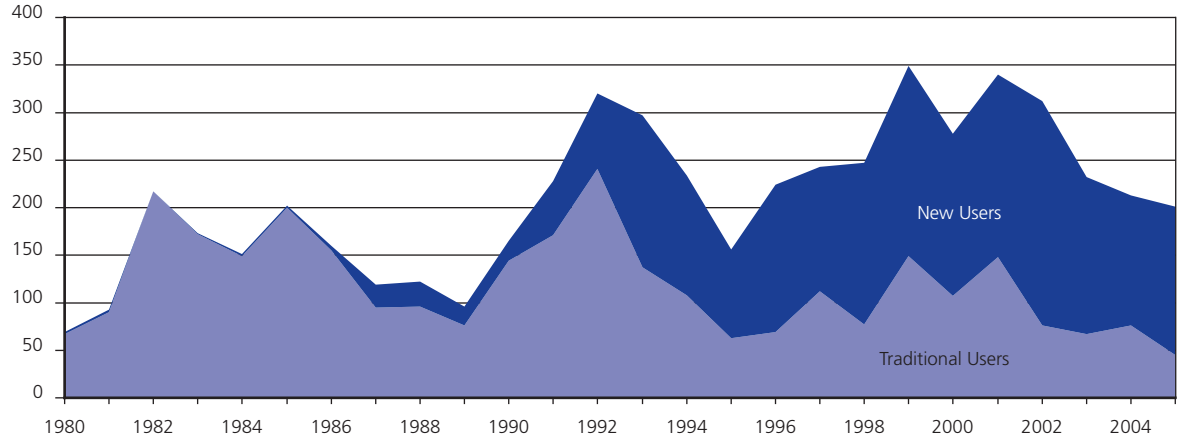
opening. To the extent that this trade-off exists, it may make sense to discuss some aspects of trade remedy used in the trading system – its growth, spread and attempts to rein these in through changes in multilateral rules – under this Section on non-tariff measures. And since, as noted in Section C of this Report, countries have a revealed preference for the use of antidumping measures, dwarfing the number of safeguards or countervailing actions, it is important not to neglect discussing those measures.

Antidumping has a far longer history than the other contingency measures. The first antidumping legislation was adopted in Canada in 1904 followed soon after by Australia in 1906. The United States enacted its antidumping legislations in 1916 and 1921.

The original multilateral rule on antidumping is contained in GATT Article VI. It allows a contracting party to levy a duty on a product that is dumped and which causes or threatens to cause material injury to an established industry. In its first 30 or 40 years of operation (or until the last two decades of the 20th century), most antidumping actions were confined to a small group of GATT Contracting Parties – the United States, Canada, Australia and the EC.

In the mid-1980s, antidumping actions began to spread beyond the traditional users and to involve many developing countries (see Miranda et al., 1998; Zanardi, 2004; Prusa, 2005). Chart 7 gives an indication of the main trends. First, total antidumping initiations have continued to rise during the two decades since 1980. The annual growth rate is 8 per cent, higher than the rate of global merchandize trade expansion of 5 per cent during the same period. Second, antidumping initiations by the historically predominant users (Australia, Canada, the EC and the United States), which made up the overwhelming part of initiations during the 1980s, has tailed off in the last decade. Third, the newcomers (primarily developing countries like Argentina, Brazil, India and Mexico) have become quite active users and have been responsible for much of the growth of antidumping activity since the mid-90s. The new users initiate antidumping cases more intensively (15 to 20 times more frequently per dollar of imports) than historically predominant users like the United States and the EC (Prusa, 2005). Lastly, antidumping actions by developing countries are increasingly directed at other developing countries. For the period 1995-2001, about two-thirds of all initiations and antidumping measures by developing countries are against other developing countries (see Zanardi, 2004).[138]

Chart 7
Count of antidumping initiations, 1980-2005
(Number of initiations)



Note: Traditional users include Australia, Canada, the EC and the United States.
Source: Prusa (2005) and WTO Secretariat.

[138] Zanardi (2004) distinguishes between "developing" countries and "transition economies". Since many countries in the latter group are usually treated or classified as developing countries in the WTO context, they have been grouped together as developing countries for the purpose of the calculation.

There is no lack of proposed explanations for this trend. Some have assigned the major role to the worldwide reduction in traditional instruments of protection (i.e. tariffs) with antidumping measures being used as a potent substitute (Tharakan, 1995). Others have looked for the explanation in the successive rounds of multilateral negotiations aimed at developing an antidumping code, culminating in the single undertaking of the Uruguay Round, which helped spread the adoption of antidumping statutes around the world (Zanardi, 2004). And there is the argument that antidumping is a necessary tool for countries undertaking trade liberalization. Finger and Nogues (2006) have pointed to the trade reform experiences in Latin America during the late 1980s and 1990s. Countries like Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, and Peru went through what was often a painful process of economic reform, which included liberalization of their trade regimes. Their governments created and managed trade contingent measures as part of this liberalization. In many cases, and not always without difficulty, these instruments allowed the countries to sustain the momentum towards openness to international trade. This period of the late 1980s and early 1990 was, not coincidentally, when these countries began to appear as new users of antidumping. This is a worthwhile reminder that these trends in antidumping initiations and measures, useful though they may be, only tell part of the story, since these measures may be part of the price to pay for a successful transition to more open trade.

The idea that contingency measures are necessary in trade agreements acknowledges that there is a trade-off being made between short-term protectionism and the longer-term benefits from mustering political support for trade liberalization. But this does not mean that these short-term costs are negligible. There is a lot of good information on the frequency of antidumping initiations and measures but much less available evidence about the economic cost of antidumping measures. Nevertheless, some studies indicate that they represent a big part of the welfare cost of trade restrictions. For example, according to one estimate, the cost of antidumping and countervailing duties for the US economy has been about $4 billion in 1993 dollars annually, a cost that is second only to that imposed by the restrictions under the Multi-fibre Agreement (Gallaway, et al, 1999).

The fundamental challenge for the international trading system is to make certain that the expected benefits from having contingency measures, such as antidumping, in trade agreements are not negated by the very real and immediate cost of the measures. If indeed short-term protectionism from contingent measures is one of the parents of a liberal trading system, one must ensure that it does not devour its young.

Thus, there have been frequent attempts at clarifying or strengthening the antidumping rules in the GATT/WTO. After the first decade of the GATT, those who were frequent targets of antidumping actions began to question whether the application of the measures were raising new barriers to trade (Jackson, 1997). This led to negotiations during the Kennedy Round to elaborate rules for the application of Article VI. The objective was "to provide greater uniformity and certainty in their implementation". Although the Round ended with a new antidumping code, continued problems or frustrations with the application of antidumping measures, and attempts to curb them through rule changes, have led all subsequent multilateral trade rounds – Tokyo Round, Uruguay Round and the Doha Round – to always include negotiations on antidumping rules. This led to a new antidumping code in the Tokyo Round and the current Antidumping Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) from the Uruguay Round.

Through these various rounds, the elaboration of the antidumping rules has touched on nearly all of its aspects: determination of dumping, definition of material injury and domestic industry, causality, spelling out the procedures for initiating a case, conduct of the investigation, evidence, the duration of the measure, reviews of the measures, etc.

The current Doha Round continues this process since the mandated negotiations are aimed at clarifying and improving the existing rules on antidumping. Proposals have been made on a number of specific issues: determinations of injury/causation, the lesser duty rule, public interest, transparency and due process, interim reviews, sunset, duty assessment, circumvention, the use of facts available, limited

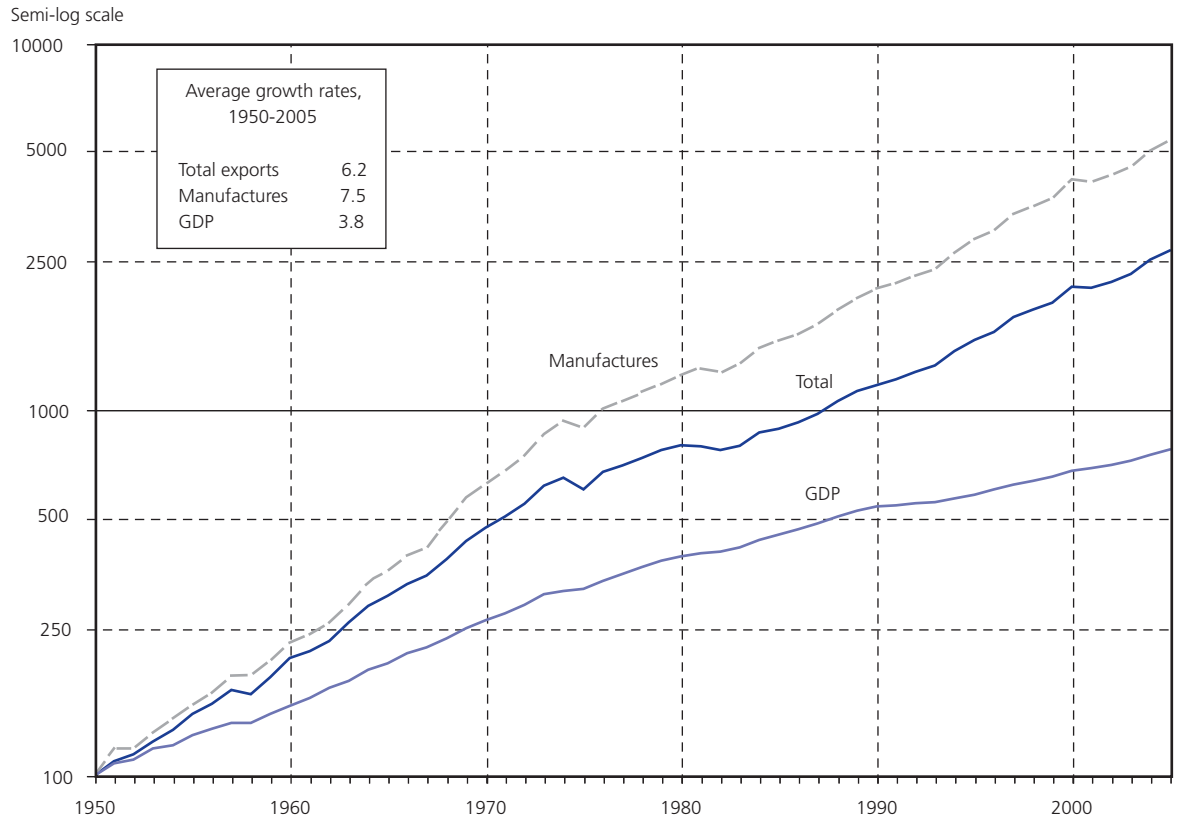
examination and all others rates, dispute settlement, the definition of dumped imports, affiliated parties, product under consideration, and the initiation and completion of investigations.

Given the enduring appeal of antidumping measures, it is unlikely that even a successful outcome to the negotiations that leads to "improved disciplines" will cause a fundamental alteration of countries' preference for the use of antidumping measures. Deardorff and Stern (2005) have discussed various possible explanations for the strong appeal of antidumping measures. It provides a stronger and more focused means of protection against surges of imports than GATT-legal safeguards laws permit. Antidumping formalizes a meaning for "unfair trade" that strikes a chord in the public mind. For now and the foreseeable future, antidumping actions will likely remain the default trade adjustment measure of many WTO Members.

(d) GATT/WTO contribution to world trade growth

Since 1950, world trade has grown more than twenty-seven fold in volume terms (see Chart 8). This expansion has been three times faster than growth in world GDP, which expanded eight-fold during the same period.

Chart 8
World merchandise exports and GDP, 1950-2005
(Volume indices, 1950=100)



Source: WTO, International Trade Statistics.

The trade expansion was much more pronounced for manufactures than for either agricultural products or fuel and mining products (see Table 14). Trade in manufactures grew (7.5 per cent annual growth) more than twice as fast as trade in agricultural products (3.6 per cent annual growth).

Table 14
Growth of trade by sector, 1950-2005

Sector	Average annual growth (in percent)
Agricultural products	3.6
Fuels and mining products	4.2
Manufactures	7.5

Source: WTO (2006) International Trade Statistics 2006.

This increase in international trade is unprecedented in historical terms. To put it in perspective, the expansion in trade between 1870 and the start of the first World War, a period that has sometimes been described as the first wave of globalization (Baldwin and Martin, 1999), saw trade volume expand at about half the pace of the period since 1950 (see Table 15). The difference in the rate of trade expansion between the first wave of globalization and the post-war era persists even after taking into account the faster growth of GDP in the latter period. Based on Maddison's (2001) data, the trade to GDP ratio for the world rose from 4.6 per cent in 1870 to 7.9 per cent in 1913.[139] This ratio has risen far more in the second wave of globalization reaching 19.4 per cent in 2005, confirming how trade growth in this era had outstripped the expansion of the previous period of globalization.

Table 15
World exports and world GDP, 1870-2005
(In billions of constant 1990 dollars)

Item	1870	1913	Annual Growth: 1870-1913	1950	1998	2005	Annual Growth: 1950-2005
Exports	50.3	212.4	3.4%	296	5817	8043	6.2%
GDP	1,102	2,705	2.1%	5,336	33,726	41,456	3.8%
Trade/GDP	4.6%	7.9%		5.5%	17.2%	19.4%	

Note: The last two columns are not from Maddison. The figures in the last column are derived from the International Trade Statistics 2005 and were used to calculate world exports and world GDP for 2005 (in 1990 prices).

Source: Maddison (2001), Tables B-18 and F-3 and own calculations.

Several reasons are often given to explain this expansion in world trade. First is technological change, which dramatically reduced the cost of transportation and communication. A second reason is more open trade policies. A third explanation refers to the changes in economic organization, such as vertical specialization, that may have been induced by both technological change and open markets.[140] But liberalization of trade regimes can take place unilaterally, bilaterally, regionally and multilaterally. The key question that is taken up in this subsection is the link between post-war trade expansion and WTO-induced liberalization.

There is now a growing literature on the subject of the multilateral trading system's contribution to the post-war trade expansion. Two principal questions have been addressed. First, does the GATT/WTO increase trade through its rounds of negotiations or from countries becoming a Member of the organization? Second, since two of the principal roles of the GATT/WTO are to establish rules on international trade and to resolve disputes among its members, to what extent has it resulted in greater stability in the trade of its members? Several answers can be provided by this growing body of work. First, there is econometric evidence that the GATT/WTO accounted for some of this expansion in world trade. The multilateral system's impact on trade expansion was strong in the case of developed countries and in industrial goods. The GATT/WTO appeared to have also been important in helping Members, who had no previous trade relationship, to begin trading with one another. There is conflicting research on the effect of GATT/WTO membership on reducing the volatility of a country's trade.

139 Table F-5 in Maddison (2001), p. 363.

140 See Yi (2003). Vertical specialization leads to countries specializing in particular stages of a good's production. Such specialization requires much more trade of the parts and components to occur per unit of output of the final product. In effect, production becomes much more trade-intensive.

The GATT conducted the first three rounds of tariff negotiations within the relatively short period of four years, 1947-51. Irwin (1995) found that these early rounds of GATT negotiations did not produce a rapid liberalization of world trade. But he did go on to credit the GATT for securing commitments from Contracting Parties to early tariff reductions, which kept them from instituting higher tariffs as import quotas and foreign exchange controls were dismantled in the 1950s.

The paper by Andrew Rose (2004a) went considerably beyond examining the GATT's early decade. It was the first econometric study (using a gravity model) on the effects of the multilateral system on global trade. The gravity model predicts that the volume of trade between any two countries will be positively related to the size of their economies (usually measured by GDP) and inversely related to the trade costs between them.[141] These trade costs are usually represented by geographical characteristics of the countries, like the distance between them, whether they are landlocked, whether they have a common border, etc. as well as policy barriers. In the absence of any reduction in trade costs or policy barriers, the gravity model predicts that bilateral trade should grow at a rate equal to the sum of the partners' GDP growth rates. Since world trade has expanded much faster than that, this suggests that trade liberalization and cost of trade reductions mattered in the post-war period. But to much surprise, Rose's study, which covered about 178 countries and spanned the period from 1948 to 1999, concluded that there was little evidence that countries joining the GATT/WTO experienced a statistically significant increase in their trade.

A subsequent paper by Rose (2004b) argued that this was because GATT/WTO accession did not lead to significant trade liberalization by Members. However, as the discussion in subsections 2.(a) and (b) above shows, it is essential to distinguish between liberalization by developed countries and developing countries. Developed countries undertook substantive reductions in tariffs in the various multilateral rounds of negotiations: about one-fifth during the Geneva Round; a further one-third during the Kennedy Round; another one-third during the Tokyo Round; and 40 per cent in the Uruguay Round. On the other hand, there is little evidence to show that developing countries undertook as deep a commitment on trade liberalization within the GATT. Ignoring these differences and lumping together all GATT Members can lead one to the conclusion that GATT/WTO membership did not entail significant changes in trade policy.

Given the counterintuitive nature of the results, the conclusion that GATT/WTO membership had no impact on trade was quickly challenged.[142] Subramanian and Wei (2007) concluded that GATT or WTO membership had a strongly positive but uneven effect on trade. They explain this unevenness in trade effects as a reflection both of the history and design of the multilateral trading system. First, there was little or less liberalization by developing country Members compared to industrial countries because of special and differential treatment. However, the situation may be different with developing countries that have acceded to the institution since the establishment of the WTO. They have had to accept more obligations, including offering more market access. Second, some sectors – agriculture, textiles and clothing, etc. – were not subject to multilateral rules for a substantial part of the history of the institution. Third, market access commitments are granted on an MFN basis only to Members. True to these features of the organization, they found that the impact on trade was strong for the industrialized countries. They also find a significant difference in the impact of the WTO in those sectors which were covered by multilateral rules and disciplines and those sectors which, for many decades, were left outside of such rules: – agriculture, textiles and clothing. They estimated that GATT/WTO membership has resulted in a 120 per cent increase in world trade. Thus, the reason for Rose's inability to find a positive impact of WTO membership on trade was because he did not take these important institutional details into account and focused only on aggregate trade flows. This masked the positive impact on the subset of countries and sectors where multilateral liberalization took place.

[141] The gravity model has proven to be popular among empirical trade economists because of the high explanatory value of the model in explaining bilateral trade flows. Besides the trade effect of WTO membership, gravity models have been used to study the impact of regionalism and currency unions.

[142] See, for example, Evenett et al. (2004) as well as Goldstein et al. (2005).

A more important gap in Rose's analysis, and in most work on gravity models, was the inclusion of only positive bilateral trade flows in the sample. This means that the analysis will not be able to examine cases where a pair of countries who did not have a prior trade relationship will begin to trade. (Box 22 below examines the frequency of such cases). Accession to the GATT/WTO can make it easier for countries that did not have a prior trade relation to establish such links. This can come about because of a reduction in levels of protection or through greater policy certainty from undertaking GATT/WTO commitments. Recent studies that have included unrecorded trade flows in gravity equations have tended to find that WTO membership has a strong and significant effect on the formation of bilateral trading relationships. If the trade flows are unrecorded either because of censoring (as in Felbermayr and Kohler, 2005) or because of self-selection (as in Helpman et al., 2006).[143] In the first case (censoring), the absence of trade between two countries is a consequence of actions (or non-actions) external to the firm or trader; in the second (self-selection), the absence of trade can be traced to decisions made by the firm or trader himself. In Felbermayr and Kohler (2005), positive trade between two countries arises only if their bilateral trade potential exceeds some threshold value. Maintaining a trade relationship may require the presence of certain public infrastructure or public institutions. But governments will not spend on these institutions unless the expected size of bilateral trade justifies the cost of the investment. The self-selection in Helpman et al. (2006) comes from firms deciding whether to enter an export market or not. The selection decision depends on their underlying productivities because only firms above a threshold productivity level will be able to remain profitable after paying the fixed cost of entry. But whatever assumption is made, the end result is still the same. GATT/WTO membership has a positive and significant impact on new trade relationships. One will fail to fully capture the contribution of the multilateral trading system to world trade growth if one neglects this impact.

In the WTO, a Member's market access rights are protected by its ability to use the WTOs dispute settlement mechanism. While this cannot provide an ironclad guarantee that all Members would abide by their commitments, it does mean that a reneging Member faces the prospect of costly retaliation. This would imply greater security of a WTO Member's access to other Members' markets and, therefore, more stable trade. This has led to empirical investigations of whether membership in the GATT/WTO results in more predictable or stable trade. However, it is not clear whether this is the appropriate test to carry out since security of negotiated market access is what is desired by a WTO Member and not necessarily stability of trade volumes. It seems more reasonable, for example, to test whether WTO Members are less prone to policy reversals than non-Members. A country may in fact welcome less predictability of trade volumes if it occurs, for instance, as a result of rapid trade expansion because of negotiated market access.

So far, the evidence on the stability of a WTO Member's trade is conflicting. Using a data set covering annual bilateral trade flows between over 175 countries between 1950 and 1999, Rose (2005) estimated the effect of GATT/WTO membership on the coefficient of variation (a statistical measure of variability) in trade computed over 25-year samples. He found little evidence that membership in the GATT/WTO had a significant dampening effect on trade volatility. There is however some question whether the gravity model setup which he uses for the empirical test is the appropriate framework for assessing the effect of GATT/WTO membership on trade volatility. The gravity model is a model about bilateral trade flows or volumes and not about variability. A different result is found by Mansfield and Reinhardt (2006) who, among other approaches, use an ARCH[144] specification to directly model the variability of trade and test the impact of GATT/WTO membership on it. They found that GATT/WTO membership significantly reduced export volatility, providing in their view, evidence of the beneficial impact of the institution.

[143] Different assumptions about the unrecorded data lead to different estimation methods. Assuming that the unrecorded data are zero trade flows (i.e. the data is censored) leads to Tobit estimation. If one assumes that the data are missing because of self-selection, the appropriate estimation technique is the Heckman 2-step procedure.

[144] ARCH (Engle, 1982) stands for autoregressive conditional heteroskedasticity and is an econometric method introduced to account for a pattern of volatility, in which turbulence is concentrated at certain periods rather than being more evenly spread out. This type of turbulence is commonly found in financial prices, the area where the model was first applied. The ARCH process models the current disturbance term as a function of past disturbance terms ("autoregressive"). The modelling framework has been extended by Bollerslev (1986) into the GARCH (generalized autoregressive conditional heteroskedasticity) process. The "generalization" involves adding a moving average process to the autoregressive components of the disturbance term.

Box 22: Creating new trade relationships

Over the past 50 years, more and more countries have begun trading with one another. Global trade has grown not only through the expansion of already existing trade among partners but also through the growth of new trade among countries that had previously not had a trade relationship. New research strongly suggests that this is one avenue through which the GATT, and thereafter the WTO, has contributed to world trade growth.

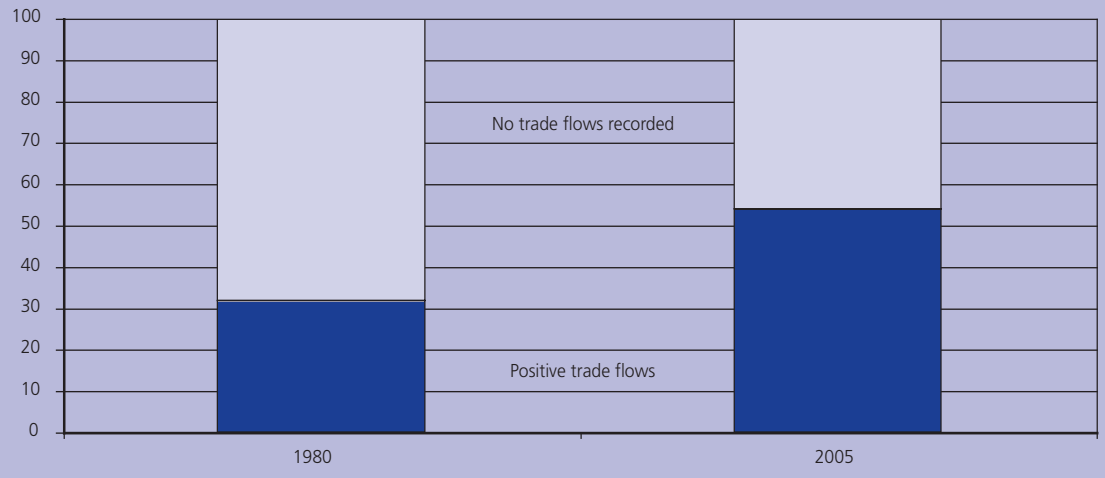
Some indication of this expansion in new trading relations can be gleaned from bilateral trade data. For the year 1980, the IMF's Direction of Trade Statistics had import data for about 183 countries, 27 of them developed and the remainder developing countries. The maximum possible number of bilateral import relationships is 33,306 (183 x 182) country-pairs. But there were positive import flows for less than a third (10,087 country-pairs) of that. No one country imported from all the 182 potential partners. The median number of import sources was only 53, i.e., half of the 183 countries in the IMF database imported from less than 53 partners.

By 2005, the same database had import data for 204 countries, 32 of them developed and the remainder developing countries. The maximum possible number of bilateral import relationships is 41,412 (204 x 203) country-pairs. There were now positive imports flows for more than half (21,630 country-pairs) of that. The median number of import sources had now almost doubled to 105.

The growth in new trading relationships took place between developing and developed countries (North-South trade) and among developing countries (South-South trade). In 1980, there were positive import flows for 98 per cent of all possible developed country-pairs. In contrast, there were only positive import flows for 59 per cent of all possible North-South country pairs and just 18 per cent of all possible South-South country-pairs. By 2005, there were now positive import flows for 83 per cent of all possible North-South country pairs and 39 per cent of all possible South-South country-pairs.

Now some caution may be called for in interpreting this trend since not all empty cells in the bilateral trade matrix represent zero trade flows. They may also reflect non-availability of data. Thus part of the increase in positive trade flows would be due to better data availability.

New trading relationships, 1980 and 2005
(Percentage)



Source: IMF Direction of Trade Statistics.

(e) Future challenges

Evidence presented in this subsection indicates that since 1947 industrial countries have made use of the multilateral system to reduce their tariffs on industrial products. Developing countries on the other hand have made a more limited use of the system in the tariff area. The binding coverage of most developing countries remained very low and their tariffs very high until the second half of the 1980s when approaches towards trade and trade policies started changing and pressure for liberalization from developed countries and the international financial institutions increased. These changes translated into substantial trade liberalization and a considerable extension of binding coverage for many developing countries but the bindings in most cases did not cause the liberalization. Developing countries reduced their applied tariffs unilaterally but did not bind these reductions. Where they made commitments, they set their bound tariffs at a considerably higher level than their applied tariffs. This evidence is consistent with the results of econometric studies surveyed in subsection 4 above, which find an uneven effect of GATT/WTO participation on Members.

The evidence on participation in market access negotiations is largely consistent with the terms-of-trade approach presented in Section B, according to which small countries have an incentive to join the GATT/WTO but not to participate in market access negotiations. The fact that developing countries liberalized unilaterally without binding their tariff reductions suggests that they are not using the GATT/WTO system for commitment purposes. Bown and Hoekman (2007) link the failure of the system to play the role of a commitment mechanism to the fact that WTO Members do not challenge poor countries. They see this lack of enforcement as both a cause and a consequence of developing countries' limited market access commitments. They suggest that the failure to enforce developing-country commitments creates disincentives for those countries to negotiate additional commitments. International relations theories also shed interesting light on the evidence discussed in this subsection. Constructivist approaches can help understand the role played by changes in approaches to openness in the 1980s. Liberalist approaches, which relate changes in domestic interest patterns with changes in trade policies can help explain why developing countries liberalized but did not bind, while neorealist approaches help understand the power games behind the changes in policies.

Evidence on NTMs suggests that the GATT/WTO also helped its Members reduce or discipline other barriers to trade, such as quasi-tariffs and quantitative restrictions. GATT disciplines provided for the general elimination of quantitative restrictions with some exceptions. Developed countries kept quantitative restrictions in place in agriculture and textiles, while some developing countries maintained balance-of-payments related restrictions for several decades. The single undertaking of the Uruguay Round, however, led to a significant reduction of remaining non-tariff obstacles to trade.

The evidence discussed in this subsection sheds some light on the challenges still faced by WTO Members, and which are being taken up in the current negotiations. The post-UR tariff landscape is characterized by relatively low bound and applied tariffs in developed countries in all sectors except for agriculture and in some cases textiles, footwear, or fish and fish products. By contrast, developing countries exhibit applied tariffs that, though much lower than before, are on average higher than those of the developed countries, and, where they exist, bound tariffs that are often considerably higher than these applied rates. Issues of market access for developing countries, including access to developed markets by developing countries, access to developing markets by developed countries and access to developing markets by developing countries are all relevant in the Doha negotiations.

TECHNICAL APPENDIX TO SUBSECTION 2

Tariff nomenclatures: historical background

Efforts aimed at improving the comparability of customs tariffs led to the creation of a common framework for customs tariffs in the late thirties. In 1937, the League of Nations published its Draft Customs Nomenclature. This nomenclature, known as the "*Geneva Nomenclature*", has 991 positions grouped in 86 chapters, themselves grouped in 21 sections. The 991 positions are common to all countries that use the nomenclature but governments have some flexibility with sub positions.

The Geneva Nomenclature was only used for a short period of time, but it served as a basis for other tariff nomenclatures such as the Brussels Tariffs Nomenclature of the Customs Cooperation Council. The Brussels Tariffs Nomenclature (BTN) was established in 1955 and was widely used. It followed a logic of production process, i.e. articles were grouped according to the nature of the inputs used in their production. The BTN had 1097 positions, 99 chapters and 21 sections. The BTN differed from the Geneva Nomenclature with regard to both the number of chapters and the number of positions and the unavailability of correlation tables makes it difficult to track changes and rectifications over time.

In 1974, the Brussels Tariffs Nomenclature was renamed the Customs Cooperation Council Nomenclature (CCCN) to avoid confusion with the nomenclature of the European Community. In 1978, the CCCN was amended. The updated nomenclature had 1.011 positions, 99 chapters and 21 sections. Again, the unavailability of tables of correlation between the BTN and the CCCN makes it difficult to track changes over time.

The need to further harmonize trade related data (trade statistics, customs etc.) led the Customs Cooperation Council to the creation of the "*Harmonized Commodity Description and Coding System*". Entering into force on January 1, 1989, the new HS nomenclature progressively replaced the CCCN. The Customs Cooperation Council published correlation tables between the 1978 CCCN and the 1989 HS.

Sources for the case studies in subsection 2

Nomenclatures and data sources used in case studies

Country	Year	Nomenclature	Data Source	
			Applied tariffs	Bound tariffs
Brazil	1949-1950	National Nomenclature	ICJ	Schedule of tariff concessions, GATT 1947
	1957-1958; 1979-1980; 1986-1987	BTN/CCCN	ICJ	ICJ
	1997; 2001	HS	IDB	-
India	1948-1949	Geneva Nomenclature	ICJ	Schedule of tariff concessions, GATT 1947
	1958-1959; 1964-1965;	Geneva Nomenclature	ICJ	ICJ
	1979-1980; 1987-1988	BTN/CCCN	ICJ	ICJ
	1997; 2001	HS	IDB	-
Senegal	1969-1970; 1977-1978; 1985-1986	BTN/CCCN	ICJ	-
	2002	HS	IDB	-
Nigeria	1965-1966; 1970-1971	BTN/CCCN	ICJ	-
	1987	BTN/CCCN	BFAI	-
	2003	HS	IDB	-
Argentina	1967-1968	BTN/CCCN	ICJ	Schedule of tariff concessions, GATT 1967
	1967-1968; 1971-1972; 1987-1988	BTN/CCCN	ICJ	-
	2001	HS	IDB	-
Korea	1974	BTN/CCCN	Korean Customs Association	-
	1982-1983	BTN/CCCN	ICJ	-
	2001	HS	IDB	-

ICJ International Customs Journal.
IDB WTO Integrated Data Base.
BFAI Zoll und Handelsinformation by the Bundesstelle für Aussenhandelsinformation.

Methodology used for the case studies in subsection 2

Binding coverage

Pre-1989 binding coverage estimates were computed manually from paper sources. Post-1995 figures were computed from electronic sources.

Average applied tariff rates

For the selected product groups, pre-1989 simple averages were calculated as the sum of all tariffs in the product group divided by the total number of lines in the product group. Only *ad valorem* duties were taken into account. However, the proportion of non-*ad valorem* duties (specific, mixed, compound or other duties) is indicated in the tables.

Post-1995 averages are calculated from tariff data pre-aggregated at the HS 6 digit level. For the calculation of HS 6-digit duty averages, only *ad valorem* duties were used.

Despite the use of tables of correlation to keep a constant definition of product groups over time, the change from the CCCN to the HS tariff nomenclature in early 1989 probably affects the comparability of tariff averages over time.

Appendix Table 6
Applied tariff average rates for 13 European countries and industrial product groups, 1950
(Percentage)

Country [a]	All Groups,[b] 79 Items	Mineral Oils and Chemicals, 19 Items	Textiles, 16 Items	Apparel, 4 Items	Iron and Steel, 8 Items	Non-ferrous Metals, 10 Items	Tools,[c] 3 Items	Machinery, 13 Items	Transportation Equipment, 6 Items
Denmark	3.4	0.4	4.5	6.7	1.8	1.9	1.0	5.4	5.9
Sweden	8.5	3.2	9.2	22.7	3.0	3.4	5.7	7.9	13.0
Norway	10.8	2.3	6.9	16.2	1.5	1.7	20.0	13.5	24.0
Benelux	11.2	19.9	8.2	24.0	3.7	4.8	8.7	6.3	13.7
France	17.9	17.4	12.8	22.0	18.4	18.1	16.0	18.4	20.0
Portugal	18.0	16.7	28.6	61.0	6.1	13.6	4.8	9.3	3.9
United Kingdom	23.3	33.1	16.3	26.0	42.0	14.0	15.8	19.2	20.4
Italy	25.3	27.0	15.6	30.0	30.6	19.5	32.9	22.6	24.6
(Austria	18.0	14.1	19.0	-	37.8	19.3	18.5	16.6	18.6)
(Germany	26.4	81.6	27.9	28.2	14.9	10.8	9.0	20.3	18.2)
(Greece	39.0	53.1	55.9	92.5	24.7	25.0	26.7	19.7	14.0)

[a] Arrayed in ascending order of average duty of all groups.

[b] Unweighted average of the eight group indexes.

[c] Excludes knives.

Note: The reported average rates for Germany, Austria and Greece are upward biased as they refer to pre-WW II trade flows and not to 1950. Some calculation errors have been found which, if corrected, increase somewhat the average rates for Denmark, Sweden and Norway.

Source: Woytinsky, W.S. and Woytinsky, E.S. (1955) -'World Commerce and Governments. Trends and Outlook'.

Appendix Table 7
Applied tariff rates of selected developed GATT/WTO Members, 1952 and 2005
(All products)

	1952	2005
Austria	17	(4.2)
Benelux	9	(4.2)
Denmark	5	(4.2)
France	19	(4.2)
Germany	16	(4.2)
Italy	24	(4.2)
Sweden	6	(4.2)
United Kingdom	17	(4.2)
EU(25)	-	4.2
Canada	11	3.8
United States	16	3.7
Total (arithmetic country average)	14.0	3.9
Total (country import weighted) [a]	15.1	4.1

[a] Excluding trade with NAFTA members for the US and Canada and EU intra trade in 2004.

Note: Unweighted arithmetic average of 52 products in 1952 and of all tariff lines in 2005.

Source: GATT, International Trade 1952, WTO, Trade Profiles 2006, WTO, International Trade Statistics 2006 and IMF, IFS Statistics Yearbook 1979.

Appendix Table 8
Status of tariff bindings: developed countries and industrial products, 1972-2000
(Percentage – Coverage based on tariff lines)

	Post-Kennedy Round	Post-Tokyo Round	Post-Uruguay Round
	1972	1987	2000
Canada	74-74	98-98	99.7
United States	100-100	100-100	100.0
Japan	90-91	97-97	99.6
EU [a]	98-99	99-99	100.0
Denmark	97-91	-	-
United Kingdom	93-94	-	-
Austria	86-87	96-96	-
Finland	55-86	97-97	-
Sweden	94-95	97-97	-
Norway	79-81	95-95	100.0
Switzerland	98-98	99-99	99.7
Australia	...	11-17	96.5
New Zealand	...	39-51	99.5

[a] Refers to EEC(6) for Post-Kennedy, to EEC(9) for Post-Tokyo and to EU(15) for Post-Uruguay Round (including ITA).

Note: Lower end of binding coverage range refers to totally bound tariff lines while upper end includes partially bound tariff lines.

Source: GATT (1971) Basic Documentation for the Tariff Study. Supplementary Tables, Geneva. (Kennedy Round). GATT (1987), Importance des consolidations tarifaires établies dans le cadre de l'Accord Général, GATT document: MTN.GNG/NG1/WW/2/Rev.1*, 27 mars 1987. (Tokyo Round). WTO (2007), World Tariff Profiles. (Uruguay Round).WTO (2007), World Tariff Profiles. (Uruguay Round).

Appendix Table 9
Status of tariff bindings: developed countries and agricultural products, 1987 and 2000
(Percentage – Coverage based on tariff lines)

	Post-Tokyo Round	Post-UR Round
Canada	90-91	100.0
United States	90-93	100.0
Japan	60-63	100.0
EU [a]	63-65	100.0
Austria	55-62	-
Finland	51-56	-
Sweden	46-50	-
Norway	67-69	100.0
Switzerland	44-46	< 100.0
Australia	26-32	100.0
New Zealand	48-54	100.0

[a] Refers to EEC(9) for Post-Tokyo and to EU(15) for Post-UR Round (incl. ITA).

Note: Lower end of binding coverage range refers to totally bound tariff lines while upper end includes partially bound tariff lines.

Source: GATT (1987), Importance des consolidations tarifaires établies dans le cadre de l'Accord Général; GATT document: MTN.GNG/NG1/WW/2/Rev.1*, 27 mars 1987 (Tokyo Round); WTO (2007), World Tariff Profiles (Uruguay Round).

Appendix Table 10
Accessions and successions to GATT and accessions to the WTO[a]

Country	Date of Accession	Article of Accession
Australia	1-Jan-48	Original Contracting Party
Belgium	1-Jan-48	Original Contracting Party
Canada	1-Jan-48	Original Contracting Party
Cuba	1-Jan-48	Original Contracting Party
France	1-Jan-48	Original Contracting Party
Luxembourg	1-Jan-48	Original Contracting Party
Netherlands	1-Jan-48	Original Contracting Party
United Kingdom	1-Jan-48	Original Contracting Party
United States of America	1-Jan-48	Original Contracting Party
Czechoslovakia	20-Apr-48	Original Contracting Party
South Africa	13-Jun-48	Original Contracting Party
India	8-Jul-48	Original Contracting Party
Norway	10-Jul-48	Original Contracting Party
Zimbabwe	11-Jul-48	Original Contracting Party
Myanmar	29-Jul-48	Original Contracting Party
Sri Lanka	29-Jul-48	Original Contracting Party
Brazil	30-Jul-48	Original Contracting Party
New Zealand	30-Jul-48	Original Contracting Party
Pakistan	30-Jul-48	Original Contracting Party
Chile	16-Mar-49	Original Contracting Party
Haiti	1-Jan-50	Art XXXIII [a]
Indonesia	24-Feb-50	Art XXVI:5(C) [b]
Greece	1-Mar-50	Art XXXIII
Sweden	30-Apr-50	Art XXXIII
Dominican Republic	19-May-50	Art XXXIII
Finland	25-May-50	Art XXXIII
Denmark	28-May-50	Art XXXIII
Nicaragua	28-May-50	Art XXXIII
Italy	30-May-50	Art XXXIII
Germany	1-Oct-51	Art XXXIII
Peru	7-Oct-51	Art XXXIII
Turkey	17-Oct-51	Art XXXIII
Austria	19-Oct-51	Art XXXIII
Uruguay	6-Dec-53	Art XXXIII
Japan	10-Sep-55	Art XXXIII
Ghana	17-Oct-57	Art XXVI:5(C)
Malaysia	24-Oct-57	Art XXVI:5(C)
Nigeria	18-Nov-60	Art XXVI:5(C)
Sierra Leone	19-May-61	Art XXVI:5(C)
Tanzania	9-Dec-61	Art XXVI:5(C)
Portugal	6-May-62	Art XXXIII
Israel	5-Jul-62	Art XXXIII
Trinidad and Tobago	23-Oct-62	Art XXVI:5(C)
Uganda	23-Oct-62	Art XXVI:5(C)
Burkina Faso	3-May-63	Art XXVI:5(C)

Appendix Table 10
Accessions and successions to GATT and accessions to the WTO[a] (cont'd)

Country	Date of Accession	Article of Accession
Cameroon	3-May-63	Art XXVI:5(C)
Central African Republic	3-May-63	Art XXVI:5(C)
Congo	3-May-63	Art XXVI:5(C)
Gabon	3-May-63	Art XXVI:5(C)
Kuwait	3-May-63	Art XXVI:5(C)
Chad	12-Jul-63	Art XXVI:5(C)
Cyprus	15-Jul-63	Art XXVI:5(C)
Spain	29-Aug-63	Art XXXIII
Benin	12-Sep-63	Art XXVI:5(C)
Senegal	27-Sep-63	Art XXVI:5(C)
Madagascar	30-Sep-63	Art XXVI:5(C)
Mauritania	30-Sep-63	Art XXVI:5(C)
Côte d'Ivoire	31-Dec-63	Art XXVI:5(C)
Jamaica	31-Dec-63	Art XXVI:5(C)
Niger	31-Dec-63	Art XXVI:5(C)
Kenya	5-Feb-64	Art XXVI:5(C)
Togo	20-Mar-64	Art XXVI:5(C)
Malawi	28-Aug-64	Art XXVI:5(C)
Malta	17-Nov-64	Art XXVI:5(C)
Gambia	22-Feb-65	Art XXVI:5(C)
Burundi	13-Mar-65	Art XXVI:5(C)
Rwanda	1-Jan-66	Art XXVI:5(C)
Yugoslavia	25-Aug-66	Art XXXIII
Guyana	5-Jul-66	Art XXVI:5(C)
Switzerland	1-Aug-66	Art XXXIII
Barbados	15-Feb-67	Art XXVI:5(C)
Korea, Republic of	14-Apr-67	Art XXXIII
Argentina	11-Oct-67	Art XXXIII
Poland	18-Oct-67	Art XXXIII
Ireland	22-Dec-67	Art XXXIII
Iceland	21-Apr-68	Art XXXIII
Egypt	9-May-70	Art XXXIII
Mauritius	2-Sep-70	Art XXVI:5(C)
Democratic Republic of the Congo	11-Sep-71	Art XXXIII
Romania	14-Nov-71	Art XXXIII
Bangladesh	16-Dec-72	Art XXXIII
Singapore	20-Aug-73	Art XXVI:5(C)
Hungary	9-Sep-73	Art XXXIII
Suriname	22-Mar-78	Art XXVI:5(C)
Philippines	27-Dec-79	Art XXXIII
Columbia	3-Oct-81	Art XXXIII
Zambia	10-Feb-82	Art XXVI:5(C)
Thailand	20-Nov-82	Art XXXIII
Maldives	19-Apr-83	Art XXVI:5(C)
Belize	7-Oct-83	Art XXVI:5(C)
Hong Kong, China	23-Apr-86	Art XXVI:5(C)

Appendix Table 10
Accessions and successions to GATT and accessions to the WTO[a] (cont'd)

Country	Date of Accession	Article of Accession
Mexico	24-Aug-86	Art XXXIII
Antigua and Barbuda	30-Mar-87	Art XXVI:5(C)
Morocco	17-Jun-87	Art XXXIII
Botswana	28-Aug-87	Art XXVI:5(C)
Lesotho	8-Jan-88	Art XXVI:5(C)
Tunisia	19-Aug-90	Art XXXIII
Venezuela	31-Aug-90	Art XXXIII
Bolivia	8-Sep-90	Art XXXIII
Costa Rica	24-Nov-90	Art XXXIII
Macao, China	11-Jan-91	Art XXVI:5(C)
El Salvador	22-May-91	Art XXXIII
Guatemala	10-Oct-91	Art XXXIII
Mozambique	27-Jul-92	Art XXVI:5(C)
Namibia	15-Sep-92	Art XXVI:5(C)
Mali	11-Jan-93	Art XXVI:5(C)
Swaziland	8-Feb-93	Art XXVI:5(C)
Saint Lucia	13-Apr-93	Art XXVI:5(C)
Czech Republic	15-Apr-93	Art XXXIII
Slovak Republic	15-Apr-93	Art XXXIII
Dominica	20-Apr-93	Art XXVI:5(C)
Saint Vincent and the Grenadines	18-May-93	Art XXVI:5(C)
Fiji	16-Nov-93	Art XXVI:5(C)
Brunei Darussalam	9-Dec-93	Art XXVI:5(C)
Bahrain	13-Dec-93	Art XXVI:5(C)
Paraguay	6-Jan-94	Art XXXIII
Grenada	9-Feb-94	Art XXVI:5(C)
United Arab Emirates	8-Mar-94	Art XXVI:5(C)
Guinea Bissau	17-Mar-94	Art XXVI:5(C)
Saint Kitts and Nevis	24-Mar-94	Art XXVI:5(C)
Lichtenstein	29-Mar-94	Art XXVI:5(C)
Qatar	7-Apr-94	Art XXVI:5(C)
Angola	8-Apr-94	Art XXVI:5(C)
Honduras	10-Apr-94	Art XXXIII
Slovenia	30-Oct-94	Art XXXIII
Guinea	8-Dec-94	Art XXVI:5(C)
Djibouti	16-Dec-94	Art XXVI:5(C)
Papua New Guinea	16-Dec-94	Art XXVI:5(C)
Solomon Islands	28-Dec-94	Art XXVI:5(C)
European Communities	1-Jan-95	Art Xi [c]
Ecuador	21-Jan-96	Art XII [d]
Bulgaria	1-Dec-96	Art XII
Mongolia	29-Jan-97	Art XII
Panama	6-Sep-97	Art XII
Kyrgyz Republic	20-Dec-98	Art XII
Latvia	10-Feb-99	Art XII
Estonia	13-Nov-99	Art XII

Appendix Table 10
Accessions and successions to GATT and accessions to the WTO[a] (cont'd)

Country	Date of Accession	Article of Accession
Jordan	11-Apr-00	Art XII
Georgia	14-Jun-00	Art XII
Albania	8-Sep-00	Art XII
Oman	9-Nov-00	Art XII
Croatia	30-Nov-00	Art XII
Lithuania	31-May-01	Art XII
Moldova	26-Jul-01	Art XII
China [e]	11-Dec-01	Art XII
Chinese Taipei	1-Jan-02	Art XII
Armenia	5-Feb-03	Art XII
Former Yugoslav Republic Macedonia	4-Apr-03	Art XII
Nepal	23-Apr-04	Art XII
Cambodia	13-Oct-04	Art XII
Saudi Arabia	11-Dec-05	Art XII
Viet Nam	11-Jan-07	Art XII

Note:

[a] Of GATT 1947.

[b] Of GATT 1947.

[c] Of the Marrakesh Agreement.

[d] Of the Marrakesh Agreement.

[e] China was an original contracting party to the GATT but withdrew in 1950. Similarly, Lebanon and Syria were original contracting parties but withdrew in 1949 and 1951 respectively. At 1 January 1995 (date of entry into force of WTO Agreement), there were 128 contracting parties to GATT (including Socialist Federal Republic of Yugoslavia). All of these, except the Socialist Federal Republic of Yugoslavia whose participation in GATT was suspended, accepted the Agreement definitively. Liberia became a contracting party in November 1949 but withdrew in 1953.

Source: WTO (1995a) Guide to GATT law and practice - Analytical index, volume 2, Geneva: WTO.

Appendix Table 11
Brazil: Binding coverage by section, 1949

Section	Description	Total Number of Lines	Number of Bound Lines	Binding Coverage in %
1	Live animals	16	2	12.5
2	Human hair-animal hair	72	5	6.9
3	Hides, skins and leather	117	14	11.9
4	Meat, fish, oleaginous substances	73	16	21.9
5	Mother-of-pearl, ivory tortoise	50	2	4.0
6	Wool	147	10	6.8
7	Silk, rayon and other similar artificial products	104	7	6.7
8	Fruits, cereals, pot herbs, vegetables thereof	69	19	27.5
9	Plants, leaves, flowers, fruits, seeds, roots, barks	106	42	39.6
10	Vegetable juices, alcoholic and fermented beverages	98	15	15.3
11	Wood	194	2	1.0
12	Indian and other cane, bamboo, rushes	48	2	4.1
13	Coir, esparto, Manila hemp, kapok and other similar vegetables	66	6	9.0
14	Cotton	273	6	2.1
15	Flax, jute, hemp and ramie	143	11	7.6
16	Paper and its applications	166	11	6.6
17	Stones, earths, ores and other minerals products	249	29	11.6
18	Earthenware and glassware	93	29	31.1
19	Aluminium, lead, tin and zinc	191	5	2.6
20	Copper and nickel	137	6	4.3
21	Iron and steel and their alloys	184	26	14.1
22	Gold, platinum and silver and their alloys	46	4	8.6
23	Metalloids and miscellaneous metals	82	16	19.5
24	Raw materials and miscellaneous preparations	239	47	19.7
25	Inorganic and organic chemical products	1177	77	6.5
26	Drugs, chemical medicines and pharmaceutical dietetic	487	36	7.3
27	Armaments and other gunsmiths' wares, ammunition and war material	71	22	31.0
28	Cutlery and accessories thereof	34	10	29.4
29	Clocks and watches	53	41	77.3
30	Physical, chemical, mathematical and optical apparatus	199	180	90.5
31	Surgical, medical, dental and veterinary apparatus	128	102	79.6
32	Musical instruments	151	13	8.6
33	Vehicles and their accessories	77	31	40.2
34	Machines, apparatus, tools and miscellaneous	389	197	50.6
35	Miscellaneous articles	207	6	2.8
	Total	5936	1047	17.6

Source: International Customs Journal, Brazil (1949); WTO estimates.

Appendix Table 12
Brazil: Binding coverage by section, selected years

Section	Description	1957			1979			1986		
		Total Number of Lines	Number of Bound Lines	Binding Coverage in %	Total Number of Lines	Number of Bound Lines	Binding Coverage in %	Total Number of Lines	Number of Bound Lines	Binding Coverage in %
1	Live animals	160	19	11.9	277	16	5.8	308	4	1.3
2	Vegetable products	603	22	3.6	498	30	6.0	586	19	3.2
3	Animal and vegetable Fats	110	1	0.9	156	2	1.3	164	2	1.2
4	Prepared foodstuffs, beverages and vinegar	132	2	0.2	398	1	0.3	452	0	0.0
5	Mineral products	93	0	0.0	468	6	1.3	325	4	1.2
6	Products of the chemical and allied industries	2335	22	0.9	2871	88	3.1	3244	55	1.7
7	Artificial resins and plastic materials	135	3	2.2	310	3	1.0	419	3	0.7
8	Raw hides and skins	73	3	4.1	90	2	2.2	116	0	0.0
9	Wood and articles of wood	81	0	0.0	144	0	0.0	175	0	0.0
10	Paper making material	102	20	19.6	145	23	15.9	181	10	5.5
11	Textiles and textile articles	458	11	2.4	975	12	1.2	588	2	0.3
12	Footwear, headgear, umbrellas	74	1	1.3	78	0	0.0	85	0	0.0
13	Articles of stones, of plaster	109	5	4.5	284	4	1.4	262	1	0.4
14	Pearls, precious and semi precious stones	33	1	3.0	116	4	3.4	127	0	0.0
15	Base metals and articles of base metals	408	26	6.3	835	42	5.0	785	29	3.7
16	Machinery and mechanical appliances	589	30	5.0	1470	193	13.1	1919	219	11.4
17	Vehicles, aircraft and associated equipment	209	0	0.0	356	24	6.7	299	4	1.3
18	Optical, photographic, cinematographic measuring	426	62	14.5	621	33	5.3	928	76	8.2
19	Arms and ammunition	14	0	0.0	18	0	0.0	18	0	0.0
20	Miscellaneous manufactured articles	153	6	3.9	191	8	4.2	271	4	1.5
21	Works of art, collectors' pieces and antiques	6	0	0.0	6	0	0.0	6	0	0.0
	Total	6303	234	3.7	10307	491	4.8	11258	432	3.8

Note: Because of changes in Nomenclature, binding coverage are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, Brazil (1957), Brazil (1979), Brazil (1986); WTO estimates.

Appendix Table 13
India: Binding coverage by section, selected years

Section	Description	1948		1958		1964		1979		1987-1988	
		Number of Bound Lines	Binding Coverage in %	Number of Bound Lines	Binding Coverage in %	Number of Bound Lines	Binding Coverage in %	Number of Bound Lines	Binding Coverage in %	Number of Bound Lines	Binding Coverage in %
1	Live animals	6	13.6	5	31.2	5	29.4	1	10.0	0	0.0
2	Vegetable products	10	18.9	12	13.3	16	20.8	17	45.9	142	52.2
3	Animal and vegetable Fats	6	46.2	7	50.0	6	37.5	3	42.9	25	47.2
4	Prepared foodstuffs, beverages and vinegar	22	46.8	22	31.9	19	29.2	0	0.0	0	0.0
5	Mineral products	3	12.5	4	13.3	4	13.3	3	9.1	3	2.0
6	Products of the chemical and allied industries	26	21.0	21	12.6	18	11.5	19	24.4	60	7.1
7	Artificial resins and plastic materials	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
8	Raw hides and skins	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
9	Wood and articles of wood	1	16.7	3	27.3	2	20.0	0	0.0	0	0.0
10	Paper making material	2	22.2	3	18.8	3	16.7	0	0.0	0	0.0
11	Textiles and textile articles	5	6.5	7	8.3	3	3.8	0	0.0	0	0.0
12	Footwear, headgear, umbrellas	3	60.0	3	33.3	2	25.0	0	0.0	0	0.0
13	Articles of stones, of plaster	2	11.8	3	13.6	3	14.3	0	0.0	0	0.0
14	Pearls, precious and semi precious stones	0	0.0	1	6.7	0	0.0	0	0.0	0	0.0
15	Base metals and articles of base metals	6	5.6	5	2.4	5	3.3	0	0.0	0	0.0
16	Machinery and mechanical appliances	28	84.8	28	39.4	24	30.0	0	0.0	0	0.0
17	Vehicles, aircraft and associated equipment	3	13.6	7	18.9	13	34.2	0	0.0	0	0.0
18	Optical, photographic, cinematographic, measuring	3	50.0	4	33.3	4	33.3	1	2.6	0	0.0
19	Arms and ammunition	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
20	Miscellaneous manufactured articles	0	0.0	2	10.5	2	11.8	0	0.0	0	0.0
21	Works of art, collectors' pieces and antiques	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
22	Articles not otherwise specified	1	100.0	0	0.0	1	50.0	0	0.0	0	0.0
	Total	127	20.0	137	14.9	130	15.4	44	7.9	230	4.4

Note: Because of changes in Nomenclature, binding coverages are not strictly comparable across years. See technical appendix for further details.

Source: International Customs Journal, India (1948), India (1957), India (1964), India (1979); India (1987); WTO estimates.

Appendix Table 14
Argentina: Binding coverage by section, selected years

Section	Description	1967		
		Total Number of Lines	Number of Bound Lines	Binding Coverage in %
1	Live animals	100	23	23.0
2	Vegetable products	262	11	4.2
3	Animal and vegetable Fats	42	2	4.8
4	Prepared foodstuffs, beverages and vinegar	85	9	10.6
5	Mineral products	157	8	5.1
6	Products of the chemical and allied industries	2689	82	3.1
7	Artificial resins and plastic materials	257	1	0.4
8	Raw hides and skins	26	0	0.0
9	Wood and articles of wood	155	0	0.0
10	Paper making material	110	13	11.8
11	Textiles and textile articles	244	5	2.1
12	Footwear, headgear, umbrellas	22	0	0.0
13	Articles of stones, of plaster	114	3	2.6
14	Pearls, precious and semi precious stones	35	0	0.0
15	Base metals and articles of base metals	535	34	6.4
16	Machinery and mechanical appliances	1373	124	9.0
17	Vehicles, aircraft and associated equipment	141	17	12.1
18	Optical, photographic, cinematographic, measuring	427	39	9.1
19	Arms and ammunition	12	0	0.0
20	Miscellaneous manufactured articles	59	6	10.2
21	Works of art, collectors' pieces and antiques	8	0	0.0
	Total	6853	377	5.5

Source: International Customs Journal, Argentina (1967); WTO estimates.

Appendix Table 15
Recourse to Article XVIII:B, 1959 to present

Argentina	1972 – 1978
	1986 – 1991
Bangladesh	1974 – 2008
Brazil	1962 – 1971
	1976 – 1991
Chile	1961 – 1980
Colombia	1981 – 1992
Egypt	1963 – 1995
Ghana	1959 – 1989
India	1960 – 1997
Indonesia	1960 – 1979
Korea	1969 – 1989
Nigeria	1985 – 1998
Pakistan	1960 – 2002
Philippines	1980 – 1995
Peru	1968 – 1991
Sri Lanka	1960 – 1998
Tunisia	1967 – 1997

Source: WTO Secretariat.

3. THE EVOLUTION OF DISPUTE SETTLEMENT PROCEDURES: STRENGTHENING THE RULE OF LAW

The new dispute settlement mechanism is seen by many as the crown jewel of the WTO. Plagued by an increasing incidence of procedural bottlenecks in the final years of the GATT, the GATT dispute settlement arrangements were substantially revised during the Uruguay Round and the resulting new WTO dispute settlement system has been successfully used by an increasing number of WTO Members (both developed and developing) over the past ten years. Although WTO Members have stated that they are reasonably satisfied with the operation of the WTOs dispute settlement system, they have also recognized that aspects of the new system could perhaps be clarified and improved, in such areas as developing country participation, legal procedures and enforcement. This subsection begins by discussing the evolution of GATT/WTO dispute settlement. It then analyses the performance of the WTO dispute settlement system to date. It concludes with an overview of various proposals by WTO legal scholars to improve the system.

(a) GATT/WTO dispute settlement history

Despite its lack of legal rigour, the GATT dispute settlement system actually performed rather well in the early years of the GATT. In its later years, however, GATT Contracting Parties who were subject to complaints under the system were able to use various procedural techniques arising from the positive consensus rule on which the system operated, to block the establishment of panels and/or the adoption of panel reports. This often led to long delays in complaints being heard, or, if they were heard and ruled on, to delays in the rulings being given legal effect. This unsatisfactory state of affairs led to the negotiation of the WTOs DSU, which codified and substantially improved the GATT system for settling disputes, which had oscillated between legal and diplomatic solutions. The DSU moved disputing parties from a power- to a rules-based orientation in settling their differences. In reviewing the history of GATT/WTO dispute settlement, the processes and instruments used in resolving disputes are described. Explanations are provided as to why the dispute settlement system worked better at certain times than others. The subsection also highlights the deficiencies of GATT dispute settlement system, which led to its overhaul during the Uruguay Round.

(i) Dispute settlement under the GATT 1948-94

Early GATT dispute resolution

Discussion on the use of both diplomatic and legal approaches to settling commercial disputes had begun even before the GATT was born. The first working draft of the ITO charter ("Suggested Charter") – put forward by the United States – foresaw a rigorous legal procedure that included the right to appeal before the International Court of Justice (ICJ). However, participants in the ITO negotiations were not ready to surrender all legal authority for settling disputes to independent experts. Thus, it was proposed that appeals to the ICJ would only take the form of a request by the collective ITO membership for an advisory opinion. Parties would not appear as litigants and therefore could not become subject to a decree by the Court (Jackson, 1969). There was wide consensus that, if anything, the involvement of the ICJ was to help find a diplomatic solution. Other key players, such as the United Kingdom, felt that potential disputes, rather than being defined as purely legal, also required an economic appraisal and hence should remain ultimately under the control of ITO members (Hudec, 1990). Ultimately, the formal legal structure of the Charter was considerably modified to accommodate political demands for flexibility. Its key provision on disputes, as in the GATT, was a clause on nullification and impairment.

In view of the provisional nature of the GATT (ITO negotiations were still ongoing, see subsection 4) and its small, "like-minded" membership, the rudimentary dispute procedure on nullification and impairment (copied verbatim from the draft ITO Charter) was considered more than appropriate (Jackson et al., 1995). Although vague, GATT Article XXIII allowed for formal judgements, requests for corrective action and ultimately economic countermeasures. No references were made to other dispute settlement provisions

of the draft ITO Charter owing to their character as the "legal machinery for a formal organization" (Hudec, 1990: 53).[145] The functioning of GATT dispute settlement was tested from its very beginnings. The first bilateral dispute (*Cuba–Consular Taxes*) on whether Article I applied to consular taxes was resolved by an affirmative ruling of the Chairman of the Contracting Parties. No reference to GATT Article XXIII was made.[146] This improvised procedure relying on the Chairman's personal prestige was only used once more.[147]

In the following years, complaints were referred to "working parties" consisting of parties to the dispute (who needed to consent to any decisions taken), some supporters and a number of neutral countries. A range of cases was successfully settled[148], but agreement was not always possible with the disputants participating in the proceedings and lobbying for other countries' support.[149] It was not until 1952 (after the failure of the ITO) when this procedure was modified in a subtle, but important manner. At the Seventh Session of the Contracting Parties, the Chairman proposed establishing a single working party to deal with all of the complaints on the agenda.[150] It was later referred to as the "Panel on Complaints".[151] The novelties were twofold: first, none of the parties to the various disputes were members of the Panel. In fact, in this particular case, the major powers, which had usually been present in working parties to ensure the political acceptability of the outcome, did not even take part in the proceedings. Second, while the Panel would discuss its draft report with each party, it would determine the findings itself.[152] Parties were not invited to present their arguments orally, rather these were submitted in writing and subsequently were closely examined by Panel members (and the Secretariat) as to their legal merits. At the Tenth Session of the Contracting Parties, in 1955, the panel procedure became formalized in a Secretariat document on "Consideration Concerning the Extended Use of Panels".[153] With the adoption of the new procedure, the "judicialization" of dispute settlement was well on its way (Petersmann, 1997b).[154]

Despite this change in practice, dispute settlement proceedings remained rather informal. Rulings were drafted "with an elusive diplomatic vagueness" (Hudec, 1993: 12). Mostly, they were in favour of the complainant, and despite vigorous protests by the defendants, rulings usually were accepted. The main tool to induce compliance in the early days of the GATT was peer pressure. It usually worked due to the cohesiveness and limited number of GATT Contracting Parties. The devastating experiences of commercial confrontation during the interwar period were still on everybody's mind (see Section B.1) as was the failed

145 As a reminder: GATT was an agreement between the commercial powers of the time who sought to reduce tariffs amongst themselves even before the ITO would come into force. In order to avoid lengthy ratification procedures in the United States and a number of other countries, it was important that legal obligations in the GATT were limited to trade and only accepted on a "provisional" basis and "to the fullest extent not inconsistent with existing legislation" (Hudec, 1990: 51; see particularly references in footnote 8).

146 GATT/CP.2/SR.11; see also GATT/CP.2/9. For a digital archive of GATT documents see http://www.wto.org/english/docs_e/gattdocs_e.htm.

147 GATT/CP.2/SR.11.

148 Some of them were put on the agenda before bilateral consultations were exhausted. Hudec (1990) takes this as an indication that filing disputes was seen as a normal "diplomatic" act.

149 For instance, at the Fourth Session in 1950, in a complaint by Chile, now with explicit reference to GATT Article XXIII, Australia stated its opposition to the Working Party report (prepared by the Secretariat) in writing and lobbied among Contracting Parties for its rejection. A counter-lobby was started "stressing the importance of not subjecting such decisions to political reviews before the full GATT membership" (Hudec, 1990: 79). Australia eventually gave way to the Contracting Parties' approval of the report (Jackson, 1969). With this case, while still of a diplomatic nature, GATT dispute settlement had taken a first step in the direction of third-party adjudication. See Australian Subsidy on Ammonium Sulphate (GATT/CP.3/61 and GATT/CP.4/23); see also GATT/CP.4/SR.15 and GATT/CP.4/SR.21.

150 SR.7/5.

151 SR.7/7.

152 As Hudec (1990: 86) observes, "the word 'panel' ... evoked notions of impartial and non-political decisions by individuals acting in their own capacity".

153 L/392/Rev.1.

154 In the following years, "working parties" were still created in certain cases for reasons of domestic political sensitivities of one of the parties as to the surrender of decision-making authority or simply because a country representative of the complainant was part of the Panel on Complaints. See, for instance, SR.7/10 regarding Dairy Products - United States Restrictions (complaint by the Netherlands).

effort to build a larger and more formal international organization governing trade. Despite an increasingly legalistic approach, dispute settlement did not lose its "negotiation" character and depended strongly on the cooperation of the defending party. Panel decisions essentially provided the losing government with additional arguments that could be used domestically to justify a change in policy to its constituencies.

In only one case was retaliation ever authorized.[155] The countermeasures applied were "small enough to avoid charges of overreaction and yet large enough to attract the public attention desired. ... The point was not to punish, but to get across a message." (Hudec, 1990: 195-196). Interestingly, the offending measures were not withdrawn for years to come and the complainant (Netherlands) regularly obtained extensions to keep its retaliatory quotas in place. At the time, a continued breach of obligations *cum* countermeasures was not an unusual situation (Jackson, 1967). On several occasions, countries had withdrawn concessions unilaterally in response to what they considered to be abuses of the various escape clause provisions contained in GATT Articles XIX and XXVIII[156], although it should be recognised that unlike GATT Article XXIII, unilateral rebalancing of concessions were permitted under these two articles. Rather than hostile acts to coerce a country into compliance, "sanctions" were seen as a means to restore the balance of reciprocal concessions in a diplomatic, but assertive manner.

"Anti-judicialization" – GATT dispute settlement wanes in the 1960s

The 1960s were marked by a steep decline in dispute settlement activity in the GATT. For one thing, the formation of the EEC in 1958 obliged its members – previously active users of GATT procedures (see subsection 2.(b)) – to speak with one voice in the GATT and to settle disputes amongst themselves.[157] What is more, a review of the EECs trading regime by Contracting Parties revealed a number of politically sensitive problems that could hardly be resolved by resorting to adversarial proceedings. In particular, the EC sought flexibility in dealing with its agricultural sector and in maintaining preferential relations with its former colonies, notably via the European Economic Community Association Agreement. At the Twelfth Session in 1958, it managed to convince Contracting Parties of the usefulness of further study on these issues focusing on "practical problems, leaving aside for the time being questions of law" (BISD 7th Supplement, 1959: 70).

Contracting Parties' tolerance of the new EC trading regime was put to the test when the EC introduced variable levies in the context of its Common Agricultural Policy (CAP). Since the issue of fluctuating tariffs had also arisen in the context of tariff renegotiations under GATT Article XXVIII upon formation of the EEC, the EC again offered lower tariff bindings on other products not subject to the new variable levies. However, the United States rejected any form of compensation other than ceiling bindings on the variable duty items themselves, albeit to no avail. Failure to agree on suitable compensation ultimately entitled the United States to withdraw an equivalent amount of concessions (i.e. to retaliate) without further legal examination. Disagreement on the appropriate amount finally led to the establishment of a panel, which decided on a retaliatory award in an amount that lay somewhere between the proposals advanced by the disputing parties.[158] Again, retaliation did not lead to any meaningful modification of the offending measures (Jackson, 1969). Further progress on agricultural issues was made by the EC and the US on the sidelines of the Kennedy Round when the two sides agreed on standards for surplus disposal and a set of export prices.[159] Contracting Parties thus came to tolerate the CAP without mounting any form of legal challenge as to its basic elements, notably in regard to the disputed measures of import protection (Sampson and Snape, 1980).

[155] SR.7/16. Both parties provided statistics supporting their claims of the appropriate amount of damage in a highly speculative manner. The Panel agreed on a "middle ground" figure, which was readily accepted by both parties, without further justification. See L/61.

[156] See for instance L/57.

[157] Hudec (1990: 236) notes: "[T]he ease and legitimacy of the disputes procedure seemed to depend a good deal upon its momentum – the frequency of use, and the prior participation of litigants".

[158] L/2088 "Panel on Poultry", also known as the so-called "Chicken War".

[159] See, for instance, the Arrangement Concerning Certain Dairy Products (BISD 17th Supplement, 1970: 5-11.

The array of preferential agreements between the EC and its former colonies (see subsection 4) as well as the formation of further trade agreements, such as the European Free Trade Area (EFTA) and the Latin American Free Trade Association (LAFTA), gave further impetus to "anti-legalistic" tendencies. These developments also coincided with developing countries' own demands for greater freedom to deviate from their own GATT obligations. With the shifting status of many former colonies into independent nations, developing countries began to constitute a powerful force in the GATT.[160] However, their calls for special exemptions for developing countries (which went back to the ITO negotiations) were accompanied by demands for more effective enforcement of developed country obligations.

This attitude was best illustrated by Uruguay's complaint against 15 developed countries, which listed all these countries' non-tariff measures that were affecting Uruguay's exports.[161] However, rather than seeking a specific dispute settlement ruling, the Uruguayan complaint was more a political gesture, aimed at drawing public attention to developing countries' worsening trade situation (Jackson, 1969). Seeking to avoid direct confrontation with major trading partners, Uruguay abstained from making legal arguments as to the non-conformity of the measures with GATT rules and from submitting evidence of the trade damage suffered. Instead, it asked the Panel to determine whether retaliation should be authorized in an attempt "to make GATT assume the prosecutor's role" (Hudec: 1990: 242). The Panel declined to do so. During the Kennedy Round, Uruguay (together with Brazil) again pursued the idea of having the GATT itself act as a type of public prosecutor that would pursue complaints on behalf of developing countries along with the idea of strengthening available remedies (calling *inter alia* for financial compensation and the right to retaliate collectively).[162] Neither proposal met with any success.[163]

Following the Uruguayan complaint and the proposed "radical" reforms of GATT Article XXIII, GATT dispute settlement became increasingly associated with a more forceful pursuit by developing countries of their grievances with the GATT trading system. This was offset, however, by developed countries' resolve to preserve a more flexible application of GATT rules and to address their problems through diplomatic means. Rapidly developing and newer Contracting Parties, such as Japan, had further changed the composition of the GATT membership and their expanding exports began to have economic consequences, which triggered new forms of protectionism ("voluntary export restrictions", VERs) which did not appear to fall within GATT obligations. The GATT trading system thus became infused with legally doubtful trade measures. GATT Contracting Parties, in turn, when criticized for certain of these practices, were able to point to similar policies elsewhere or to tie the issue to a larger problem that needed an overall solution.[164] With this increased potential for serious economic conflict, stringent enforcement of GATT law came to be seen as an inimical act that did not take account of economic realities; instead an understanding developed that a more gradual approach towards fulfilling obligations was what was needed. Following a small number of confrontational cases (including the *US-EC "Chicken War"* and the massive Uruguayan complaint), dispute settlement activity ground to almost a complete halt between 1963 and 1969. Certainly, the two major rounds of trade negotiations in the 1960s (see subsection 1) reinforced this decline. During this period Contracting Parties preferred to address trade conflicts through negotiation, wary of antagonizing matters by engaging in formal dispute settlement.

In that spirit, other attempts by developing countries in the late 1960s to establish some type of self-initiated panel procedure also failed.[165] Instead of a public prosecutor, in 1971, Contracting Parties agreed to create a

160 Within a decade, developing country numbers more than tripled. A 21 to 16 majority of developed to developing countries in 1960 tipped over to reach a 25 to 52 ratio in 1970. See subsection 4.(a).

161 See L/1647 and L/1662 for Uruguay's submissions; see BISD 11th Supplement (1963): 95-148, for the Panel ruling; see BISD 13th Supplement (1965): 35-44, for the Panel's compliance review.

162 COM.TD/F/W.1.

163 See BISD (1966): 18-20, for the modifications of the procedures under GATT Article XXIII adopted at the end of the Kennedy Round. At least, for developing country complaints, after the exhaustion of various consultation procedures "the Council shall forthwith appoint a panel of experts" (para. 5). Hence, the possibility to block the establishment of a panel was forestalled in such cases.

164 See, for instance, SR.24/10 and SR.24/14 for a discussion of the New Zealand proposal on waivers for residual balance-on-payments restrictions.

165 COM.TD/W/68 and COM.TD/W/116.

"Group of Three" consisting of the three Chairmen of the Contracting Parties, the Council and the Committee on Trade and Development. This group was tasked to identify apparently unjustified trade restrictions affecting developing countries and make proposals for their removal.[166] Rather than triggering panel proceedings, this type of "surveillance" body was intended to expose (and embarrass) specific countries, while preserving flexibility to act as a potential mediator that could step in and broker a less confrontational solution.[167]

The revival of formal dispute settlement in the 1970s and beyond

With major supporters of a more "legalistic" approach (United States, major developing countries) having accepted the tendency towards more informal, "diplomatic" means to address trade problems in the 1960s, GATT dispute settlement was only revived due to domestic events in the United States in the early 1970s. Deteriorating economic conditions, notably the first US merchandise trade deficit since World War II in 1971 (leading also to the abandonment of the dollar's convertibility into gold), strengthened the interest of the US Congress in international economic policy, including trade. A review of foreign trade restrictions in Congress triggered widespread criticism of the GATT's "ineffectiveness" (Hudec, 1990: 251). At the same time, the US administration sought new negotiating authority in the run-up to the Tokyo Round. To show its resolve, the US administration pursued a number of complaints in the GATT and, more importantly, announced its intention to exercise its right to retaliate against French import restrictions still in place and ruled illegal by a panel in 1962.[168] Being the target in most US complaints, the EC responded by challenging income tax incentives provided under the US Domestic International Sales Corporation (DISC) legislation for alleged violation of subsidy rules under GATT Article XVI. Soon thereafter, the United States mounted its own complaint against tax measures in several EC countries. For more than two years, the two parties could not agree on the composition of the panel.[169] These events, combined with the continuing frustration of unfettered agricultural policies and the growing range of preferential agreements by the EC, led the United States to call for a strengthening of dispute settlement procedures, including improved rights to retaliate (Hudec, 1993).

However, the major impetus to rebuild the GATT's legal system came from the new "codes" on various non-tariff measures agreed during the Tokyo Round. In view of the increase of obligations and the complexity of issues, a credible enforcement mechanism was needed. As a consequence, a general overhaul of GATT dispute settlement was undertaken, and each code contained its own, more advanced set of procedures. Most importantly, under the new Subsidies Code, and in light of the experience of the DISC dispute, the establishment of a panel could no longer be blocked by the defendant.[170] The other codes contained similar, although less rigorous, language (Hudec, 1980). However, the new general framework did not provide for the right to a panel.[171] It did however confirm a number of established practices, such as third-party adjudication, and set out various procedural issues, such as rough time limits for the different phases of a dispute.

The increasing number of complaints during the 1980s, their legal complexity and the sophistication of the evidence submitted (as foreshadowed already in the DISC dispute) prompted the Secretariat to create a specialized "legal office" in 1981.[172] However, the limits of the existing procedures soon became evident, in particular, with the EC's CAP coming under increased fire. On several occasions, the panel had difficulties in interpreting legal concepts, in handling the large amount of evidence submitted by parties and, ultimately,

166 BISD, 18th Supplement (1972): 70-87.

167 BISD, 19th Supplement (1973): 31-47. The Group of Three operated between 1971 and 1973. In 1974, the subjects covered by it became part of the negotiating mandate for the Tokyo Round and its work was suspended. See COM.TD/W/219.

168 L/3744.

169 Interestingly, both parties agreed to involve outside tax experts in the panel due to the complexity of the matter, an implicit acknowledgement of the need for third-party adjudication. See Hudec (1990): 260-261.

170 The automaticity of establishing a panel was modelled after the special 1966 procedures for developing countries. See BISD (1966). The possibility to block the establishment of a panel continues to be a feature in many bilateral or regional free trade agreement, including recent ones, such as the agreements between Australia and Singapore and Australia and Thailand (Fink and Molinuevo, 2007). Panel blockage is also foreseen in the FTA scheduled to come into force by 2010 between the European Union and Mediterranean countries (Ramírez Robles, 2006).

171 L/4907 in BISD, 26th Supplement: 210-218, see particularly para. 6(ii).

172 It took until 1983 before it was more or less operational. See Hudec (1993).

in reaching a decision.[173] As a consequence, on a growing number of occasions parties experienced a sense of frustration as a result of the panel process. In one instance, the United States even offered "to drop its complaint in exchange for wiping this ruling off the books" (Hudec, 1993: 136).[174] But even when the legal system, towards the latter half of the decade, managed to deal more effectively with an increasing caseload and to render more legally coherent decisions, the adoption of rulings dealing with sensitive issues continued to be blocked by the party ruled to be in violation of its obligations in a significant number of cases. At the 1982 Ministerial Meeting, the EC had stopped short of agreeing to a "consensus-minus-two" principle (Hudec, 1993). The recommendations on dispute settlement finally agreed were targeted at making the process faster and more effective, including by exhorting panels to render clear decisions and recommendations.[175] Following growing dissatisfaction with the lack of enforcement under the GATT, threats of unilateral retaliation were voiced, notably by the United States under its Section 301 procedure, which allowed private parties to file complaints on foreign trade barriers to which the administration was required to respond (Sykes, 1992). Not surprisingly, there was a risk that such non-GATT-authorized measures would spark counter-threats by equally potent players[176], but at the same time this policy proved quite effective (Hippler Bello and Holmer, 1990). It also served to remind GATT Contracting Parties of the value of a functioning dispute settlement system under the GATT, as illustrated by the increasing number of countries initiating disputes and by the decision to further strengthen dispute settlement procedures during the Uruguay Round. Indeed, in 1989, a decision was taken to improve GATT dispute settlement rules and procedures as part of an "early harvest" agreed by Ministers at the Montreal Mid-term Meeting in December 1988.[177] While procedural steps were further clarified to keep the process going (for instance, by giving the Director-General the right to appoint panellists in instances where parties could not agree), the decision did not alter the consensus required to adopt a report and only contained a rather ambiguous provision concerning a complainants' right to a panel.[178]

The continued threat of unilateral sanctions was underscored by the adoption of the Omnibus Trade and Competitiveness Act of 1988, which intensified the pressure on the United States' administration to wield its retaliatory power.[179] In order to subject such measures to multilateral control, Uruguay Round negotiators began to press for a more fundamental reform of the GATT dispute settlement system. By the time of the 1990 Brussels Ministerial meeting a draft understanding was presented that, in a further refined form, subsequently became part of the "Dunkel Draft" of December 1991.[180] The DSU adopted at the end of the Uruguay Round as part of the Single Understanding incorporated all of the earlier GATT decisions on dispute settlement but, what is more important, genuinely reformed the system.

(ii) The WTO Dispute Settlement Mechanism (DSM) – 1995 to present

Providing for a unified system of rules, the WTO Dispute Settlement Understanding (DSU) became applicable to all WTO Agreements, although some of them include special and additional dispute settlement provisions.[181] It has entailed an increasing "judicialization" and "de-politicization" of the process (Esserman and Howse,

173 For instance, in interpreting the concept of "equitable share" in subsidies disputes, it proved difficult to establish a causal chain between subsidization and increased market shares on the basis of the data available to the panel. See, for instance, *European Communities–Refunds on Exports of Sugar*, L/4833 in BISD 26th Supplement (1980): 290-319.

174 L/5142 and L/5142/Corr.1, not reprinted in BISD. The General Council merely noted the ruling rather than adopting it. See C/M/152.

175 L/5424 in BISD 26th Supplement (1983): 9-23.

176 For instance, when Portugal adopted quotas on grains and soybeans in the context of the CAP upon its accession to the EC, the US imposed a non-restrictive quota on EC exports, as long as the Portuguese restrictions did not reduce the level of US exports. In response, the EC subjected a range of US exports to special "surveillance" threatening to apply similar measures if needed. See Hudec (1993): 203-206 in particular.

177 L/6489 in BISD 36th Supplement (1990): 61-67.

178 Despite the success of its unilateral policies, the United States, a long-time supporter of a stronger legal system under the GATT, was the driving force behind more automaticity in panel proceedings and even tried to interpret the 1990 Decision to that extent. See, for instance, C/M/248 and C/M/249.

179 Public Law 100-418.

180 MTN.TNC/W/35 and MTN.TNC/W/FA: S.1-S.23.

181 See Article II.2 of the WTO Agreement and Article 1.2 of the DSU.

2003), albeit not without continuing to make use of both political and legal elements (Petersmann, 1997a). Diplomatic procedures, such as consultations, are mandated to precede the establishment of a panel, while others, such as good offices and mediation, are voluntary alternatives if the parties so agree. Judicial elements have clearly been strengthened. Notably, the right to a panel has been made explicit. Requests for the establishment of a panel before the DSB may only be blocked once, but not when the matter is raised a second time. By the same token, by virtue of DSU Article 23, all trade-related grievances must be channelled through the DSU, thus precluding the unilateral reprisals that had helped to stimulate the reforms. The DSU codifies a number of GATT practices, such as the composition of a panel, its terms of reference, time-limits, procedures for multiple complainants and the intervention of third parties, and has introduced new procedures, such as the interim review of panel reports. Some other procedures, *inter alia*, the right of panels to seek information from any relevant source in addition to the information provided by the disputing parties, including by soliciting reports from expert groups, are set out in more detail (Petersmann, 1997b).

Perhaps the most important features of the WTOs DSM are institutional, namely the quasi-automatic decision-making of the Dispute Settlement Body (DSB) ("reverse" or "negative" consensus that prevents the losing party from vetoing adoption of the report) and the establishment of the Appellate Body as a standing organ for legal review. Both innovations are connected: in exchange for giving up the power to veto rulings they consider erroneous, WTO Members have gained the possibility to appeal to a review body on matters of legal interpretation. Rulings of the Appellate Body are expected to be rendered quickly (60-90 days) and become binding unless overturned by consensus. At any time, parties may call for voluntary arbitration or settle a dispute bilaterally. However, the terms of such settlements and awards must be notified to the WTO and consistent with WTO law, and may be challenged by third Members - another confirmation of the emphasis of multilateral control.

Enforcement procedures have also been streamlined and isolated from possible blockage by the party found to be in violation. If corrective action by the responding Member has been taken, a separate ruling may be sought (to be rendered within 90 days) on whether these measures taken to comply satisfy the recommendations rendered by the panel/Appellate Body and adopted by the DSB. Failure by the Member that has been the object of an adverse ruling to come into compliance after a reasonable period of time (determined by binding arbitration if the parties cannot agree) triggers a 20-day period during which voluntary compensation can be negotiated. If no agreement is reached, with prior authorization by the DSB, retaliatory measures may be implemented 10 days later. The size of such retaliation may be settled by arbitration before the WTO and must be equivalent to the economic harm and loss in trade benefits caused. Any compensatory or retaliatory measures are considered to be temporary, pending full compliance with the ruling.

In order to evaluate the performance of reforms, Ministers in their 1994 Declaration agreed to review the DSU within the next four years. When the DSU review was initiated by the end of 1997, Members largely expressed their satisfaction with the workings of the system[182], as witnessed also by the high level of dispute activity in the first decade of its existence (see next subsection). Few suggestions for improvement were made in the early stages of the review, which at the end of 2001 became part of the Doha Round of negotiations. Zimmermann (2006) takes the initial reluctance to propose modifications not only as an indication of the smooth functioning of the DSU, but also as an expression of uncertainty about how the system would deal with the implementation of politically sensitive disputes, such as *EC-Hormones* and *EC-Bananas*.

Compliance matters ultimately became a major item under the review, in particular the question of whether a successful challenge of implementing measures pursuant to Article 21.5 of the DSU was a prerequisite for the complainant's request for authorization of countermeasures (the so-called "sequencing" issue). In 2002, the United States became the object of the biggest retaliatory award in WTO history, when its replacement legislation for the Foreign Sales Corporation (FSC) was found not to be in compliance with DSB recommendations[183] and the EC was given the right to impose import restrictions on up to $4 billion of trade from the United States. Increasingly, the United States' proposals to reform the dispute settlement system began to reflect the fact that more and more cases were successfully brought against United States, especially in the trade remedy area.

182 WT/DSB/M/42.

183 WT/DS108/AB/RW.

US proposals for increased flexibility and Member control were thus put forward. In addition, certain United States environmental measures (*US–Gasoline* and *US–Shrimp*) had previously been challenged, which sparked concern among various NGO environmental groups in the United States.[184] As a consequence, the WTO also came under pressure from NGOs for more transparency in regard to WTO dispute settlement proceedings. Proposals to that end continue to be opposed by some developing countries for fear of undue pressure being put on panels to consider concerns other than trade concerns. Indeed, the DSM in recent times has proved itself capable of protecting Members' rights to pursue other policy objectives e.g. in the fields of environment and health, as illustrated by the *US–Shrimp (Article 21.5 – Malaysia)* and *EC–Asbestos* cases.

With its broad-ranging coverage of policy issues, exclusive jurisdiction and virtually automatic adoption of dispute settlement reports, the WTOs DSM has been described as the most powerful international law tribunal (Jackson, 2006).[185] It has widely been hailed as a victory of the rule-of-law over bilateral power politics. Indeed, with the adoption of the DSU, rule-oriented, binding adjudication has replaced many of the "diplomatic" elements characterizing dispute settlement under the GATT, such as flexible procedures, party control over the proceedings (including the possibility to reject rulings), compromise solutions (instead of winner-loser situations) as well as the limited use of legal techniques of treaty interpretation. Of course, some observers deplore the loss or weakening of certain elements, be they substantive such as closer ties to public international law (see early references to the ICJ) or be they procedural, such as attorney functions within the institution (akin to the Group of Three mentioned above). Despite the obvious room for discussion on possible improvement[186], the DSU seemed to have served Members well over the first ten years given the over 300 requests for consultations and more than 140 reports issued, including in the new areas of services and trade-related intellectual property rights (Petersmann, 1997b). Before discussing some remaining challenges identified in the literature, the following subsection provides a more detailed overview of salient features in the use of dispute settlement procedures under the GATT and WTO along with possible explanations of the patterns observed.

(b) Utilization of GATT/WTO dispute settlement procedures and outcomes

It has often been noted that a few large countries, particularly the US and EC, have been the principal users of GATT/WTO dispute settlement. However, a more recent development has been the increasingly frequent use of the DSM by developing countries, including to solve disputes amongst themselves. This subsection provides an overview of dispute settlement activities in the GATT and WTO in terms of participation and content of disputes, settlement record (mutually agreed solutions, reports issued) and implementation of rulings/countermeasures.[187] It also cites the literature that has sought to explain various matters related to the use of GATT/WTO dispute settlement procedures, such as the decision to bring a dispute, the likelihood of obtaining concessions in early settlements, the likelihood of complainants winning their cases, the high compliance rate and the limited recourse to retaliation to date.

[184] Ultimately, in the *US–Shrimp (Article 21.5 – Malaysia)* compliance proceedings, it was determined that the United States could maintain its environmental measure in modified form.

[185] While most regional or bilateral free trade agreements contain dispute settlement procedures, often following similar steps as the WTOs DSU, only a few have put in place a comparable institutional framework. A notable exception is the ASEAN dispute settlement mechanism, which provides both an independent secretariat equipped to provide legal support and a permanent Appellate Body, closely following the WTO model (Fink and Molinuevo, 2007).

[186] In fact, proposals in the DSU negotiations cover 25 out of the 27 Articles of the DSU.

[187] For the WTO, the data set compiled by Horn and Mavroidis (2006b) covers all 311 WTO disputes initiated through the official filing of a request for consultations from 1 January 1995 until 31 July 2004. For these disputes, the data have been updated to include events occurring until February 2006. Given the average length of disputes (until circulation of an Appellate Body Report) of almost two years determined by Horn and Mavroidis (2006a), disputes initiated thereafter are likely to be still ongoing and hence cannot be used in much of the analysis undertaken here. For more up-to-date descriptive statistics on WTO dispute settlement (number of complaints initiated, Members bringing/subject to complaints etc.) see Leitner and Lester (2006) See also earlier papers, such as Park and Panizzon (2002). These papers only contain summary statistics. The underlying data sets are not made public, and accounting methodologies (e.g. what constitutes a "case") as well as questions of categorization (e.g. how to characterize the content of a dispute) are different. For the analytical questions addressed in this Report (e.g. concerning types of measures and dispute settlement outcomes), the Report has relied on the publicly available and well documented database prepared by Horn and Mavroidis (2006b) which enables the reader to replicate aggregate results and verify questions of classification in specific cases. The methodology is also consistent with the analysis of GATT disputes based on the equally publicly available data in Reinhardt (1996 and 2001).

(i) Participation in, and subject matter of disputes

As discussed above, dispute settlement activity had its ups and down under the GATT until it exploded in the 1980s. Heavy use of the system continued under the WTO. These changes in the volume of litigation are a reflection of the GATT's evolution as well as of broader economic circumstances. Table 16 shows that the volume of activity was reasonably strong in the first 15 years of the GATT until it bottomed out in the 1960s and early 1970s. The sharp drop in cases brought by the EC and developing countries (despite their increase in numbers) during that time period and the continued activity by the United States (responsible for 25 of 39 complaints) underscore the scepticism of the former towards formal dispute settlement and consistent support of the system by the latter.[188] Dispute settlement activity grew strongly after the Tokyo Round and further intensified during the final seven years of the GATT after the 1988 Midterm Review. Under the WTO, the annual caseload has been quite stable with a recent decrease in cases initiated by the US and the EC offset by growing developing country activity as complaining parties. Overall activity has multiplied under the WTO with almost as many cases (339) being initiated in not even ten years as were initiated (433) in the 47 years of the GATT.

Table 16
Total number of disputes over time and by country group

	GATT						
	1948-57	1958-67	1968-77	1978-87	1988-94	Total GATT 1948-94	Total WTO 1995-2004
US	13	10	25	31	37	116	81
EC15	32	8	4	32	29	105	63
IND	3	13	8	28	26	78	55
DEV	9	23	2	41	57	132	139
LDC	1	1	0	0	0	2	1
All	**58**	**55**	**39**	**132**	**149**	**433**	**339**

	WTO										
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
US	8	17	17	11	10	8	1	4	3	2	81
EC15	2	7	16	16	6	8	1	4	3	0	63
IND	6	8	7	7	7	3	3	10	2	2	55
DEV	14	17	10	8	12	21	19	19	18	1	139
LDC	0	0	0	0	0	0		0	0	1	1
All	**30**	**49**	**50**	**42**	**35**	**40**	**24**	**37**	**26**	**6**	**339**

Notes: Use of dyadic disputes results in more observations than requests for consultations due to multiple complaints. GATT cases resolved under the WTO DSU are counted under the WTO. Due to its evolution from six Members in 1958 to 15 Members in 1995 some cases appear as intra-EU complaints during the GATT years. Accession of ten new Members to the EC in 2004 and of an additional two Members in 2007 is not taken into account. IND: other industrialized countries, i.e. Australia, Canada, Iceland, Japan, Liechtenstein, Norway, New Zealand, Switzerland. LDC: least-developed countries in accordance with UN classification; DEV: other developing country Contracting Parties/Members.

Source: GATT: Reinhardt (1996) updated by authors; WTO: own compilation from Horn and Mavroidis (2006b); data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occuring until February 2006.

On average, given their weight in international trade, the EC and US have been involved in the majority of disputes both under the GATT and WTO (Table 2; Horn and Mavroidis, 2006b). Japan was mostly active as a defendant under the GATT, but its picture is more balanced under the WTO. Amongst developing countries, Argentina, Brazil and Chile were the most active dispute participants under the

[188] Of course, as stated in Subsection 3.(a) above, trade negotiations, in particular the Kennedy Round, also contributed to the overall decline in dispute settlement activity during that time period, since Members addressed certain issues through negotiations rather than disputes.

GATT and continue to be so in the WTO. Over the first 10 years of the WTO India, the Republic of Korea and Mexico joined their ranks in terms of frequency of participation.

While the EC continues to target the United States in about 40 per cent of cases, the share of US complaints against the EC as a percentage of overall US complaints dropped from close to 60 per cent under the GATT to about 35 per cent under the WTO. Both Members file proportionally more complaints against developing countries than under the GATT (around 12 per cent of disputes under the GATT versus 43 and 47 per cent for the EC and US respectively under the WTO). However, Horn and Mavroidis (2006a) also observe that these two Members increasingly have become the subject of complaints rather than acting primarily as complaining parties, an indication of the rise of other countries seeking to defend their export interests. Indeed, a new development over the last ten years has been the more frequent use of the DSM by developing countries. Developing countries have instigated more than 40 per cent of disputes under the WTO as compared to 30 per cent during the years of the GATT. Forty-two per cent of developing country complaints under WTO have been directed against other developing countries as opposed to merely 5 per cent under the GATT. Despite increased litigation between themselves, the US and EC also continue to be prime targets for developing countries, with 75 cases being brought against the two biggest players over the initial 10 years of the WTO compared to 106 cases during 48 years of the GATT.

Several authors have tried to identify the fundamental factors accounting for utilization of the dispute settlement system. Bütler and Hauser (2000) hold a decision to bring a case depends on the strength of the implementation mechanism and the probability of reaching a favourable decision. Both aspects were strengthened with the DSU (which removed the possibility of responding parties to block establishment of panels and adoption of reports and introduced more elaborate implementation procedures) which, helps to explain the boost in WTO dispute settlement activity relative to the GATT. Horn et al. (1999) examine which countries tend to litigate. They find that while differences in legal capacities appear to play some role, dispute patterns can fairly well be explained by the diversity and value of exports. Bown (2005a) shows that even when the size of exports at stake is controlled for, a country's retaliatory and legal capacity as well as its relationship with the defendant, for instance via preferential agreements, are important factors in a decision to initiate a formal complaint. Guzman and Simmons (2005) find that developing countries pursue complaints according to their immediate trade interests and are not deterred from filing a dispute against bigger players for fear of reprisal. However, owing to a lack of resources they face difficulties in identifying violations and building a case and, hence, are constrained in their capacity to launch disputes. Reinhardt (1999) attributes less importance to legal resources and international power relationships, but relates the likelihood to bring a dispute to the ability of domestic interest groups in a country to exert pressure on the government to defend their export interests. Interestingly, Bown (2005b) finds that the incentive to go through formal litigation is reduced, when it is easy for industries to initiate an anti-dumping/countervail investigation leading to the implementation of trade contingency measures in retaliation for an alleged breach of rules by another country.

The WTO dispute settlement system has also seen a growing participation by third parties.[189] Many observers see this as a positive development as it enlarges the circle of Members who can express their concerns (including "systemic" interests) (Lanye, 2003). Indeed, Busch and Reinhardt (2006) find that the participation of third parties, including at the consultation stage, has an impact on dispute settlement outcomes. They caution that third party participation increases the transaction costs of reaching a mutually agreed solution and may deter disputes from being filed in the first place.

[189] Third parties are Members that merely reserve their rights in a dispute (as opposed to co-complainants). The conditions for third party participation depend on the Article under which the complainant requests consultations with the defendant. "Other parties" may also request to join the consultations in advance of a panel proceeding. Article 10 of the DSU allows third parties to make written and oral submissions in the first round of litigation which are to be reflected in the final report. If a panel report is appealed, DSU Article 17 gives those third parties similar access to the proceedings before the Appellate Body.

Table 17
Most frequent complainants and defendants

	GATT		WTO	
	Complainant	Defendant	Complainant	Defendant
Argentina	13	3	10	14
Australia	24	4	7	9
Brazil	19	9	21	13
Canada	33	23	25	12
Chile	18	3	9	10
EC15	105	197	63	74
India	6	3	13	18
Japan	8	35	11	13
Korea, Rep. of	1	4	11	12
Mexico	5	3	13	11
New Zealand	9	2	6	0
Norway	4	12	1	0
US	116	116	81	92

Notes: Use of dyadic disputes results in more observations than requests for consultations due to multiple complaints. GATT cases resolved under the WTO DSU are counted under the WTO. Due to its evolution from six Members in 1958 to 15 Members in 1995 some cases appear as intra-EU complaints during the GATT years. Accession of ten new Members to the EC in 2004 and of an additional two Members in 2007 is not taken into account.

Source: GATT: Reinhardt (1996) updated by authors; WTO: own compilation from Horn and Mavroidis (2006b); data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occuring until February 2006.

Table 18
Who targets whom?

		GATT									
Complainant		US		EC15		IND		DEV		LDC	
		number	share	number	share	number	share	number	share	number	share
Defendant	US	0	0	42	40	28	35.9	43	32.8	2	100
	EC15	67	57.8	30	28.6	37	47.4	63	48.1	0	0
	IND	34	29.3	21	20	11	14.1	17	13.7	0	0
	DEV	15	12.9	12	11.4	2	2.6	8	5.4	0	0
	LDC	0	0	0	0	0	0	0	0	0	0
	Total	**116**	**100**	**105**	**100**	**78**		**131**	**100**	**2**	**100**

		WTO									
Complainant		US		EC15		IND		DEV		LDC	
		number	share	number	share	number	share	number	share	number	share
Defendant	US	0	0	26	41.3	26	47.3	40	28.8	0	0
	EC15	29	35.8	0	0	10	18.2	35	25.2	0	0
	IND	14	17.3	10	15.9	5	9.1	5	3.6	0	0
	DEV	38	46.9	27	42.8	14	25.4	59	42.4	1	100
	LDC	0	0	0	0	0	0	0	0	0	0
	Total	**81**	**100**	**63**	**100**	**55**	**100**	**139**	**100**	**1**	**100**

Notes: Use of dyadic disputes results in more observations than requests for consultations due to multiple complaints. GATT cases resolved under the WTO DSU are counted under the WTO. Due to its evolution from six Members in 1958 to 15 Members in 1995 some cases appear as intra-EU complaints during the GATT years. Accession of ten new Members to the EC in 2004 and of an additional two Members in 2007 is not taken into account. IND: other industrialized countries, i.e. Australia, Canada, Iceland, Japan, Liechtenstein, Norway, New Zealand, Switzerland. LDC: least-developed countries in accordance with UN classification; DEV: other developing country Contracting Parties/Members.

Source: GATT: Reinhardt (1996) updated by authors; WTO: own compilation from Horn and Mavroidis (2006b); data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occuring until February 2006.

Table 19 shows that non-tariff barriers (NTBs) are the type of measure most frequently complained about (more than half of all measures under the GATT and about 45 per cent under the WTO, including SPS and TBT related complaints). Hudec (1990) confirms that, as tariffs were cut, tariff related disputes revealed a constant downward trend, while NTB litigation became relatively more important. Combining the subsidy and antidumping (AD) / countervailing duty (CvD) categories, it seems remarkable that about one-quarter of GATT and WTO cases deals with "unfair" trade practices or the measures taken to offset them. United States AD/CvD measures are and historically have been a main target of trade remedy disputes (as compared to, for instance, Japan who, until recently,[190] has not been the target of any such dispute. In the GATT years, the EC frequently had to defend its subsidy regime. Under the WTO, developing countries have quickly been catching up as defendants in trade remedy disputes, notably in regard to AD as well as safeguards, while the picture is more balanced across other types of trade measures.[191] Most disputes under the WTO cover goods, with services and trade-related intellectual property rights barely accounting for 10 per cent of complaints.

Table 19
Disputes by type of measure

	GATT						
Contested Measure	Tariff	NTB	Subsidy	AD/CvD	SG	PTA	Total
number	84	267	54	54	7	47	513
share	16	52	11	11	1	9	100

	WTO										
Contested Measure	Tariff	NTB	Subsidy	AD/CvD	SG	PTA	SPS	TBT	IP	Services	Total
number	64	163	43	79	37	10	30	33	25	21	505
share	13	32	9	16	7	2	6	7	5	4	100

Notes: Use of dyadic disputes results in more observations than number of bilateral complaints and number of requests for consultations due to multiple contested measures. GATT cases resolved under the WTO DSU are counted under the WTO. GATT preferential trade agreement (PTA) disputes represents a lower bound due to missing data/conservative classification, but include disputes associated with European Economic Community (EEC). GATT count does not single out measures under the plurilateral Codes, e.g. the Tokyo Round TBT Agreement, since all relevant disputes also referred to GATT provisions. Internal money charges, such as discriminatory taxes, are categorized as NTBs, not tariffs.

Source: GATT: Reinhardt (1996) updated by authors; WTO: own compilation from Horn and Mavroidis (2006b); data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occuring until February 2006.

For the WTO, data is available on the HS classification of products categories subject to disputes. As Figure 9 illustrates, by far the largest number of disputes are in agriculture,[192] followed by base metals (Section XV), vehicles and transport equipment (Section XVII), textiles and clothing (Section XI) and machinery (Section XVI). Sections I to IV alone (agricultural products except fish) account for 45 per cent of the disputes. This is broadly consistent with the GATT, where about one-half were agricultural cases (with the exception of the 1950s when agricultural products were shielded behind quotas for balance-of-payments purposes).[193]

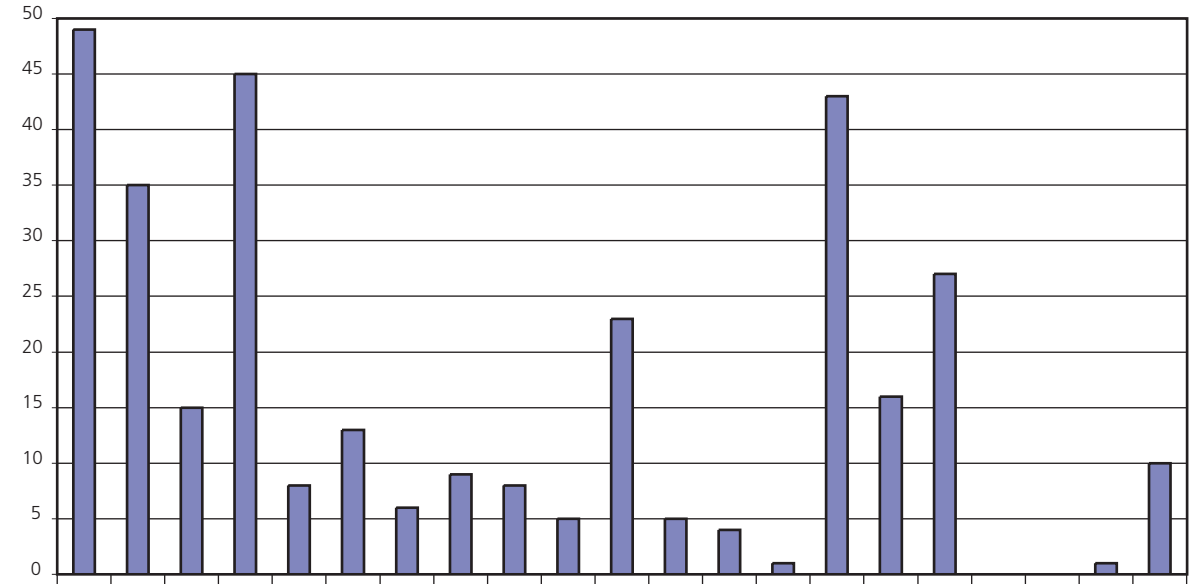
190 In 2006, a panel has been established in *Japan–Countervailing Duties on Dynamic Random Access Memories from Korea* (WT/DS336).

191 See, for instance, Park and Panizzon (2002): 233, Table 6 as well as Hudec (1990): 340, Table 11.38.

192 Agricultural products under the WTO are defined as products contained in Sections I-IV, except fish and fish products, and certain products of Sections VI, VIII and XI; see Annex 1 of the Agreement on Agriculture.

193 See Hudec, 1990: 327, Table 11.28.

Chart 9
WTO disputes by type of product



	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	XIII	XIV	XV	XVI	XVII	XVIII	XIX	XX	XXI
Count	49	35	15	45	8	13	6	9	8	5	23	5	4	1	43	16	27	0	0	1	10

Notes: Use of dyadic disputes results in more observations than requests for consultations due to multiple complaints. Products categorized by HS chapters and summarized in HS Sections I-XXI as follows: I – animals and animal products, II – vegetable products, III – animal or vegetable fats, IV – prepared foodstuffs, V – mineral products, VI – chemical products, VII – plastics and rubber, VIII - hides and skins, IX – wood and wood products, X – wood pulp products, XI – textiles and textile articles, XII – footwear, headgear, XIII – articles of stone, plaster, cement, asbestos, XIV – pearls, precious or semi-precious stones, metals, XV – base metals and articles thereof, XVI – machinery and mechanical appliances, XVII – transport equipment, XVIII – measuring and musical instruments, XIX – arms and ammunition, XX – miscellaneous, XXI – works of art.

Source: Own compilation from Horn and Mavroidis (2006b); data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occurring until February 2006.

(ii) Dispute settlement outcomes

As far as dispute settlement outcomes are concerned, Table 20 confirms a number of improvements from the GATT to the WTO. Due to the positive consensus rule under the GATT, panels were established in less than 45 per cent of complaints filed. Of the 189 complaints that went to the panel stage, another 20 per cent were dropped or mutually settled without official notice. Finally of the 151 cases in which reports were issued more than a quarter remained unadopted. In total, only 25 per cent of initial complaints ended with an adopted panel report. Under the WTO, this compares to 62 per cent of the complaints (excluding ongoing disputes) for which a panel report was issued and proved "decisive"[194] and to another 28 per cent of complaints settled according to the rules. Seventy per cent of the cases, where a panel report is issued and that are not mutually settled or ongoing, are appealed. Bütler and Hauser (2000) explain that this high rate is a result of compelling reasons on the part of the losing government to appeal. First, there is at least a small chance that a panel's findings might be reversed, even if only in part; second, the losing government is likely to be under pressure from domestic interest groups to appeal; and finally, during the appeal process a little more time is gained during which the offending measure can be maintained.

Indeed, both under the GATT (82 per cent) and the WTO (88 per cent) complainants have mostly won their cases (counting the ones that went through to an adopted report and "decisive" ruling respectively). More than one-third of completed cases under the WTO have been mutually settled, some of them (about 10 per cent of the total) without notifying details of a bilateral agreement to the membership as

[194] For the present statistical purposes, "Panel/AB is decisive" means that either (i) the ruling was pro-defendant; or, (ii) it was pro-complainant and defendant complies; or, (iii) it was pro-complainant and compliance was not forthcoming, but the complainant decided not to pursue the matter further.

a whole.[195] Of those, a number of cases simply were dropped. Davey (2005a) raises the question whether the contested measure was removed or not, and if not, what action, if any, by the respondent led to the dropping of the case. Bütler and Hauser (2000) demonstrate that bilateral settlements are more likely at the early stages of the dispute process; the later a mutually agreed settlement (MAS) is concluded the more likely it is to resemble to the expected ruling. Busch and Reinhardt (2000) as well as Guzman (2002) note that the complainant government may prefer to go before a panel because the political damage of giving in to foreign pressure may not be offset by the expected benefits from a negotiated settlement. Likewise, politicians in the defending country, should the case be lost, can blame the WTO for the need to repeal the disputed measure and may suffer less political harm than if they had settled for a compromise deal. This selection effect also helps to explain the high "victory" rate of complainants.[196] Guzman and Simmons (2002) further elaborate that the nature of the disputed issue has an impact on the likelihood to settle in consultations. When the subject matter of the dispute has an all-or-nothing character and leaves little room to compromise (such as a health measure), there is considerably less opportunity for a negotiated compromise than when "continuous" variables, such as tariff levels are concerned.[197] Despite the rather high quota of mutual settlements, Holmes et al. (2003) and Reinhardt (2001) do not find evidence that weaker Members, especially developing countries, come under systematic pressure to settle bilaterally instead of seeing their cases completed. To the contrary, Busch and Reinhardt (2000 and 2003) hold that early settlement offers the greatest likelihood of securing full concessions from a defendant, but that developing countries have less been able to do so.[198]

195 Hoekman and Mavroidis (2000) contend that even the notifications received under Article 3.6 of the DSU often do not allow for a determination of whether Article 3.6 of the DSU (stipulating that any mutually agreed settlement must be consistent with the covered agreements) has been complied with.

196 Guzman's (2002) reasoning is that unlike in domestic litigation the relative payoffs of the disputing parties are political and not symmetrical, i.e. not "zero-sum". This may be for a variety of reasons: affected interest groups in the defendant may be more powerful than their counterparts in the complainant or a higher reputation damage following a lost case may be inflicted on the complainant (seen to be bringing "meritless" lawsuits) than on the defendant (suffering little reputation loss as long as the measure ultimately is removed).

197 When WTO Members negotiate a bilateral settlement, they typically focus on the specific measure at issue. According to the authors, it would, of course, be possible to make a "lumpy" issue (such as a safety regulation) more "continuous" by making side payments or link it to another policy matter. As a corollary, the authors find that democracies are less likely to negotiate these more complicated deals (and hence are more likely to go through the full panel process on "discontinuous" issues), since they are more concerned with the interests of other domestic groups, who might oppose the strategy of such linkage, than autocratic regimes.

198 To recall, by virtue of Articles 3.7 and 11 of the DSU, a bilateral settlement always remains possible, i.e. also when the case has progressed to the panel stage or when a report has been issued.

Table 20
Dispute settlement outcomes and direction of ruling

GATT				WTO			
				Complaint ongoing			122
					consultation ongoing	106	
					active Panel	16	
Case dropped during panel phase			38	Settled by MAS (notified)			55
					at consultation stage	28	
					at panel stage	21	
					post-report stage	6	
Settled by MAS (not notified) or no panel established			244	Settled by MAS (not notified)			23
					at consultation stage	12	
					at panel stage	11	
				Settled for procedural reasons			4
				Settled by Art. 25 Arbitration			1
Report unadopted			42				
Report adopted			109	Panel/AB report is decisive			134
	pro-defendant	20			pro-defendant	16	
	pro-complainant	89			pro-complainant	118	
Complaints notified			433	Complaints notified			339

Notes: Use of dyadic disputes results in more observations than requests for consultations due to multiple complaints. GATT: GATT cases resolved under the WTO DSU are counted under the WTO. WTO: Cut-off date for ongoing disputes is February 2006. The number of observations in "Panel/AB is decisive" (134) is less than the number of adopted reports (141), since in 6 instances post-report MAS occurred and in 1 instance an Art. 25 arbitration was agreed upon.

Source: GATT: Reinhardt (1996) updated by authors and own compilation. WTO: own compilation from Horn and Mavroidis (2006b); data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occurring until February 2006.

Ultimately, a complaint can only be considered successful if it induces the offending Member to live up to its commitments. The clearest favourable result for the complainant is achieved when the measure at issue is withdrawn, which appears to be the case for at least 66 of 121 completed WTO cases (Table 21). By empirically analysing a large set of GATT/WTO dispute settlement outcomes Bown (2004a) finds that the potential costs of retaliation, and hence consideration of the plaintiff's power, influence a Member's decision to comply rather than concerns for its reputation. However, the statistics in Table 21 may hide the fact that a losing Member can modify the offending measure to a certain extent or replace it with a new policy that may raise WTO-consistency problems of its own. Reif and Florestal (1998) point to the problem of defining the precise nature of the losing party's obligation given that findings are mostly confined to recommendations to bring the contested measure into conformity without suggesting how this should be done. Davey (2005a) sees the increasing invocation of DSU Article 21.5 compliance panels[199] (many of which are ongoing) as an indication of the problem of modified or replacement measures. He finds evidence of the former particularly in SPS matters and of the latter in anti-dumping and countervailing cases.

From Table 21 it can also be seen that only about 20 per cent of completed cases lead to threats of retaliation, and in only one half of those instances have retaliatory measures been imposed. Another 10 per cent of completed cases are "missing" in the sense that no requests for countermeasures have been made despite the absence of a confirmed "positive" solution for the complainant. Bown (2004b) cautions against taking the low number of countermeasures as a sign of lacking effectiveness. To the

[199] DSU Article 21.5 foresees that where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings by a panel or the Appellate Body, a panel – wherever possible the original panel – can be called upon to decide on such a dispute.

contrary, he notes that concerns about retaliation affect governments' decisions in the first place of whether to protect a domestic industry via "illegal" measures and face a formal complaint or "legally" via safeguards while providing compensation.

Table 21
Compliance record in WTO disputes

Report adopted, of which:			141
Implementation (reasonable period of time) ongoing (excluding sequencing)			20
Pro-defendant, i.e. officially settled			14
MAS (prior to request for CM)			3
Compliance forthcoming			68
	undisputed compliance	66	
	prior to request for CM, 21.5 panel pro-defendant	2	
CM requested			25
	post request for CM, MAS	3	
	post request for CM, 21.5 panel pro-defendant	1	
	inactive or suspended	4	
	n/a	1	
	under Art. 25	1	
	sequencing, i.e. pending	2	
	imposed	13	
"Missing cases": compliance not forthcoming, no MAS, not ongoing, but also no CM requested			11

Notes: Use of dyadic disputes results in more observations than requests for consultations due to multiple complaints. Cut-off date for ongoing disputes is February 2006. The number of adopted reports (141) is higher than the number of observations in "Panel/AB is decisive" (134) in Table 20, since it included 6 instances in which post-report MAS occurred and 1 instance in which an Art. 25 arbitration was agreed upon. CM: counter measures.

Source: Own compilation from Horn and Mavroidis (2006b) data include all disputes initiated between 1 January 1995 and 31 July 2004 (DS 1-311); for these disputes, the data have been updated to include events occuring until February 2006.

In order to evaluate the success of the DSM, the time it takes to achieve satisfactory results from the point of view of the complainant must also be taken into account, given that any offending measure may be in force for at least the duration of the proceedings. Horn and Mavroidis (2006a) have calculated an average of just under two years (23 months) from the date of request for consultations until the date of circulation of an Appellate Body report.[200] This is longer than the sum of statutory timelines (15 months). The authors conjecture that delays may be a function of the complexity of the dispute (as measured by the number of invoked articles), the damage at stake (as claimed by the defendant) and the litigation capacity of parties (as measured by their level of development). Delays may also occur simply because parties agree to suspend the proceedings.

(c) Performance of the WTO's DSM and challenges discussed in the literature

This subsection provides an overview of the academic literature and makes no attempt to portray the whole range of proposals in the current DSU review negotiations under the Doha Development Agenda. The main topics discussed in the DSU review negotiations include sequencing, remand, post-retaliation, transparency, enhanced third party rights and improved participation of developing countries.

[200] If averages for the reasonable period of time during which implementation must occur as well as the time for a compliance panel and Appellate Body compliance report are added the total process starting from the request for consultations can take over three and a half years.

As foreshadowed in subsection 3.(a), after 12 years of operation, there is an overwhelming consensus in the literature that the WTO's DSM works well.[201] However, defining and measuring the success of the DSM is not as straightforward as it may seem. According to Article 3 of the DSU, the objective of the WTO dispute settlement is to provide security and predictability to the multilateral trading system and to preserve the rights and obligations originally negotiated among its Members. In order to measure fulfilment of the DSU's objectives, reference is commonly made to the workings of the system and its level of activity, as portrayed in the preceding Section.[202] Yet, these criteria are far from being unambiguous. For some commentators, the number of disputes is a sign of success (after all, countries utilize the system), for others it is an indication of growing discontent with the ambiguity of rules governing world trade (Reinhardt, 1999). Likewise, an extensive litigation process is tantamount to bureaucratic slack for some, and a sign of due process for others (Iida, 2004). The frequency of retaliation is evidence of a system at work for some, but a worrisome tendency for others (Schwartz and Sykes, 2002). By the same token, a high level of mutually agreed solutions may be a positive trend or a sign of power-politics and understandings that are potentially detrimental to outsiders (Busch, 2000). What all of these criteria have in common is that only disputes actually initiated are considered, while the fact that some cases are never brought may be a consequence of how the dispute settlement system is designed. Hence, the number of "missing cases" could be an indication of failure (Bown and Hoekman, 2005), but is next to impossible to measure.[203]

In light of these problems, any evaluation of the success and remaining challenges of WTO dispute settlement must be less than perfect. For the purposes of this subsection, the approach by Jackson (2005) and others is followed, who have primarily compared the WTO dispute settlement to GATT practices as well as to similar international tribunals. In a qualitative manner, it has been stated that WTO dispute settlement processes are comparatively well defined and running smoothly. A large variety of countries are using the system. The DSB's authority is accepted and its recommendations are generally complied with. The enforcement apparatus is powerful in being able to issue binding decisions, in the quasi-automaticity that exists for the adoption of reports and especially in its ability to enforce decisions against non-complying Members and has created what Jackson calls "sanctions envy" (Jackson cited in Charnovitz: 2001: 792) by other international organizations. Along similar lines, some of the challenges identified in the literature can be categorized into questions of participation, adjudication and implementation of rulings.

(i) Issues of participation

As mentioned in the preceding section, a large range of countries make use of the DSM. Yet, these statistics reveal an absence of the poorest WTO Members who fail to engage either as complainants or interested third parties (but are not challenged either). The descriptive statistics above reveal that the participation of developing countries as a group has increased under the WTO compared to the GATT. In the 47 years of the existence of the GATT, 30 developing countries filed a total of 132 complaints corresponding to an average of about 3 cases per year. In comparison, 139 cases have been initiated by 31 developing countries during the first ten years of the WTO resulting in an annual average of about 14 developing country complaints.[204] However, 57 per cent of all developing country complaints and 42 per cent of third party participation are accounted for by the most active developing countries, namely Argentina, Brazil, Chile, India, Mexico and South Korea, as well as China and Chinese Taipei as of 2001 (Horn and Mavroidis, 2006a). This means that more than 80 developing Members litigate rarely,

201 See exemplarily Davey (2005b).

202 See e.g. Jackson (2005). For a discussion of alternative indicators of the DSU's effectiveness, which are more difficult to measure, see e.g. Iida (2004).

203 The term "missing cases" in this context refers to a different phenomenon than in Table 20. Here, "missing cases" refers to the possibility that some cases are never brought before the DSB, whereas above, the term denotes litigation outcomes that cannot be accounted for. In the literature, the term "missing cases" is also used in both contexts.

204 139 of 339 complaints represent about 40 per cent of filings. In addition, developing country Members are third parties in at least 49 per cent of WTO disputes (Horn and Mavroidis, 2006a).

if ever. As shown in Table 16, least-developed country participation in dispute settlement is practically inexistent.[205]

Hence, some concern remains whether the WTO's DSM may be systematically biased against developing countries. Two explanations for the possibly disadvantageous position of economically weaker, "small" countries are commonly noted (Anderson, 2002; Mavroidis, 2000; Pauwelyn 2000). Firstly, it has been argued that small countries lack the necessary retaliatory power to enforce rulings in their favour. Anticipating the futility of their endeavours to coerce economically powerful countries into compliance, small countries abstain from engaging in costly litigation procedures in the first place or right away opt for other options to protect their interests (for instance via trade remedies or balance-of-payments restrictions). These considerations (and possible avenues of reform) are examined in detail in subsection (iii) below, which deals with issues of implementation and enforcement.

Secondly, it has been argued that resource constraints prevent poor countries from obtaining information to build their case, from taking the necessary steps to initiate a dispute and from arguing their case in the appropriate manner. Hoekman and Mavroidis (2000) contend that small countries are confronted with higher costs to collect relevant information, since there is a lack of national mechanisms as well as resourceful private groups that could monitor foreign trade practices. Once a violation of another country has been detected, many developing and least-developed countries may only have limited legal expertise at their disposal to bring or defend a case and may have to rely on (expensive) outside expertise. Horn and Mavroidis (1999) highlight disadvantages in legal capacity that may be more pronounced for poorer countries, notably in relation to non-violation complaints, monitoring and implementation of rulings.

Hoekman and Mavroidis (2000) stress the role of "surveillance", a term they use interchangeably for transparency. Important progress was made with the creation of the Trade Policy Review Mechanism (TPRM). While reviews of Members' trade policies take place in a more systematic fashion, they do not include proposals for the removal of trade barriers, like the reports by the Group of Three did in the early 1970s. Moreover, in Article A.(i) of Annex 3 of the Marrakesh Agreement establishing the WTO, it is made explicit that the TPRM is not intended "to serve as a basis for the enforcement of specific obligations ... or for dispute settlement procedures", i.e. the Secretariat is not meant to fulfil the function of a general attorney, and reports cannot be used as evidence against the Member reviewed. Hoekman and Mavroidis (2000) criticize that the TPRM process is too infrequent and that periodic surveys of a representative cross-section of companies involved in importing and exporting as well as of consumer and industry associations are needed to assess the impact of a country's trade policies on export (as well as domestic) markets. To that end, Bown and Hoekman (2005) advocate private-public partnerships (between developing country governments and private companies, NGOs and/or consumer groups) in order to raise awareness and provide legal assistance.[206] The authors make further proposals to facilitate the participation of WTO Members in dispute settlement activities, including the provision of direct financial support for litigation, increased surveillance by the WTO Secretariat as well as capacity-building.

An important initiative to support developing countries in dispute settlement activities has been the Advisory Centre on WTO Law, established in 2001 (Van der Borght, 1999). The DSU also contains special procedures and time-frames that are meant to alleviate the burden of developing countries in becoming involved in a dispute.[207] Developing countries are also entitled to legal assistance from the WTO Secretariat and other special and differential treatment in relation to dispute settlement under certain agreements (Footer, 2001). Nordstrom (2005) and Nordstrom and Shaffer (2007), while acknowledging

[205] LDCs have a share of about 0.8 per cent in world trade (2005 merchandise export values) and only filed a single complaint in the WTO (which corresponds to 0.3 per cent of complaints). Furthermore, LDCs were third parties in only 1.5 per cent of disputes. See also Shaffer (2005).

[206] See Shaffer (2003a; 2006) for a detailed overview over the issue of public-private-partnerships in the WTO and developing countries' challenges in establishing such mechanisms.

[207] See Articles 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8 and 27.2 of the DSU. In Article 3.12, reference is also made to the special procedures agreed in 1966. See BISD, 14th Supplement (1966): 18-20.

the importance of legal aid, highlight the limitations of the WTO Secretariat in providing assistance under its current mandate for reasons of impartiality, and, as an alternative avenue, propose the introduction of simpler and less costly dispute settlement procedures for "small claims". The proposal from before the Tokyo Round to create a "federal prosecutor" or "general attorney" within the WTO Secretariat for developing countries has also been brought up on occasion by certain authors (e.g. Hoekman and Mavroidis, 2000).[208]

(ii) Issues of adjudication

Dispute panels and the Appellate Body have created a large body of WTO case law, ensuring to the maximum extent possible its internal consistency. However, in interpreting WTO law, they have at times been criticized in the literature for making law instead of administering it. "Judicial activism", the argument goes, may lead to a serious encroachment on Members' sovereignty. Along with this critique, WTO scholars have also raised the concern that the system has become too rigid, too "judicialized", over the years. Too much rigidity, it is claimed, prevents the DSB from dealing with unforeseen situations and new developments. Finally, a number of commentators have suggested that a lack of transparency in the litigation process undermines the legitimacy of rulings. Legal questions of this sort can hardly be assessed empirically. They reflect conceptual differences among WTO scholars about what the role of dispute settlement should be.

The mandate of dispute settlement bodies

According to Article 31(1) of the *Vienna Convention on the Law of Treaties*: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.". In interpreting WTO law, dispute settlement panels and the Appellate Body have, on several occasions, been accused of exceeding their mandate by adding to Members' obligations or limiting their rights, instead of merely clarifying the ambit of provisions (Davey, 2001). It has been claimed that such practice may curtail the sovereignty of WTO Members and have an impact on their right to pursue legitimate domestic policy objectives (Essermann and Howse, 2003). Interestingly, early criticisms came from environmentalists after the *US–Tuna* and the *US –Shrimp* disputes, but somewhat died down when the rulings in *EC–Asbestos*, and *US–Shrimp (Article 21.5 – Malaysia)* demonstrated the deference of WTO dispute settlement to national environmental and health policies (Petersmann, 1997b). More recently, panels and the Appellate Body have been criticized for certain rulings on trade remedies for allegedly having disregarded the standard of review under Article 17.6(ii) of the Anti-Dumping Agreement.[209] Others have criticized WTO jurisprudence for "under-reaching" by giving too much deference to measures taken by WTO Members (e.g. McRae, 2004).

These debates brought to the surface the fundamental question for WTO dispute settlement: how to deal with the existence of constructive ambiguity and loopholes in the treaty text? As stated above, adjudicators are charged with interpreting the treaty text in its context and in the light of the object and purpose of the treaty.[210] In addition, the Appellate Body has said, based on Article 31 of the *Vienna*

[208] Precedents for an independent international bureaucracy to act as a prosecutor exist. Pursuant to Article 226 of the 1957 Treaty of Rome Establishing the European Community, the European Commission, at its own initiative, can take action against member states that fail to fulfil their obligations. After having received the observations by the member state in question, it issues a "reasoned opinion". If the member state does not comply with the terms of the opinion within the specified time period, the Commission may bring the matter before the European Court of Justice.

[209] According to Article 17.6(ii) of the Anti-Dumping Agreement, where a panel finds that a provision admits of more than one "permissible" interpretation, it shall consider the national authority's determination in conformity if it rests upon one of those interpretations. There is considerable controversy among legal scholars as to whether the WTO DSM has exceeded the limits of the standard of review and the interpretative approach mandated under the Anti-Dumping Agreement. Tarullo (2002) and Greenwald (2003), for example, are affirmative, while Durling (2003) and Leibovitz (2001) do not see an excess of mandate.

[210] For a discussion of the role of various methods of treaty interpretation see e.g. Petersmann (1998).

Convention, that treaty interpretation could not occur in clinical isolation from public international law.[211] Pauwelyn (2001) acknowledges that interpretation (even within the relatively strict sense referred to in Articles 31 and 32 of the Vienna Convention) is a matter of definition. However, he emphasizes that interpretation must be limited to giving meaning to rules of law and cannot extend to creating new rules,[212] which is the prerogative of WTO Members through negotiations.

Proposals have been made by a few authors to curb the authority of panels and the Appellate Body, to do away with the reverse consensus rule of adopting reports, to increase party control over the dispute outcome as well as to introduce stronger elements of post-report diplomacy.[213] Opponents of this weakening of the judicial process fear, among other things, a loss of the public good nature of setting legal precedents and an undue encouragement of undisclosed deals with adverse effects on other Members (Holmes et al., 2003).[214] Most WTO scholars observe that there is no evidence of judicial activism and, therefore, agree with Mercurio (2004) that if proposals for increased flexibility and Member control were implemented, "the basis of dispute settlement in the WTO and the fundamental tenets upon which the DSU operates [would be eroded ... and that] the organization as we currently know it would cease to exist" (Mercurio, 2004: 818).

Has the dispute settlement system become too "judicialized"?

Some commentators have argued in favour of more diplomacy for a somewhat different reason. Recognizing that the WTO is a relational contract of trade cooperation, Guzman (2002) and others have noted that the WTO is crucially dependant on the good-will of its Members and that too much "judicialization" endangers dispute settlement.[215] These authors observe that the current trading system is becoming progressively institutionalized, legalized and formalized by virtue of institutional innovations, treaty addenda and the power of de facto precedence of WTO jurisdiction. They hold that a focus on rules creates the illusion that the WTO is a complete (unambiguous) contract, when in reality, it is not. A move towards increased "judicialization" seeks to create the appearance that WTO agreements contain the answer to all possible issues of conflict and that dispute settlement is a matter of applying the correct legal passage of the text. It is argued that a "judicialized" approach may be counterproductive

211 Pauwelyn argues that "[f]or a non-WTO rule to play a role in this process, (1) the WTO term in question must be broad and ambiguous enough to allow for input by other rules; and (2) the other rule must say something about what the WTO term should mean, i.e., there must be some connection with a WTO term for a non-WTO rule to impart meaning to the interpretive process. ... [W]ithin the process of treaty interpretation, non-WTO rules cannot add meaning to WTO rules that goes either beyond or against the 'clear meaning of the terms' of WTO covered agreements" (Pauwelyn, 2001: 572-573).

212 The Appellate Body confirmed that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (*United States-Standards for Reformulated and Conventional Gasoline*: 23). Elsewhere, the Appellate Body emphasized that "it is certainly not the task of either panels or the Appellate Body to amend the DSU. ... Only WTO Members have the authority to amend the DSU" (*United States-Import Measures on Certain Products from the European Communities*: para. 92).

213 See e.g. Hippler Bello (1996). It appears that only very few authors, such as Barfield (2001), really wish to go back to diplomatic solutions in politically difficult cases, advocating the re-introduction of a blocking mechanism by the losing party. In the current DSU negotiations, the United States and Chile have proposed, *inter alia*, to provide a mechanism for parties to delete by mutual agreement findings in a panel report that are not necessary or helpful to resolving the dispute, to make provision for some form of "partial adoption" procedure, where the DSB would decline to adopt certain parts of reports and to provide some form of additional guidance to WTO adjudicative bodies concerning (i) the nature and scope of their mandate and (ii) rules of interpretation of the WTO agreements. See TN/DS/W/82 and 82/Add.1.

214 In fact, more "bilateralism" in trade matters may even be counterproductive for the broader relationship between two countries. The possibility to "refer" bilateral trade disputes to the WTO can help to "remove" (at least to some extent and for some time) trade rows that recurrently spoil the atmosphere in bilateral diplomatic relations dealing with a wider range of policy issues. This observation is owed to WTO Deputy Director-General Alejandro Jara, who from previous experience as a trade negotiator has noted that progress on other matters became easier, once a bilateral trade dispute was addressed at the WTO. See also Guzman (2002) for related arguments on governments' preference for seeking the establishment of a panel rather than a bilaterally negotiated solution.

215 See Chayes and Chayes (1993) for the so-called managerial school of international relations. A "relational" (or "fiduciary") contract is characterized by longevity, a continuing relationship and substantial incompleteness. As a consequence, relational contracts are governed by shared norms, values and a sense of "what is right" rather than through explicit rules and elaborate provisions. These authors hold that it is often impossible (since a party cannot observe or verify implicit contract details), or at least counterproductive (since it sours the atmosphere of cooperation), to try to settle disputes in relational contracts by resorting to the letter of the contract.

for at least three reasons: First, it entails a loss of flexibility in dealing with unanticipated situations and dissatisfied parties may distance themselves from the system and turn to outside solutions (Downs et al., 1996). Second, excessive obedience to procedural, statutory and legalistic details may frustrate disputants and leave important questions unresolved.[216] Third, it may invite "trigger-happy" Members to initiate disputes that are formally correct, but against the spirit of the agreement (Klein, 1996). The result of this over-reliance on the letter of the treaty, critics maintain, is a loss of the initial spirit of the GATT and the shared sense of cooperation (Charnovitz, 2002a).

Several reform proposals have been made in favour of a multilateral soft law approach, also called "sunshine methods" (Charnovitz, 2001: 824). Taking human rights and environmental agreements as an example, a number of scholars contend that compliance in relational contracts is best promoted through more harmonious and less confrontational processes that rely on transparency and accessibility of information, increased reporting, monitoring, implementation review procedures, NGO involvement and capacity building.[217] This notion of "managing" the compliance process relies on the argument that behaviour is more easily modified through persuasion and a "normative pull" (a culture of compliance) than through coercion. In order to counter a potential trend towards excessive and "unfriendly" litigation in international trade, Charnovitz (2001) and Holmes et al. (2003) recommend a greater use of mediation, conciliation and arbitration techniques.[218] Most of these authors see their suggestions as a complement to current practice, in order to preserve the smooth functioning of the DSM.

On the other hand, a large body of literature exists on how to further strengthen the authority of panels/Appellate Body and, more generally, the judicial elements of WTO dispute settlement in order to increase the security and predictability of the multilateral trading system. Pauwelyn (2006), for instance, proposes to allow the Appellate Body to collect factual evidence and complete the analysis itself or to remand a case to the original panel.[219] Another example is Mercurio (2004) who discusses a range of strategies that have been proposed to ensure the availability of qualified panellists and reduce delays associated with their selection.[220]

Do WTO dispute settlement procedures lack adequate transparency?

While transparency is an issue in all phases of dispute settlement, the panel phase has attracted most attention both in regard to public participation in panel hearings and the possibility of non-governmental actors to make their arguments heard.[221] Some have also noted the opacity of the deliberation process by panels and the Appellate Body, for instance in regard to the role of the WTO Secretariat, the circumstances under which panels exercise "judicial economy" or the decision to seek outside expertise (Hoekman and Mavroidis, 2000).

216 A pertinent example is the statutory prohibition for the Appellate Body to reconsider the facts established by the panel or to fill gaps in fact-finding left by the panel. However, occasionally, the Appellate Body has "completed the analysis" on the basis of factual determinations by the panel or facts undisputed between the parties in the interest of the prompt resolution of disputes.

217 See Charnovitz (2002a), Chayes and Chayes (1993) and Guzman (2002). For a critical note see Lawrence (2003), Downs et al. (1996) and Bown (2004a).

218 For an explanation of the various political vs. adjudicative models of international dispute settlement see Merrills (2005).

219 On remand authority see also, e.g., proposal by the EC (TN/DS/W/38).

220 See also proposals by the EC (TN/DS/W/1) on a permanent body of panellists and by Thailand (TN/DS/W/31) as well as Canada (TN/DS/W/41) on streamlining the panel selection process.

221 Unlike at the WTO, which is an intergovernmental body, it is possible for private parties to have a standing before international tribunals and dispute settlement mechanisms. Several free trade agreements, such as NAFTA or ASEAN, include provisions on investor-to-state arbitrations. Under most agreements, foreign investors can submit their claims either to the International Centre for the Settlement of Investment Disputes (ICSID) or to *ad hoc* arbitral tribunals established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The advantage of this approach is that investors do not need to convince their home governments to challenge offending measures in the host country. At the same time, investor-to-state arbitrations offer a bilateral solution between the complainant and the host government without the obligation of the latter to bring its measures into conformity. See also Fink and Molinuevo (2007).

It has been proposed to establish operating procedures that would allow for a systematic consideration of *amicus curiae* briefs by non-state actors[222] and the explicit right to open hearings (Charnovitz, 2001).[223] In order to foster transparency during panel deliberations, guidelines for the role and competence of external experts and the Secretariat advising panels have been called for by these authors. The proposals to establish standing dispute panels or to streamline the selection process not only seek to ensure constant professional quality and legal predictability *vis-à-vis* litigating Members (Hoekman and Mavroidis, 2000), but also to address transparency concerns as to the nomination of panellists for the roster and the composition of individual panels (Davey, 2002).

(iii) Issues of implementation

Enforcement in the WTO implies that the offending measure is brought into conformity with the WTO Agreements. When a measure is successfully challenged, the defending WTO Member may comply by withdrawing the offending measure, or it may achieve compliance in other ways. It may maintain the measure on a temporary basis if it offers adequate compensation to the complainant and the offer is accepted. If the Member concerned neither complies nor provides mutually acceptable temporary compensation, the aggrieved Member may, subject to prior DSB approval, take retaliatory measures equivalent to the economic harm and loss in trade benefits caused. A number of commentators have taken issue with certain aspects of the DSU's dealing with enforcement matters. Firstly, a range of authors have questioned the DSU's insistence on compliance with WTO obligations over temporary derogation from WTO commitments. Secondly, the infrequent use of compensatory measures and the limited availability and practicality of retaliatory measures, especially for developing countries have been noted. Finally, several authors have questioned the methodologies used in the calculation of economic harm and loss in trade benefits and equivalent retaliation that has been authorized by the DSB so far. In terms of inducing compliance, the question has been raised whether the standard of equivalent damages is appropriate, or whether punitive damages are called for. Although these issues are not unrelated, each will be further discussed in turn.

What should be the objective of dispute settlement?

WTO scholars are divided as to what the aim of dispute settlement should be. Should it be to compensate the victim by "rebalancing" or to induce compliance? The latter is the principal objective enshrined in the DSU, and numerous scholars have argued that the main function of the WTO's DSM is to serve the rule of law and ensure the security and predictability of the multilateral trading system, as mandated in Article 3.2 of the DSU (Hilf, 2001). Petersmann (1997b: 57) has not tired of portraying the WTO Agreement and its "compulsory worldwide dispute settlement system" as a model for "constitutionalizing" other international organizations and of emphasizing the public good character of dispute settlement, including by creating a degree of precedent. In order to protect the integrity of the multilateral trading system, the objective of WTO dispute settlement is (and must be) to re-establish adherence to the rules (Jackson, 2006). Therefore, every WTO Member is under an unalterable international obligation to comply with DSB rulings and bring its measures into conformity. Hence, while satisfied with the current objective of the DSU, some have proposed that *extra*-contractual behaviour must be sanctioned through "punitive" damages (contrary to Article 22.4 of the DSU) above and beyond the "rebalancing level" in order to motivate a prompt return to compliance and deter deviations (Charnovitz, 2001; Mavroidis, 2000).

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222 The Appellate Body has ruled that panels have the discretion to accept *amicus curiae* briefs by non-state parties in view of their right to seek information from any source (Article 13 of the DSU). It is left to the discretion of panels whether to accept or reject those briefs. See *US-Shrimp/Turtle* (Appellate Body Report, WT/DS58/AB/R: paras. 107-108).

223 A first experience with public hearings was made in the recent *United States/Canada–Continued suspension of obligations in the EC–Hormones* dispute (DS320 and DS321). At the request of the parties the panels agreed to open their proceedings with the parties and scientific experts on 27-28 September 2006 and with the parties on 2-3 October 2006 for observation by WTO Members and the general public via closed-circuit broadcast to a separate viewing room at WTO Headquarters in Geneva.

Other authors, who see the WTO as a web of bilateral concessions, argue in favour of returning to a more flexible dispute settlement system (Zimmermann, 2005). Rather than conceiving of WTO dispute settlement as a "supranational" compliance system, these authors stress its "transnational" character, which should allow for an orderly rebalancing of concessions between parties to the dispute. Proponents of this view, such as Hippler Bello (1996), are content with the current standard of "equivalent" damages, but hold that Members should be given the explicit right to choose between compliance with DSB rulings on the one hand and deliberately "opting out" of certain obligations on the other, as long as tariff compensation is provided or a suspension of concessions tolerated. As a consequence, Hippler Bello sees the main benefit of the WTO DSM's orientation towards the "rule of law" in the institutionalization of commensurate punishments.[224] However, Jackson (2004), Pauwelyn (2000) and Dunoff and Trachtman (1999) convincingly argue that besides being conceptually flawed for confusing enforcement provisions with temporary escape clauses, such an approach (which is mainly based on an abstract game-theoretic literature on the exchange of market access commitments between two players) is ill-suited for an international contract between multiple parties and a complex set of obligations, such as the ones covered by WTO agreements.

Compensation, retaliation and alternative remedies

If compliance is not forthcoming, the principal remedy under the DSU in order to pressure a Member to bring an offending measure into conformity with WTO law is retaliation. The option of voluntary and temporary compensation is heavily under-utilized.[225] The principal problem is that an agreement between the complainant and the respondent is required. Members in dispute would need to negotiate and agree on the scope of compensation and the way to implement it (e.g. via tariff cuts or other liberalization measures). One reason why, in reality, compensation is hardly ever offered may be that the offending Member would run into internal political difficulties if it were to expose an unrelated domestic industry to more foreign competition as a compensation for WTO-illegal protection offered to another sector (Guzman, 2002).[226] In addition, for similar reasons, the successful complainant is likely to prefer withdrawal of the inconsistent measure to compensation.

The basic idea of retaliation is that sectors not directly involved in the dispute are harmed and consequently exert pressure on the non-compliant Member to bring its measure into conformity.[227] In addition to the deterrent effect on the offending party, protection of its import-competing sectors constitutes at least a partial compensation for the complainant.[228] Retaliation can be executed by the complainant without cooperation by the defendant, but entails other disadvantages. Higher levels of protection introduce additional economic inefficiencies on both sides. In addition, it affects "innocent bystanders", such as consumers and competitive industries (Pauwelyn, 2000; Charnovitz 2001, 2002a). Hence, it runs

224 Schwartz and Sykes (2002: 26) hold that the main innovation of the DSU (*vis-à-vis* the old GATT system) was the institutionalization of the "efficient breach" principle: "[T]he innovation of the DSU was intended not so much to deter violation of most substantive rules ... What the system really adds is the opportunity for the losing disputant to 'buy out' of the violation at a price set by an arbitrator who has examined carefully the question of what sanctions are substantially equivalent to the harm done by the violation. … The new system does a better job of protecting violators from the actual or threatened imposition of excessive sanctions. In turn, it ought to perform better than the old system at ensuring that opportunities for efficient breach are not undermined."

225 Cases, in which compensation was agreed upon, are very rare. Following arbitration in *US–Section 110(5) of the US Copyright Act*, the United States paid financial damages to the European music industry until the offending law was repealed.

226 According to DSU Article 22.1, compensation is "voluntary and, if granted, shall be consistent with the covered agreements". This provision suggests that e.g. tariff compensation must be granted on an MFN-basis, which may make it less attractive to both complainant and defendant, since exporters from third countries also benefit. Monetary compensation, which is further discussed below, limits the scope for these (positive) externalities on third countries. Bagwell (2007) briefly mentions the possibility that other forms of trade compensation, such as reductions of existing anti-dumping duties, could be chosen, but may give rise to further legal questions.

227 Retaliation induces exporters in the non-compliant country to lobby their government to keep foreign markets open and act as a counterweight to the influence of import-competing industries.

228 This is so owing to either political economy consideration or positive terms-of-trade effects if the retaliating country is large enough to affect world prices.

counter to the liberalizing spirit of WTO and its objective to secure predictable business opportunities. Retaliation is also likely to lead to trade diversion, and hence economic impacts on third countries. The complainant may have no interest in applying retaliatory measures, when the costs of raising tariffs on needed imports are considered too high, both economically and politically.[229] Even larger Members may face resistance by consumers and importers of intermediate products who suffer from higher prices or disturbed relations with regular suppliers (Anderson, 2002).

However, in applying retaliatory measures, large countries can cause economic harm to the party found not to be in compliance with its obligations and even extract additional economic benefits via terms-of-trade improvements. Conversely, small countries, in view of their limited market size, are unable to exert sufficient pressure on larger Members to alter their behaviour (Anderson, 2002). Hence, retaliation fails to deter economically powerful countries from committing a violation against small countries (Mavroidis, 2000; Pauwelyn 2000). Large countries may either remain non-compliant or offer settlements at unfavourable conditions. Indeed, to date developing countries have never suspended concessions. As mentioned previously, the futility of retaliation gives rise to the suspicion of "missing cases" (Bown and Hoekman, 2005), i.e. complaints by "small" countries that are never brought, since costs of dispute settlement would be incurred on top of the costs caused by the offending Member's non-compliance, without any hope of obtaining reparation (Bronckers and van den Broek, 2005).[230] Smaller countries lacking sufficient retaliatory power may be generally less willing to make trade liberalization commitments (Bown and Hoekman, 2005). Reform proposals suggest promoting the use of compensation,[231] improving the effectiveness of tariff retaliation[232] and mechanisms that foster expeditious implementation by, *inter alia*, introducing the concept of remedies with effect as of the adoption of DSB rulings or even with retroactive effect.[233]

In order to strengthen the remedy of temporary compensation (which unlike retaliation leads to more not less trade) through tariff reductions in other sectors, a proposal has been made to make tariff compensation mandatory and automatic (Pauwelyn, 2000). It has been proposed that the WTO DSB indicate in which sectors the non-complying Member should reduce tariffs or that it authorize the winning complainant to choose sectors for compensation (Horlick, 2002). Alternatively, Lawrence (2003) proposes that Members pre-commit sectors that they promise to liberalize in case they lose a dispute. Schropp (2005) suggests the creation of an arbitration procedure for compensation and to make compensation more attractive by offering a discount as compared to the retaliation award. Several DSU review proposals suggest that the level of nullification or impairment caused by an inconsistent measure be determined earlier in the process than under existing DSU rules, either by the panel or the Appellate Body in the original proceedings or in compliance proceedings, with a view to facilitating and expediting negotiations on compensation.[234]

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229 It should be noted that optimal tariffs are close to zero in countries that are too small to affect world prices, and, hence, tariff increases would reduce welfare.

230 Bown (2004a) shows that retaliatory capacity of complainants is the crucial determinant affecting the defendant governments' policy decision to comply with rulings adopted by the DSB or to remain recalcitrant *vis-à-vis* those rulings. Retaliation capacity thereby is understood as the complainant's market power *vis-à-vis* the defendant: The more the defendant's exporters depend on the market of the complainant, the more credible and deterring are the latter party's self-enforcement threats.

231 See proposals by the EC (TN/DS/W/1), by Japan (TN/DS/W/32) and by Ecuador (TN/DS/W/33).

232 The African group has proposed to allow collective retaliation (TN/DS/W/15 and TN/DS/W42), see also the LDC group proposal (TN/DS/W/17). A group of developing countries comprising India, Cuba, the Dominican Republic, Egypt, Honduras, Jamaica and Malaysia has proposed to ease the conditions for the use of cross-retaliation by developing countries (TN/DS/W/47).

233 See, e.g., proposals by Mexico (TN/DS/W/23), the LDC Group (TN/DS/W/37), and the African Group (TN/DS/W/42).

234 See, e.g., proposals by Ecuador (TN/DS/W/33), and Korea (TN/DS/W/35).

Bronckers and van den Broek (2005), among others, support financial compensation as an alternative remedy. Several WTO Members have submitted proposals to that effect in the DSU reform negotiations.[235] Payments received could be disbursed as reparation for the injury suffered by industries directly affected by the violating measure.[236] It may also be more easily applied retroactively (Davey, 2005a, 2005b). Those who advocate more flexibility to temporarily derogate from certain WTO obligations may presume that this option would be used whenever it was desirable for the offending Member from an economic efficiency or political economy perspective. Others are concerned with the determination of appropriate amounts and the possibility for rich countries to buy themselves out of their obligations "too cheaply" and on a more or less permanent basis. Bronckers and van den Broek (2005) counter that fines could increase by a certain percentage each year and that arbitrators determine trade damage already under current rules. However, following the approach of introducing an element of punishment to induce compliance would not re-establish the original balance of concessions. Another systemic concern is that equivalent monetary pay-offs may represent less of an incentive for the offender to comply, since an increased burden on the government budget (shouldered by a large number of unorganized taxpayers) triggers less domestic pressure than retaliatory trade barriers faced by export lobbies (Lawrence, 2003). In the public eye, money flows from developing countries that have lost a dispute to industrialized nations may not be perceived well either.·[237]

Even if temporary compensation became mandatory, the risk would remain that a non-compliant Member may continue to disregard its duty, whatever form compensation would take. Retaliation would remain the means of enforcement of last resort, since it is not controlled by the offender. In order to increase the incentive to comply, "stiffer" penalties have been proposed, i.e. deliberately punitive damage awards (Bown, 2002). Another idea to exert more pressure on a trading partner to comply with a WTO ruling has become known as "carousel retaliation" (Sek, 2002).[238] Furthermore, Members have proposed to facilitate developing countries' resort to cross-retaliation, that is retaliation in sectors or under agreements other than those where the violation occurred.[239] Some authors explore the idea of collective retaliation by developing countries in order to overcome the problems of limited market size (Maggi, 1999; Pauwelyn,

235 See the proposals by Ecuador (TN/DS/W/33), China (TN/DS/W29), the LDC Group (TN/DS/W/17 and TN/DS/W/37), and the African Group (TN/DS/W/15 and TN/DS/W/42) suggesting monetary compensation for developing and/or least-developed Members affected by WTO-inconsistent measures taken by developed Members.

236 Limão and Saggi (2006) show that monetary fines act both as a deterrent and compensation mechanism and avoid the inefficiencies introduced by tariff retaliation. Tariffs transfer income via terms-of-trade changes, but do so in an inefficient manner compared to fines due to deadweight loss. Shaffer (2003a) notes that "cash remedies" could facilitate payment of legal fees by developing countries to private law firms and, hence, may change the dynamics of litigation by alleviating an important constraint in bringing a case.

237 There are several examples of other agreements envisaging compensation in monetary form. The free trade agreement between the United States and Chile, for instance, provides for monetary compensation, including the possibility to make annual payments at a 50 per cent discount compared to the level of damages determined by the dispute panel. See Article 22.15, para. 5. The compensation is paid to the complaining party or, if the FTA Commission so decides, into a fund to sponsor appropriate initiatives to facilitate trade between the parties. For the full text of the free trade agreement between the United States and Chile see http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html. See also the free trade agreement between Singapore and the United States (Article 20.6, para.5) and, furthermore, the North American Free Trade Agreement (NAFTA) (Chapter 11), the Common Market for Eastern and Southern Africa (COMESA) (Articles 8, 171) and the EC Treaty (Article 171). The principle of financial liability to injured parties is also firmly established in the domestic law of many countries and exists also in international law on State responsibility.

238 "Carousel" retaliation refers to the periodic revision of the list of targeted sectors in order to (threaten to) harm a greater number of exporters and maximize domestic pressure on the offending government. Sek (2002) notes wide criticism of this practice, including from domestic industries. Australia (TN/DS/W/49), and Thailand and the Philippines (TN/DS/W/3), for example, have proposed prohibitions of "carousel" retaliation.

239 See footnote 232 above and. Subramanian and Watal (2000), Hudec (2002), Charnovitz (2002a). In the case of TRIPS retaliation, denying foreign IP rights, at least in the short run, results in assets being available at a lower price, i.e. has the opposite effect of a retaliatory tariff. Hudec (2002: 90) also contends that even "negligible" amounts of retaliation in the IP area could cause considerable "political discomfort". Critics of cross-retaliation raise the concern that suspending intellectual property rights, given the private nature of rights, amounts to expropriation, undermines the rule-of-law in a country and may create conflicts with other international agreements (Cottier, 1992). Nevertheless, it features in certain free trade agreements, such as the one between the European Union and Mexico. See Ramírez Robles (2006).

2000).[240] Others suggest making retaliation rights tradable, such that Members who do not find it opportune to retaliate can obtain some monetary reparation, while others would acquire the right to protect their industries, supposedly at a discount.[241] Bagwell et al. (2007) further elaborate on auction design, particularly the question whether the losing party should be allowed to bid. If it was, sellers (supposedly small developing countries) could expect higher revenues, but globally it would be more efficient if only third countries were allowed to acquire the right to retaliate.[242] Under the latter approach it is still necessary that at least one interested country is found that is large enough to credibly threaten retaliation. Retaliation as a "back-up" for monetary compensation can be avoided if, as suggested by Limão and Saggi (2006), each country has posted a bond with a neutral party (an "escrow") at the time the trade agreement is concluded.[243] When a country is found to have violated its obligations, it has to decide whether to pay the fine and recover the right to its bond or not to pay the fine and forfeit the bond, which is then disbursed to the aggrieved country as compensation.[244]

New "penalties" discussed in the literature include the suspension of membership rights, for instance to attend meetings, to participate in decision-making, to use the DSM or to exercise other WTO rights or to receive technical assistance.[245] While such proposals may not entail negative trade effects, they may alienate the penalized Member from further engaging in WTO matters and reduce its motivation to bring its measures into conformity. Moreover, it would be difficult to identify a suspension of rights that would not be out of proportion with the underlying violation. A number of scholars have come out in favour of more subtle methods, such as improved surveillance of Members' implementation of DSB rulings or attempts to rally international mobilization *vis-à-vis* non-compliant states (Charnovitz, 2001). The latter includes "home-directed mobilization", that is an increased exposure of governments to domestic stakeholders. As explained above, proposals include "sunshine methods" geared at exerting constructive influence on the compliance process.

Arbitration on the level of suspension of concessions to be authorized by the DSB

A number of authors have criticized the way in which the equivalent level of damages has been calculated pursuant to Article 22.4 of the DSU. A systematic under-compensation is said to result from the absence of retroactive damage awards. Under current DSU rules, complaining parties are not compensated for any damage suffered in the period between commencement of the breach and the authorization of retaliation by the DSB (Pauwelyn, 2000; Bronckers and van den Broek, 2005; Trachtman, 2006). According to Lawrence (2003), prospective damages coupled with weak procedural disciplines invite "foot-dragging" tactics by offending WTO Members, i.e. the swapping of one non-compliant measure

240 India and nine other developing countries proposed a collective retaliation scheme along the lines of the "principle of collective responsibility" championed in the UN Charter, see footnote 232 above. However, Limão and Saggi (2006) point out that a "small" country may prefer that others retaliate, leading to possible collective action problems.

241 This idea has been taken up by Mexico. See WTO document TN/DS/W/23.

242 Bagwell et al. (2007) show that the expected benefit of acquiring the right to retaliate in a country with strong domestic political economy interests is likely to outweigh the expected cost in other countries. This has the consequence that under certain conditions a prior compensation stage (essentially the possibility for the losing party to retire retaliatory rights) can reduce overall efficiency.

243 The authors also show that the possibility of financial compensation has an added value for the level of cooperation only if it is backed up by bonds and not by retaliatory tariffs as a supporting instrument.

244 The authors quote an article in *Inside U.S. Trade* 13 of 11 November 2002 ("Chile Looks for Monetary Sanctions as Enforcement Mechanism"), in which Chile proposes such an "escrow" scheme for its bilateral free trade agreement with the United States. However, in the final agreement, the suspension of benefits has been chosen as a fall-back option if compensation is not forthcoming.

245 Experiences with the suspension of membership rights have been made in the IMF, the Montreal Protocol for the Protection of the Ozone Layer or the ILO (Charnovitz, 2001; Lawrence, 2003).

with another. In addition to the introduction of retroactive damages,[246] several procedural reforms have been proposed by the above authors to speed up the dispute settlement process. These include improved rules on the reasonable period of time for implementation, a reversal of the burden of proof (the implementing Member would have to demonstrate that the measures it has taken to comply with the adverse DSB rulings fully implement those rulings), the right for panels or the Appellate Body to grant interim measures[247] and rules resolving the so-called "sequencing" problem.[248]

Another point of concern has been that arbitrators have set the level of authorized retaliation equal to the level of adverse trade effects of the inconsistent measure (Anderson, 2002).[249] In response, Breuss (2004), for instance, seeks to estimate welfare rather than trade impacts, including indirect repercussions. Along these lines, Mavroidis (2000), Schwartz and Sykes (2002) and Schropp (2005) contend that the benchmark for achieving full rebalancing must be the "expectation damage".[250] Ethier (2004) and Schwartz and Sykes (2002) argue that the WTO is a profoundly political agreement between self-interested policymakers. Given its political nature, the authors deny that awards limited to economic damage can re-establish any kind of political balance. These criticisms have not resulted in readily operational reform proposals. Even the calculation of direct trade effects, let alone welfare and other second-round effects, have posed methodological and data challenges (Bagwell, 2007; Keck, 2004). In light of the less than fully transparent methodologies used in certain past arbitration awards,[251] the modelling approach laid out in *US–Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) (22.6)* illustrates the need for a more

246 The panel report on "Australia – Subsidies Provided to Producers and Exporters of Automotive Leather: Recourse to Article 21.5 of the DSU by the United States" (DS/WT126/RW) illustrates that retrospective application of remedies may not be precluded in respect of prohibited subsidies in the light of the requirement in Article 4.7 of the SCM Agreement that such subsidies be withdrawn. See in particular paragraphs 6.29-6.32. For remedies with retroactive effect, see proposal by Mexico (TN/DS/W/40); see also proposal by Japan (TN/DS/W/32) suggesting a prospective determination of the level of nullification and impairment which takes into account continued application of inconsistent measures and frequency of inconsistent administration or implementation.

247 See e.g. Jackson (1998) and Lockhart and Voon (2005). Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) allow the arbitral tribunal to impose interim measures, which may be established in the form of an interim award. See UNCITRAL Arbitration Rules Article 26, para. 2. On similar measures taken by the International Court of Justice (ICJ) see Merrills (2005).

248 Since *EC–Bananas* it has been contested whether or not a so-called "compliance panel" (Article 21.5 of DSU) must have finished its determination of non-conformity before a request to suspend concessions can be submitted. The DSU is unclear on this question (Valles and McGivern, 2000). If a compliance panel proceeding must precede arbitration on retaliation, the implementing Member may successfully procrastinate by replacing one illegal measure with another one. Sequencing of compliance proceedings and arbitration on the level of suspension of concessions equivalent to the level of nullification or impairment caused by the inconsistent measure is the subject of a number of DSU review proposals, see, e.g., proposal by Australia (TN/DS/W/49).

249 Judging from past experience with WTO arbitrations, an estimation of the level of trade that would occur based on the counterfactual that the inconsistent measure had been brought into conformity, has become the standard in arbitration under Article 22.6 of the DSU. Of course, the equivalent value of imports does not measure the actual welfare loss caused by the inconsistent measure. Counterfactual trade effects are relevant also in a number of other applications of WTO rules. See Keck et al. (2006) for more.

250 "Expectation damages" embrace all further efficiency costs (trade opportunities foregone or losses in domestic value-added production) caused by the breach of the agreement over and above direct trade effects (Mavroidis 2000). Those efficiency losses include the present (discounted) values of profits foregone, diseconomies of scale, costs of finding new markets/partners, costs of switching production, and so forth. However, Bagwell (2007) cautions that such a system would require detailed information about a government's political-economic preferences and might increase the probability of third-party externalities. Howse and Staiger (2006) show that, for the latter reason, such remedies are likely to trigger further violations. The authors endorse the trade effects approach and liken it to a system of remedies that provides for "expectation damages" if concessions negotiated within the GATT/WTO system are considered as protected by an overarching "liability rule". In addition, the trade effects approach is attractive because the implications of breach and retaliation concern the same bilateral relationship. However, it is of course true, as Bagwell (2007) notes, that even if by virtue of retaliation commensurate to trade effects, the pre-violation terms-of-trade level is restored, retaliation results in an internal (local-price) distortion for the complainant.

251 For example, in *EC–Bananas (Article 22.6 of the DSU)*, in order to estimate the trade effect of an inconsistent measure, the value of EC imports under the banana import regime was compared to an estimated value under a counterfactual WTO-consistent regime. Arbitrators did not disclose how counterfactual scenarios were selected and defined and why the scenario on which the final award was based differed from the counterfactuals that had been proposed by the parties.

systematic approach based on economic theory.[252] Sound methodologies are all the more important if punitive elements/over-compensation are to be avoided, especially in disputes involving prohibited subsidies, where the more flexible benchmark of "appropriate" countermeasures applies.[253]

In sum, the last 60 years have seen a remarkable evolution of GATT/WTO dispute settlement. Contracting Parties/Members have managed to strengthen the rule-of-law while preserving the system's intergovernmental character, notably in the area of enforcement. This overview has concentrated on a number of key challenges and possible modifications to the current system.[254] The analysis of the various proposals by trade scholars suggests that additional progress could possibly be made at the technical level in facilitating the use of the DSM and in clarifying its procedures, and perhaps even in further strengthening its capacity to resolve disputes in a more timely and effective manner, without necessarily requiring drastic or fundamental changes to the current DSM rules. At the same time, such analysis does not nor is it intended to detract from the substantial success already achieved under the current system as it has operated since the inception of the WTO.

4. THE EXPANSION OF GATT/WTO MEMBERSHIP: ACCOMMODATING DEVELOPING COUNTRIES

This subsection focuses on the way in which the special concerns of developing countries have been incorporated into the multilateral trading system. The first part describes the evolution of special GATT/WTO disciplines as they apply to developing countries and explains how contemporaneous development thinking shaped decisions by the GATT Contracting Parties. The complexities of locating trade policy within the framework of development policy continue to be felt today, not least in the ongoing debates on implementation and S&D in the context of the Doha Round. The second part discusses the forms of S&D currently available in WTO Agreements as well as some of the empirical evidence on the use of trade policy measures for industrial development. Remaining challenges to accommodate developing country interests within the WTO are highlighted and strategies for enhanced S&D are presented.

(a) Developing countries in the GATT/WTO

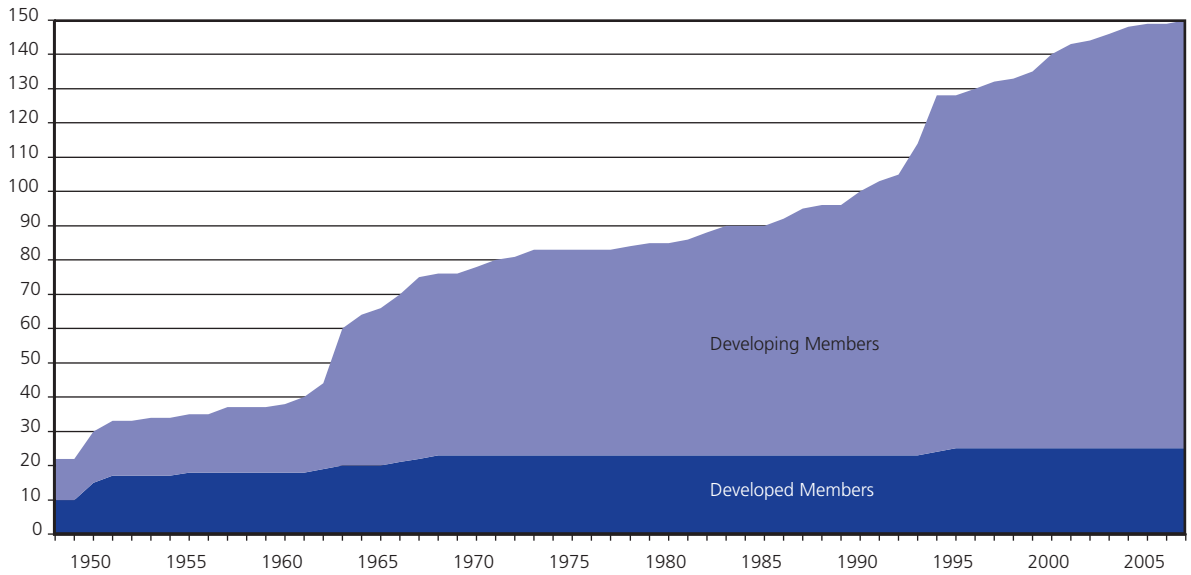
The expansion of GATT/WTO membership over time is mainly due to the successive accessions of developing countries. Most of the industrialized nations were founding Members of the GATT or acceded in its early years. They have traditionally been seen as driving the extent and content of its disciplines. One or several developing countries joined the multilateral trading system in almost every year of its existence (Chart 10). The years around the Kennedy Round in the 1960s and towards the end of the Uruguay Round in the early 1990s saw particularly large increases in developing country membership. In light of these developments, the notion of increased "diversity" of GATT/WTO membership has principally been associated with fundamental differences in interest between developed and developing countries, despite the large heterogeneity within the latter group. This part describes the evolution of GATT/WTO disciplines as they apply to developing countries and explains the timing of demands and concessions made within the historical context.

252 Howse and Staiger (2006) is a recent attempt to respond on the basis of economic theory to the question of how the level of nullification or impairment should be defined and measured, using *United States-Anti-Dumping Act of 1916* case as an example. In particular, as suggested above, the authors find that arbitrators' focus on trade effects has merit from an economic perspective. They emphasize that in order to measure forgone trade flows, arbitrators must determine the extent to which the change in conditions of competition would have led to reduced export volumes at the original exporter prices.

253 According to the special standard under Articles 4.10 and 4.11 of the SCM Agreement, countermeasures are to be "appropriate" as a response to the initial wrongful act and (according to Footnotes 9 and 10) "not disproportionate" in light of the fact that the subsidies are prohibited. This standard is different from the general standard of "equivalence" between the level of permissible retaliation and the level nullification or impairment (usually equated with the value of trade benefits foregone) under Article 22.4 of the DSU.

254 For an overview and analysis of proposals made in the DSU negotiations see Zimmermann (2006).

Chart 10
Developing and developed country membership in the GATT/WTO, 1948-2006
(Number of members)



Notes: For the purposes of this Chart, the following 24 countries plus the European Communities in their own right as of 1995 are considered developed: Austria, Australia, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States. The remaining GATT Contracting Parties/WTO Members are counted as developing/transition economies. For consistency purposes, Czechoslovakia and South Africa as original Contracting Parties are counted among the latter (although this is sometimes done differently in the literature, see e.g. Hudec, 1987). In the early days of the GATT, Greece, Spain and Portugal were considered developing, while Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia as well as Bulgaria and Romania are considered developed at latest since their accession to the European Union in 2004 and 2007 respectively. China, Lebanon and Syria were original Contracting Parties to the GATT but withdrew in 1950, 1949 and 1951 respectively. China acceded again in 2001. Yugoslavia, a GATT Contracting Party since 1966, did not become a WTO Member under Article XI of the Marrakesh Agreement Establishing the World Trade Agreement. The Chart shows 22 countries in 1948, as Chile, although an original Contracting Party, formally joined only in 1949.

Source: WTO (1995) and WTO website.

(i) Failure of the ITO negotiations and the early days of the GATT: limited exceptions for developing countries

Twelve of the original 23 Contracting Parties of the GATT 1947 were developing countries (see Appendix Table 10), six of which were also part of the preparatory committee to the Havana conference drawing up the draft charter of the ITO (Brazil, Chile, China, Cuba, India, Lebanon). Srinivasan (1998) recalls that India and, even more so, the Latin American countries considered the draft charter to not represent their interests. A large number of proposals were tabled calling for both a transfer of resources and deviations from the draft charter's legal obligations. These demands, notably for infant industry protection, unilateral preferences, non-reciprocity and commodity agreements, were guided by the idea that economic development could be a legitimate reason for trade-distorting policies. Hudec (1987) explains this attitude as a reflection of developing countries' colonial past, in which parent countries were seen to maximize economic benefits by controlling trade and suppressing competition from overseas suppliers. During the negotiations, developing countries were reinforced in their beliefs by the exceptions developed countries claimed for themselves, notably quantitative import restrictions on agricultural products and the right to use export subsidies.

With the demise of the ITO charter, its trade-policy rules survived in the GATT. Already early on in the drafting process of the ITO charter, the "no-exceptions" principle originally advanced by the United States was abandoned and parties adopted the basic premise that developing countries were "special" and required some dispensation from the rules. However, GATT governments could not agree on all the concessions made in the draft ITO charter regarding exceptions for "economic development". The

controversy about which exceptions to include centred on the protection of infant industries (Corden, 1974), a right that was ultimately conceded, albeit subject to prior approval by Contracting Parties.[255]

In the first seven years of operation of the GATT, developing countries appeared to cope with the few exceptions obtained. Only limited use was made of infant industry provisions. An important reason for this was the widespread existence of balance-of-payments restrictions in both developed and developing countries which obviated the need to resort to other types of restrictions. However, over time, with new geo-political realities and an increase in numbers, developing countries gradually raised their demands to obtain "more favourable" treatment and realize some of the proposals originally made at the ITO conference (Tussie, 1987). Hudec (1987) observes that, as a result, "over the next four decades the legal discipline applicable to developing countries all but disappeared" (1987: 15).

(ii) The 1955 Review Session, Haberler Report and GATT Part IV: the quest for "more favourable" treatment

The move of colonies into independence and Cold War competition for influence in the Third World played an important role in order to understand some of the decisions taken during that time period in favour of developing countries. The notion of preferential market access was omnipresent in defining the relationship between former colonizers and the newly independent territories. During the 1955 Review Session, developing countries pressed for an extensive revision of GATT Article XVIII giving them additional leeway to protect infant industries. In 1958, the Haberler Report (GATT, 1958) established a link between the insufficiency of developing country export earnings and developed country trade barriers. In the following, developing countries gradually extended their interests from securing exceptions for their own policies towards extracting broad market access concessions from developed countries (Hudec, 1987).

Developing countries' reliance on primary commodity exports and the problem of deteriorating terms of trade gained new prominence with the formulation of the Prebisch-Singer thesis,[256] which gained a high degree of popularity in the 1960s and 1970s, and the creation of the United Nations Conference on Trade and Development (UNCTAD). Both developments reinforced the intellectual foundations for an industrialization based on import substitution and the concomitant focus on domestic and regional markets in developing countries. In 1967, efforts to obtain a temporary waiver from MFN obligations and promote trade among developing countries led to the signing of the Tripartite Agreement between Egypt, India and Yugoslavia.[257] In 1973, the GATT Protocol relating to Trade Negotiations among Developing Countries, which had been negotiated under GATT auspices, entered into force (Hamza, 1981).[258] Perceived "competition" with UNCTAD (developing Contracting Parties had threatened to abandon the GATT for UNCTAD) and the creation of the Group of 77 bloc of developing countries as a counterweight to industrialized nations contributed to the formal recognition of developing country concerns in the GATT, as manifested by the inclusion of Part IV on trade and development in 1964, which, among other

255 ITO Article 13 on "Governmental Assistance to Economic Development and Reconstruction" appears to have inspired to a large extent GATT Article XVIII. Despite the insistence by developing countries on their other principal demands, the ITO charter's chapter VI (Articles 55-70) on "Intergovernmental Commodity Agreements" ultimately did not become part of the GATT (apart from a reference in Article XX(h)) nor did ITO Article 15 on "Preferential Agreements for Economic Development and Reconstruction".

256 The thesis concerning the declining trends of the terms-of-trade for developing countries was formulated concurrently by Singer (1950) and Prebisch (1950). The original thesis combined two complementary hypotheses. One referred to the negative effect of the income-inelasticity of demand for commodities on developing countries' terms-of-trade. The other hypothesis pointed to the asymmetries in the functioning of labour markets in the "centre" vs. the "periphery" of the world economy. In the first case, the pressure towards a deterioration in real commodity prices is generated in goods markets, in the second this pressure comes from factor markets and thus affects developing countries' terms-of-trade indirectly through the effects on production costs. Whereas the first hypothesis applies solely to commodities (more generally, to goods with a low income-elasticity), the second applies to all goods and services produced in developing countries. For more see Ocampo and Parra (2003).

257 The first preferential scheme between developing countries raising the issue of MFN inconsistency was the Latin American Free Trade Area (LAFTA) set up in 1960. However, its goal arguably was the attainment of a free-trade area covered under GATT Article XXIV (Tussie, 1987).

258 These countries were Brazil, Chile, Egypt, India, Israel, Korea, Mexico, Pakistan, Peru, the Philippines, Tunisia, Turkey, Uruguay and Yugoslavia, as well as Greece and Spain that were still considered developing countries at that time.

things, codified the principle of non-reciprocity (Abdel Kader, 1986). The quest for improved market access culminated with UNCTAD II in 1968 and the adoption of a "generalized system of preferences" (GSP). The United States that for long had resented the provision of special preferences by the European Community (EC) to certain Mediterranean and African countries finally abandoned its opposition in exchange for the abolition of "reverse preferences" enjoyed by the EC in these countries (Hudec, 1987). In 1971, two 10-years waivers were obtained covering both GSP schemes and preferential agreements between developing countries.

(iii) The Tokyo Round negotiations and the Enabling Clause: the heyday of disengagement

During the 1970s, problems related to import substitution policies became evident in several parts of the developing world owing to the restrictions on competition as well as the policy bias against exports it had introduced (Nishimizu and Robinson, 1984; Bell et al., 1984). During the Tokyo Round negotiations, developing countries agreed to make limited market access commitments, although bindings were few and at relatively high ceilings. At the same time, most of them refused to participate in and sign up to the new "Codes" dealing with a variety of non-tariff measures. In order to overcome "export pessimism" owing to the uncertainty and insufficiency of market outlets for developing country products (Cline, 1982; Finger and Laird, 1987), developing countries pressed for a permanent waiver covering GSP as well as the newly created Global System of Trade Preferences among Developing Countries (GSTP). These exemptions were institutionalized in the context of the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, also known as the Enabling Clause.[259]

The flip-side of developing countries' increased flexibility was a lack of engagement in the rule-making process and in the exchange of reciprocal concessions (Golt, 1978; Baldwin, 2006). Amongst trade policy-makers the perception was gaining ground that the proposition of a unified group of developing countries was hardly tenable any longer, if it ever had been (Koekkoek, 1989). While the Enabling Clause agreed at the end of the Tokyo Round codified a number of exemptions, it also introduced the notion of "graduation". The exhortation contained in the Enabling Clause that developing countries were expected to make further concessions as and when their development and trade situation improved (known as "graduation") as well as the recognition of the least-developed group of countries were a clear hint at the problem of heterogeneity within that group.

(iv) The Uruguay Round and the single undertaking

The 1980s saw a radical break of the trend towards increasing disengagement by developing countries under the GATT. It culminated in first half of the 1990s with the conclusion of the Uruguay Round which dramatically widened the scope of developing countries' obligations. Several developments contributed to this reversal. First, a number of developing countries had succeeded in diversifying their economies and developed an active interest in further liberalization, notably in the heavily distorted sectors of agriculture and textiles and clothing (Page et al., 1991). Second, GSP donors extended their set of conditions defining eligibility of developing countries and began to "graduate" countries out of preferential tariffs applying to individual products for which they had become successful exporters. Moreover, prominent studies, such as Baldwin and Murray (1977), confirmed that developing countries stood more to gain from MFN tariff cuts than they would lose from preference erosion. Third, GATT Contracting Parties realized the need to discipline the increased use of "voluntary" export restraints and trade contingency measures which were increasingly used against developing exporters, particularly from Asia (Hindley, 1987). Fourth, there was a fear of unilateral retaliation absent further progress on multilateral disciplines, notably in the new areas of negotiations. According to Low (1993), the United States explicitly named India and Brazil (along with Japan) for possible action under its Omnibus Trading Act of 1988. Fifth, regional agreements appeared as an alternative to achieve more ambitious liberalization if the multilateral trading

[259] L/4903.

system was not to budge itself. Developing nations, especially smaller countries that feared exclusion from emerging regional trading blocs, appeared to be willing to accept new disciplines if this led to a strengthening of the multilateral system, where they enjoyed greater bargaining power than what they expected to have under a variety of "hub-and-spokes" regional set-ups (Whalley, 1995). Finally, research by the World Bank and International Monetary Fund (IMF), such as Krueger (1978), noted the sharp rise in private financing which removed one of the constraints – the lack of foreign exchange – that had inspired import substitution. These and other studies (e.g. Krugman, 1987) further shifted the economic thinking towards emphasizing the role of markets and argued against the distortions introduced by excessive government interventions, including export promotion measures formerly employed by East Asian countries. The "*laissez-faire*" approach gained further influence following the debt crises in various parts of the developing world in the 1980s, and even led to unilateral trade liberalization efforts, for instance in the case of Mexico.

For any combination of these reasons, a number of developing countries saw further multilateral trade liberalization and the strengthening of trade rules to be in their interest. A group of 20 developing countries (G-20) from Latin America, Africa and Asia led by Colombia at one point broke with the traditional position of the Informal Group of developing countries to block the inclusion of services in further multilateral trade negotiations, which had turned out to be a major obstacle in launching a new round. In cooperation with a group of nine smaller industrialized countries under the leadership of Switzerland, the G-20 established the "Café au Lait" Group that was instrumental in the launch of the Uruguay Round by providing a draft text that formed the basis of the Punta del Este Declaration in 1986. Various developing countries played an active role in the negotiations, not only participating in the exchange of concessions, but also advancing an offensive agenda on their own (Tussie and Lengyel, 2002). The Uruguay Round certainly marked a turning point for traditional developing country unity. Having diversified across products and markets, several developing countries were confronted with a multiplicity of domestic interests and issue areas of importance to them that made it harder for negotiators to develop a unified, well-defined position. In addition, South-South harmony suffered from an increased use of trade contingency measures amongst developing countries.

The single undertaking of the Uruguay Round meant that all WTO Members accepted all Agreements, including the ones evolving from the previous Codes of the Tokyo Round. Many developing countries significantly increased their market access commitments, especially in agriculture. In addition, they were called to observe the new Agreements on services and trade-related intellectual property. The Uruguay Round spawned a large set of studies examining its implications for developing countries, many of which criticized the unevenness of the bargain struck from the perspective of poorer nations (e.g. Finger and Schuler, 2000). Others have identified significant opportunities for the expansion of developing country trade, although some estimates turned out to be overoptimistic, for instance owing to non-consideration of the reduction in preference margins (e.g. Blackhurst et al., 1995).

(v) Implementation of WTO Agreements

The expansion and strengthening of the rules of the multilateral trading system agreed in the Uruguay Round is a reflection of both developed and developing country trade interests (and of the diversity of interests within each "group"). Sectors of particular interest to developing country exporters and characterized by pervasive distortions, such as agriculture and textiles and clothing, have been brought under multilateral disciplines. A large number of countries supported the tightening of disciplines on, for instance, contingent trade remedies. Developing Members, including small and poor countries, have benefited from the strengthening of the dispute settlement mechanism and from improved transparency, also via the trade policy review mechanism. Even in the newly included areas of services and trade-related intellectual property rights, a variety of developing countries have been active supporters, for instance in regard to the liberalization of certain services sectors and modes of supply or the protection of geographical indications.

However, in a number of developing countries, the implementation of certain obligations not only stretched their financial and human resources, but was also perceived as being inconsistent with national economic interests and development priorities. Longer transitory time periods which allowed for delayed implementation but not for differences as to the nature of obligations themselves, turned out in many instances to be ineffective as the principal tool to help developing countries adjust to the steep increase in obligations. During the preparatory process of the Third WTO Ministerial Conference in Seattle from September 1998 to November 1999, a number of developing countries put forward a wide range of proposals dealing with their perceived problems in the implementation of WTO Agreements. The over 100 proposals tabled were targeted not only at additional phase-in periods, but also at increased flexibility to deviate from substantive obligations on a more or less permanent and self-determined basis. At Doha, as part of the implementation decision and endorsed by the Ministerial Declaration, another exercise was launched, focusing specifically on making S&D provisions "more precise, effective and operational".

In the years following the conclusion of the Uruguay Round, the WTO stepped up its technical assistance and capacity-building efforts. In 1996, the Committee on Trade and Development adopted Guidelines for WTO Technical Cooperation (WT/COMTD/8) establishing objectives, principles and operational directives for technical cooperation activities administered by the Secretariat. In the run-up to the Doha Ministerial Meeting in late 2001 the Secretariat formulated a "New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration" (WT/COMTD/W/90) consisting of ten core elements, including "mainstreaming" trade priority areas into national development strategies, increased coordination with other agencies and adequate funding. These elements have subsequently been reflected in a variety of initiatives, not least in the revamping of the Integrated Framework (IF) for LDCs, through which the IMF, ITC, UNCTAD, UNDP, the World Bank and WTO combine their efforts with those of recipients and donors to respond to the trade development needs of LDCs.

In light of the emphasis that technical cooperation and capacity building has received in the Doha Ministerial Declaration (WT/MIN(01)/DEC/1), the WTO has expanded its technical assistance efforts further. Besides its own activities,[260] which to an important extent are financed from the Doha Development Agenda Global Trust Fund (featuring an annual budget of 24 million Swiss francs), the WTO increasingly acts as a coordinator of trade-related assistance, for instance in the context of the Task Force on Aid for Trade.[261] In this respect, the WTO has a catalytic role to play – ensuring that relevant agencies and organizations understand the trade needs of WTO Members and encouraging them to work together more coherently and effectively to address these needs. The Aid for Trade initiative seeks to respond to two related concerns: one is to help WTO Members in need to implement the results of the current multilateral trade negotiations and to cope with certain economic adjustment costs that may be incurred. The second concern is the insufficiency of trade-related capacity in many WTO Members which inhibits them from taking advantage of the opportunities offered by the multilateral trading system. The latter set of concerns covers a wide range of areas, from testing facilities to transport infrastructure and trade logistics. An important element of Aid for Trade is the proposal by the WTO Director-General to establish a monitoring and evaluation function in the WTO in order to build confidence that increased Aid for Trade would be delivered and used effectively.[262] Despite their increased importance, it is clear that Aid for Trade and other technical assistance and capacity-building initiatives can only be a complement

260 For a fuller overview of WTO technical cooperation and capacity-building see http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm. The 2007 Technical Assistance and Training Plan is contained in document WT/COMTD/W/151 and Corr.1.

261 For its recommendations see WT/AFT/1. The Task Force was created pursuant to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC) and is composed of a limited range of WTO Members, both developed and developing. Relevant international organizations were invited to act in an advisory role to the Task Force on a regular basis.

262 In order to assist the development and trade policy communities to achieve higher degrees of co-ordination and coherence, avoid duplication, share information, and monitor the implementation of commitments registered in the Doha Ministerial Declaration Doha Development Agenda, the WTO and OECD Secretariats launched a Trade Capacity Building Database (TCBDB) in November 2002 . The two Secretariats also regularly produce reports to increase awareness of the multiplicity of programmes and help donors to identify where additional efforts could be applied (see http://tcbdb.wto.org). The Aid for Trade monitoring and evaluation will draw on these data for a global review of Aid for trade flows, but will also rely on donor self-assessments and recipient case studies. The various levels of monitoring will form the substance of an Annual Aid for Trade Report and Debate amongst all WTO Members.

to, and not a substitute for, ambitious liberalization outcomes and WTO rules that are responsive to development needs.

(b) S&D for developing countries in the WTO

In subsection C:2.(c).(ii) on the rationale for S&D, a range of trade-related measures were mentioned that could be employed to address specific problems in developing countries. As discussed in the previous subsection, over time the use of such policies has been accommodated to a certain extent under the multilateral trading system, usually subject to certain conditions. This subsection examines the types of S&D currently available under the WTO as well as the empirical evidence on the usefulness of the authorized trade policies for development purposes. It also portrays the claims for enhanced special and differential treatment before providing a short overview of alternative approaches on how best to accommodate special developing country interests within a multilateral system of rules.

(i) Main types of S&D in the WTO

The methodology established in subsection C.2.(iii) portrayed S&D as one of two major exceptions to the MFN principle. This is certainly true for some forms of S&D, but this statement must be further qualified. In the existing WTO agreements,[263] S&D provisions may or may not imply a violation of the MFN principle. Certain S&D provisions authorize other Members to provide more favourable treatment to developing countries, while others allow for special flexibilities that developing countries may dispose of, but that normally are to be implemented on an MFN basis.

In the first category, besides GSP schemes, there are two other forms of more favourable treatment to developing countries. These mostly come in the form of mere "exhortations". First, developed-country Members are expected to provide technical assistance under individual agreements. For instance, the TBT and SPS Agreements encourage Members to assist traditional developing country exporters who may face difficulties in complying with new measures. The best endeavour character of these provisions has been a source of long-standing controversy. While improvements on agreement-specific technical assistance continue to be made, for example with the creation of the Standards and Trade Development Facility (STDF) in the SPS area targeted at enhancing the capacity of developing countries to fulfil SPS standards, Members are unlikely to agree to legally enforceable obligations to provide technical assistance with unknown budgetary implications. Second, where possible, developed countries are encouraged to impose more lenient requirements when applying certain measures to developing-country Members, e.g. provide longer time frames to comment when a new TBT measure is enacted. Often, this type of S&D clause stipulates that developing country interests "shall be taken into account". Attempts to create mandatory exemptions have met with great resistance whenever S&D risks undermining a domestic policy objective, for example in the case of an urgent product safety standard that could not be applied with immediate effect to developing country suppliers. Nonetheless, continuing efforts are made that Members take account of developing country concerns with new regulations, for instance in the SPS area via improved notification systems allowing for consultations and information-sharing on special measures for developing country exporters.[264]

Conversely, special flexibilities available to developing countries normally do not carry MFN implications. Developing countries may be exempted from certain rules, but usually may not implement the otherwise prohibited measures in a way that discriminates among trading partners.[265] Such exemptions from market

[263] As discussed above, S&D also forms part of the current negotiations, notably in the context of non-reciprocity of concessions.

[264] See Decision by the Committee on Sanitary and Phytosanitary Measures of 27 October 2004 on a Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members, WTO document G/SPS/33.

[265] For example, trade restrictions by developing countries for balance-of-payments purposes under GATT 1994 Article XVIII are implemented on an MFN basis. Article XVIII para.10 in Section B provides further conditions on how such restrictions are to be applied, e.g. in order to avoid unnecessary damage to the interests of individual Members.

access commitments, subsidy disciplines or other obligations usually come in the form of enforceable rights, albeit often subject to conditions or weakened by discretionary decision making.

In order to evaluate the track record of S&D to date, the empirical evidence on their use and development impact is examined. The focus is thereby on S&D in existing agreements (as opposed to e.g. differential tariff cuts or special safeguard mechanisms still to be determined in the context of the negotiations) and on "hard" rights (as opposed to "best endeavour" type promises). The most prominent S&D rights over time that have been incorporated in the GATT/WTO system relate to preferential market access, infant industry protection, export promotion as well as temporary exemptions from the rules to take account of adjustment difficulties and implementation costs. While the former two demands have formed the core of developing country demands since the beginnings of the GATT, the latter have evolved as development thinking shifted and as obligations increased, notably after the Uruguay Round, both in number and complexity.[266] For each main type of S&D[267] the experience to date is contrasted with continuing demands for more flexibility and possible alternative solutions.

Non-reciprocal preferences

As mentioned in subsection 4.(a), with decolonization, preferential access for developing countries has become a prominent issue in trade policy-making. In the 1970s, when import substitution policies increasingly came into disrepute, non-reciprocal preferences received a further boost as a tool for improving the export performance of developing countries. For both political and economic reasons, the provision of unilateral preferences to developing countries has been accommodated as a permanent exception to the MFN principle under the Enabling Clause. Preferences are to be "generalized, non-reciprocal and non-discriminatory" and "respond positively to the development, financial and trade needs of developing countries" (Enabling Clause: para.2(a) footnote 3 and para. 3(c)), thus covering GSP schemes as well as preferential agreements among developing countries, such as the Generalized System of Trade Preferences (GSTP).[268]

Empirical studies on the contribution of preferences towards export diversification and growth give a mixed picture at best. Major concerns relate to the coverage and depth of preferences schemes as well as to their structural and political economy implications. On the former issue, preferences have proven of little value when items attracting high tariff rates are excluded or when preference margins are small. Even where highly protected items are covered and margins are substantial, the size of the benefits ultimately depends on other conditions that need to be fulfilled to qualify for preferential treatment,

266 Another long-standing developing country issue has been the stabilization of export earnings via commodity agreements. However, with the creation of international commodity agreements based on buffer stocks following UNCTAD's Integrated Programme on Commodities (IPC) and of financing schemes, such as the International Monetary Fund's Compensatory Financing Facility (CFF), this discussion has largely taken place outside the GATT/WTO. Hermann et al. (1989) show empirically that most of these schemes have not been very successful in stabilizing developing country export earnings.

267 Essentially, the categorization chosen here comprises three principal S&D types with and three without MFN implications. The former are non-reciprocal preferences, technical assistance by Members to individual developing country Members and more lenient requirements, while the latter are flexibility to restrict imports, flexibility to promote exports and longer transition periods to implement resource-intensive agreements. The two types that usually come in a best endeavour fashion, i.e. technical assistance and more lenient requirements, are not further discussed. Kleen and Page (2005) choose a similar focus, but other classifications have been proposed in the literature (e.g. Cottier, 2006) or used in WTO discussions, depending on the context. In the Committee on Trade and Development, a six-fold typology has been proposed by the WTO Secretariat: (i) provisions aimed at increasing the trade opportunities of developing country Members; (ii) provisions under which WTO Members should safeguard the interests of developing country Members; (iii) flexibility of commitments, of action, and use of policy instruments; (iv) transitional time periods; (v) technical assistance; and (vi) provisions relating to least-developed country Members (WT/COMTD/W/77/Rev.1).

268 In 2005, 12 developed country Members made available GSP programmes. The EC is counted as one, while Bulgaria and Estonia's programmes feature separately. See UNCTAD (2005). For an in-depth discussion of certain programmes see UNCTAD (1999) and WTO (2001b). Under the Agreement on the Global System of Trade Preferences Among Developing Countries, i.e. the GSTP scheme, the concessions (contained in Annex IV of the Agreement) of 42 countries, not all of which are WTO Members, are listed on UNCTAD's website. See http://www.unctadxi.org/templates/Page____6206.aspx, visited on 25 April 2007.

notably rules of origin (Brenton, 2003; Brenton and Manchin, 2003).[269] Regarding the second concern, preferences entail inefficiencies in the allocation of resources that may make it harder to restructure the economy in the future according to a country's comparative advantage (Hoekman and Özden, 2005).[270] Moreover, Lederman and Özden (2005) find that eligibility under unilateral schemes is often tied to conditions related to other than development motives which may be costly to implement for prospective beneficiaries and lead to additional distortions. Preferences also generate interests opposed to non-discriminatory liberalization in the future (Limão, 2005; Özden and Reinhardt, 2003). Kleen and Page (2005) find that the overall impact of preferences was rather to generate rents and transfers to selected groups than to foster broad-based industrial development.[271]

Current discussions on preferences in the WTO principally pit beneficiaries against excluded developing countries. This conflict has been accentuated by the recent Appellate Body decision that GSP providers can offer higher preference margins to a specific group of developing countries that fulfil certain conditions.[272] Beneficiaries remain concerned with the erosion of preference margins following further multilateral and regional liberalization. Proposals have been made to bind existing preferences (Oyejide, 1997), i.e. to limit MFN liberalization in key sectors, such as textiles, sugar and bananas, or to set market access targets for preference beneficiaries (TN/CTD/W/3/Rev.2). Alexandraki and Lankes (2004) and IMF (2003) show that potential preference erosion is not significant for most countries, but is important for a limited number of small countries and sectors.[273] Yeats (1994), Limão and Olarreaga (2005) and Amiti and Romalis (2006) caution against slowing down MFN liberalization showing that non-discriminatory liberalization by the provider can more than offset preference erosion and lead to export increases from beneficiaries. Low et al. (2005) cast doubts as to trade solutions for preference erosion, noting the limited potential for increased utilization, alternative products and providers. As an alternative, some authors have endorsed the provision of development assistance to fund adjustment costs (Hoekman and Özden, 2005).[274]

Flexibility to restrict imports and promote exports

Despite lesser tariff reductions and fewer bindings/commitments, developing countries dispose of additional flexibilities to restrict imports, notably the right to protect infant industries (GATT Article XVIII: A and C). As discussed above, these provisions were inherited from the days of import substitution in

269 See, for instance, Inama (2003) who attributes a utilization rate of less than 40 per cent for beneficiaries under the GSP schemes of the EC, US, Canada and Japan largely to the stringency and/or complexity of rules of origin. However, he fails to fully take account of alternative schemes. For individual markets, exporters may be able to choose between different preference schemes, and taken together, utilization rates may be higher. In the EC, for example, African LDCs may export either under the EBA initiative or the Cotonou agreement. The latter is better utilized since rules of origin are less demanding (Candau and Jean, 2005). Of course, preferences in sectors of export interest to developing countries and featuring high preference margins, such as agricultural and textile products in the EC and US, are highly utilized (Bureau and Gallezot, 2004; Candau et al., 2004).

270 Part of the development impact of preferences depends on whether they stimulate the creation of an industry that can survive when preferences are lowered or removed (essentially an infant industry argument). Obviously, the challenge to adapt to new circumstances also depends on the time frame within which adjustments need to take place (Kleen and Page, 2005).

271 Even if preferences do not foster sectors that, in the medium-term, become competitive, the rents they generate can still be an important source of income in poor countries, and their development impact depends on how that income is used. Mauritius, for instance, has successfully used preferential rents to diversify its economy. Nevertheless, with the reductions in the high fixed prices on sugar exports to the EU, Mauritius has had to cope with considerable adjustment difficulties faced by inefficient sugar producers who have lost their markets (Kleen and Page, 2005; Subramanian and Roy, 2001).

272 In *European Communitie –Tariff Preferences*, the Appellate Body ruled that GSP providers could differentiate between beneficiaries who are not "similarly-situated" (para. 153). It found that development needs were not necessarily shared by all developing countries and that, therefore, beneficiaries could be treated differently (para. 162). Two conditions were attached: first, the existence of such a need had to be widely recognized, for instance, by another international organization; second, a sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the relevant need (paras. 163-164).

273 For a more complete overview of studies on the extent of preference erosion, see Hoekman et al. (2006).

274 See, for instance, the IMF's Trade Integration Mechanism (TIM) which provides financial support for balance-of-payments difficulties arising from trade-related adjustments, for instance, due to the erosion of tariff preferences. See http://www.imf.org/external/x10/changecss/changestyle.aspx, website visited on 24 April 2007.

1950s and early 1960s. They have rarely been invoked. One reason obviously is that developing countries with unbound tariffs or high ceiling bindings can increase applied rates without recourse to S&D. Another reason is that Article XVIII:B on trade restrictions for balance-of-payments purposes is considered easier to apply and does not call for compensation. Article XVIII:B has been used by 16 developing countries to date.[275] At the end of the Uruguay Round, developing and least-developed countries (LDCs) were also given longer transition periods (five and seven years respectively) during which notified trade-related investment measures, such as local content or export-import balancing requirements, could be maintained (Agreement on Trade-Related Investment Measures (TRIMs) Article 5). Twenty-six countries, including Uganda as the only LDC, requested extensions.[276]

Inspired by the successes of export promotion in East Asia, developing countries also requested special rights to subsidize exports. These rights are frequently claimed in order to cover certain features of export-processing zones (EPZs). SCM Article 27 provides for an eight-year transition period for developing countries to phase out export subsidies and an open-ended exemption for LDCs and some poorer countries listed in SCM Annex VII, subject to certain conditions. Individual extensions are possible under SCM Article 27.4 and, in addition, a fast-track procedure was created for countries fulfilling a number of criteria (G/SCM/39). So far, the various extension procedures have been used by two dozen developing countries.[277]

Based on empirical evidence, infant industry protection for import substitution purposes was soon discarded as a development tool. It had introduced large distortions in the countries pursuing such policies by penalizing traditional sectors such as agriculture, discouraging exports and exacerbating tendencies to trade raw materials in exchange for capital goods.[278] On trade-related investment measures, Moran (1998) finds from an extensive review of empirical case studies that "[t]he imposition of domestic-content requirements in protected local markets leads to less efficient production and provides less valuable backward linkages than does allowing foreign firms to set up operations oriented toward global or regional markets" (Moran, 1998: 161).[279] Besides the impact on production structure, the overall chilling effect of trade-related investment measures on foreign direct investment (FDI) has also been found to retard technological progress (Kokko and Blomstrom, 1995; Smarzynska Javorcik, 2004).[280]

The evidence is less clear-cut for export promotion policies. The rise of the Republic of Korea and other "Asian tigers" as major traders are often quoted as examples of the importance of government involvement in establishing successful export industries (Noland and Pack, 2003). For certain followers, such as Mauritius, EPZs played an important role in the diversification of production into non-traditional sectors (Subramanian and Roy, 2001). However, other countries pursued similar strategies without

275 The Tokyo Round Declaration on Trade Measures Taken for Balance-of-Payment Purposes (BISD 26S, 1979: 205-209) requires countries in balance-of-payment difficulties to give priority to price-based measures over quantitative restrictions and to announce time-schedules for removing the measures. For an overview of the countries and time periods during which BOP measures were kept in place, see subsection 2.(c).

276 At the Hong Kong Ministerial Conference in 2005, it was decided that LDCs could notify and maintain for another seven years existing trade-related investment measures and introduce new measures subject to Members' approval and periodic review. All such measures are to be phased out by 2020 at the latest (WT/MIN(05)/DEC: F-2). However, no such notification had been received at the writing of this Report.

277 See the G/SCM/-series of WTO documents starting with G/SCM/50.

278 For two large collections of case studies see Balassa and associates (1971) and Little et al. (1970).

279 Local content schemes require firms to purchase higher cost, domestically-produced components instead of imported substitutes, thus involving higher production costs, which makes investment in the respective downstream sector less attractive. Of course, other factors in the host country, notably the level of tariff protection and fiscal or financial incentives, may outweigh the negative effect on investment of local content requirements, albeit at the cost of further distortions.

280 For a comprehensive overview of the channels through which trade-related investment measures and other performance requirements affect trade, investment and growth as well as of the empirical evidence, see WTO and UNCTAD (2002).

success.[281] Noland and Pack (2003) emphasize that horizontal factors, such as good macroeconomic policies and a highly-educated labour force, played a more important role in the East Asian experience than sector-specific interventions. In fact, the authors conclude that export incentives merely served to offset the remaining protection and that similar results could have been obtained in a less wasteful manner. Experience shows that policies of selective intervention pose important challenges of rent-seeking and long-term inefficiency (Hoekman et al., 2004). The Asian tigers were able to contain these problems owing to their stable political situation, competent bureaucracies and strict enforcement of export targets, i.e. by letting non-performing companies go out of business. By contrast, in other cases, support polices were captured by interest groups leading to corruption and continued existence of inefficient industries (Lall, 2002). Other problems relate to the fiscal implications of industrial policies and the information difficulties involved in identifying "winners" (Panagariya, 2000a).

Current S&D discussions, despite the little encouraging evidence of selective government interventions, have stressed the need for "policy space" of developing countries to protect import-competing industries and subsidize exporters.[282] It has been suggested that developing countries should be able to reject any conditions attached to infant industry protection as too cumbersome (TN/CTD/W/3/Rev.2) and not have to offer compensation (TN/CTD/W/4/Add.1). In the same vein, a number of developing countries proposed that they be free to use trade-related investment measures (TN/CTD/W/4; TN/CTD/W/3/Rev.2) and export subsidies (TN/CTD/W/3/Rev.2) as they see fit their development objectives. The underlying presumption that fewer international obligations are somehow better for development may be seen as a counter-reaction to the "Washington Consensus" advocated by the World Bank and International Monetary Fund (IMF) in the 1980s. Rodrik (1993) provides empirical support noting that the recommended strategy to minimize government intervention in the pursuit of outward-oriented development strategies met with mixed success at best.

Academic commentators in recent times have taken a more nuanced approach that foresees a role for government involvement while taking account of the experiences made to date. On the one hand, the budgetary, informational, administrative as well as political economy concerns limiting the success of active industrial policies have been acknowledged (Rodrik, 2004) as has been the importance of functioning markets and institutions.[283] On the other hand, while trade openness led to productivity improvements in previously protected markets, *laissez-faire* policies did not result in the expected improvements in economic performance either. Hausman and Rodrik (2003) hold that in order to foster structural change and growth, governments need to play a role in encouraging entrepreneurship and investment in new activities, while pushing out firms and sectors that turned out unproductive.[284] While non-trade instruments, such as time-limited public sector credits or guarantees until private financial markets are ready to step in (or declare default), in most cases may be preferable from an efficiency point of view, Melitz (2005) points out that in order to capture learning externalities, trade restrictions, albeit to be treated with great caution, under certain circumstances may be less distorting than previously thought. Panagariya (2000a) notes that the selection of first-, second or n-best policies is also a matter

[281] Panagariya (2000a) notes that the costs of export subsidies provided by a number of Asian and Latin American countries largely exceeded the benefits in terms of export promotion and diversification. Similarly, most case studies contained in Helleiner (2002) on a range of African countries do not find a significant impact of EPZs on exports of non-traditional commodities.

[282] Hoekman (2005) notes the widespread use and ill-defined content of the term "policy space" in current debates and proposes a more precisely defined operationalization of this concept that is further discussed below.

[283] These are important factors determining the investment climate in a country. FDI has been found to play an important role in the diversification and modernization of the industrial base in developing countries. See, in particular, Hoekman et al. (2004) for an overview of the literature on FDI and technology transfer. While the authors point to numerous case studies, where substantial technological diffusion has occurred due to FDI, they also stress that technology transfer/spillovers via FDI are not automatic and may be fostered by appropriate policies.

[284] The authors stress the need to learn what one is good at producing. They find that such discoveries are of great social value, as they determine the future pattern of specialization of the economy. Since other entrepreneurs quickly emulate what pioneers have found out, the initial entrepreneur can only internalize part of the social value generated. The authors conclude that *laissez-faire* policies lead to an under-provision of innovation. Rodriguez-Clare (2005) further elaborates that if new industries are to flourish, governments may also need to coordinate investment decisions in upstream and downstream industries that depend on each other.

of feasibility within the available time horizon. S&D discussions in this area may need to take a more detailed look at the policy instruments currently available in the WTO, including the conditions attached to their use, as well as at possible alternatives and may need to move way from a one-size-fits-all approach to better take into account the specific situation in individual countries.

Longer transition periods to implement resource-intensive obligations

The considerable increase in obligations by developing countries under the Uruguay Round soon led to complaints about the excessive costs of compliance. While under some Agreements, such as TRIMs, longer time periods were allowed to facilitate adjustment to changes in sectoral patterns and take account of political economy costs related to the phasing-out of trade distorting measures, other agreements, such as TRIPS and Customs Valuation (CV), entitled developing countries to delay implementation in order to create the required administrative environment. Presumably, it was felt that the balance between the immediate costs and the long-term benefits of an agreement would be more favourable if developing countries were required to only implement a limited number of reforms at a time and defer some of the costs to a later stage (Kleen and Page, 2005).

Under the Customs Valuation Agreement, 56 developing country Members requested the initial five years transition period under CV Article 20.1, with 32 of them applying for extensions, which essentially allowed for the continued use of minimum values. Only a limited number of developing country Members appear to have used the transition period in the sense that legislation in accordance with the Agreement was notified after its expiry. In many cases, no notifications have been received even though no further extensions were requested or no request for the initial delay was made in the first place. While use of the transaction value as the preferred methodology for customs purposes is beneficial in terms of increased transparency and objectivity, it may require reform of the customs process as a whole implying investment in institutions, equipment and training (Shin, 1999). Access to electronic information to make price comparisons is particularly important in order to avoid fraud relating to the under- (loss of tariff revenues) or over-valuation (circumvention of capital controls) of goods. The resolution of broader institutional problems, such as corruption, heavy bureaucratic procedures and weak internal auditing systems, may also be seen as a prerequisite to the use of more sophisticated valuation systems. By the same token, where customs valuation was associated with a more wide-ranging reform process, improvements in transparency, clearance times and revenue performance mostly exceeded expectations (Duran and Sokol, 2005).

Developing-country experiences with the TRIPS Agreement have revealed even more wide-ranging implementation concerns. Pursuant to TRIPS Article 65.2, apart from MFN and national treatment (TRIPS Articles 3, 4 and 5), developing countries were not required to adapt their legislation to the requirements of the Agreement for five years (eleven years for LDCs, according to TRIPS Article 66.1, with possibility of extension). Moreover, TRIPS Article 65.4 provides for a total of ten years during which product patent protection need not be extended in areas of technology where such protection did not exist before. In 2001, it was decided that LDCs could delay, with respect to pharmaceutical products, the implementation of the patent provisions and provisions in respect of the protection of undisclosed information until 1 January 2016 (WT/MIN(01)DEC/2). The general transition period for LDCs under the TRIPS Agreement was extended in 2005 until 1 July 2013 (IP/C/40). Many developing countries already had intellectual property (IP) systems in place before TRIPS, but used the transition to modernize the existing infrastructure.[285] India, for instance, further developed the Indian Patent Act (originally enacted in 1970) with a view to making it fully compatible with TRIPS through amendments in 2000, 2003 and 2005, emphasizing IP as an important tool for its commercial development in its Science and Technology Policy 2003 (Saha, 2005). A variety of developing country case studies noted that the modernization costs as well annual operational costs of IP institutions would be substantial (UNCTAD, 1996; World Bank, 2002). However, estimates varied widely, and it was often not possible to identify the

[285] Developing countries also used the opportunity to obtain enhanced assistance, both bilaterally and from multilateral agencies, notably the World Intellectual Property Organization (WIPO), for the upgrading and modernization of their IP systems.

incremental costs of TRIPS obligations. In addition, in a number of developing countries revenues from registration fees, mainly of trademarks, exceeded recurring expenses (CIPR, 2002). But TRIPS was shown to have resource implications beyond operating budgets. Rightholders are disproportionately located in a few industrialized countries. In the short run, this has been estimated to result in net financial outflows from developing (and other developed) countries to technology exporters notably in the United States, Germany and Japan (World Bank, 2002; Maskus, 2000). However, some developing countries are catching up. In preparation of WTO accession China has modernized its IP authorities and, between 2001 and 2005, has registered an almost threefold increase in the number of annual patent applications for inventions received by the State Intellectual Property Office (SIPO) (2001: 63,204; 2005: 173,327). Over that time period, and in each individual year since 2003, the majority of patent applications for inventions has been submitted by domestic applicants.[286] Also on the positive side, improved IP rights have been found to increase the flow of FDI (not only in IP-sensitive sectors) and transfer of technology, including to LDCs (OECD, 2003; Smarzynska Javorcik, 2002; Lee and Mansfield, 1996). While technology transfer via imitation is constrained, FDI effects have been strongest in countries with a large capacity to reverse engineer (OECD, 2003). In addition, technology transfer via licensing agreements have increased in a range of developing countries (with positive effects depending on the size of the royalties) (Maskus and Yang, 2003).

In the current discussions on S&D, a number of developing countries have tabled proposals that transition periods under the Customs Valuation and TRIPS Agreements be extended automatically upon request (TN/CTD/W/3/Rev.2 and TN/CTD/W/4/Add.1). Opposing Members would need to demonstrate that the expiring transition period has fulfilled its purposes and resulted in the establishment of the required infrastructure (or "a viable technological base" in the case of TRIPS). While many remain sceptical as to the moral hazard[287] problems that such an approach would imply, the insight has gained some ground that the cost-benefit ratio of certain obligations may be a function of development levels. It is argued that the required investments and complementary reforms in the developing world are in competition for scarce funds and administrative capacity with other development priorities (Hoekman, 2005). At the same time, the empirical evidence has demonstrated that customs and IP modernization had positive effects on a range of development indicators, and should therefore not be neglected.[288] Effective S&D would need to be targeted at the country-specific situation, taking account of its existing infrastructure and assets, while fostering incentives for reform, but it would also need to factor in the costs of non-compliance imposed on other countries.

(ii) New approaches towards accommodating developing country interests

The current negotiations offer a good opportunity to reconsider the way in which the special interests of developing countries are accommodated within the WTO. According to the Doha mandate, all existing S&D provisions are to be reviewed with a view to making them more precise, effective and operational (WT/MIN(01)/DEC/1). Agreed S&D modalities are to be applied in the negotiations and new S&D provisions need to be conceived of in negotiating areas, such as trade facilitation. Two major challenges remain that are equally relevant to all of these forms of S&D: first, the absence of policy analysis and accountability by *demandeurs* why exemptions are needed; and second, the lack of a realistic assessment about how exemptions should be implemented without undermining the integrity of the system. These considerations are not unrelated since a justification of special development needs and of the required derogations from the rules would likely put an end to the self-selection of developing country status leaving a gap as to the appropriate selection mechanism to qualify for S&D.

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286 See http://www.sipo.gov.cn/sipo_English/statistics/200607/t20060725_104689.htm, visited on 27 April 2007. Also, other forms of protection, such as copyrights, have proven beneficial e.g. for the music industry in developing countries (Maskus, 2000).

287 Moral hazard is defined as an insurance-induced alteration of behaviour that makes the event insured against more likely to occur.

288 For further empirical work see also Swedish National Board of Trade (2004).

Two extreme strategies have proven particularly popular so far helping to avoid a more serious analysis: the first one has been to afford total flexibility (sometimes time-bound) to those developing countries, notably LDCs, that are too small economically to matter to the interests of other Members, without consideration of the underlying rationale or consequences. For instance, LDCs are not expected to undertake commitments in agricultural market access or in the new negotiations on trade facilitation (WT/L/579).[289] Or, they may maintain existing or new trade-related investment measures for an extended period of time, possibly until 2020 (WT/MIN(05)/DEC: F-2). While celebrated as a success, both the economic and strategic wisdom of this approach are highly doubtful. LDCs have liberalized certain sectors unilaterally and could tie in reforms under the WTO to prevent policy slippage.[290] In addition, LDCs could commit the status quo as a bargaining chip to assert their offensive interests.[291] On trade-related investment measures, as discussed above, it may not be the most cost-effective policy to foster domestic industries.

The second approach has been to focus on S&D proposals with virtually no or little intrinsic value or to make yet more pledges of "best endeavour", i.e. concede "rights" that can hardly be enforced. For example, it was agreed in principle that "the terms and conditions of the Enabling Clause shall apply when action is taken ... under the provisions of this Clause" or that in evaluating balance-of-payments measures under GATT 1994 Article XVIII:B "*full consideration shall be given* to the impact of the volatility of short-term financial flows" (Job(03)/150/Rev.2: C-2 and C-6, emphasis by author).

A number of commentators have made proposals on how to redirect S&D discussions towards a more analytical approach. They all embrace the notion of heterogeneity among developing countries if S&D is to be effective, i.e. they agree that the specific situation of individual Members should determine the eligibility and the type of S&D measure to be authorized.[292] The proposed approaches differ, however, as to the extent of differentiation among developing countries and how this is to be achieved. The two main alternatives also vary as to the exact scope of S&D and the level of detail with which the content of WTO rules and possible exemptions are examined.

Some authors have made a distinction between core obligations, such as MFN-based market access and the prohibition of highly trade-distorting measures, and obligations to implement "costly" agreements dealing with regulatory issues, such as customs valuation and TRIPS. Universal adherence to core disciplines implies that further liberalization should not be slowed down by the consideration of preference erosion

289 For new areas, such as trade facilitation and the other Singapore issues, this approach has received some academic backing. Lawrence (2005) proposes that existing WTO Agreements be supplemented with additional 'clubs' to which only members would subscribe that are willing to accept a more extensive set of commitments. In order to avoid the lack of ownership following the conversion of the plurilateral Tokyo Round Codes into universally applicable obligations, all WTO Members would participate in negotiating club rules, but would be free to join at a later stage. The author sees the WTO as a "global coordinating club" on trade that should deal with all issue linkages. Such a "club-of-clubs" would constitute a compromise in which diversity can co-exist with the establishment of a deeper integration framework. In light of fears of a "two-class society" and a further marginalization of the poorest countries, many observers (e.g. Hoekman, 2005) do not consider "plurilaterals" to be in the interest of developing countries.

290 See subsections B.2., B.5 and C.2.(c) on international commitments as a means to address domestic governance problems. If all countries generating costs of non-compliance that are too small as markets to matter to trading partners were allowed to have more or less permanent exemptions, it must be asked whether this practice, albeit not uncommon in reality, should be formalized under WTO rules, thereby putting at risk these countries' further integration into the multilateral trading system. See Kerr (2005).

291 As discussed in subsections B.2 and B.5, it is not straightforward to explain why a large country would bargain with a small country over its liberalization commitments. A plausible motivation may be the interest of the large country in cooperating on issues other than trade, such as environmental protection. Also, an LDC may not be considered a small market for certain products. Finally, since large market size *per se* provides significant bargaining power, LDCs can act as a group when negotiating with large trading partners.

292 As noted in subsections B.2, B.5 and C.2.(c), the terms-of-trade approach to trade agreements would imply that large developing countries should be accommodated in different ways than small developing countries. To recall, Staiger (2006) holds that the critical pieces of empirical evidence are the past and present degree to which developing countries are large enough in relevant markets to alter international prices with their trade policy choices. Citing two papers in support of his argument (Gros, 1987; Broda et al., 2006), he deplores the general lack of empirical studies in this regard.

and that little if any "wiggle" room be left for trade-related investment measures or export subsidization (Hoekman et al., 2004). Different strategies have been advanced to identify possible beneficiaries. Hoekman et al. (2004) advocate time-limited exemptions from "resource-intensive" agreements for an "LDC plus" group characterized by broad criteria, such as per capita income or size. It is argued that such a crude differentiation would cover practically all countries with similar implementation concerns across WTO Agreements.[293] In order to deal with complaints by individual countries not part of this group to have access to the same rights on a case-by-case basis, an appeals procedure is proposed. Wang and Winters (2000), Prowse (2002) and Hoekman (2002) hold that implementation capacity should be assessed on a country-by-country basis ("implementation audits"). The authors link the temporary exemption to the provision of technical assistance and capacity-building. Hoekman (2005) suggests that rather than creating formal exceptions to the rule, complaints against developing countries that do not implement "resource-intensive" obligations should be made conditional on prior approval by an independent oversight body that determines the likely benefits of implementation versus the costs of compliance ("development test").

While intellectually stimulating, defining S&D eligibility in one of these ways entails several shortcomings in practice: first, attempts to subdivide developing countries have proven unworkable, particularly since the same group of countries at the exclusion of other developing countries would become eligible for broad-ranging S&D. Country-by-country assessments or appeals procedures carry the disadvantage of making eligibility subject to discretionary decision-making instead of creating enforceable rights. Second, a "tailor-made" approach would require an extraordinary improvement in the coordination and provision of assistance at all levels. Finally, the involvement of external authorities to conduct "implementation audits" or "development tests" is likely to be contentious. It is unlikely that WTO Members would agree to delegate such a fundamental role to another institution, especially since the results from such an analysis could lead to enforceable rights under S&D flexibilities or determine the right to initiate panel proceedings under the dispute settlement mechanism. Also, agreement would need to be reached on who among competing groups and agencies would ultimately determine the costs of compliance and how this should be done (Keck and Priyadarshi, 2005). Nevertheless, to a certain extent, these approaches already have shaped current S&D debates. A number of institutions have stepped up their assistance and coordination efforts.[294] The modalities for the negotiations on Trade Facilitation stipulate that "the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed countries ... [and that] developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments" (WT/L/579: D-1, paras. 2 and 6). While "best endeavour" elements remain, implementation is formally linked to capacity and assistance, albeit in a non-objective manner.[295]

Concerning the proposed scope of S&D, there is wide agreement in the literature that further market access liberalization constitutes a "core" activity of the multilateral trading system and that concerns over preference erosion should be dealt with by eliminating trade barriers on an MFN basis in sectors of export interest to developing countries and by providing compensation/adjustment assistance to those countries/sectors that are particularly affected. However, several commentators doubt that a clean distinction can be drawn between other "core" disciplines and more extensive obligations. For one, infrastructure-related Agreements, such as Customs Valuation, contain elements, such as publication requirements (Article 12), that have limited resource implications, but are crucial to limit *ad hoc* exceptions and maintain an equitable customs system. Furthermore, the approach does not do justice to the fact

293 This position appears to have received some backing by an unpublished econometric analysis by the Organisation for Economic Co-operation and Development (OECD) showing that a number of developing countries were similar to LDCs for a range of key indicators while others could reasonably be grouped together with developed countries. The study was discussed during a number of meetings of the Working Party of the Trade Committee in 2002. Since no consensus could be reached on the findings of the study, it remains classified.

294 See, for example, IMF and World Bank (2006) and WTO (2006b).

295 Evenett (2005) mentions the idea of "pledging rounds" whereby donors would commit targeted assistance requested by a WTO Member and endorsed by a technical committee of experts. The execution of both the technical assistance and capacity-building pledges as well as of the additional trade facilitation commitments according to a management plan would constitute binding obligations.

that limited exemptions for higher tariffs or quotas may be justified when market imperfections or certain political economy considerations are involved.[296] Keck and Low (2004) argue in favour of an issue-specific approach based on economic arguments for government interventions that are otherwise prohibited by WTO rules.[297] Hence, exemptions for infant industry protection, for example, would not be excluded *a priori* as a violation of "core" disciplines, but would be made conditional on the specific situation in the *demandeur*, i.e. the existence of learning externalities, the unavailability of first-best policies and a clear timetable for removing the measures in question. The rationales for delays in dealing with export measures, trade-related investment measures or certain infrastructure matters could be tested in a similar manner.[298] The right to S&D would obviously also depend on the extent to which third interests are likely to be damaged.

Ideally, measurable criteria could be found that characterize the situation of a country and, hence, could be used to determine access to a specific S&D provision, introducing some "automaticity" or, at least, "hard" evidence into the authorization process. The range of indicators would vary depending on the circumstances and policy objective at issue. Stevens (2002) demonstrates how countries falling within a number of food security-specific thresholds could be allowed to use production subsidies for certain agricultural commodities. Keck and Low (2004) support the need for provision-specific criteria noting the difference between Stevens' (2002) hypothetical list of beneficiaries and the actual list of countries having obtained a permission to provide subsidies under certain programmes pursuant to the SCM fast track procedure (G/SCM/39). The conditions imposed on beneficiary countries, such as compensation, should also involve an economic assessment. As an example, Cottier (2006) cites the calculation methodologies of royalties in the Canadian and Swiss implementing legislations of the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2), which foresee the adjustment of payments on the basis of human development indicators.

The biggest advantage of such an approach would be that no *a priori* differentiation between developing country Members is necessary. In view of the differing sets of criteria for different types of S&D, target groups would match more closely with actual needs. By the same token, while qualifying for one or two "meaningful" S&D rights, not all developing countries would be able to claim all exceptions. This should lower the resistance of those who do not wish to see stronger players take advantage of flexibilities at the expense of others. However, a major challenge would be to identify and measure suitable criteria. This could not only be a lengthy undertaking, but would also strain Members' resources due to the level of detail and technical complexity involved. Even where appropriate data exist, views differ as to the quality and suitability of various sources, as witnessed by the lengthy discussion on the database to be used for the calculation of *ad valorem* equivalents in the current market access negotiations or by past complaints about the IMF's central role in supplying data for BOP consultations. Cottier (2006) rejects the idea that data problems would make a more objective and "automatic" approach unfeasible pointing to precedents in other areas, such as the criteria used to characterize a country's needs (taking account also of moral hazard risks) when determining the grant-credit mix it is entitled to under debt relief programmes (IDA, 2004). The fact that despite the data-intensity of the approach an element of "negotiation" or "decision-making" by the membership as a whole would remain, for instance, on the precise time interval during which the exemption is granted, represents an additional drawback.

Unfortunately, as this overview of the literature has shown, no silver bullet exists on how S&D in the WTO can be made more relevant to developing country needs. A number of lessons for future discussions can still be drawn from the experience to date: first, the lack of analysis of the reasons for S&D, its forms and conditions as well as its compatibility with the rules-based character of the organization needs to be addressed. This would imply a move away from broad-brushed political debates in terms

296 See the theoretical discussion in subsection C.2.(c).(ii) and empirical evidence in part (a) of this subsection.

297 Others have endorsed and further elaborated such an "issue"-, "provision"- or "situation"-specific approach. See, for instance, Cottier (2006), Paugam and Novel (2005) and Corralles-Leal (2005).

298 For example, limited transition periods could be made available to bring EPZs into conformity with WTO rules if it is demonstrated that the principal role of governments has been to coordinate the establishment of an industrial cluster and provide the required infrastructure.

of "graduation" vs. "total opt-outs" towards problem-oriented discussions of market imperfections and economic instruments. Second, not all S&D demands may result in enforceable obligations, for instance, when more lenient requirements would risk undermining the policy objective pursued. Technical assistance constitutes an indispensable complement, also in regard to facilitating adjustment during times of transition. Finally, radical approaches are unlikely to meet with the required consensus. This applies to suggestions that seek to change the contractual nature of the WTO or neglect important sensitivities and capacity constraints. It seems that more technical, open-minded and incremental approaches to S&D stand the best chance to help accommodate developing country concerns within the multilateral trading system without undermining its integrity.

5. THE CHALLENGE OF REGIONALISM

In the past decade and a half, the number of regional or free trade agreements has mushroomed. Throughout its existence (1948-1994), the GATT received only 124 notifications of RTAs. But since the creation of the WTO in 1995, over 160 additional arrangements covering trade in goods or services have been notified. As of 1 March 2007, there were 194 notified RTAs in force, with 129 notified under GATT Article XXIV, 21 under the Enabling Clause and 44 under GATS Article V. With the possible exception of Mongolia, all other WTO Members are a party to at least one RTA. Asian countries, which in the past had shunned free trade agreements, are now some of the most actively involved in negotiating new agreements.

The analysis of RTAs in Section C gave valuable insights into the welfare effects of regional trade agreements and the interaction between RTAs and the multilateral trading system. One important conclusion to recall from that analysis is the ambivalence of the welfare effects of preferential trade agreements. Joining an RTA does not guarantee an increase in the RTA members' welfare. Further, RTA formation may adversely affect the welfare of non-members due to trade diversion and terms-of-trade effects. Given that WTO Members embrace both regionalism and multilateralism at the same time, it is essential to understand how the WTO has been dealing with the challenge posed by the proliferation of RTAs and what are the remaining challenges. This subsection addresses these issues.

First, it describes the way in which the multilateral system has dealt with the challenge of regionalism with a special emphasis on efforts made since the establishment of the WTO in 1995. Second, it provides an analytical account of the issues that remain to be settled and that characterize the main debate surrounding RTAs presently at WTO, with a focus on the importance of the debate from an economic point of view. Third, it provides a review of the theoretical literature on RTAs as building blocs or stumbling blocs to the multilateral trading system. It also provides anecdotal and systematic evidence on the interaction between the proliferation of RTAs and the developments in the multilateral trading system, in order to shed some light on whether RTAs have been building blocs or stumbling blocs. Finally, a number of results from the theoretical literature and empirical evidence are pulled together to discuss ways of strengthening GATT Article XXIV.

(a) Regionalism in the GATT/WTO history

How has the multilateral trading system dealt with regionalism? How have the provisions of GATT Article XXIV been implemented over the years?

There are a number of explanations about the historical origins of GATT Article XXIV, which gives exceptions from the obligation of MFN to customs unions and free trade areas that meet certain criteria. One prominent explanation for the exception given to customs unions is that it was intended to open the door for European integration, which was believed to be essential to the future peace of the Continent (Bhagwati, 1991). Another explanation for the exemption granted to customs unions is that they had received exemption from the MFN principle in bilateral trade agreements long before the GATT was created (Mathis, 2002). The United States submitted draft proposals for GATT Article XXIV that followed

its own MFN bilateral agreements formed according to the US Reciprocal Trade Agreements Act, which granted exemptions to customs unions.[299]

With respect to the exception given to free trade areas, most accounts have interpreted it as a way of hanging on to the support of developing countries for the Havana Charter, since many of them wanted the option to negotiate preferential trade arrangements in the future. GATT Article I:2 had intended to grandfather only the existing preferences at that time, such as those under the British imperial system, on the condition that no new preferences be extended. Introducing an exception to free trade areas under Article XXIV was one way of accommodating developing countries' demands (Mathis, 2002).

In most contemporary accounts of the Havana negotiations, the United States was always portrayed as standing its ground on the principle of MFN and only reluctantly acquiescing to the exception given to preferential trade agreements. However, Chase (2006) has suggested that the United States gave way to GATT Article XXIV in part to accommodate a possible US-Canada free trade agreement, which was being negotiated secretly simultaneously with the Havana Charter. Although the US-Canada FTA was eventually dropped[300] (and not successfully pursued until four decades later), the language to exempt free trade areas from the obligation of MFN was retained in the GATT.

What all these various explanations testify to is the strong interest by the countries involved in the post-war negotiations to establish the ITO to pursue preferential trade arrangements.

In 1947, there was the general belief that trade liberalization, be it regional or multilateral, was good. And regional liberalization, by providing deeper market access was complementary to the multilateral trading system. Article XXIV of GATT allowed regional arrangements as long as they satisfied three requirements: transparency, commitment to deep intra-regional liberalization and neutrality *vis-à-vis* third parties. Nearly three decades later, Paragraph 2(c) of the 1979 Decision of the GATT Council on Differential and More Favourable Treatment allowed less-developed GATT Contracting Parties to enter into regional arrangements for the mutual reduction or elimination of tariffs on less restrictive criteria than developed countries.[301] Further, the creation of the General Agreement on Trade in Services in 1995 also resulted in a sanctioned exception to MFN in preferential agreements involving trade in services (GATS Article V).

The weakness of the GATT rules on regional arrangements became first apparent with the notification of the EEC-Association of Overseas Countries and Territories. Part IV of the Treaty of Rome established an association between the EEC members and their overseas countries and territories.[302] The Treaty provided preferential treatment by the EEC members to these countries and territories in pursuit of promoting their economic development and establishing close economic relations. While it was not the first arrangement to be reviewed under Article XXIV, the examination prefigured the issues that would pre-occupy subsequent RTA examinations. Principal among the issues discussed by the working group examining the Association were the definition of "substantially all trade" and what measures were covered by "other restrictive regulations of commerce" cited in GATT Article XXIV:8. Is it possible to offer a quantitative measure of "substantially all trade"? What are the "other restrictive regulations of commerce" that must be eliminated between the members of a free trade area, e.g. should contingent measures be eliminated?[303] The Working Group responsible for the assessment of consistency of the agreement with the GATT relevant rules was not able to reach a clear-cut conclusion. Part of the reasons

299 See Mathis (2002), p. 33.

300 Notice that Canada rejected the 1948 agreement (Smith, 1988; Wonnacott, 1987).

301 The only requirements applying to RTA concluded under the Enabling Clause is a certain degree of transparency.

302 There are currently 21 overseas countries and territories scattered around the globe: 12 British overseas countries and territories: 6 French overseas territories and territorial communities (*collectivités territoriales*); 2 Dutch overseas countries; and 1 under the Danish Crown.

303 Similar opaque requirements are established in Article V of the GATS for economic integration areas in services (see next subsection for further details).

for this may be political but part is also because of the inability to substantively agree on the interpretation of these key concepts.

By the time the Uruguay Round negotiations got underway (1986-94), the so-called "second wave" of regionalism had begun. The catalytic event was the creation of the US-Canada free trade agreement (1989), prefigured nearly four decades earlier. For many, it was a momentous occasion that reflected a fundamental shift in US priorities from multilateralism to regionalism. Hence the negotiations included efforts at strengthening multilateral disciplines on RTAs.

The Uruguay Round produced the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. The Understanding seeks to clarify the criteria and procedures for the assessment of new or enlarged agreements and to improve the transparency of notified agreements. With respect for example to the assessment of customs unions, it provides specific guidelines on how to calculate the "general incidence of the duties and charges" that prevailed before and after the establishment of the Agreement. It establishes 10 years as the "reasonable length of time" for an RTA to be completed. With respect to transparency, it requires all notified RTAs to be examined by a WTO working party in accordance with the provisions both of the GATT and the Understanding.

After the creation of the WTO in 1995, the Committee on Regional Trade Agreements (CRTA) was established to carry out this examination function. The Committee was established with the mandate to assess the compliance of the various regional trade agreements with the relevant WTO rule and to consider the implications for the multilateral trading system. As of 1 March 2007, more than half of the 194 notified RTAs have either been examined or are in the process of being examined. Fourteen are under factual examination; the factual examination of 62 RTAs have been concluded; the reports for 5 RTAs are under consultation; and 19 RTA examination reports have been adopted. However, due to questions on the interpretation of the provisions contained in Article XXIV, Members have not reached consensus and finalized any of the examinations of the CRTA.[304]

Faced with the clear difficulties in the surveillance function of the WTO and concerned by the increasing number of RTAs, in Doha, the multilateral effort at providing some oversight of RTAs continued. WTO Members agreed on negotiations aimed at "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements." The negotiations were pursued along two tracks: identifying the issues for negotiation, including "substantive" issues (e.g. systemic and legal issues) and holding consultations on procedural issues related to transparency of RTAs.

Negotiations over substantive issues have shown great complexity and have experienced limited progress. As far as procedural issues are concerned, on 14 December 2006, the WTO's General Council established on a provisional basis a new WTO transparency mechanism for all regional trade agreements (RTAs).[305] Members are to review, and if necessary modify, the decision, and replace it by a permanent mechanism adopted as part of the overall results of the Doha Round. The transparency mechanism requires early announcement of the RTA. This early announcement can take place after the RTA has been just signed or even as early as during the negotiation phase of the RTA. The mechanism also requires early notification of the RTA to the WTO, no later than the parties' ratification of the RTA, or application of relevant parts of the agreement, and before the application of preferential treatment between the parties. The consideration of the RTA shall be based on a report of the WTO Secretariat, which shall be "factual" and "shall refrain from any value judgement." The aim is to improve the surveillance role of the WTO. As of June 2007, factual presentations have been prepared on a total of nine RTAs in the areas of goods and services.[306]

304 However, during the GATT, the Working Party examining the Czech Republic-Slovak Republic Customs Union was able to conclude that the Agreement was consistent with the provisions of GATT Article XXIV.

305 WTO document WT/L/671.

306 For an example of factual presentation see WTO document WT/REG169/3.

(b) The "substantive issues" in the debate surrounding RTAs in the WTO

What are the main issues that remain open in the debate on RTAs in the WTO? And, how could this debate help to minimise the risks of distortions associated with RTAs?

All RTAs grant preferential market access to their members. However, RTAs may differ greatly as to the set of products eligible for preferential treatment, the margin of preference granted on each product, the pace of tariff reduction and the level of the MFN barrier of the RTA member-countries against third parties. All these elements are essential determinants of the overall extent of preferential market access granted by a RTA, its economic effects and the degree of compatibility with the multilateral trading system.

From a legal perspective, Article XXIV defines the market access requirements that each RTA (be it a free trade area or a customs union) should satisfy. In particular, Article XXIV allows the formation of RTAs under two key conditions. First, in order to qualify under Article XXIV, customs unions and free-trade areas are required to "eliminate" duties and "other restrictive regulation of commerce" on "substantially all trade" within a "reasonable length of time". Second, with regard to extra-regional trade barriers, Article XXIV requires that the formation of a RTA should not result in barriers toward third-parties higher than those prevailing before the formation of the RTA.

Similar requirements are established in Article V of the GATS for economic integration areas in services. In particular, Article V requires that an economic integration area must have "substantial sectoral coverage" of the trade in services among the parties and that "substantially all discrimination" has to be eliminated either at the entry into force of the agreement or on the basis of a "reasonable time-frame". Furthermore, with regard to extra-regional barriers, Article V requires that the agreement shall not raise the overall level of barriers to trade in services compared to the level before the formation of the economic integration agreement.

The main debate surrounding RTAs has focused on the interpretation of these conditions in terms of the depth and the extent of product coverage of trade liberalization, the transition period and the policy instruments on which preferential rules should be applied. To a large extent the interpretation of these provisions remains a challenge for further negotiations.

(i) The sectoral coverage

The requirement established in Article XXIV that barriers to trade should be eliminated on "substantially all trade" suggests that the sectoral coverage of the liberalization effort should be extensive. Most likely, the depth and extent of trade liberalization required was aimed at limiting the proliferation of RTAs, at avoiding RTAs that were formed with the intent to create sectorally discriminatory arrangements. The Understanding on the Interpretation of Article XXIV of GATT includes among the benefits of free-trade areas and customs unions their contribution to the expansion of world trade[307], and re-affirms how this is larger the more comprehensive is the coverage of the agreement and smaller if any major sector is excluded. But, neither Article XXIV nor the understanding defined the precise extent of the required product coverage.

Similarly, Article V of the GATS requires that an economic integration agreement must have "substantial sectoral coverage" of the trade in services among the parties. A footnote clarifies that this requirement should be "understood in terms of number of sectors, volume of trade affected and of the four modes of supply". But the extent of the sectoral coverage required remains unresolved.

[307] Note that from an economic point of view not all trade expansion generated by the formation of a RTA is desirable as some of the trade created by the RTA may simply reflect trade diversion from countries outside the agreement. See discussion in Section C on this point.

The debate

The discussions aimed at clarifying this wording have focused on whether a more precise definition of "substantially all trade" should be established in terms of trade volumes, tariff lines or sectoral coverage. This quantitative approach favours a definition of product coverage based on a statistical benchmark such as a certain percentage of tariff lines and/or trade between the parties that the agreement should cover. However, it has been objected, this criterion does not rule out the possibility that entire sectors could be excluded. Furthermore, a threshold based on trade volumes may be biased by the existence of high tariff barriers in the base year.[308] Beyond these statistical benchmarks, discussions have also touched on other considerations. For example, "substantially all trade" could imply that no sector (or at least no major sector) would be excluded from regional liberalization. In practice, this debate has revolved around whether agriculture could be excluded in the regional integration process.

A number of more specific methodological issues related to the definition of "substantially all trade" have been raised and remain under discussion. For example, one issue raised with regard to the use of tariff lines as a basis for the definition of the concept of "substantially all trade" is what threshold level should be used. Australia, for instance, has suggested using a threshold of 95 per cent of all Harmonized System (HS) tariff lines at the six-digit level. But other countries favour a lower threshold. Still other Members have objected to the setting of a numerical threshold in the first place.

A related issue is how this threshold level should be calculated. Clearly, calculations should be done on tariffs at the six-digit level as this is the maximum common level of sectoral disaggregation. But, this opens up the issue of how tariff lines below six-digit should be treated. Should a six-digit sector be counted as liberalized only if all tariff lines at a deeper level of disaggregation (10 or 12 digits) have been liberalized or would it be sufficient that just the majority of tariff lines have been liberalized? Furthermore, Article XXIV requires that duties should be "eliminated". Therefore, it is unclear whether tariff lines where duties have been reduced rather than eliminated should be included in the count of liberalized tariff lines.

Another issue is whether the requirement to liberalize should refer to each individual country in the preferential agreement or should it refer to the overall trade in the area? This is especially relevant for North-South RTAs where the required threshold level of trade liberalization may be achieved through asymmetric liberalization, whereby only the developed party liberalizes, or the developing party liberalizes but to a much lesser extent.

Regarding Article V of the GATS, despite the clarification contained in the footnote that the wording "substantial sectoral coverage" should be understood in terms of number of sectors, volume of trade affected and modes of supply, the question of the extent of liberalization needed to meet the requirement of "substantial sectoral coverage" remains unsettled. It has been argued that the flexibility allowed by the word "substantial" does not allow for the exclusion of essential services (e.g. transportation) and that no economic integration area should exclude investment and labour mobility (that is, Modes 3 and 4). Yet, a consensus on the precise interpretation has not emerged.

Another issue related to the interpretation of GATS rules is that of the adequate level of disaggregation, that is whether the examination of the extent of the coverage should take place at the level of sectors or sub-sectors and whether the requirement of substantial coverage should be defined in terms of percentage of sectors/trade excluded. It has been noted that, given the unavailability of reliable data on trade in services, it would be difficult to define a requirement in terms of percentages of trade and that a sector-by-sector examination should be favoured relative to one at the sub-sectoral level.

[308] The issue may be of relevant importance in the case of near-prohibitive initial tariffs, for example. In this case, it would be possible to exclude from the regional liberalization also a sector with a high potential for trade between the parties, on the basis that the existing trade is very low.

From an economic point of view, the definition of the required coverage and depth of integration for regional trade liberalization has important implications both in terms of welfare consequences of the formation of a RTA and its interaction with the multilateral trading system. But, economic theory does not provide a precise guide on how to evaluate Article XXIV if global welfare is the objective. For example, the requirement that RTAs eliminate protection on substantially all trade may help to avoid a proliferation of RTAs by raising the bar to their formation. If RTAs with very limited sectoral coverage were allowed, it would be possible for countries to create RTAs by simply swapping trade diverting concessions. This will increase the risk that third parties outside the agreement suffer from being discriminated and that RTAs will be stumbling blocs to the process of multilateral liberalization, as preferences granted through RTAs, especially trade diverting RTAs, may generate vested interests against MFN liberalization.[309]

On the other hand, economic theory shows that there are circumstances when the likelihood of trade diverting RTAs is higher, the deeper the level of integration within the region. Suppose, for example, that countries A and B form a RTA and that producers of good *x*, say agriculture, in country B are inefficient relative to country C (that is they produce at a price higher than producers in country C). In these circumstances, if the margin of preference[310] that A provide to B is sufficiently low, consumers in country A may still find it convenient to import from C and the RTA may not generate trade diversion. However, a large margin of preference may displace imports from C (that continues to face import barriers) in favour of imports from B (that benefit from preferential access into A).

The interpretation of the required extent of sectoral coverage in existing RTAs

How has "substantially all trade" been interpreted in RTAs? Have RTAs eliminated duties? Do RTAs allow for special treatment for developing countries?

The WTO Secretariat (2002) conducted an analysis of some 47 RTAs, mostly arrangements involving the EC, EFTA and CEFTA. It found that the agreements resulted in the elimination of most, if not all, duties on industrial goods either on the date of entry into force of the agreement or during the transition period of the agreement. The goal of free trade in industrial products appeared to be the accepted norm. However, agricultural trade remained subject to exceptions with average agricultural preferential tariffs remaining high and tariff peaks quite prominent.

A more recent study by the Inter-American Development Bank (IADB) (2006) involved 20 RTAs, primarily in Latin America and the Asia-Pacific region. The study found that most of the RTAs eliminated duties on at least 90 per cent of their imports from RTA partners by the 10th year of implementation of the agreement. The same conclusion is reached if, instead of the share of imports from RTA partners, one uses the number of tariff lines or trade-weighted tariff lines as the relevant indicator. But there are important caveats to this conclusion. Products such as agriculture and textiles and clothing, which have historically been difficult to liberalize at the multilateral level, also appeared to encounter significant problems in RTAs. In RTAs, the transition period for completely removing tariffs on these products is significantly longer (sometimes 20 years) than for other goods. And while tariffs may, at some distant point be completely eliminated on these sensitive sectors, non-tariff measures ensure an outcome that is less than free trade. These non-tariff measures include restrictive and complicated rules of origin and special safeguard measures.

The free trade commitment is also decidedly reciprocal. Even though the IADB study found that RTA partners varied markedly in the share of tariff lines subjected to liberalization in the first few years of implementation, convergence was eventually achieved so that at least 90 per cent of the tariff lines were duty free by the 10th year of implementation. There is a marked absence of the principle of "special and differential treatment" in the RTAs even though many of them have both developed and developing

309 See also subsection B.2 and Section C

310 The preference margin is defined as the difference between the MFN tariff and the preferential tariff applied within the region.

country Members. The elimination of barriers to trade is expected as much from the developing country as from the developed country member. But while the principle of special and differential treatment may not be explicitly present, there appears to be some reflection of it in the staging of the tariff reduction programmes. The IADB study found that the rate at which developing countries eliminated duties on RTA partners' trade was slower than developed countries; although the difference does not appear to be substantial (developing countries eliminated duties on 89 per cent of tariff lines by the 10th year of implementation compared to 95 per cent of tariff lines for developed countries).

As far as regional liberalization in services trade is concerned, Roy et al. (2006) reviewed the services commitments in 28 RTAs.[311] About 17 of the RTAs take a negative list approach to services liberalization. They found that the services commitments in Mode 1 and Mode 3 tended to go significantly beyond GATS bindings both in terms of coverage and improvements in the commitments, and that this was true not only in key infrastructure sectors, such as finance and telecom, but also in more traditionally difficult ones such as audiovisual or education services. In terms of coverage, they found than more than two-thirds of the countries reviewed take new or improved bindings in at least 25 per cent of services sub-sectors (their study covers 152 sub-sectors for mode 3 and 142 for mode 1). On average, the percentage of sub-sectors committed in the countries reviewed increased from about 40 per cent in GATS to over 70 per cent in RTAs for Mode 1, and from about 50 to over 80 per cent, respectively, for Mode 3.

(ii) The requirement of a "reasonable" transition period

Linked to the definition of "substantially all trade" is the debate over what constitutes "reasonable length of time". The link is determined by the fact that the length of the transition period affects when "substantially all trade" has to be calculated and how the liberalization should proceed during the transition period. The Understanding on the Interpretation of Article XXIV of GATT states that the "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed ten years only in "exceptional cases". But, there is no clear consensus on what constitute "exceptional cases" and what should be the pace of liberalization within the transition period.

Similarly, in GATS the wording is "reasonable time-frame". This has been argued to mean a ten-year limit (like for GATT Article XXIV), a five-year limit or any time limit to apply on a case-by-case basis. How to deal with a gradual and selected extension of certain GATS obligations (such as national treatment) is also an issue that remains to be settled.

What is the average length of the transition period in existing RTAs? The IADB (2006) study discussed above highlighted that by the 10th year of implementation of the agreement on average 90 per cent of regional trade has been liberalized, although for products such as agriculture and textiles and clothing, the transition period for the complete removal of tariffs is on average much longer, sometimes as high as 20 years.

In general, it is recognised that some flexibility should be given to RTAs involving developing countries. There is no clear consensus on what type of flexibility rules should be adopted, but it has been suggested that this may include longer transitional period for developing countries.

From an economic point of view, the need for a certain transition period finds its justification on the basis of the possible adjustment costs arising from trade liberalization. When trade is liberalized firms need to adjust to the new competitive environment. For example, they may need to invest in new technologies or higher quality products. This would require funds and time. Gradual liberalization may provide firms with the necessary time to internally finance these adjustment costs through profits. Longer implementation periods may be justified on the ground that firms face higher adjustment costs and that financial markets are inefficient in these countries.[312]

311 As of 1 March, 2007, 44 RTAs have been notified under GATS Article V (Economic Integration).

312 Bacchetta and Jansen (2003).

The IADB (2006) finds that on average developing countries eliminated duties on RTA partners' trade at a somewhat slower pace than developed countries. In fact, while developed countries eliminated duties on 95 per cent of tariff lines by the 10th year of implementation of the agreement, developing countries eliminated duties on 89 per cent of tariff lines by the same period.

(iii) The debate over "other restrictive regulations of commerce"

Article XXIV also requires that beside duties RTAs eliminate "other restrictive regulations of commerce". However, the GATT Agreement does not provide a definition as to which trade policy instruments should be regarded as "other restrictive regulations of commerce".

From an economic point of view, there are a number of policy instruments on which RTAs may legislate and that may qualify the depth and the extent of preferential market access provided by tariff liberalization, as well as the impact on third parties. Among these instruments there are tariff rate quotas (TRQs), safeguard and anti-dumping measures and rules of origin (RoO). TRQs can limit the extent of market access provided by the preferential arrangement, as they can limit the quantity of imports that benefit of preferential market access. The use of safeguards can also strongly limit market access.[313] For example, RTAs may define additional duties in the case their markets were disrupted by imports from their partner. Finally, RoO[314] may be designed for protection (Krueger, 1997 and Krishna and Krueger, 1995). Suppose that two countries A and B form a FTA. Suppose as well that country A is a very inefficient producer of an intermediate product *x*, say tyres, used in the production of cars that country B exports. Then, in the absence of specific constraints, country B will import tyres from the rest of the world at the MFN tariff and will export cars to A under the preferential regime. But, RoO can be designed in such as way that it may be convenient for country B to use tyres produced in country A (although it has to pay a higher price than if they were imported from the rest of the world), in order to qualify for preferential treatment in the market for cars of country A. Focusing on NAFTA, recent economic empirical studies have shown that RoO effectively limit Mexico's duty free access to Canada and the United States (Estevadeordal, 2000; Cadot et al. 2005). Focusing on the EU, Augier et al. (2005) shows that non-cumulation represents an effective barrier to trade, significantly reducing bilateral trade.

It is important to note that, like in the case of tariffs, there may be an inverse relationship between the degree of preferential liberalization provided with respect to "other regulations of commerce" and the likelihood of an adverse impact on third parties. For example, to the extent that TRQs entitlements of regional partners are provided in addition to existing entitlements (e.g. under the WTO Agreement on Agriculture), they may have a negative impact on third parties. This is because an expansion of the overall quota entitlements may reduce prices in the sector, thus eroding the quota rents for all pre-existing quota-holders. The formation of the RTA will have a negative impact on third parties, even if no more restrictive barriers are raised against them.

(iv) The requirement that RTAs should not result in higher barriers against third parties

Article XXIV allows the formation of a FTA provided that "the duties and other regulation of commerce" imposed on countries outside the agreement "shall not be higher or more restrictive than the corresponding duties and other regulations of commerce"[315] existing before the formation of the RTA. With respect to customs unions, the rules are similar but it is required that duties and other regulations imposed on countries outside the union shall not "on the whole" be higher or more restrictive than the general incidence applied before the formation of the customs union. The Understanding on the Interpretation

313 See Section C for a discussion on safeguard measures in the multilateral trading system.

314 In free trade areas, RoO are set to prevent goods that can enter the free trade area through the country imposing the lowest import tariff.

315 There is no definition of what may be meant by other regulation of commerce. And interestingly, there is no other reference to "other regulation of commerce" in the GATT.

of Article XXIV of GATT re-affirms that the purpose of customs unions and free trade agreement "should be to facilitate trade between the constituent territories and not raise barriers to trade of other Members with such territories".

Turning to GATS, Article V establishes that parties must ensure that the agreement does not "raise the overall level of barriers" to trade in services with respect to third parties. But here an important methodological problem arises which makes it difficult to apply this provision. Data limitation and differences in regulatory mechanisms across countries impede an objective assessment of the level of trade barriers both before and after the establishment of the RTA.

From an economic point of view, the simple requirement that overall barriers against third countries should not be raised does not ensure that the formation of a RTA does not have negative welfare consequences on countries outside the agreement. On the contrary, economic theory has indeed highlighted how the increase in intra-RTA may actually come at the expense of non-RTA members who lose out from trade diversion and from deterioration in their terms of trade, even when barriers against third parties remain unchanged (see Section C).

Interestingly, the Understanding on the Interpretation of Article XXIV of GATT adds that RTAs should "to the greatest possible extent avoid creating adverse effects on the trade of other Members". This requirement appears to go in the direction of considering adverse welfare consequences of the formation of free-trade areas and customs unions against third parties. Indeed, in the specific case of customs unions, economic theory has also shown that RTA partners may avoid imposing losses on third-parties outside the agreement by adopting a common external tariff that leaves the volume of trade between the non-members and the customs union members unchanged (see Box 9 in Section C for an explanation of the Kemp-Wan theorem). Given the continuing increase in the number of RTAs, reducing their adverse effects on non-RTA members will be an important challenge for the multilateral trading system (see subsection (d) below).

(c) The interaction between RTAs and progress in the multilateral trading system

The theoretical literature has provided contrasting answers to the question of whether RTAs are building blocs or stumbling blocs to the multilateral trading system.

(i) Are RTAs stumbling blocs or building blocs?

Arguments in support of the building bloc view

Several arguments have been put forward as to why regionalism can complement the multilateral trading system and be a driving force for multilateral trade liberalization.

One argument is that RTAs increase the pressure to act in the direction of further multilateral liberalization. The argument applies to both RTA members and non-RTA members. With regard to the former, the proliferation and expansion of RTAs de facto erode existing preferences, thus reducing the opposition to multilateral liberalization. With regard to the latter, it is argued that by reducing the margin of competitiveness of countries that remain outside the agreement relative to partner countries, RTAs increase these countries' incentive to move on the multilateral front to avoid trade diversion.[316] Furthermore, the formation of RTAs – especially customs unions – may prompt non-member countries to pursue more liberal multilateral trade to avoid aggressive retaliation in the future given the increased market power of the regional arrangement (Bagwell and Staiger, 1997b).

[316] An alternative way is to sign a compensatory regional trade agreement. This case is discussed below in the context of the domino theory.

Another argument in support of the complementarity between regionalism and multilateralism is that RTAs act as laboratories of international cooperation, whereby trade cooperation can be tested among a small number of countries first before being extended multilaterally. Political economic models of trade support this view. A government may lack the political support necessary to pursue a global free trade policy. But, it may be able to achieve this goal after joining a RTA. For example, Ethier (1998) argues that RTAs may help a government to mobilize domestic forces in support for the multilateral trading system through enhanced FDI. Suppose that the government of a country, which has not yet acceded to the WTO, is convinced of the need for economic reform and of joining the multilateral trading system. However, it faces political opposition to both courses of action. By initially entering into a preferential trade arrangement with a developed country, the reforming country would be able to attract FDI from its RTA partner and from other foreign investors, because of its access to the market of its RTA partner. These gains tilt the political balance within the country in favour of economic reform and accession to the WTO and subsequently allow the government to successfully proceed along both fronts.

Focusing on the impact of RTAs on enforcement, Bagwell and Staiger (1999b) show that the anticipation of an exogenous strengthening of regionalism may offer a temporary boost to multilateralism, as it may increase the perceived penalty from deflecting multilateral rules. That is, the market power effect that accompanies the formation of a customs union may temporarily work in favour of multilateralism, as it enables member countries to impose a more credible threat of punitive action against defection. Bagwell and Staiger also propose the following interpretation as to the enhanced multilateral cooperation under the GATT over the transition period corresponding to the formation and the extension of the EC. " If it is accepted that the EC customs union offered its member countries greater market power than they would have otherwise possessed, than it can be argued that the enhanced multilateral cooperation was spurred in part by the growing awareness of the United States and others that a breakdown in multilateral cooperation may have especially dire consequences in the presence of a united group of the European countries" (Bagwell and Staiger, 2002, p. 119).[317]

Recently, Baldwin (2006) has made the argument that RTAs will trigger the forces for multilateral liberalization by generating the need for "taming the tangle" of regionalism. The argument relies on the interaction between the "domino" theory of regionalism and the "juggernaut" theory. According to the domino theory, the formation of a RTA raises the value of entering into a RTA for non-members, and therefore leads to a spate of RTAs in the future (Baldwin, 1995). The domino theory starts from an initial political economy equilibrium characterised by the presence of a RTA, in which pro-membership forces (exporters that gain from preferential access) balance anti-membership forces (import-competing sector that suffer from stronger competition within the region). Then, in these circumstances, suppose that there is shock, such as deeper integration in an existing RTA or the formation of a new RTA. This will change the political equilibrium in non-member countries. The profits of the firms exporting to the region, but located in a non-member country, will suffer from their cost disadvantage. Therefore, they will turn more fiercely in favour of joining the bloc. If the government of the country was (before the shock) close to being indifferent between the option of joining the bloc or not, after the shock it will be in favour of joining. If the bloc is open, there will be an enlargement.[318] If it is closed, then the country may look for compensatory regional agreements with other excluded countries. In both cases, the new equilibrium will trigger a fourth country to join and so on. Historically, Baldwin (2006) claims that the domino effect was present in Europe during the five enlargements phases (1961, 1973, 1986, 1994, 2004).

The proliferation of RTAs predicted by the domino theory may lead to a process of gradual liberalization. To put it in Baldwin's terms, the domino effect can start the juggernaut rolling (Baldwin 1994; Baldwin and Robert-Nicoud, 2005). The argument is straightforward when RTAs are trade creating.[319] The export

[317] In contrast, the formation of a FTA may temporarily enhance multilateral tensions. This is because expectations of trade diversion reduce the expected losses from deviating from multilateral rules (Bagwell and Staiger, 1997a).

[318] Notice that the domino theory does not investigate whether the expansion is in the interest of the incumbent countries. It is simply assumed that the incumbent will allow new entrant countries to join.

[319] See Box 8 for a definition of trade creation.

sector will expand and the import competing sector will shrink. This process will imply that when another round of reciprocal multilateral negotiations is launched, pro-liberalization political pressure will be stronger and anti-liberalization pressure weaker. Hence, RTAs are building blocs for multilateral liberalization.

The growing network of RTAs can be associated with multilateral liberalization regardless of whether RTAs are trade creating or trade diverting. The argument is as follows. If enough criss-crossing regional agreements are established and liberalize enough trade, it would only be a matter of time before increasingly incoherent and overlapping rules would induce business to pressure governments to harmonize these rules or make them multilateral. Essential elements in the political economy story behind this claim are: rules of origin (RoO) and the fragmentation of production. Since rules of origin are determined by the particular interests driving protection, they will be specific to each pair of bilateral trade relationships. Therefore, as bilateral and regional trade agreements proliferate, a "spaghetti bowl" of most likely incompatible RoOs will emerge. On the other hand, the fragmentation of production, by relocating firms that were originally in the hub-country into the spoke for example, will lower the support for existing rules of origin, while increasing the support for harmonization.

Arguments in support of the stumbling bloc view

According to the received theory of international trade cooperation, the main purpose of a trade agreement is to manage the terms of trade inefficiency that arises from a non-cooperative outcome. The multilateral trading system is able to solve this problem through reciprocal liberalization and the principle of MFN together. The principle of MFN ensures that all terms of trade externalities are channelled through the world price. Reciprocity, by neutralizing the world price implications of governments' tariff decisions, will ensure the volume of trade and welfare increases while the world price (terms of trade) remains unchanged. When MFN is violated, the principle of reciprocity is impaired. The intuition is that in a discriminatory environment governments are no longer just concerned with the total amount of imports (i.e. the world price), but also with the relative share of imports coming from each supplying country (i.e. local price abroad) as they enter under a different tariff –thus implying, for example, different tariff revenues. This generates local-price externalities that cannot be solved with reciprocity. The multilateral trading system is hampered in its ability to solve the terms of trade problem and thus regionalism (in particular free trade agreements) poses an important threat to multilateralism.[320]

Proponents of the stumbling bloc view of regionalism stress the risks that regionalism may reduce the enthusiasm or the resources to achieve further multilateral liberalization. One of their principle arguments is that preferences granted through RTAs may generate vested interests against MFN liberalization. RTAs may be trade diverting. In this case, a firm located in a country that is a member of the bloc, although inefficient, may be able to overcome the competition from a more efficient firm located in a non-member state, because it will benefit from preferential rates. Preferential rates act as a form of protection against non-members. Therefore, it is likely that an inefficient firm will lobby against the prospects of future global liberalization, because it will not want to forgo its privileged access to the regional market. Since the protection received under the regional arrangement will reinforce the inefficient firm, its lobbying power will be higher with the regional agreement than without. Consequently, a RTA that is net trade diverting, not only is welfare reducing, but might also have negative effects on further liberalization of the multilateral trading system (Grossman and Helpman, 1995 and Krishna, 1998).

A third argument is that preferential arrangements may provide members with bargaining power that governments may not be willing to give up. The argument is especially valid for large/developed countries granting unilateral preferences to small/developing countries (Limão, 2002) and explains why industrialized countries may slow down multilateral liberalization following a RTA with a small developing country.

[320] Bagwell and Staiger (1998) also show that the effects can be different between a FTA and a customs union (CU). The intuition is that, if countries that form a CU are sufficiently similar, a union will approximately behave as a single (larger) country. Therefore, as long as the common external tariff conforms to the MFN principle, the principle of reciprocity can deliver an efficient outcome.

In North-South RTAs, large countries may benefit from preferential agreements with small countries, as they may be able to engage in cooperation on non-tariff issues, such as labour market or environmental standards, migration and intellectual property. Therefore, they may have an incentive to slow down multilateral liberalization in order to maintain a certain bargaining power *vis-à-vis* the relevant partners. Recent evidence that the average extent of liberalization at the multilateral level by the US and EU is lower in products that are imported from regions (including small countries) with which these countries have regional arrangement (Limão, 2006; and Karacaovali and Limão, 2005) conforms to this prediction.[321]

Fourth, RTAs may erode the political support for multilateral liberalization. Using a political economy model based on the median voter, Levy (1997) shows that RTAs will thwart any further attempt at multilateral liberalization, if they provide higher gains than multilateral liberalization for over 50 per cent of the voting population. Levy argued that a bilateral free trade agreement can undermine support for multilateral free trade because it may offer the median voter better conditions. Suppose for example that two identical countries form a FTA. In this case the median voter will gain (as a consumer) from the access to a larger variety of goods but (as a worker) will not suffer from any price/wage change. The remaining variety gains offered by a move to a multilateral free trade agreement may be insufficient to compensate the median voter for the factor-price changes that will follow multilateral liberalization.[322] Therefore, any move to multilateralism will be blocked.

Fifth, RTAs may increase the adjustment costs associated with multilateral liberalization, thus rendering multilateral liberalization less attractive. Suppose that in order to produce, firms have to make sector-specific investments. Suppose as well that a government announcement to negotiate multilateral liberalization is not perceived by agents as a credible commitment, while they expect a particular regional trade agreement to emerge. If this region's agreements maintain high tariffs relative to the rest of the world, producers in the bloc will expect the prices of the goods produced outside the bloc to be high. Therefore, they will invest in this sector. The opposite will occur in the rest of the world. These investment decisions will create inefficient "sensitive sectors" that will lower ex-post (after the formation of the RTA) the value of multilateral liberalization. This is because multilateral liberalization will require that these sensitive sectors be compensated and the cost will be higher than had multilateral liberalization been implemented first (McLaren, 2001).

A related argument is that competing RTAs with incompatible regulatory structures and standards may lock-in its members. It is commonly argued that the maze of different regulatory regimes poses a threat to the multilateral trading system, because it undermines the principles of transparency and predictability of regulatory regimes (WTO, 2003). Furthermore, these different regulatory systems may hinder further multilateral liberalization. A recent study (Piermartini and Budetta, 2006) has found evidence of distinct "families" of RTAs with differentiated rules on technical barriers to trade (TBTs). The study shows that a number of regional arrangements that have the EU as the hub include provisions to harmonize the standards of the spoke partner country to EU standards. To the extent that the adjustment to European standards requires making investments, these provisions may lock-in a country to the regional arrangement, thus making movement towards multilateral liberalization costly.

Sixth, RTAs can affect the ability to enforce commitments at the multilateral level. In particular, in a three country model, Bagwell and Staiger (1999b) show that if two countries (A and B) are good at collaborating on a bilateral basis (so that they can achieve an agreement for free trade) and the third one (country C) is not, then RTAs may lead to an overall deterioration in multilateral tariff cooperation. A and

321 See Section D for more details on these findings.

322 Changes in factor prices are the consequence of liberalization between diverse countries, that is, countries with different levels of capital-labour ratios.

B will establish free trade between themselves, but they will set a tariff against country C higher than the tariff they would set were the MFN rule rigidly applied. However, the opposite can occur too.[323]

Finally, engagement in regional negotiations absorbs resources away from multilateral negotiation, thus stalling the process of multilateral liberalization.

Overall, it is possible to distinguish two schools of thought as to the dynamic impact of discriminatory liberalization: one school highlights "discrimination" and provides a pessimistic prognosis on the effects of regionalism on multilateral liberalization, thus suggesting that regionalism represents a threat to the development of a global open economy. Proponents of this view stress: (i) the risks that RTAs may promote trade diversion rather than trade creation, thus reinforcing vested interests to maintain preference margins and raising concerns against multilateral liberalization on the ground of preference erosion; (ii) that RTAs may provide a bargaining tool to exchange preferential market access with concessions on non-tariff issues (such as standards), thus reducing the enthusiasm for MFN liberalization; (iii) that the proliferation of RTAs may crowd out negotiating resources necessary to achieve further multilateral liberalization; (iv) that competing RTAs may lock-in incompatible regulatory structures and standards; (v) the fact that RTAs, by creating alternative legal systems and dispute settlement mechanisms, may weaken the enforcement system of the discipline of the multilateral trading system; (vi) that the proliferation of a maze of different regulatory systems undermines the principles of transparency and predictability of the WTO.

The other school highlights "liberalization" and predicts a benign effect of regionalism on multilateralism, reaching the conclusion that regionalism can serve as a catalyst for further liberalization. Proponents of this view have highlighted that: (i) the proliferation and expansion of RTAs de facto erode existing preferences, thus reducing the opposition to multilateral liberalization; (ii) RTAs act as laboratories of international cooperation, whereby cooperation can be tested among a small number of countries before being extended multilaterally. This helps to build up the political consensus for further liberalization and may make multilateral liberalization politically viable; and, (iii) the network of overlapping RTAs, including trade diverting RTAs, may act as a positive force for the multilateral system by generating the need of rationalizing the system (or to put in Baldwin terms "taming the tangle").[324]

What does empirical evidence show about the interaction between regionalism and the process of multilateral trading system? Have RTAs worked as building blocks or stumbling blocks in the process of multilateral liberalization?

(ii) Systematic evidence is limited

Direct systematic evidence on whether RTAs slow down or accelerate multilateral liberalization is very limited. This is probably because theoretical predictions are difficult to test for two reasons: first, most of the theoretical literature focuses on whether the formation of RTAs reduces or not the incentive for a country to sign a free trade multilateral agreement. In contrast, in practice, countries negotiate multilateral liberalization with more or less ambitious liberalization scenarios, rather than opting for full or no multilateral liberalization. Therefore, a direct test of whether RTAs decrease the likelihood to sign multilateral free trade agreements is impossible. Second, other theoretical models (e.g. Bagwell

[323] In general, Bagwell and Staiger find that both a stumbling bloc and a building bloc relationship is possible between RTAs and multilateral trade liberalization. For example, on the bases of a repeated game model, Bagwell and Staiger (1997a and 1997b, 1999b) show that the impact of regionalism on multilateralism will depend: (i) on the form of RTA (free trade agreement reduce the incentive for while customs union may improve multilateral cooperation); (ii) the time period under consideration (FTA may lead to temporarily higher multilateral tariffs, but once the FTA is completed tariff rates between the home country and the non-FTA members will be no higher); and (iii) on the strength of the multilateral enforcement mechanism (RTAs are a stumbling block when multilateral enforcement mechanism is efficient, but they can be building block when the multilateral system is working poorly – anticipation of an exogenous strengthening of regionalism may offer a temporary boost to multilateralism as it may increase the perceive penalty from deflecting multilateral rules).

[324] See Baldwin (2006) and Section C.

and Staiger, 1999b, Limão, 2002) do focus on the level of MFN tariff and show that it may be higher or lower in the absence of RTAs. But, it is not possible to observe the degree of multilateral liberalization to which a country that is a member of a RTA would have committed to without the regional trade agreement. Therefore, empirical analysis has to rely on differences in liberalization patterns over time, across countries or across sectors. A general problem is that there are so many factors that may affect the multilateral tariff that it is difficult to identify the role played by RTAs.

Some empirical evidence exists of a positive correlation between the presence of preferential trade agreements (PTAs), including both reciprocal and non-reciprocal preferential trade agreements, and the level of multilateral tariffs. For example, Foroutan (1998) finds lower average MFN tariffs for Latin American countries with PTAs after the Uruguay Round. But, this correlation is not tested against the possibility of reverse causation.

More robust evidence based on the econometric analysis of the differences in multilateral tariffs across sectors appears to support the view that PTAs may work as stumbling blocks. This perspective is supported by two recent papers (Limão, 2006; and Karacaovali and Limão, 2005). Both papers examine the effect of RTAs on the multilateral trading system, analysing the differences in MFN tariffs between PTA and non-PTA goods, that is goods imported by countries within a PTA and goods imported from countries outside the preferential area. The papers focus on the behaviour by the US and the EC, respectively. They find that, after controlling for product characteristics, on average the cuts in multilateral tariffs were smaller for products that were being imported under a PTA relative to similar products that did not receive preferential treatment. In particular, for the EU, Karacaovali and Limão (2005) find that multilateral tariff cuts are only about half the amount in the goods imported duty-free under a PTA than on similar non-PTA goods. Moreover, they estimate that in the absence of PTAs, the EU would have reduced its multilateral tariffs on the PTA products by 1.6 percentage points more.

To a certain extent, indirect empirical evidence on whether RTAs pose a risk for multilateral liberalization may be provided by the literature on trade creation and trade diversion.[325] One issue that proponents of the stumbling block theory have highlighted as affecting the probability that RTAs are stumbling blocks is the risk that they may promote trade diversion rather than trade creation. Recent papers by Rose (2000), Feenstra et al. (2001) and Frankel and Rose (2002) find that regional trading arrangements, in general, are trade creating rather than trade diverting. However, at the level of specific RTAs this result appears sensitive to alternative estimation procedures (Ghosh and Yamarik, 2004).[326]

(iii) Anecdotal evidence supports alternative views

Anecdotal evidence can be found in support of both views of how regional trade policy approaches impact on the multilateral system. On the one hand, there is evidence that the issue of preference erosion has contributed in stalling multilateral negotiations.[327] For example, in the context of the Doha negotiating agenda in agriculture, Paragraph 44 of Annex A of the 1 August 2004 Decision makes a cross-reference to Paragraph 16 of the Harbinson text.[328] The Harbinson text proposes an arrangement that would slow down the pace of MFN liberalization for "tariff reductions affecting long-standing preferences in respect of products which are of vital export importance for developing country beneficiaries..". Similar concerns were raised in previous Rounds. In the Tokyo Round, for example, Brazil put a proposal on the table calling

325 Aitken (1973), Bergstrand (1985), Thursby and Thursby (1987), Frankel and Wei (1993 and 1995), Frankel and Wei (1995), Frankel (1997) and Soloaga and Winters (2001). For a review see OECD (2001).

326 For example, Bayoumi and Eichengreen (1998) find a positive trade creating effect for the EU and no evidence of trade diversion from enlargement of the European Union (to include Greece, Portugal, and Spain). In contrast, Frankel (1997) found significant negative effects from membership in the EC and Frankel and Wei (1995) find significant trade diversion.

327 The example actually refers to non-reciprocal preferences. But, preference erosion is equally an issue in reciprocal preferential trade agreements.

328 WTO (2002) document TN/AG/W/1/Rev.1 of 18 March, 2003

for MFN tariff-cutting exemptions to preserve certain preferential margins - as well as arrangements for improving and extending the Generalized System of Preferences.[329]

Furthermore, there is evidence that the concern for preference erosion has actually reflected in less multilateral liberalization. For example, in the Kennedy Round, the concern about the erosion of preferences provided by the EC to African and other LDCs through the Yaoundé Convention was linked to "the difficulties of achieving expanded conditions of access to European markets for products of developing countries" (Curtis and Vestine, 1971). Another often quoted example is the case of US tariffs on low-value rum (World Bank, 2005). Rum is one of the most important export products for the Caribbean region and it enters duty free in the US market under the Caribbean Basin initiative. In 1996, in the context of WTO discussions, the United States and EC negotiated lower multilateral tariffs on white spirits, including rum. Governments of some Caribbean countries' raised concerns that this may have eroded their preferences. In response, the United States introduced four new tariff lines for rum and established a MFN duty free regime in high value rum, but maintained MFN tariff on low value rum.

Finally, there is also evidence that the engagement in regional negotiations may stall the process of multilateral liberalization by absorbing resources away from multilateral negotiation. For example, during the Kennedy Round, with regard to agriculture, the Chairman to the Meeting of the Trade Negotiations Committee pointed out to the representatives of the EEC that "all delegations were aware that in many respects there was a real dilemma for them because they were really engaged in two operations at the same time": elaborate and put into force a common agricultural policy for the Community, and participate in international negotiations covering the same field. But that at the same time, other countries "found it very difficult to move resolutely ahead without, as matters stood, any indication as to the conditions which would govern international trade in products in which the Community played an important role" as an importer or as an exporter.[330]

On the other hand, there is also anecdotal evidence in support of the view that RTAs may work as a building block toward further multilateral liberalization. For example, one of the arguments of the proponents of a building block view of RTAs is that by reducing the margin of competitiveness of countries that remain outside the agreement relative to partner countries, RTAs increase these countries' incentive to move on the multilateral front to avoid trade diversion. These predictions seem broadly compatible with historical evidence. Perhaps the most compelling example of this argument is the launch of the Kennedy Round. A number of authors (Metzger, 1964 and Winham, 1986) have argued that this was prompted by the success of the European programme of liberalization. The need to avoid US exporters being discriminated against and losing competitiveness in the EU market prompted the US President to ask the Congress for tariff bargaining authority with the objective of reducing European external protection. This triggered the launch of a new Round of multilateral negotiations. More recently, according to a WTO report the failure to conclude Uruguay Round negotiations at the Ministerial Meeting in Brussels in December 1990 together with the subsequent increase in regional initiatives were "major factors in eliciting the concessions needed to conclude the Uruguay Round" in 1994 (WTO, 1995b, p.54).

A related argument is the timing of major RTAs and multilateral trade negotiations. In particular, Baldwin (2006) points at the "coincidence" that the last three Rounds of multilateral trade negotiations have started in tandem with major moves towards regional integration as evidence of the building block relationship between the two processes. First, the period 1958-1965 saw the formation of the EEC and EFTA together with the launch of the Dillon Round and the launch of the Kennedy Round. Second, the period 1973-1979 saw the enlargement of the EEC and the signing of the EEC-EFTA FTAs, where almost all tariffs in Western Europe were eliminated and, on the multilateral side, the launch of the Tokyo Round. Third, in 1986 the Uruguay Round was launched and, on the regional side, US-Canada FTA talks started and the European Single Act was signed.

329 WTO (1973) document MTN/W/2, 26 October, 1973.

330 The Summary of the Progress Report by the Chairman to the Meeting of the Trade Negotiations Committee on 5 May 1964, WTO document TN. 64/28, p.3

Another argument in favour of the building block argument is that RTAs will trigger the forces for multilateral liberalization by generating the need for "taming the tangle". Baldwin (2006) provides two examples of how the cost from overlapping RTAs can trigger a rationalization of the system or recourse to the multilateral system. One is the Pan-European Cumulation System (PECS) and the other is the WTO Information Technology Agreement (ITA). The PECS arrangements came into being because industrial trade was almost duty-free in Europe, but trade flows were beset by complex and intertwining origin and cumulation rules. With the increasing prominence of production sharing, or geographical fragmentation of production processes, these arrangements became burdensome. A constituency grew in the business sector to get rid of these obstacles to exchange and production, which eventually gave birth to PECS. Trade in information technology products was virtually duty free, but the impediments to efficiency arising from multiple preferential arrangements built pressure on governments to simplify arrangements – hence the ITA. While motivated by the same irritation with the tangle of RTA-induced administrative paraphernalia, there was a big difference between the PECS and ITA initiatives. PECS still meant disadvantages to outsiders, even though much of the problem had been addressed within the PECS zone. The ITA, on the other hand was non-discriminatory and open-ended, intended to attract new signatories over time. With the ITA, therefore, there are no insiders and outsiders – all interested parties can benefit from the ITA's welfare-enhancing elimination of the tangle.

In conclusion, it is fair to say that empirical evidence is too limited to draw strong conclusions as to whether RTAs affect the multilateral liberalization either way. However, both theoretical arguments and empirical evidence highlight that RTAs can pose threats to the progress of the multilateral trading system and that the risk appears to be higher in the case of RTAs that penalize third parties. On the basis of the discussion above, the next subsection address the issue of whether there is scope to ensure compatibility between the current multiplicity of overlapping agreements and the multilateral trading system.

(d) WTO rules: do they ensure that RTAs are compatible with multilateral liberalization?

The discussion above showed that one way in which the GATT, and subsequently the WTO, has dealt with regionalism was to increase the level of transparency of these arrangements. The new transparency mechanism adopted in December 2006 increases the level of transparency by mandating the WTO Secretariat to prepare a report on notified RTAs. While this report on the RTA has to be "factual" and refrain from any "value judgement", the focus of the report and the analysis could still function to alert the rest of the WTO membership to some of the rules and practices in RTAs that adversely affect non-RTA members. This may induce countries entering RTAs to increasingly adopt RTA rules that lead to greater complementarity with existing multilateral agreements.

Unfortunately, transparency may not be enough to ensure complementarity between regionalism and multilateralism. What can economic theory contribute? In the light of the discussions above and in Section C, various proposals to strengthen GATT Article XXIV so as to make regionalism more compatible with multilateralism will be examined.

One of the conditions imposed by GATT Article XXIV on countries entering into a free trade agreement is that "the duties and other regulations of commerce"[331] applicable to non-members at the establishment of the free trade agreement should not be higher or more restrictive than those that prevailed prior to the FTA. But the economic literature suggests that this condition is too weak in shielding non-FTA members from the cost of trade diversion. The requirement that the duties and other regulations of commerce imposed on non-FTA partners shall not be higher or more restrictive than before is unlikely to protect the latter from a welfare loss. Based on the Kemp-Wan theorem, a sufficient condition to shield non-FTA members from a welfare loss is, for each product, to preserve the volume of trade between the FTA members and non-members that existed prior to the establishment of the agreement (see discussion

[331] See discussion in subsection b.(iv) above.

of the Kemp-Wan theorem in Section C Box 9). This suggests that the duties and other regulations of commerce imposed on non-FTA partners may actually need to fall to achieve this heightened threshold.

In line with the Kemp-Wan theorem, McMillan (1993) has proposed an amendment of GATT Article XXIV by changing the focus from "the duties and other regulations of commerce" to import volumes. The proposed change requires that the members of an RTA (whether the RTA is a customs union or a free trade agreement) to maintain their aggregate level of imports from the rest of the world at the pre-integration levels. Note that the proposal is a simplification of the Kemp-Wan conditions. The Kemp-Wan theorem requires that for each product, the trade (imports and exports) with the rest of the world be maintained at their pre-integration levels. The McMillan simplification is intended to lessen the operational burden of applying the criterion, otherwise, the Kemp-Wan conditions would require examining the RTA's trade with the rest of the world in every commodity. While the proposal simplifies the operationalization of the Kemp-Wan conditions, it does so at some cost. With aggregate imports as the indicator, one can only be certain that taken as a whole, the rest of the world is not harmed. But one cannot be certain that there are no individual losers in the countries that make up the rest of the world.

In principle, the Kemp-Wan theorem should be as applicable to trade in services as to trade in goods. One leaves the welfare of non-members unchanged if the establishment of the RTA leaves the RTA's trade in services with non-members at the pre-integration level. In practice, however, this may be more difficult to achieve than in the case of merchandise goods. In the case of a customs union, the Kemp-Wan theorem requires adjustments to the common external tariff to preserve the bloc's merchandise trade with non-partners at the pre-integration level. But even in highly integrated regions (customs unions), there may be no equivalent analogue in trade in services to a common external tariff.

Very recently, Baldwin (2006) warned that the GATT/WTO has been a passive bystander as regionalism has exploded, and that it now risks a serious erosion of its relevance. However, he argues the WTO could play a valuable role in "taming the regionalism tangle". His argument relies on claim that today we have three "fuzzy" and "leaky" trade blocs – fuzzy because sharp lines cannot be drawn around the main blocs in North America, Europe and East Asia; and leaky because of links among the "spokes" in different "hub and spoke" arrangements. In this maze, complex and costly rules of origin raise political forces to rationalize the system of trade.[332] In addition, he claims, the WTO could play an active role in multilateralizing FTAs.

In particular, Baldwin sees three roles for the WTO under the present circumstances. Firstly, to undertake analytical work to provide a deeper understanding of the attractions of multilateralizing regionalism. By providing Members with qualified and impartial information on critical issues, the WTO could alert members about the risks associated with the proliferation of RTAs. Second, to provide a negotiating forum for the coordination/standardization/harmonization of rules of origin. The process of fragmentation of production will show the importance of a coordinated set of rule of origin or cumulation. The WTO could in this field play the same role as the ISO in standards. A timing intervention could help save on large costs. Finally, the WTO can provide a forum for the spokes in hub-and-spoke regional arrangements such that the spokes would be able to identify ways of dealing with the hegemonic power of the hub. In this context, the WTO may provide legal and economic advisory services on North-South and South-South agreements.

[332] See Section C.

6. DOING BUSINESS IN THE WTO

(a) Introduction

Any healthy institution, public or private, which experiences a six-fold increase in size over six decades and expands into numerous new areas of activity would expect to face a number of institutional challenges – internally as well as externally. The WTO is no different in this respect. Since its creation little over a decade ago, the WTO's membership has grown by more than 20 per cent, adding to its coverage more than a quarter of the world's population. The combination of a growing membership and the diversification of the organization into areas beyond traditional tariff-cutting has ensured that the WTO is a very different entity compared to its predecessor, the GATT. From the small, homogenous but largely obscure club of 23 Contracting Parties in 1948 to a near universal institution with 150 Members at very different levels of development and with divergent ideological persuasions the WTO has become a more political organisation. And whereas the GATT for much of its 50 year existence rarely generated public interest beyond the trade community, the WTO is now scrutinized by a general public concerned with a long range of new issues ranging from the impact of trade and trade policy on health, the environment, food security, human rights and economic development.

With its 150 Members and a decision-making process which operates by consensus, doing business in the WTO has become increasingly prone to gridlock. Whereas negotiations under the GATT were generally led by and conducted among a small group of developed countries the growing involvement and assertiveness of multiple actors combined with a widening, deepening and, above all, inter-linked agenda has made the internal decision-making process increasingly cumbersome. In this respect, the combination of the difficulties in concluding the Doha Round, the proliferation of Preferential Trade Agreements and the relatively modest advances in multilateral trade liberalization over the past decade are all important elements in understanding why the decision-making process of the WTO has been placed under increased scrutiny by the WTO membership and by an interested public. To be sure, the focus on governance issues, including the legitimacy of decisions and processes, is not unique to the WTO, but is a central theme for most public institutions at the domestic as well as international level. However, for a Member-driven organization based on a set of legally binding rules agreed by all Members, this is particularly relevant. The legitimacy of these rules depends crucially on the extent to which all Members feel they have participated in the process that produced the rules.

The WTO has been criticized by non-governmental organizations (NGOs) and other civil society organizations for its "democratic deficit" and the lack of "legitimacy" of its decision-making process. These criticisms initially targeted the lack of external transparency of the organization and the absence of a consultative interface which would allow NGOs a more direct role into the WTO process. However, over the past few years these terms have more often been applied when criticizing the internal decision-making process of the WTO and less in the context of external transparency. This transition from a predominantly process-oriented focus on the WTO to more nuanced and substance-driven lobbying is important when evaluating the relationship between the multilateral trading system and civil society. Over the past decade NGOs have come to the gradual realization that the most efficient way to influence the WTO agenda is through individual or groups of Members, rather than through the WTO Secretariat. Whereas the member-driven nature of the WTO was poorly understood and appreciated by most of these organizations in the early years, the last few years have seen a much better understanding of the notion that it is the WTO Members that drive the multilateral trading agenda. Accordingly, the focus of most NGOs has increasingly turned to the substantive agenda of the WTO and they have often become important providers of policy input and legal advice to Members on a broad range of trade issues. The role of civil society in the way that the WTO does business today is radically different from anything which took place in the GATT and is a clear indication of how the multilateral trading system no longer operates in a vacuum.

The following chapter has two objectives. First, we shall attempt to analyse the evolution in the internal decision-making process of the WTO and demonstrate how the membership has addressed this important

institutional challenge. We shall outline the specific practices which characterize the way the WTO operates today, including the transparency guidelines which underpin the consultative processes among Members. Second, we shall take a closer look at the evolution of the way in which the WTO interacts with civil society at large, particularly with NGOs. This section will aim to illustrate the extent to which external pressure and input have contributed to important changes in the practices that guide the WTO's relationship with the outside world and the way in which the outside world views and does business with the WTO.

(b) Decision-making in the GATT and the WTO

Whereas much of the 1980's debate of international institutions focused on the need for such organizations (Keohane, 1983) and the relevancy of their mandates, an increasingly important element in the current discussion of these institutions relate to the manner in which decisions are taken in such forums. This focus is hardly surprising given that some of the most powerful international institutions of today were founded in the immediate post World War II period and reflect the ideas and ambitions of a relatively limited number of developed countries. The emergence of a number of developing countries as international powerbrokers in their own right and the increasingly multi-polar nature of international affairs have stimulated a discussion on whether existing institutional structures adequately cater to the new multiple actor power equilibrium in the international economic system. The decision-making procedures and practices of an international organization, it can be argued, represent important parameters in evaluating the extent to which the institution reflects the diversity of its membership.

This is not the place for an in-depth analysis of the decision-making rules in other international organizations. Suffice it to say that generally such organizations will use one or a combination of decision-making rules for most non-judicial action. Some organizations will apply a system of majority voting among members based on one vote per member and others will subscribe to a weighted form of voting where voting power is allocated in proportion to a members' financial contribution to the organization. Another category of organizations will offer equal representation and voting power to its members and will take decisions by consensus or unanimity. The GATT and subsequently the WTO fall under this latter category which has its roots in a notion of sovereign equality of states (Steinberg, 2002). In fact, Steinberg (2002) notes that several other organizations such as ASEAN, MERCOSUR, NATO and OECD to name a few have complex structures and mechanisms to ensure that decisions normally are taken by consensus or unanimity.

The principal objective of the following section is to examine the evolution of the decision-making process from the GATT to the WTO. For the present purposes, decision-making refers to the informal and off-the-record consultative track as well as the more formal and recorded process and we shall endeavour to analyse both. This definition deliberately seeks to identify and include those aspects of the GATT/WTO decision-making process for which the system can be held responsible, e.g. consultations organized and hosted by elected chairpersons and by the Director-General. At the same time it excludes processes which fall outside the trading system's institutional framework, e.g. bilateral or plurilateral meetings among countries. The distinction is important, but often not understood.

(i) The GATT decision-making process

Apart from its Article XXV which called for one-country one-vote and decision by a majority of votes cast unless otherwise provided, the GATT treaty contained very little concerning decision-making. However, despite this clear and formal reference to voting, the GATT decision-making practice, with the exception of accessions and waivers, generally was characterized by consensus.[333] In the early years and until the late 1950s, a practice developed whereby the Chairperson of a meeting would take sense of a meeting

[333] It is worthwhile noting that Article XXV of the GATT authorized "joint action" by GATT Contracting Parties (CPs) and had been the basis for launching most negotiations. The Article permitted decisions that were supported by two-thirds majority of the votes cast, provided that this included more than half the GATT CPs. The Article was instrumental in the US push for launching the Uruguay Round. See Croome (1995).

rather than ask for a vote. Subsequently, and until the creation of the WTO, the GATT decision-making practice was that of consensus. The development of this practice of consensus was undoubtedly related to the increasing number of developing countries that joined the GATT from the late 1950s and onwards and whose numbers could have provided them with effective control of the system to the detriment of the developed countries.

The GATT decision-making process relied heavily on informal consultations. Although the practice of the so-called Green Room meetings among a few delegations had its origins in the Tokyo Round, these informal consultations became both more frequent and involved more Contracting Parties throughout the Uruguay Round (Blackhurst and Hartridge, 2004).[334] In addition, numerous informal groups began meeting outside the GATT to discuss how to move the negotiations forward. These groups performed an important function in terms of gradually exposing ideas and proposals which required further development before being aired in meetings among all the Contracting Parties. Although the ideological homogeneity of the original Contracting Parties of the GATT notionally was diluted somewhat as more countries signed up to the Agreement, the so-called Club Model of multilateral cooperation (Keohane and Nye, 2000) in which the agenda was determined and negotiations concluded among a relatively small group of developed countries persisted until and even well into the Uruguay Round. The success and relative efficiency of the negotiating rounds under the GATT were principally down to the fact that a majority of Contracting Parties were not asked to bring anything to the negotiating table, yet received the full benefits of the outcome. In addition, the pre-Uruguay Round trade negotiations by and large focused on the traditional and relatively uncontroversial tariff-cutting on industrial products.

Although the GATT decision-making process experienced its share of problems throughout its almost 50 year existence, particularly during the Tokyo and Uruguay Rounds, many of its practices were institutionalized in the WTO[335], including the practice of taking decisions by consensus. Whereas this practice was not articulated anywhere in the GATT, Article IX of the WTO Charter states "the WTO shall continue the practice of decision-making by consensus followed under GATT 1947.". [336] The footnote to this Article defines what consensus means[337]. Articles IX and X specify when voting is possible.[338]

Despite the commitment to consensus decision-making, the issue of voting in the multilateral trading system continues to generate considerable interest. In the GATT, as in the WTO, certain decisions were required to be taken by a qualified majority of the membership. For instance, decisions on waivers and accessions in the GATT were required to be taken by two-thirds of the membership. Similar provisions have been carried over into the WTO Agreement, although waiver decisions in the WTO now require a three-fourths majority. Under the GATT, decisions requiring such qualified majorities were regularly submitted to a formal vote by the membership, either by postal ballots or by roll-call votes at meetings of the Contracting Parties to the GATT. However, in connection with such decisions that were submitted to a vote under the GATT, it is worth noting that the texts of the draft decisions and the decision to submit the draft decisions to a vote were agreed by prior consensus.

334 The term Green Room has been the subject of considerable speculation over the years. One theory explains the term by the colour of the walls of the Director-General's conference room at the time while another adheres to the more traditional understanding of the green room as the space where actors would gather and prepare before going on stage.

335 For a comprehensive overview of the GATT and WTO rules on decision-making see Ehlermann and Ehring (2005).

336 The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, page 11.

337 The footnote states that "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decisions.".

338 Where not otherwise specified, and where a consensus cannot be established, simple majority voting is sufficient. In addition, there are three different methods of voting: (i) amendments to general principles, e.g. MFN and national treatment, require unanimity; (ii) amendments to issues other than the general principles require a two-thirds majority; and, (iii) interpretations of the provisions of the WTO agreements, including decisions on waivers, require a three-fourths majority vote.

The practice of submitting texts of draft decisions requiring qualified majorities to a vote by postal ballot, after consensus had been reached on the contents of the decisions, was initially followed in the WTO in the months immediately following its entry into force. This was the case, for example, in July 1995 when the General Council agreed to submit a draft decision on the Accession of Ecuador to a vote by postal ballot.[339] This way of proceeding reflected the old practice followed in GATT. However, the submission to a vote by postal ballot of a decision on the contents of which consensus had already been reached was soon considered unnecessarily complicated and time-consuming by Members and the General Council decided to streamline its working practice with regard to the taking of such decisions.[340] The adopted procedures make it clear that the General Council will seek a decision on a matter related to a request for a waiver or an accession by consensus and that, except as otherwise provided, a vote will be taken only where the matter cannot be decided by consensus. So far, all decisions in the WTO have been agreed by consensus and despite the amount of time and energy spent on designing WTO voting rules by Uruguay Round negotiators, both theoretical objections to voting and the practical reality ensured that the GATT tradition of consensus decision-making remained at the core of the multilateral trading system.

The agenda of the Uruguay Round complicated matters insofar as it included a number of new and sensitive issues and because it introduced the principle of a single undertaking, i.e. that the negotiated outcome would apply to all participating countries. The principle of the single undertaking and the fact that new rules would apply to all, although with varying degrees of implementation flexibility, meant that active participation in the decision-making processes mattered for all participants. The duration of the Uruguay Round and the numerous failed ministerial conferences which peppered the path to its eventual conclusion in 1994 were a genuine reflection of the complexity of the agenda as well as the fact that a much larger number of stakeholders participated in the negotiations. Nonetheless, the successful conclusion of Uruguay Round still required a bilateral agreement between the US and the EU on agriculture. The Blair House accord, incidentally, may be the last time that agreement between the two biggest traders in the multilateral trading system was enough to assure the completion of a wider negotiation. The numerous delays and the decision-making grid-lock which had characterized the Uruguay Round would foreshadow a number of institutional challenges, particularly in the area of decision-making, which would surface in the WTO.

(ii) The WTO decision-making process

Unlike the GATT, agreements reached in the WTO impose legal obligations on all Members. This places a premium on participation and the demand for active involvement in the WTO decision-making process has increased drastically among a large number of Members, particularly developing countries. It is generally accepted among the WTO membership that the extent of the WTO's legal obligations and the quasi-automatic nature of the dispute settlement mechanism are only possible because of the political participation which the consensus principle offers.

Strains in the WTO decision-making process became apparent as early as the first Ministerial Conference in 1996. Although the Singapore meeting was more of a stock-taking exercise and as such did not envisage significant trade-offs, the agenda nevertheless included a number of controversial issues which required consultation and negotiation. For a large number of developing countries the Singapore meeting was the first experience with the intense dynamic which tend to characterize WTO Ministerial Conferences and the majority of these countries came poorly prepared substantively and logistically (Pedersen, 2006). Lack of organization within individual delegations in turn made effective coordination and coalition building with other developing countries difficult. At Singapore, the core consultative process in charge of drafting the Ministerial Declaration took place among 34 countries and although the existence of this group was controversial, the antagonism it generated was neither coherent nor rebellious enough to seriously jeopardize its operation. Nevertheless, at the final informal session on 12 December 1996,

339 WT/GC/M/6.

340 On 15 November 1995, the General Council agreed on a statement by the Chairman on procedures regarding decision-making under Articles IX and XII of the WTO Agreement (WT/L/93).

designed to reach the consensus required for adoption of the Singapore Ministerial Declaration, a large number of those countries which had not been involved in the small group consultations articulated their dissatisfaction with the manner in which the text had been prepared and indicated that they were no longer willing to accept this lack of inclusiveness and transparency. However, back in Geneva these issues were placed on the back-burner and did not surface in earnest until the preparatory process for the 1999 Ministerial Conference in Seattle.

Much has been written about the comprehensive and complex substantive agenda before the WTO membership prior to Seattle and the extent to which the 14-month preparatory process became bogged down in a number of procedural issues. From a substantive as well as a pure decision-making point of view, the length and nature of the Seattle preparatory process had created a sense of expectation among delegations to see their own specific language reflected in the Chairman's text. The result became known as the "Christmas Tree" text as delegations submitted new proposals and specific wording which they expected to see in the Chairman's draft text. Little, if any, negotiation to narrow substantive differences took place and the second revision of the text ran a full 34 pages and contained some 402 square brackets. Despite a number of unsuccessful attempts to consolidate this draft through small group consultations so as to present Ministers with a manageable product the negotiation process in Geneva had clearly broken down. The issue which sparked off a procedural debate more than any other was the transfer of the ministerial text from the Geneva process to Ministers at Seattle and the extent to which the Chairman of the General Council and the Director-General could forward the draft document to Ministers or whether a consensus was required.

The key concern among many delegations was that even if it was acknowledged that the draft did not reflect agreement it would nevertheless become the basis for discussions. At previous occasions the Director-General had been given a mandate to prepare/assemble a draft declaration but forwarding the text to Ministers had always generated some controversy although never along the lines of the opposition before Seattle. Furthermore, the opposition to granting a mandate to the General Council Chairman and the Director-General to forward the text to ministers to a large extent was a reflection of the atmosphere of general distrust among WTO Members in 1999 following a rather acrimonious selection process for a new Director-General. Although it is beyond the scope of this section to analyse the substantive agenda at Seattle, it became clear even before the Ministerial Conference that outstanding differences among Members were too numerous and profound to be solved at Seattle.

The 1999 preparatory process and the Seattle meeting itself represent landmarks in terms of how the WTO operates today and in several ways set the agenda for the reforms of the practices that guide WTO decision-making. What set the Seattle preparatory process apart from previous experiences in the GATT/WTO was the active participation of a large number of developing countries and the unprecedented level of coordination which took place among a number of groups. The creation of the Like-Minded Group (LMG), the enhanced coordination of a number of developing country groups such as the African Group, the African, Caribbean and Pacific Group of States (ACP) and the Least Developed Country Group (LDC), as well as their increased use of external analytical expertise provided by a number of NGOs and international organizations, were all important elements in explaining the growing assertiveness and confidence of developing countries in the run up to Seattle. Although there is little doubt that the frustration felt by many countries at the Singapore Ministerial Conference can explain some of this improved coordination, the fact that the Seattle Ministerial Conference aimed at launching a new round of trade negotiations, including on a number of contentious issues for developing countries, provided an added incentive for these countries to cooperate.

As the conference got under way it became clear that many developing countries and the various groups to which they belonged were determined to carry over the momentum and influence which they had established in the Geneva preparatory process. This is a particularly important point because experience has demonstrated how the depth and automaticity of the Geneva coordination can be lost as the negotiating baton is handed over to capital-based officials and ministers. As the Seattle meeting entered its final days a large number of developing countries which had not been included in the small group consultations by either the facilitators or the Conference Chairperson publicly denounced the process

and, in an unprecedented move, signalled their readiness to veto any substantive outcome by the small group consultations on the basis of procedural objections. This threat was, of course, never tested as a substantive outcome from consultative processes never materialized and a draft text never appeared. However, it did send a very strong message that a large number of developing countries would no longer accept being mere spectators in the WTO and were ready to accept a larger degree of responsibility. When the meeting ended inconclusively on 3 December 1999 the issue at the forefront for a majority of WTO delegations was how to improve the internal transparency of, and participation in, the decision-making processes of the WTO.

(iii) WTO Members scrutinize decision-making process

Unlike the aftermath of Singapore, where the discussion of systemic/institutional improvements fell by the wayside, the follow-up to the flaws in the WTO decision-making process which had become apparent both before and at Seattle was immediate and represented the first time in WTO history that Members agreed to engage in a dedicated discussion at the level of the General Council of options for systemic reform. In this context it was particularly significant that a very wide spectrum of Members shared the sense that improvements to the decision-making process was required.

The consultative processes on the transparency and inclusiveness of WTO decision-making in 2000, and again in 2002, are significant from an organisational point of view.[341] The 2000 process took place against the backdrop of a failed ministerial conference which had underscored the institutional shortcomings of the consultative practices of the WTO. If anything positive came out of the Seattle meeting it was the wide-spread recognition among the membership that some sort of reform of the WTO decision-making process was necessary. The 2002 process, by contrast, did not come about as a result of a crisis or a break-down of negotiations. The successful launch of the Doha Round in late 2001 had overall seen a number of improvements in terms of the decision-making process and 2002 began with the articulation of a number of guidelines which should guide the operation of the newly established TNC and the work of the chairpersons of the negotiating groups.[342]

In the discussions on transparency in decision-making among Members two main arguments quickly crystallized. On the one hand, a number of delegations felt that the informal decision-making process lacked predictability and accountability and that a specific set of rules to guide the informal consultative processes would eliminate what they saw as sometimes arbitrary behaviour by WTO chairpersons. On the other hand, a number of countries argued that imposing specific procedures on the informal consultations would strait-jacket a process which required a maximum of flexibility to adjust to different circumstances (Pedersen, 2006). In addition, these countries argued that imposing a strict set of formal rules on the consultative process would simply ensure that the process would go outside the framework of the WTO with the negative ramifications that would entail in terms of transparency. Although the discussions were considerably more nuanced, this difference of opinion goes to the core of the trade-off between efficiency and transparency in decision-making. Following several informal and formal discussions it became clear that it would be impossible to adopt a specific set of rules on decision-making by the required consensus and that the articulation of a number of best endeavour practices remained the most realistic compromise outcome.

Although this outcome clearly fell short of what many delegations had hoped for, the principles and practices section in the Chairman's statement, which was endorsed by Members at the first meeting of the TNC on 1 February went further in articulating the role and obligations of chairpersons in ensuring inclusiveness and fair representation of different positions. While these principles were couched in best endeavour terminology and have no legal status, the context and timing of their articulation made them carry particular weight and have ensured that they remain the principal point of reference in the decision-making debate.

341 For a full overview of the discussions on internal transparency see Pedersen (2006).

342 TN/C/1.

(iv) New practices in WTO decision-making

The following will seek to provide an overview of those new practices which characterize the WTO decision-making process – in the day-to-day operation of the WTO and in relation to the conduct of Ministerial Conferences.

The WTO decision-making process, like the GATT before it, consists of formal and informal processes. In general, the former are on-the-record meetings from which minutes[343] will be available to delegations and the public within a few weeks after the meeting. The formal WTO meeting track is open to all Members of the organization[344] and the minutes provide the automatic transparency feature of this process. Whereas the formal meeting track is where WTO decisions are taken, the informal meeting track, also known as informal consultations, is where such decisions are negotiated and prepared. Such consultations aimed at building consensus among 150 Member Governments are often time-consuming, and involve discussions not only at various levels – bilateral, plurilateral and multilateral – but also in various settings, both formal and informal. The mechanics of this process is not unique to the WTO, but is a feature of most, if not all, international organizations. It remains a serious misconception that the WTO informal consultations in some strange way are different from similar processes in other international intergovernmental organizations or large non-governmental entities.

In the past, the informal consultative processes of the WTO have been the target of criticism among other things because of their exclusive nature, i.e. not all Members are invited to take part. Critics have also focused on the absence of summaries from these meetings although the entire idea behind informal gatherings is precisely that they allow participants to discuss and negotiate areas that would be impossible in a formal setting. However, informal consultations in the WTO today are subject to a much greater degree of transparency and predictability compared to the GATT and the early years of the WTO. For example, since 2000 Chairpersons of WTO bodies have followed a practice of announcing in formal meetings their intention to hold informal consultations and their intent of reporting back to the full membership on the outcome of such consultations.[345] Although a Chairperson may take the initiative to engage in such consultations, it is equally commonplace for the membership of a WTO body to request that he/she consults informally on specific issues before these are brought back to the full membership. Such requests are made by implicit recognition of the limits in terms of efficiency of open-ended meetings of all 150 Members. The Chairperson, of course, retains a large degree of autonomy in defining with whom and on what is to be consulted, but it has become increasingly customary for delegations who believe they should be consulted to contact the Chairperson or his WTO Secretariat aides directly in order to be included in a consultative process. The regular bodies of the WTO as well as the negotiating groups under the TNC have generally followed this approach and although delegations regularly articulate the need to maintain vigilance regarding transparency there is widespread recognition that the current practice as described above is striking the right balance between transparency and efficiency. The automaticity of the announcement of a consultative process and the reporting back on these discussions to the full membership has provided the WTO decision-making process with an element of predictability which did not exist previously. In addition, more countries participate more often in these consultative processes and participation in these meetings roughly reflects the proportionality between developing and developed countries in the WTO. In articulating the practices that should guide the decision-making process WTO Members also addressed the particular constraints faced by smaller delegations in the context of the ever increasing number of meetings. Specifically, the TNC has been mandated to keep the calendar of meetings under tight surveillance to avoid, as far as possible, a situation where more than one negotiating body meets at any given time.

343 Minutes of meetings are produced and translated into all three official languages of the WTO by the Secretariat. Minutes are not verbatim although they are produced from either audio tapes or written statements by delegations.

344 Exceptions are plurilateral agreements such as the Government Procurement Committee.

345 For a comprehensive overview of the role played by a WTO chairperson, see Odell (2005).

The increased transparency and predictability of the day-to-day business of the WTO decision-making process has also had a significant impact on the organization, preparation and conduct of Ministerial Conferences. In response to the confusion experienced by most delegations at the Seattle meeting, the Doha, Cancún and Hong Kong conferences introduced an increasing number of features to facilitate the work of delegations and increase transparency and predictability. At Doha the practice of setting aside two one-hour slots per day for delegations to coordinate their work and consult with others was initiated and this feature has been maintained ever since. In addition, the Doha meeting inaugurated the practice of having daily open-ended meetings to allow reports on the various consultative processes to be shared with the full membership. The rhythm of these transparency meetings mirrors the Geneva consultative practice and they have become fixed features at WTO Ministerial Conferences.

The Cancún and Hong Kong meetings represented a series of improvements over Doha. The participation of the Conference Chairpersons in the final meeting of the preparatory process represented an unprecedented commitment to ensuring continuity with the Geneva process. Similarly, the decision to announce the roster of facilitators prior to these meetings was widely welcomed by Members. At the first open-ended informal meetings at both Cancún and Hong Kong delegations were also provided with detailed and practical overview of the informal process. These new initiatives went further than what had been done previously and increased the predictability of the proceedings at Ministerial Conferences. Nevertheless, WTO Ministerial Conferences continue to represent important challenges. As the debate in 2000 demonstrated, the potential of these meetings to move forward the agenda versus the risk of provoking high profile political disasters remain real concerns among the WTO membership. Although the Hong Kong meeting was widely seen as having made important strides in terms of transparency, the substantive outcome of the meeting only just managed to keep afloat the Doha Round.

There is little doubt that adherence to these new practices constitutes an important element in the mutual trust which is often highlighted as the cornerstone of multilateral trade negotiations. The practices demonstrate how difficult it is to separate process and substance in the WTO and how important participation is to the sense of ownership of a substantive outcome.

(v) The growing importance of groups and coalitions in the WTO

One of the most significant developments within the WTO decision-making process over the past few years is the role played by different groups and coalitions of countries, particularly among developing countries. To be sure, the operation of groups and coalitions within the multilateral trading system can be traced back to the pre-Uruguay Round days, including the existence of the Informal Group of Developing Countries which opposed the attempts to bring services into the GATT. From this group emerged the so-called G10 which took an irreconcilable and hard-line approach to the services issue. Eventually, the G10 was side-lined by a coalition led by Colombia and Switzerland which brought together members of two groups known as the G9 and the G20 and whose efforts provided the basis for the Punta del Este Declaration that launched the Uruguay Round (Tussie and Lengyel, 2002, Narlikar, 2003). The success of this group, also known as the Café au Lait coalition, was founded on a common interest in a single issue which still allowed members to pursue their own agendas in other areas. Similarly, the group included a wide range of developing and developed countries and had placed a premium on research and information sharing a part of its operational characteristics. The experience and success of the Café au Lait coalition were in some ways the precursor for the creation of the Cairns Group of agricultural exporting countries in 1986. An issue and research-driven coalition of developed and developing countries, the Cairns Group positioned itself between the US and the EU and succeeded in setting the agenda on agriculture for much of the Uruguay Round. During the Round, a number of other groups, including the De La Paix Group (broad range of issues), the Morges Group (agriculture), the Pacific Group (safeguards), the Victims Group (anti-dumping) and the Rolle Group (services) brought countries together on specific issues. However, although many of these groups signalled the importance of issue-based alliances, most other issue-based initiatives during the Uruguay Round fared less well and it can be argued that only the Cairns Group managed survive the transition into the WTO.

WTO Ministerial Conferences have played a particularly important part in the emergence and evolution of individual country groups as well as the wider cooperation among such groups. Historically, one of the most significant challenges which have faced country groups and their coordinators in the Geneva process has been how to ensure that the level of coordination achieved in the Geneva process was carried over to the ministerial level. This challenge was often made more difficult because the coordinator of a particular group was different at ministerial level compared to the ambassadorial level in Geneva. In the following we shall take a brief look at the evolution of groups in the contexts of the various WTO Ministerial Conferences and their respective preparatory processes. Subsequently, we shall endeavour to provide an overview of the multitude of groups which have emerged during the on-going negotiations in the Doha Round.

Examples of effective issue-specific group coordination in the WTO prior to the 1999 preparatory process for the Seattle Ministerial Conference were relatively scarce. Although groups such as the African Group, the ACP, the LCDs, the Small and Vulnerable Economies, (SVEs) and the Like-Minded Group (LMG)[346] revealed the general outline of some group cooperation among developing countries, even if primarily organized around the opposition to a number of "trade-and" issues, it would be wrong to label any of these groups "issue-specific". Instead, they appeared to organize their efforts according to the specific challenges faced on a day-to-day basis. However, during the Seattle preparatory process and at the conference itself several of these groups began tentative cooperation on such issues as S&D, preference erosion, implementation issues and systemic reform.[347]

Discussions on systemic reform occupied a central place on the WTO agenda following Seattle with the LMG playing a particularly active role. The initiative at Doha to maintain two meeting free slots every day to allow for delegations to coordinate was specifically introduced by the Director-General following lobbying by the coordinators of major groups. These coordination meetings also provided a facility for civil society representatives to provide input to individual and groups of delegations. Such a dialogue had taken place at Seattle, but the Doha conference took a significant step in facilitating such consultations. At Doha, as during the preparatory process, the Director-General met daily with the coordinators of the ACP, African Group and LDCs and their inclusion in the ministerial Green Rooms at Doha became automatic. In terms of the effectiveness of different groups in getting their issues onto the agenda, the Doha declaration contains several paragraphs where such influence is visible.[348] The Doha meeting also revealed the significant challenge faced by Geneva based groups in ensuring that the level of coordination achieved in the preparatory process is continued at the ministerial level.

Where the Doha meeting had illustrated the growing significance of country groups in the WTO, the Cancún meeting established these groups as power-brokers in their own right. Although the Cancún conference was envisaged as little more than a mid-term review of the Doha negotiating agenda, the absence of progress since Doha created an environment in which most delegations saw some of their specific concerns being sidelined or sacrificed. As a result, and in addition to an increasing level of coordination between existing groups, the final months before the Cancún meeting saw the emergence of several new coalitions, including the Core Group of developing countries (Singapore issues), the Cotton-Four, the G33 (agriculture) and the G20 (agriculture).[349] The emergence of these groups prior to the Cancún meeting was significant from a substantive as well as a process point of view. First, the substantive contributions of these groups, particularly the G20's proposal on agriculture, represented a serious substantive alternative to what had been placed on the table by the EU and the US. This is significant because rather than simply rejecting the transatlantic proposal, the G20 submitted its own

[346] The informal Like-Minded Group was formed in 1999 to provide a platform for a common approach on implementation-related issues.

[347] It is important to note the considerable official support that many of these groups received from international organizations such as UNCTAD, particularly prior to Seattle and to a lesser extent at subsequent ministerials.

[348] The Cotonou waiver is counted as a success for the ACP and many African countries, paragraphs 42 and 43 deal exclusively with LDCs, paragraph 35 recognises the concerns of SVEs, references to S&D are omnipresent in the text and paragraph 12 as well as a separate decision deal with implementation issues.

[349] For an overview of the agendas of each of these groups see Narlikar and Tussie (2004)

detailed proposal on agriculture and in the process established the kind of credibility which comes through research ability and substantive engagement. Second, the composition of these groups and the extensive coordination which characterized their preparations for the Ministerial Conference were unprecedented in the history of the multilateral trading system. Cancún also saw the emergence of the G20, a group of developing countries comprising the Africa Group, LDCs and ACP countries.[350] The Hong Kong Ministerial Conference as well as the preparatory process for this meeting confirmed the high degree of coordination within and among these groups, including through the use of several ministerial gatherings in preparation for Hong Kong.

The coordination within and among the three largest groups of developing countries, i.e. the African Group (45), the ACP (66) and the LDCs (34), have ensured that they play a more central role in the multilateral trading system than at anytime previously. Of course, the importance and centrality of these three groups in the WTO today can be explained by their history of increasingly active involvement in the WTO. But a number of other factors are important. First, the large numbers of Members in each group makes it impossible to overlook them in the WTO decision-making process. This is so because the groups have been active in highlighting their numbers and using their combined membership to bolster the legitimacy of their cause, as was the initiative of the Ministers representing the G-20, the G-33, the ACP Group, the LDC Group, the African Group and the Small Economies, quickly dubbed the G110, to hold a joint press conference at Hong Kong.[351] Second, the recognition in these groups that in order to participate substantively in the WTO you need to establish a reputation for detailed and technically solid research. In turning to external expertise from civil society organizations and international intergovernmental organizations to build up negotiating positions these groups have the capacity to develop and articulate a substantive agenda of their own. Third, the role of the group coordinators has changed considerably since Doha. Coordinating a large group of countries, some of whom have divergent interests, is no easy task. However, by improving internal group discipline as well as coordinating information sharing and providing the coordinator with a genuine mandate to represent its membership, each group has increased its role and importance in the WTO. Fourth, the groups – individually and in concert – have managed to ensure a much higher degree of continuity and cooperation between the Geneva process and capitals, including at ministerial level.[352]

In the context of the Doha Round negotiations the WTO has witnessed a dramatic proliferation of groups and coalitions.[353] Although this is not the place to elaborate in detail on the different groupings and coalitions it is clear that important differences exist between more structured groups, e.g. the Cairns Group or the African Group, compared to loosely organized coalitions such as the Friends of Fish or the Friends of Anti-Dumping Negotiations. The former groups will generally utilize a more formal and high-level coordination of negotiating position, including at ministerial level, while the efforts of the latter will most often evolve around Geneva-based officials and visiting senior officials. The more formal groups will often be able to draw on specialized analytical support and in some cases even established secretariats to coordinate positions and draft proposals and such groups have in the past often held their own ministerial gatherings prior to WTO Ministerial Conferences. The less organized groups and coalitions often organize their activities around specific consultative processes in Geneva at which they will attempt to present a united front. Wolfe (2006 and 2007) and Narlikar and Tussie (2004) have elaborated in more detail on the dynamics of these groups. However, what is characteristic for a number of the informal

350 See Narlikar and Odell (2006) and Odell and Sell (2006).

351 Bridges Daily Update, 17 December 2005.

352 In this context it is worth noting that in 2006 in Geneva the ACP held 46 meetings, the LDC group held 108 meetings and the African Group held 71 meetings. These figures do not include bilateral meetings of the groups. The three groups met as the G90 on four separate occasions in 2006.

353 In addition to the groups already mentioned, other groups include (non-exhaustive): G4, G6, Recently Acceded Members, Small and Vulnerable Economies (general/cross-cutting issues); Cotton-4, G10, Group on Tropical Products (agriculture), ABI group, Friends of Ambition, NAMA-11, Friends of MFN, Paragraph 6 Countries (NAMA); Mexican Group, G-7 (DSU); Friends of Anti-Dumping Negotiations, Middle Group, Friends of Fish (Rules), Friends of Environmental Goods, Group of Developing Countries (Environment); Colorado Group, Core Group (Trade Facilitation); Friends of GIs, Joint Proposal Group (TRIPS-GI-register).

coalitions in the context of the Doha Round is their organization around specific issues on which they can agree despite the fact that they have opposing interests in other areas. Some coalitions even include developed and developing countries whose agendas otherwise differ significantly. The emergence of the G20 in the run-up to Cancún represented somewhat of a watershed in the history of informal groupings within the WTO insofar as this entity, despite a number of significant internal fault-lines, has managed to maintain a central role in the Doha Round.[354]

It is difficult to generalize when it comes to the multitude of groups and coalitions which have emerged since the launch of the Doha Round. Most issues on the WTO agenda do not break along the sort of North-South fault line which existed in UNCTAD and which pre-empted the flexibility that characterizes the coalition building in the WTO today. The Doha Round negotiations have added a new dimension and a certain fluidity to the creation and abolishment of coalitions and groups within the WTO.[355]

(vi) Concluding remarks

Over the past decade issues related to internal transparency and the decision-making process of the WTO have emerged as important institutional challenges facing the multilateral trading system. This section has sought to demonstrate that, contrary to what many critics of the WTO decision-making process argue, WTO Members have been quite successful in addressing this issue. The current practices, and the guidelines within which consultations take place at the WTO, are the direct result of what a large number of Members believed was wrong with the decision-making processes. Although these practices have little legal status, their behavioural impact on the way the WTO operates is considerable. There is enough evidence in the day-to-day work of Chairpersons and the Director-General in the WTO to demonstrate adherence to a culture of increased transparency and participation and there is a general recognition among WTO Members that the current practices have improved the decision-making process.

The legitimacy of the decision-making process requires that there is an adequate degree of open-ended and inclusive activity to balance other more restrictive consultative processes. In this context, the principal challenge will always be finding the right balance between efficiency and inclusiveness. Informal and exclusive consultations will continue to play important roles in the overall WTO process since, on balance, they offer important forums for making progress. Members generally endorse this premise. Of course, the legitimacy of such consultations hinges on the ability to ensure an adequate degree of transparency and inclusiveness as well as a guarantee that such mechanisms are understood to be coalition building and not decision-making forums. It is also clear that any attempt to short-circuit or deviate from the guidelines and practices on transparency will continue to require some general acceptance among WTO Members. It may be argued that sometimes the membership may be willing to accept such a temporary deviation in return for tangible progress.[356] However, experience has also demonstrated that this is a very risky premise upon which to pursue multilateral trade negotiations.

This subsection has deliberately not engaged in a discussion of the role of bilateral and plurilateral meetings among WTO Members which take place outside the institutional framework of the WTO. While the WTO as an institution cannot be held responsible for such meetings the fact is that some of these gatherings – especially those held at ministerial level – can impact considerably on the multilateral process in Geneva. Every year a number of so-called mini-ministerial meetings are hosted by individual WTO Members, including what has become annually recurring events at Davos in January and at the

354 See Narlikar and Tussie (2004) for a detailed account on the G20.

355 It is probably too early to make a judgement as to the real significance of groups in facilitating consensus. In an organization of 150 Members the potential of these groups to help create consensus is clearly present. However, evidence of the ability of these groups to respond rapidly to new developments is still inconclusive.

356 Most recent examples include the acceptance by the WTO membership to wait for consultative processes of the G6 in 2006 and the G4 in 2007. For example, the final and relatively exclusive stretch of the negotiations which resulted in the 1 August 2004 Decision was accepted without much criticism by delegations that were not in the Green Room. Another, albeit somewhat different, example was the acceptance by the membership to wait for the (inconclusive) consultative processes of the G6 in 2006.

margins of the OECD in May. These meetings are generally organized and hosted by individual countries and include on average some 30-35 WTO Members as well as the Director-General of the WTO. Such mini-ministerials can provide both direction and momentum to a multilateral process and as such they occupy a potentially decisive place in the overall decision-making process of the multilateral trading system. At the same time it is important to recall that these meetings are outside the framework of the WTO and therefore not subject to the practices of transparency and inclusiveness described earlier.

We have not discussed here the role of other international governmental organizations in the WTO decision-making process. When ministers in 1994 adopted the Marrakesh Declaration thereby founding the WTO they also articulated one of the core functions of this new organization as achieving more coherent global economic policymaking.[357] In 1996 the General Council formalized cooperation agreements with the IMF and the World Bank with the objective of further pursuing coherence in global economic policymaking. These cooperation agreements have been in operation for more than a decade and have proved to be effective platforms for the expansion of activities, programmes and initiatives of the three institutions at staff as well as management level to cover most of the issues on the WTO agenda.

At the same time it is also recognized that the WTO system is only one part of a much broader set of international rights and obligations that bind WTO Members and that issues related to global economic policymaking go much beyond the WTO's formal and specific cooperation with the Bretton Woods institutions. The WTO maintains extensive institutional relations with several other international organizations, such as UN, FAO, UNEP and UNCTAD, and there are some 140 international organizations that have observer status in WTO bodies. The WTO also participates as observer in the work of several international organizations. In all, the WTO Secretariat maintains working relations with almost 200 international organizations in activities ranging from statistics, research, standard-setting, and technical assistance and training. Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other international organizations continues to evolve so as to assist Members in the operation of their economic policies. Although the direct impact of other IGOs on the informal WTO decision-making process is negligible, their close substantive involvement with the WTO and its Members provide an important transparency element to the overall international economic coherence discussion.

The above does not suggest that all problems related to transparency and inclusiveness have been solved. Indeed, the informal and non-legal nature of the principles and practices which underpin the current consultative process at the WTO does not provide a guarantee against a re-emergence of the brinkmanship which has characterized WTO decision-making at various times. The end-game of a WTO negotiation will almost certainly continue to feature power based bargaining among states. The scope for short-circuiting of the decision-making process remains real and this is clearly why many countries emphasize the need to maintain vigilance regarding transparency in decision-making at the WTO. At the same time it must be reiterated that the WTO can only ever hope to regulate or impress its practices on activities which take place within its institutional framework.

(c) The GATT/WTO and civil society

The obscure and largely technical nature of the GATT did not generate much debate beyond the trade community, and the GATT agenda at least until the tuna-dolphin case in the early 1990s, failed to capture the general public. However, the deepening and widening of the WTO agenda to include issues such as environment, intellectual property and services ensured not only a growing interest among the public, but also an increasing politicization of the multilateral trading system. Of course, interest in international governance among the public had already been on display for a number of years in the mounting criticism of the World Bank and the IMF for their secrecy and weak accountability.[358] The 1998 collapse of OECD-

[357] See Article III.5 of the Marrakesh Agreement as well as the separate Ministerial Declaration adopted at the Ministerial Meeting in April 1994 to underscore this objective.

[358] See Danahar (1994).

based negotiations on a multilateral agreement on investment (MAI) owed much to a collaborative effort among at least 600 non-governmental entities in over 70 countries. This episode sent a strong signal of the extent to which international organizations were attracting the interest of a wider general public concerned with the implications of globalization. The anti-MAI network, and its unprecedented use of the internet, subsequently became a central coordination mechanism for various NGO networks prior to and at the Seattle Ministerial Conference in late 1999. These are only a few examples of the increasing external scrutiny under which international institutions find themselves today.

The objective of the following section is to provide a short overview of the evolution of the relationship between the GATT/WTO and civil society, in particular NGOs. We shall specifically seek to explain how the actions and input of these organizations have influenced the manner in which the multilateral trading system operates. The use of the term NGO in the present WTO context encompasses public action NGOs, labour unions, industry associations, but not individual companies.[359] The somewhat wider concept of civil society, while still excluding firms, also includes parliamentarians and the general public, including associations and citizens' networks.

(i) Early considerations on NGOs

Although the relationship between the GATT and non-governmental actors was virtually non-existent, the agenda on the creation of the International Trade Organization included deliberations on "[...] suitable arrangements for consultation and cooperation with non-governmental organizations concerned with matters within the scope of this Charter...".[360] In assessing the merits of institutionalizing a structured mechanism for interacting with such organizations the Secretariat of the Interim Commission for the International Trade Organization (ICITO) provided the Executive Committee with a note on existing arrangements made by the United Nations and the UN specialized agencies. In addition to this *tour d'horizon,* the note included a set of recommendations and conclusions on how the procedures regarding NGOs could be adapted to suit the ITO[361] as well as an annex with a provisional list of NGOs which might be consulted. Although these recommendations never materialized into a concrete set of procedures for dealing with NGOs within the context of the multilateral trading system (particularly as the ITO was never established), they nevertheless reflect the importance which was attached to defining a policy that would allow the trading system to interact with the outside world and benefit from external technical expertise.[362] In addition, the thrust behind these recommendations, in particular the inherent vagueness which was adopted in dealing with NGOs, clearly provide the basis for the current WTO provisions for dealing with NGOs today.[363]

(ii) From the GATT to the WTO

Despite the early attempts to institutionalize the interaction of NGOs with the multilateral trading system, no provisions were included in the GATT to allow for their involvement or participation. To be sure, a number of business organizations, most notably the International Chamber of Commerce, pursued informal and ad hoc contacts with both the GATT and its Secretariat, but were denied any formal accreditation and access (Marceau and Pedersen, 1999). Some observers of the GATT foresaw the need for the system to address the issue of civil society involvement at some juncture (Jackson, 1969), but it was not until the late 1980s and early 1990s as the Uruguay Round negotiations were intensifying that a number of NGOs concerned with issues related to environment, agriculture and sustainable development began a closer

[359] The WTO does not have a formal definition of what constitutes an NGO. Public action NGOs, labour unions, industry associations are accredited to attend Ministerial Conferences. Individual companies are not eligible for WTO accreditation to Ministerial Conferences. Generally, NGOs have to demonstrate that their activities are concerned with matters related to those of the WTO.

[360] Havana Charter, Art. 87, paragraph 2.

[361] ICITO EC2/11, 15 July 1948 (note by the Secretariat).

[362] ICITO EC2/11, 15 July 1948.

[363] Art. V:2 of the Marrakesh Agreement and WT/L/162. For a complete overview of the early considerations regarding the ITO and NGOs see Marceau and Pedersen (1999).

monitoring of the GATT. In addition to the substantive concerns which the emerging agreements raised, the inability to directly access the negotiators resulted in further frustration among these organizations and the Ministerial meeting in Brussels in December 1990 witnessed the first coordinated denouncement of the trade talks as a *"GATTastrophe"* by a number of NGOs (Croome, 1995).

In the summer of 1991, after the GATT dispute settlement panel in the case United States - Restrictions on Imports of Tuna ("Tuna-Dolphin") issued its decision – ruling that a US conservation law violated GATT rules – environmentalists across the globe began scrutinizing the GATT more closely.[364] The initial conclusion was that GATT panels remained secretive and closed to the public and that decisions about the environment were made without adequate input. At the time the calls for greater transparency and openness of the GATT received relatively little attention and the 1994 Marrakesh Ministerial Conference did not make any specific arrangements for accommodating NGOs.[365] However, the draft text adopted by Ministers at Marrakesh included a significant transparency provision on arrangements for consultation and cooperation with NGOs, which resembled the original text considered for the Charter of the ITO in 1948. Article V:2 of the Marrakesh Agreement states that "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.".[366] The inclusion of this provision and the subsequent adoption by WTO Members in July 1996 of a set of Guidelines[367] for relations with NGOs clearly acknowledged the importance of NGOs in the public debate on trade and recognized that the multilateral trading system did no longer exist in the vacuum which had characterized its predecessor. In addition, WTO Members also adopted a first Decision on De-restriction of documents which would make documents available to the public more systematically and promptly than in the past.[368]

Article V:2 of the Marrakesh Agreement and the 1996 Guidelines provided the WTO Secretariat with a much-needed platform for dealing with civil society and increasing the transparency of WTO operations.[369] Although the Guidelines were a significant step forwards in terms of the WTO's relationship with NGOs they nevertheless fell short of providing these organizations with any direct and formal role in the work of the WTO. The informal and "arms-length" nature of the Guidelines which applied mostly to the Secretariat's interaction with civil society reflected the sensitivity and even hostility which characterized the relationship between a large number of WTO Members and NGOs at the time. This sensitivity became particularly evident in the discussions to ensure NGO attendance at the first WTO Ministerial Conference in Singapore in 1996 during which a number of Members expressed concern at the prospect of accrediting NGOs to attend the meeting. A number of Members argued in favour of a system whereby each NGO requesting accreditation would have to be approved by the WTO membership. Clearly, such a system would have been both extremely cumbersome and potentially very damaging to the Organization's image. In the end, the WTO Secretariat played a crucial role in brokering a compromise which made clear that NGO attendance at the conference would not create a precedent for subsequent meetings of the organization.

The early implementation of Article V:2 and the Guidelines were particularly challenging for the WTO Secretariat because the bulk of NGOs following WTO affairs were from developed countries and generally pushed issues with which developing countries felt uncomfortable, e.g. environment and labour. This sensitivity was principally exposed when the Secretariat sought to organize a series of symposia designed to provide a forum for WTO Members and representatives of NGOs to exchange views. However, it was characteristic for the period between 1996 and 1999 that the main preoccupations of the NGO community *vis-à-vis* the multilateral trading system concerned transparency and access to information rather than specific substantive matters.

364 United States - Restrictions on Imports of Tuna, GATT BISD 39S/155 (Sept. 3, 1991). A number of NGOs subsequently began referring to this case as "Gattzilla Ate Flipper".

365 NGO representatives present at the Marrakesh meeting were accredited as journalists.

366 The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, p.9.

367 WT/L/162.

368 WT/L/160.Rev1.

369 For a full overview of the Guidelines see Marceau and Pedersen (1999).

Although a number of NGOs had already attempted to provide substantive input to WTO dispute settlement panels, the academic debate at the time focused on the merit of opening the WTO processes to NGOs so as to enhance the legitimacy of its decisions. This external push for increased transparency and openness guided, to a large extent, the approach adopted by the WTO Secretariat in applying the provisions for dealing with an increasingly interested public. In July 1998, then Director-General Renato Ruggiero announced a set of initiatives for engaging more actively, though still informally with civil society, including separate Secretariat briefings for NGOs, regular circulation of a list of NGO publications received by the Secretariat and regular informal meetings between the Director-General and NGOs.

Given the novelty of interacting with NGOs in the context of the multilateral trading system the initial objective of these measures was to establish an informal confidence-building dialogue with these organizations. Although the external pressure to increase overall transparency was a significant element in the Secretariat's decision to pursue these initiatives, it was also considered to be a worthwhile two-way educational exercise which would benefit the WTO as well as the NGOs. The informal meetings which took place throughout 1998 paved the way for the organization of the first large-scale WTO Symposia in April 1999.[370] Although these early initiatives appear relatively timid, they served the dual purpose of sensitizing the WTO membership (and the WTO Secretariat) to the various NGO agendas as well as de-mystifying the operation of the multilateral trading system as perceived by civil society. Similarly, the above initiatives to increase transparency, while highly controversial at the time, remain the foundation upon which WTO structures its interaction with NGOs today and is perhaps the first clear example of how external pressure has led to a change in the way the WTO does business.

(iii) The NGO accreditation debate

Since 1996 NGOs have argued in favour of a permanent accreditation status to the WTO. However, to date, WTO accreditation has only been granted for Ministerial Conferences as well as specific events, such as the annual Public Fora. The accreditation process is administered by the WTO Secretariat and based on the mandate provided by Members in Article V:2 as well as the previously mentioned Guidelines. Historically, the principal criteria for accrediting non-profit NGOs to a WTO Ministerial Conference or a Symposia has been their ability to demonstrate "activities related to those of the WTO" and this fairly broad definition has ensured that only very few organizations have ever been refused such ad-hoc accreditation. In general, this system of accreditation has worked well over the past decade and Members seem to be very comfortable with the Secretariat's administration of its mandate. At the same time it should be emphasized that the original reservation expressed by Members in the 1996 Guidelines, namely that "there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings" remains valid. Similarly, the notion that closer consultation and cooperation with NGOs can be met constructively through appropriate processes at the national level still represents the general feeling among Members when it comes to NGOs. These elements of the Guidelines continue to constitute the core reasons of why a permanent formal accreditation mechanism for NGOs does not exist at the WTO. At the same time, the past decade has witnessed a growing tendency among WTO Members to accredit NGO representatives as part of their delegation to attend various WTO meetings.

In recent years, the NGO demand for permanent accreditation to the WTO has become less frequent. However, since 2001 a group of Geneva-based NGOs have pursued a campaign to obtain an annual, renewable badge that will allow access to the WTO along the lines of the accreditation system that exists for Geneva-based journalists. Within this scheme, NGOs would be granted access to the public parts of the WTO headquarters. The granting of badges would be subject to strict criteria and conditions, and limited in time. At present around 25-30 Geneva-based NGOs actively follow the work of the WTO.

[370] A number of smaller and single-issue symposia had been held previously. In 1994 a symposium on trade and environment had taken place and in 1997 a meeting of NGOs was organized to mirror the agenda of the High Level Meeting on Trade Related Issues Affecting Least-Developed Countries. However, both symposia had seen only sporadic participation by Member countries. In March 1998 a symposium on trade facilitation took place at the WTO headquarters and involved a large number of industry associations.

(iv) NGOs at Ministerial Conferences: from Seattle to Hong Kong

The attendance of NGOs at WTO Ministerial Conferences is arguably one of the most visible manifestations of the evolving relationship between the Organization and civil society. Following the first timid steps to ensure NGO attendance at the WTO Ministerial Conferences in 1996 and 1998, the 1999 Seattle meeting in many ways took this relationship to a new level. First, the period leading up to and including the Seattle meeting saw a dramatic increase in the number and diversity of NGOs interested in the WTO agenda. Second, the reluctance of many WTO Members in dealing with NGOs was replaced by growing cooperation and information sharing, including those among the membership that had been the most reluctant to welcome these actors to previous WTO meetings. Third, from having focused primarily on process issues such as external transparency and participation NGOs slowly began turning their attention to the substantive agenda of the WTO.

The Seattle meeting was a watershed in attracting the attendance by NGOs beyond the traditional fields of business, environment, development and labour groups. The most significant newcomers included representatives from health groups, religious groups, human rights activists, consumer groups and a variety of think-tanks. In addition, Seattle saw a significant increase in the number of NGOs from developing countries as well as a large contingent of parliamentarians from Member countries. The meeting was also unique in terms of the number of NGO representatives accredited as members of individual country delegations.[371]

The increasing sophistication among Members for dealing with NGOs was evident throughout the preparatory process for Seattle. Whereas consultative processes with NGOs on trade policy matters have a long history in many developed countries, such mechanisms existed only sporadically among developing countries. However, in addition to regularly participating in WTO Secretariat briefings for NGOs, a growing number of developing country delegates began meeting with NGO representatives with expertise in areas related to development as well as more generally. This interaction continued at the conference and to some extent confirmed that NGOs were increasingly seen as having an intellectual contribution to make.

Overall, however, the chaotic street demonstrations and the eventual collapse of the Seattle Ministerial Conference had a brief negative impact on the way WTO Members perceived the NGO community. Those NGOs that had come to Seattle with the objective of lobbying delegations as well as bringing awareness to specific issues were, to a large extent, crowded out by the down-town mayhem caused primarily by unaccredited fringe groups with little understanding of the multilateral trading system. However, a number of NGOs were quick to pick up on the transparency and process difficulties which had played a significant part in the collapse of the conference. As this issue gained prominence in 2000 these organizations were well placed to provide delegations with input and advice on how to make the WTO more responsive to the need for inclusiveness and participation of all Members. Although the transparency discussions in 2000 were a purely internal affair and did not *per se* relate to any direct improvement in terms of access and consultation for the NGOs, the fact is that their changing relationship with delegations would mean that these organizations would benefit from a higher degree of transparency as well.

Despite the experiences in Seattle, the procedural and practical arrangements for NGO attendance at subsequent Ministerial Conferences were not changed. The Ministerial Conference in Doha (2001) confirmed automaticity in allowing NGOs to attend such meetings. Arguably, the physical constraints of the Doha meeting saw the imposition of a numerical limit on the size of each NGO delegation and the overall number of accredited organization fell compared to Seattle.[372] However, the parameters for the NGO attendance, including the WTO Secretariat's control of the accreditation process as well as the arrangements in Doha meant that these organizations enjoyed the same rights and facilities as at other WTO conferences. The Table below outlines NGO attendance at WTO Ministerial Conferences.

[371] It is at the discretion of each WTO Member who they include in their delegation. Although Singapore had seen the accreditation of a number of business representatives (companies as well as associations) to individual delegations, similar accreditation of other NGOs was extremely rare.

[372] Given the physical limits at Doha, each NGO was allowed to accredit one representative.

Table 22
NGO attendance at WTO Ministerial Conferences

Ministerial Conference	Number of eligible NGOs	Number of NGOs attending	Number of Participants
Singapore 1996	159	108	235
Geneva 1998	153	128	362
Seattle 1999	776	686	1500
Doha 2001	651	370	370
Cancún 2003	961	795	1578
Hong Kong 2005	1065	812	1596

Particularly since Seattle, WTO Ministerial Conferences have provided civil society organizations with excellent opportunities to rally their constituencies around specific causes. Given the fact that it generally takes in excess of 12 months to organize such a conference, civil society organizations have often managed to orchestrate campaigns which culminate at these meetings, including through the submission of signed petitions to the Director-General.[373] The media coverage that these campaigns generate represents a clear sign of the significance of a civil society presence at WTO Ministerial Conferences.

(v) WTO Symposia and Outreach Activities

In terms of direct interaction between the WTO membership and civil society, the annual WTO Symposium, now called WTO Public Forum, represents the most substantive example of a fundamental and continuously evolving commitment to transparency, dialogue and outreach. Compared to the first large-scale symposia in 1999, the format of the current annual forum has evolved considerably to allow for a broader agenda and a more interactive dialogue with NGOs. The fine-tuning of the format from large open-ended plenary sessions to a focus on individual and more interactive working sessions owes much to the constructive input of participants who both felt that the large-scale plenary sessions offered little opportunity for direct interaction and were often counterproductive. In 2006, the WTO hosted the seventh large-scale symposium during which more than 36 individual working sessions took place. Of these, some 30 were organized by participants themselves. The summaries of the discussions were subsequently made available on the WTO website. Compared to the inaugural symposia held in 1999 which were subject to considerable interference by WTO Members, the organization and format of the Public Forums over the past couple of years have been left to the WTO Secretariat. The improvement of the event over the years and its increasing visibility as the WTO's biggest and most critical outreach event are undisputable. Both in terms of numbers and composition, participation has grown to more than 1000 people, which nowadays include academics, journalists, parliamentarians, business people as well as NGOs in the traditional sense of the word. However, it remains an ad hoc exercise which falls outside the formal structure of the WTO, partly because of the lack of regular budgetary means.

The quality and interactive nature of the discussions at the Public Forum depends crucially on the organizers and participants. In other words, these meetings do not represent a magic bullet in terms of transparency and dialogue and they do not provide NGOs with a formalized and direct access to the WTO agenda. However, these meetings are now a recurrent annual feature on the WTO calendar and are embraced as such by the WTO membership. This should be the real yard-stick by which their success is measured. This, in turn, is in no small part due to the persistent pressure by a large and cross-cutting segment of the NGO community to maintain a platform for the exchange of ideas with WTO Members. The idea of having thousands of NGOs roaming the halls of the WTO Headquarters for two days every year would have been unthinkable only a few years back – today this sensitivity among Members is gone.[374]

[373] The submission of Oxfam's "Big Noise" petition with 17.8 million signatures to the Director-General represents the most recent example.

[374] A summary of the 2006 Public Forum was published by the WTO Secretariat in April 2007.

More recently, the WTO Secretariat has developed an outreach strategy encompassing a number of activities aimed at providing information, engaging into dialogue, and listening to civil society representatives' expectations and concerns. Regular briefings for NGOs are now held at the WTO Headquarters and not as previously outside the organization, the availability of GATT and WTO documents on-line is automatic and the NGO section of the WTO web site continues to provide statistics and information of particular interest to these organizations. The Director-General regularly briefs and interacts with NGOs, both in Geneva and abroad, and engages in on-line web chats with the public. In recent years, the WTO Secretariat has initiated a regional outreach programme for civil society representatives in developing countries. It also has started to involve Chairpersons of WTO bodies as well as other experts in issue-specific and more technical briefings.

In recent years, the Secretariat has pursued a broad and proactive approach to keep parliamentarians informed and involved in the WTO's work. This recognizes the important role they play in the multilateral trading system. As the legitimate and accountable representatives of the people who elect them they can play a crucial role in bringing greater awareness and informed debate on international trade issues. The outreach programme towards parliamentarians also encompasses regional events to further the understanding of the multilateral trading system among this important group.

In general, these and other measures, including the holding of smaller symposia and seminars, permeate the day-to-day business of the WTO. While the gradual, but consistent commitment to transparency since 1995 has made the WTO more accessible, recent initiatives place an increasing emphasis on outreach and dialogue. The results from this strategy may not be immediate, but they will eventually elevate the WTO - civil society relationship to a new and more productive level.

(vi) Amicus Curae Briefs and Dispute Settlement

The WTO DSU does not contain any explicit provisions for the submission of briefs by NGOs although panels are allowed "to seek information and technical advice from any individual or body which it deems appropriate"[375] to a particular case.

In the following paragraphs we shall focus on a couple of examples where NGOs have attempted to influence the dispute settlement process and the extent to which their efforts may have led to a change in the way the process operates. In addition, we shall outline some of the more recent initiatives to provide some transparency to the dispute settlement process.

As was mentioned previously, the 1991 ruling in the *United States–Restrictions on Imports of Tuna* case placed the GATT on the radar screen for a number of environmental NGOs. In mid-1997, two NGOs sent *amicus curiae* briefs to the WTO panel considering *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* ("Shrimp-Turtle").[376] Two months later, in September 1997, the panel informed the parties that it would not consider the briefs because it did not have authority to do so under the WTO DSU rules. When the US government subsequently appealed the panel's decision regarding the scope of GATT's General Exceptions, it also appealed the panel's finding that it did not have authority to consider the NGO briefs. In addition, the NGOs sought to introduce their legal arguments on the case by attaching their briefs to the US submission. In August 1998, the Appellate Body made a preliminary ruling that it would accept the NGO briefs attached to the US submission, and that it had accepted a revised version of one of those briefs directly from one of the NGOs. During the case, it was made clear that the briefs had been read by the Appellate Body Members, although the Appellate Body ultimately stated that it focused on the arguments made by the US in the main part of its submission. In addition, in October 1998, the Appellate Body reversed the lower-level ruling on whether a panel had the authority to consider amicus

375 Art. 13.1 of the DSU.

376 *United States-Import Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (May 15, 1998). This case involved a complaint by India, Malaysia, Pakistan, and Thailand about a US import ban on shrimp from countries that the US had not certified as doing enough to safeguard endangered sea turtles from being killed during shrimp trawling.

briefs. The Appellate Body said that while NGOs do not have the "right" to have their briefs considered, a panel's authority, under the DSU, "to seek information and technical advice from any individual or body which it deems appropriate"[377] includes the authority to receive unsolicited NGO briefs. Thus, the decision was significant because it established that both panels and the Appellate Body have the authority to accept *amicus curiae* briefs. The decision was controversial with many governments which felt that that it was not in conformity with the WTO Agreement, that it undermined the government-to-government nature of the WTO and provided NGOs with greater rights than WTO Members that were not party to the dispute.

In 2000, in the case involving the *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, four NGOs submitted briefs early in the panel process.[378] Subsequently, the defendant EC attached two of the briefs to its submission. Thereafter, the panel, without providing any reason, announced that it would consider the two attached briefs, but not the other briefs. At the outset of the subsequent appeal by Canada, the Appellate Body recognized that it was likely to receive NGO briefs and, after consulting with the parties, established an *ad hoc* procedure for considering briefs by private individuals or groups. This procedure required applicants to file for leave to submit a brief. The application had to respond to a number of questions, including the objectives and financing of the applicant and how the proposed brief would not be repetitive to what the governments had already articulated. The Appellate Body's adoption of this procedure surprised governments and, at a special session of the WTO General Council convened to deal with this issue, many Members criticized the Appellate Body for undermining the governmental role in legislating dispute procedures and against the idea of amicus briefs. Shortly thereafter, the Appellate Body rejected all 17 of the applications for permission to submit a brief. In response to this rejection, several NGOs put out a critical press statement[379] complaining no reason for the rejection had been given.

By January 2006, 53 amicus briefs had been submitted to panels, the Appellate Body and Compliance Panels under Art. 21.5 of the DSU. As the two examples demonstrate, NGO activism has, at least to some extent, been instrumental in clarifying that *amicus curiae* briefs are not legally excluded in WTO dispute settlement. Of course, this is not equivalent to a right to have NGO arguments taken into account, yet several NGOs have decided to submit amicus briefs anyway, sometimes with the encouragement of the WTO Members that are parties in a case. At the same time Durling and Harbin (2005) argue that the first decade of the WTO indicates that *amicus curiae* briefs have not emerged as a prominent feature of the WTO dispute settlement system and that initial fears regarding the likely proliferation and influence of such briefs have not been realized. At this stage there is little evidence to suggest that the WTO membership would be able to agree on a specific rule amendment which would incorporate such practice into WTO law, but it is similarly clear that the past experience has established an important precedent for the submission of *amicus curiae* briefs in the future.[380]

As has been mentioned previously, a number of external observers as well as WTO Members have called for greater transparency of the dispute settlement process, including the possibility of opening up panel proceedings to other WTO Members and the general public. At the request of the parties in the disputes "Continued suspension of obligations in the *EC-hormones dispute*" (*US-Continued suspension of obligations in the EC-hormones dispute*, DS320; *Canada-Continued suspension of obligations in the EC-hormones dispute*, DS321) the panels agreed to open their proceedings with the parties and scientific experts on 27-28 September 2006, and with the parties on 2-3 October 2006 for observation by WTO

377 Art. 13.1 of the DSU.

378 *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R (Sept. 18, 2000).

379 Press Release, The Center for International Environmental Law, A Court without Friends? One Year After Seattle, the WTO Slams the Door on NGOs (Nov. 22, 2000).

380 In the ongoing DSU negotiations, the US has submitted two proposals on *amicus curae* briefs. See TN/DS/W/13 (22 August 2002) and TN/DS/W/46 (11 February 2003).

Members and the general public.[381] A special viewing room was established and some 200 seats were made available for the general public, including journalists, NGOs and WTO observers. These individuals were able to watch the live proceedings of the "hormones" dispute-settlement panels at the WTO headquarters in Geneva via closed-circuit broadcast. Although this experiment did not create any precedent for other panels and remained a decision by the Panel at the joint request of the Parties, it nevertheless represents an important initiative towards increasing transparency at the WTO. However, despite the quite significant organizational and logistical arrangements which were required for this initiative, at no point during these closed-circuit broadcasts did the total number of representatives from the general public exceed 33 and the majority of these represented universities and schools.

(vii) NGO influence on the WTO Legislative Process

We previously mentioned the growing confidence among NGOs with respect to providing Members of the WTO with technical and political advice. Of course, lobbying is not a new phenomenon in the context of the multilateral trading system as has been demonstrated through the early involvement of the ICC in the GATT and the role of the service industries in the Uruguay Round. Similarly, other business organizations have been closely associated with the negotiating positions of their respective host countries and have played important roles in the design of the substantive outcomes in the WTO. However, whereas the private sector has often been able to influence negotiating positions at the domestic level or even as members of developed country delegations, the influence of most other NGOs had until recently been only sporadic. Over the past decade, an increasing number of countries, often as a result of a genuine lack of resources, have been turning to specialized NGOs for assistance in undertaking research and preparing negotiating positions on issues of particular concern to them. In the context of the multilateral trading system three examples in the areas of intellectual property, cotton and fisheries subsidies deserve mention.

Access to medicines

On 14 November 2001, WTO Members adopted a Declaration on the TRIPS Agreement and Public Health which contained important clarifications about the flexibilities in the TRIPS Agreement to promote public health, in particular access to medicines. The Declaration also identified one issue on which the TRIPS Agreement did not provide sufficient flexibility and called for a solution. On 6 December 2005, WTO Members approved changes to the TRIPS Agreement that provide additional flexibilities on this point. The Decision directly transforms an earlier, 30 August 2003, "waiver" into a permanent amendment of the TRIPS Agreement. That waiver makes it easier for poorer countries to obtain cheaper generic versions of patented medicines by setting aside a provision of the TRIPS Agreement that could hinder exports of pharmaceuticals manufactured under compulsory licences to countries that are unable to produce them. It is beyond the scope of this section to more closely analyse the mechanism enshrined in the above Decision. The point to make here is that the access to medicines debate illustrates a rather successful alliance of a large group of developing countries and certain civil society groups in terms of bringing an issue to the centre of the WTO agenda.

While developing countries did not always follow the advice of civil society groups, these groups did provide technical expertise, including specific drafting of proposals, as well as expert legal advice to a number of them while simultaneously designing a public campaign which is widely recognized as having generated important momentum in public opinion and among political decision-makers on this issue. This combination, and the fact that the alliance between developing countries and NGOs had to contend with a serious opponent insofar as the research-based pharmaceutical industry was concerned, made the adoption of the 2001 Declaration and the 2003 and 2005 Decisions all the more remarkable and stands testimony to the substantive support of a number of civil society groups in a specific area.

[381] This was the second time that public hearings were organized in this case. The first time was in September 2005, for the joint first substantive meeting of the panels with the parties.

Cotton Subsidies

The second issue which has illustrated the increasingly close relationship between WTO delegations and NGOs relates to cotton. In 2003, four poor cotton-exporting Central and West African countries (Benin, Burkina Faso, Chad and Mali) demanded that cotton subsidy removal be part of the WTO agriculture negotiations. The issue gained prominence at the Cancún Ministerial Conference in September 2003 with a number of NGOs conducting a high-profile campaign to bring attention to the difficulties faced by cotton producing developing countries.[382] Not unlike access to medicines, a number of NGOs had been assisting the *demandeurs* with technical expertise and policy advice, including drafting specific proposals in the agriculture negotiations and managed to maintain a public campaign which has kept the issue very much on the forefront of the Doha Round. And, as with access to medicines, the NGOs have found a specific niche in terms of substantive research input and policy advice which these developing countries would have struggled to muster independently.

Fisheries subsidies

The contribution of NGOs in the context of the discussions on fisheries subsidies at the WTO is somewhat different compared to the previous two examples for a number of reasons. First, the contribution of the most actively involved NGOs has taken the form of analytical papers and proposals presented via public symposia and similar open-ended fora, (some co-sponsored by international intergovernmental organizations). These NGOs thus have not worked through any specific country or countries. Instead they have taken a proactive role as interested stakeholders seeking, through the provision of intellectual input and ideas to the fisheries subsidies debate, to influence the negotiations to reach what in their own view would be an environmentally positive outcome. Second, the fisheries subsidies debate is not a North-South issue in the same sense as access to medicines and cotton were, as there are developed and developing countries represented on all sides of the debate. Third, environmental NGOs have considerable experience in fisheries issues, having long been active around the world in promoting environmentally-friendly fishing policies and practices. In respect of fisheries subsidies in particular, they have been working with governments, international organizations, and others for almost a decade to encourage WTO Members to adopt binding new international rules on fishing subsidies, with a focus on eliminating those that contribute to over fishing.

All of the above issues provide examples of how external input can in fact have an impact on the WTO legislative agenda. In the two first cases NGOs provided developing country governments with intellectual resources and policy advice not otherwise available to them and assisted the countries in conducting highly efficient public campaigns to raise awareness among a wider public. An important explanation for the success of the relationship between the NGOs and the developing countries in both contexts is undoubtedly the commitment of the former to remain deeply involved and dedicate significant resources over an extended period of time. It can be argued that at least for the issues of access to medicines and cotton the involvement of NGOs helped developing countries defend, and perhaps even enlarge, their policy space. In the case of fisheries subsidies, the long involvement of environmental NGOs in technical fisheries issues has led these groups to take a proactive role in directly providing intellectual input to the debate through parallel fora, without working through any particular country or countries.

Other areas such as agriculture and food security, genetic resources and traditional knowledge have seen NGOs provide background information, organize seminars and other forms of support to a number of developing country delegations

(viii) Concluding remarks

The past decade has seen a change in the way in which the WTO interacts with civil society. This relates not only to the practical interaction between the WTO Secretariat and WTO Members on the one hand and the NGOs on the other, but also in terms of how the NGOs view themselves *vis-à-vis* the multilateral trading system.

382 See Baffes (2005).

From a sensitive, one-dimensional and mostly process-oriented relationship which primarily evolved around access to information, the WTO – NGO interaction has matured into a more substance-based one. In addition, it is an indication of the growing confidence in the working relation that exists between interested stakeholders. Although the WTO remains an intergovernmental organization, some NGOs have identified a particular advocacy role that they pursue with a view to influence the agenda. The original hesitation and suspicion among a majority of Members with respect to the role of NGOs has been replaced by a more constructive relationship which often manifests itself through increased substantive cooperation. It can be argued that through closer bilateral cooperation with delegations, NGOs have succeeded in influencing the WTO's substantive agenda more effectively than would have been possible through established institutional channels, notably through the WTO Secretariat.

This section has primarily focused on the interaction with and contributions from those civil society organizations which have opted for a constructive approach towards the WTO. Many of these, for example, industry and business associations, are usually supportive of the multilateral trading system. They recognize the objectives and activities of the WTO and generally favour an ambitious result in the ongoing trade negotiations. Others remain critical of the multilateral trading system, but have opted for substantive engagement in order to modify the system. A number of organizations continue to call for the abolition of the multilateral trading system and have generally refused dialogue. Although all of these organizations are regularly accredited to WTO Ministerial Conferences, the WTO Secretariat as well as Members work with the first two categories of NGOs on a regular basis.

From an institutional point of view the commitment to continue working towards a more constructive dialogue with civil society remains strong. As illustrated earlier the evolution of this relationship is a result of practice rather than procedural changes and the granting of specific rights. From the point of view of those NGOs that would like a more formal status within the WTO this is disappointing. However, for most NGOs that deal with the WTO and its Members on a regular basis it is doubtful that a formal role inside the WTO would enhance their advocacy role compared to the level of influence some enjoy through other channels. However, it is clear that current WTO practices for interacting with NGOs go far beyond anything that Members would be able to formally agree upon by consensus. These practices are solidly anchored in the culture of the WTO and it would be highly controversial to envisage a roll back. The challenge from an organizational perspective is to ensure that the relationship continues to evolve in an atmosphere of mutual trust. This will require vision and responsibility on all sides.

7. DEEPENING THE MULTILATERAL TRADE AGENDA

A core issue that has confronted the multilateral trading system down the years is the extent of its competence. Questions concerning the appropriate reach of the multilateral rules and whether or not particular rule areas should be covered at all have often raised sharp differences among governments. The issue has sometimes been drawn in terms of a distinction between "border" and "behind-the-border" policies. Behind the border policies or internal measures (as they are referred to here) are different from border measures in that they are applied internally rather than at the frontier. But in reality, both border and internal measures affect in some degree the conditions of competition between domestic and foreign supplies and suppliers and therefore affect trade. The discussion that follows centres on what can be said from a conceptual and systemic perspective about the inclusion or exclusion of particular subject areas from the GATT/WTO agenda.

The shape of the multilateral trade agenda has potentially important systemic consequences, as it determines perceptions about the legitimacy of the multilateral trading system, as well as the system's efficiency and viability. A lack of coherence between international cooperation on trade matters and cooperation in other policy domains may lead to inefficiencies in all areas. On the other hand, a further deepening of the multilateral trade agenda through the inclusion of many different kinds of internal measures may overburden the system and challenge its capacity to accomplish its mandate. The multilateral trading system does not stand alone and cannot be seen apart from other policy areas. Yet a single, all-embracing forum for international cooperation on all policy matters is hard to imagine.

The exact shape and scope of the multilateral trading system is the outcome of a political process. Moreover, no well-defined conceptual or theoretical framework exists for analysing the advantages or disadvantages of a given agenda. These two reasons – the play of politics and the absence of a comprehensive analytical frame of reference – render it impossible to predict how the agenda will or should evolve. This section will consider a number of factors that may have affected the development of the agenda in the past and possibly affect its future evolution. While contemplating such factors may temper views on the desirable dimensions of an agenda, they cannot provide a blueprint for future agenda formation. This agnosticism about the feasibility of prediction or prescription is consistent with much of the relevant literature in this area.[383]

(a) Thinking about internal measures in the context of trade cooperation

Internal measures initially figured on the GATT agenda because of concerns that such measures may be used to circumvent concessions made in market access negotiations. Trade negotiations in the early GATT days were about the reduction of barriers to trade in the form of border measures like tariffs. Article III (national treatment) and Article XX (general exceptions) were the main provisions in the original GATT text that served this purpose.[384] Over the years, the GATT and now the WTO have become progressively more concerned with internal measures that can affect the conditions of competition between foreign and domestic supplies and suppliers of goods and services. Consequently, internal measures have increasingly entered the multilateral trade agenda.

One reason for this evolution is that Members considered Article III and Article XX insufficient to control the circumvention of market access commitments – in other words, with preserving the value of existing market access commitments. More stringent and/or more clearly specified provisions were drawn up in order to protect those commitments. This motivation finds its clearest reflection in some of the Tokyo Round Agreements, particularly the Agreement on Technical Barriers to Trade and parts of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII,[385] and in the Uruguay Round Agreement on Sanitary and Phytosanitary Measures.

Internal measures aimed at preserving acquired market access rights may focus on avoiding explicit discrimination, as would be the case with subsidy or government procurement provisions. Alternatively, they may concern measures that embody elements of de facto discrimination, where the underlying putative objective of a measure is not directly to discriminate, but rather to secure a particular public policy objective. Examples of internal measures falling into this category include those pursuing the objectives covered by Article XX of GATT or Article XIV of GATS.

A second factor explaining a broader and deeper agenda on internal measures relates to the notion that market access is inherently linked to the conditions of competition prevailing in the relevant markets. A focus on measures whose effect is to modify the conditions of competition has increasingly played a role in shaping the multilateral trading system. The motivation here is not to protect existing levels of market access, but rather to promote further market opportunities. Aspects of the General Agreement on Trade in Services are clearly an example of such a focus. The same may be said of the TRIPS Agreement, and would apply, for example, to rules on competition.

Apart from the distinction between preserving *acquis* – that is, protecting acquired rights in a market – and seeking to advance those rights, the two taxonomical categories defined above have much in common and certainly overlap. Both categories also encompass measures involving *de jure* and de facto discrimination. The reason for the overlap is that any internal measure, whatever its motivation, will

383 See, for instance, Howse (2002) and Jackson (2002).

384 See the discussion in Section C.

385 It is noteworthy that similar anti-circumvention concerns prompted agreements that applied to border measures, such as those on customs valuation, import licensing and anti-dumping and countervailing duties.

affect to some degree the conditions of competition in a market. It will affect the kinds of access and/or operating environment encountered by suppliers and supplies of goods and services.

In light of this reality, some have suggested that notions of "trade-relatedness" or "specificity" may be useful in identifying which internal measures should be subject to negotiation within the WTO. The more an internal measure is able to affect the relative competitive positions of foreign and domestic suppliers and supplies of goods and services, the argument would go, the stronger the case for subjecting that measure to WTO discipline. Maskus (2002) surveys related empirical work and based on this evidence suggests a ranking of internal measures according to their trade impact.[386] But the individual studies surveyed do not directly compare the trade impact of different types of internal measures and such a direct comparison may not be possible with existing methodologies and data. Economists can therefore only provide a rather imperfect idea of the relative "trade relatedness" of different internal measures. More fundamentally, the concept of trade-relatedness only indicates the extent to which internal measures may affect trade flows and does not give any indications as to the relevance of the measures for domestic policy objectives and thus welfare maximization. It is clearly for governments to determine whether trade-relatedness is a useful consideration in choosing among internal measures that might be negotiated in the WTO.

As far as specificity is concerned, measures that target a particular group of suppliers or consumers may be considered more distorting than measures of general application and therefore more deserving of attention in the WTO. The Spaak Report, the precursor of the Treaty of Rome establishing the European Economic Community, for example, made a distinction between "specific distortions" and "general distortions" and argued in favour of concerted action to address the former (Sapir, 1995). In the Spaak Report specific measures were those that were advantageous or disadvantageous to particular branches of activity. Along similar lines, the WTO Agreement on Subsidies and Countervailing Measures develops subsidy disciplines that rely on a specificity criterion. Once again, however, specificity as a criterion for determining proximity to trade has not been subject to systematic empirical or theoretical investigation. Economic analysis does not yield clear guidance.

The difficulty of establishing clear *ex ante,* objective criteria for harnessing the multilateral trading system for negotiations on internal measures is compounded by another consideration – governments may seek linkages between issues that are entirely unrelated to market access or competitive considerations. International relations involve multiple dimensions of interaction. Even when these dimensions are not directly interdependent – for example, trade policy and security concerns – the possibility of cross-issue negotiation linkage exists. By exchanging concessions across different policy dimensions, two countries may be able to achieve cooperation in situations where scope would not otherwise exist for the attainment of mutual gains. The possibility of cross-issue linkage has, for instance, been raised with respect to global environmental problems and trade, as indicated below.

A possible drawback of combining negotiations on border and (unrelated) internal measures is that as the negotiations become more complex, the calculus of costs and benefits from international cooperation for individual parties also becomes more multi-dimensional and less certain. This is the case in part because negotiations on internal measures often go in the direction of harmonizing relevant rules at the international level. Harmonization may facilitate international transactions and understandings, but may also have disadvantages when policy objectives and appropriate measures to pursue them differ across countries. Country-specific factors such as cultural heritage, climate, ideology, regulatory traditions and the level of development will become more relevant.[387] Distributional issues across jurisdictions are more likely to arise in the context of negotiations on internal measures since the adoption and/or harmonization

386 Maskus concludes that the empirical evidence on the existence of a positive trade impact is stronger for the case of intellectual property rights than for the case of environmental measures.

387 See also Howse (2002) on this point.

of rules may represent a cost for some parties.[388] If international cooperation is intended to eliminate prisoners' dilemmas and to facilitate win-win outcomes – in other words, to improve global welfare – then where the commitments involved in rule-setting carry negative inter-jurisdictional implications for some parties in distributional terms, something else is required in order to ensure the viability of cooperation. Win-win situations at the global level that entail win-loss relationships at the level of individual parties, may be made viable if the latter are compensated in some fashion. Such compensation could comprise a transfer, elements not related directly to trade, or a balance might be found directly within a package emerging from trade negotiations.

More generally, the welfare effects of negotiations on internal measures may not be as straightforward as in the case of negotiations on border measures. In particular, it is not necessarily the case that positions defended by export industries are optimal for the exporting country itself.[389] It has, for instance, been shown that in the case of standards intended to overcome information asymmetries in a certain product category, these standards are likely to be too lax in the country that produces and exports the good.[390]

One risk of pursuing a complex set of negotiations is that some negotiating partners may be disappointed with the negotiation outcome once they are in a position to evaluate it fully, including in terms of revealed outcomes. Future negotiations may then become even more complex because some participants may want to recover what they believe they did not receive in previous negotiations. On the other hand, the value of negotiated outcomes is also likely to change over time. With economic growth and changes in competitive positions, the benefits countries draw from certain international rules may change. The benefits of international rules on intellectual property would, for instance, increase for a country when it changed from being a net importer to a net exporter of R&D intensive goods, or when it enjoyed enhanced prospects of attracting investments intensive in high technology.

The question whether or not to embrace international negotiations on internal measures is, of course, separate from the choice of forum. The discussion above has implicitly assumed that such negotiations would be considered in the WTO. But numerous kinds of internal measures are negotiated in different international fora, often – but not always – within a specialized international organization. Food safety standards are negotiated at the Codex Alimentarius Commission, labour standards at the International Labour Organization and environmental standards in the context of multilateral environmental agreements (MEAs). Bringing internal measures into the multilateral trading system therefore also calls for a definition of the relationship between the WTO Agreement and other relevant standard-setting bodies or agreements. Once again, no conceptual framework exists for determining an optimal international architecture or desirable distribution of subject matter among institutions. As shown in the discussion below, many considerations are at play in relation to this question.

In what follows, a number of policy areas in respect of which a debate has actually taken place in the context of the GATT or the WTO are discussed in more detail. These include competition policy, labour standards, product standards, sanitary and phytosanitary measures, intellectual property rights and environmental protection. The choice of internal measures discussed here is by no means comprehensive, but rather illustrative of how negotiations on internal measures have evolved within the multilateral trading system and how the different factors raised in this introductory discussion may have affected outcomes.

388 Costs are here referring to reductions in economic welfare. See Bagwell and Staiger (2004) for an analysis of costs in terms of national sovereignty being compromised by international agreements.

389 See Howse (2002) on the role of export interests in the stance of the United States during the Uruguay Round negotiations, Hoekman and Saggi (2004) on the role of export promotion policies in the attempts to put competition policy on the WTO agenda and Maskus (2002) on the relevance of US export interests for negotiations on intellectual property rights.

390 See Sturm (2006).

(b) An evolving trade agenda: from ITO to WTO

(i) Competition and labour policy in the Havana Charter

Over time the issues of environment, labour, competition policy and intellectual property protection have played different roles in trade negotiations and trade cooperation. The Havana Charter conceived in the 1940s made explicit reference to both labour and competition policy. With respect to the former the Havana Charter stipulated in Article 7:

> "(1) The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
>
> (2) Members which are also members of the International Labour Organization shall co-operate with that organization in giving effect to this undertaking."

The Havana Charter also contained an entire chapter, Chapter V, on the subject of restrictive business practices, including a requirement for members to police anti-competitive practices of an international nature.[391] The Charter would have required its members to act against anti-competitive behaviour affecting trade, although it contained no general obligation to adopt a competition law. The Havana Charter also provided for intergovernmental cooperation on competition policy issues.

But as discussed earlier in this study, ratification of the 1947 Havana Charter proved difficult in some national legislatures and was never adopted. What survived of the Charter was Chapter IV, the chapter on trade in goods that became known as the GATT.

References to intellectual property rights and to the environment were limited in the Havana Charter. Article 21 provided that Members should not prevent the importation of such minimum quantities of a product as may be necessary to obtain and maintain patent, trade mark, copyright or similar rights under industrial or intellectual property laws. Article 70 foresaw flexibilities for commodity control agreements that relate solely to the conservation of exhaustible natural resources, and Article 45 made reference to exhaustible natural resources. Provisions similar to these all found their way into the general exceptions rules contained in GATT Article XX,

Indeed, the approach taken in the GATT text to disciplining the use of internal measures reflects the approach taken in Chapter IV of the Havana Charter. Like Article 18 of the Havana Charter, GATT Article III imposes restrictions on the discriminatory use of internal measures by Members.[392] GATT Article XX gives some flexibility in the use of domestic policies as long as they are used to pursue specific policy objectives that are listed in the Article, and are not unjustifiably discriminatory or restrictive of trade. See Box 23 for the relevant legal text.

391 See, for instance, Anderson and Holmes (2002).

392 The national treatment provisions of the GATS are more complicated, since they contemplate formally identical and formally different treatment.

Box 23: GATT Article XX

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

(ii) The Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS)

As tariffs came down through a succession of multilateral trade rounds, attention shifted to non-tariff measures. In the Tokyo Round, discussions were launched on a Code of Standard Practices. One aspect of these discussions concerned the need for rules to ensure that packaging and labelling requirements did not act as unnecessary barriers to trade. In this context it was argued that GATT Article III and IX (on marks of origin) were not sufficient to achieve an appropriate outcome.[393]

The plurilateral TBT Agreement[394] was signed at the end of the Tokyo Round and entered into force on 1 January 1980. It laid down rules for the preparation, adoption and application of technical regulations, standards and conformity assessment procedures. By the mid-nineties, when a revised standards agreement emerged from the Uruguay Round negotiations, the Tokyo Round Agreement had attracted 46 signatories.[395] Technical regulations and standards regarding products can often be controlled at the border. From an inspection and enforcement point of view, such measures therefore come close to border measures, even though definitionally they are generally treated as falling within the rubric of internal measures.

The WTO TBT Agreement strengthened and clarified the provisions of the Tokyo Round TBT Agreement and broadened its coverage to certain provisions on process and production methods. In addition, the Uruguay Round SPS Agreement dealt with measures to protect human and animal health from food-borne risks, human health from animal- or plant-carried diseases, animals and plants from pests or diseases, and measures for the prevention of other damage from pests. As more stringent rules were introduced in the agricultural sector during the Uruguay Round, Members wanted to ensure that the market access gained in that sector through the conversion of non-tariff measures into ordinary customs duties, would not be undermined by product regulations. Thus, disciplines tailored for agricultural product regulations were effectively separated from the TBT Agreement.[396]

GATT Article XX (b) had been designed to allow Members to deviate from GATT rules if this was necessary to protect human, animal or plant life or health. Some countries proposed to make it more difficult to invoke this exception by allowing derogation from the rules only for measures based on international norms.[397] Indeed, the United States suggested amendments to Article XX (b) to incorporate a harmonization principle.[398] Ultimately, it was decided to leave Article XX (b) unaltered and to enshrine the concept of harmonization in the newly negotiated SPS Agreement. The European Communities argued that Members which had achieved high health standards would find it difficult to accept moving to lower standards and that such countries should, therefore, be allowed to apply SPS standards more stringent than those agreed internationally. In other words, the notion that international standards may not achieve the level of protection sought by some countries was explicitly raised during the SPS negotiations.

An agreement emerged with a requirement that deviations from international standards should be justifiable through scientific evidence. It was mainly the Cairns group of agricultural producers that had insisted on placing the burden of proof regarding scientific evidence on importing countries. In other words, suggestions were rejected that exporters would have to justify that their products were "safe" and instead importers had to justify standards that were more stringent than international standards. The SPS Agreement specifies in Annex A that international standards are those developed by the Codex

393 See European News Agency (1975).

394 BISD 26S/8 (1980). This agreement is also referred to as the Standards Code.

395 See WTO (2007).

396 See Abdel Motaal (2004), Croome (1995).

397 See discussion in Abdel Motaal (2004).

398 MTN.GNG/NG5/W118.

Alimentarius Commission for food safety issues, the International Office of Epizootics – now called the World Organization for Animal Health (OIE) – for animal health and zoonoses and the Secretariat of the International Plant Protection Convention (IPPC) for issues concerning plant health.[399]

All three standardizing bodies were established prior to the adoption of the SPS Agreement. Although the WTO and the international standardizing bodies remain separate institutions, the reference to standardizing bodies in WTO legal texts appears to have affected their way of working.[400] Stewart and Johanson (1998), for instance, argue that activities of the three standardizing bodies tended to receive little attention outside the scientific community, because the standards they promulgated were not legally binding. Their standards continue to be of a voluntary nature, but as a result of the SPS Agreement, the stakes for WTO Members in international SPS standards became higher, and all three organizations were increasingly politicized. Interaction between cooperation on international standards and trade cooperation is thus likely to take place even if negotiations on both issues are not explicitly linked and do not take place within the same institution.

The WTO TBT Agreement and the SPS Agreement brought an important new element into the multilateral legal system – the explicit reference to process and production methods (PPMs). As opposed to product characteristics, PPMs cannot necessarily be controlled at the border. A distinction is sometimes made between incorporated and non-incorporated PPMs, where the latter do not leave traces in the products that can easily be detected.[401] Fishing methods, for instance, do not necessarily have an impact on the characteristics of the fish that are caught. Working hours or safety regulations at the workplace do not necessarily affect the goods that are produced. Inspection and enforcement in respect of rules related to non-incorporated PPMs at the international level is therefore less straightforward.

(iii) The TRIPS Agreement

International cooperation on intellectual property issues has existed for a long time. The Paris Convention for the Protection of Industrial Property was signed as early as 1883, after the need for international protection of intellectual property had become evident when foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna in 1873 out of fear that their ideas would be stolen and exploited commercially in other countries. Brazil, Tunisia, the United States and a number of European countries were among the first countries to ratify the Convention. Today the Convention is administered by the World Intellectual Property Organization (WIPO), which was established in 1970. The Convention has 171 contracting parties, 74 of whom ratified it after 1990. The Berne Convention in the field of copyright, also administered by WIPO, dates from 1886.

The Paris Convention requires that members do not discriminate against foreign industrial property owners – that is, it contains a national treatment provision. The Convention also contains a number of important minimum standards, but leaves members free to determine the main standards that regulate the level of protection given to patents. Over time, business people and policy makers in the industrialized world increasingly considered that the standards of the Paris Convention were too weak to provide adequate international patent protection. In the late 1970s a number of pharmaceutical companies and representatives from the US Patent and Trademark Office took their case for minimum standards of patent protection to WIPO.[402] But developing countries vehemently opposed changes to the Convention. The Advisory Committee on Trade Policy Negotiation, a US body created to provide business advice on trade matters to the President, consequently suggested placing the issue on the GATT agenda.

399 The TBT Agreement also encourages Members to base their internal measures on international standards and urges Members to play an active role in the development of such standards. Contrary to the SPS Agreement, the TBT Agreement does not make explicit reference to any particular international standard setting body.

400 See Abdel Motaal (2004).

401 See, for instance, Abdel Motaal (1999).

402 See Ryan (1998).

Underlying the inclusion of intellectual property as a topic for negotiation in the Uruguay Round and the subsequent negotiation of the TRIPS Agreement was a growing perception on the part of a number of WTO Members that their comparative advantage in international trade lay not in raw materials or in standard technology manufactured products, but in goods and services that were intensive in technology and creativity and/or characterized by high quality and reputation. These Members believed that they would not be able to realize their comparative advantage without a functioning worldwide set of minimum standards for the protection of intellectual property. The United States initially took the lead in seeking broad-ranging negotiations on intellectual property in the GATT framework and was subsequently joined by most other developed countries, in particular the European Communities, Japan and Switzerland.

The Uruguay Round mandate on TRIPS that was agreed at Punta del Este in September 1986, contained a commitment to negotiate a multilateral framework dealing with trade in counterfeit goods and contained a provision to "clarify GATT provisions and elaborate as appropriate new rules and disciplines" with a view to reducing distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of IPRs, and to ensure that measures and procedures to enforce them did not themselves become barriers to legitimate trade.

During the first two years of the negotiations, the meaning of this mandate was the subject of extensive discussion. Many developed countries argued that new rules for IPR protection and enforcement were needed in order to ensure that trade was not distorted and to promote the effective and adequate protection of IPRs. Most developing countries argued that such matters were outside both the mandate given at Punta del Este and the competence of the GATT.[403] They maintained that WIPO was the appropriate forum.

In a number of submissions to the Negotiating Group in 1987, developed countries made their case by emphasizing the trade problems they encountered in connection with intellectual property rights. The US submission, for instance, referred to estimates produced by industry bodies on losses faced due to limited patent terms and practices like unauthorized copying.[404] The importance of the possible impact of IPRs on trade flows was later confirmed by academic studies[405], which showed that the estimated changes in imports of manufacturing goods and high-technology manufactures induced by stronger patent rights could be substantial.

Differences regarding the negotiating mandate were essentially resolved as part of the package of the Uruguay Round mid-term review agreed in April 1989. Participants agreed that a successful outcome to the negotiations would need to include a comprehensive agreement on intellectual property, covering the following five elements: basic principles of IP protection; adequate substantive standards of protection; effective and appropriate means for their enforcement; procedures for the multilateral settlement of disputes between governments; and transitional arrangements. Agreement on these points was subject to three important understandings: in the negotiations appropriate consideration would be given to the underlying public policy objectives of national IP systems, including developmental and technological objectives; on the importance of strengthened commitments to resolve disputes on trade-related IP issues through multilateral procedures so as to reduce tensions in this area; and the negotiations would be undertaken without prejudice to whether the results would be implemented in the GATT or some other framework.[406]

403 See Croome (1995).

404 The submission referred to estimates provided by the International Intellectual Property Alliance and the National Agricultural Chemicals Association on the losses faced by industries due to unauthorized copying or use of copyrighted works. It also made reference to estimates provided by US pharmaceutical companies of losses due to limited patent terms together with the lack of product protection for pharmaceuticals. See MTN.GNG/NG11/W/7.

405 See Maskus and Penubarti (1995) and Maskus (2002). Maskus (2002) also makes the point that inclusion of IPRs in the multilateral trading system is facilitated by the fact that enforcement of TRIPS through dispute resolution is, in principle, a manageable task. Indeed, the assignment of commercial damages appears to be relatively straightforward in the case of IPRs, where copying is aimed at particular products and technology that may be identified through court proceedings

406 MTN.TNC/11.

Substantive work moved ahead rapidly thereafter, with the submission of a large number of proposals by developed and developing countries.[407] Intensive negotiations on the basis of draft legal texts submitted by the European Community, United States, a group of 14 developing countries, Switzerland and Japan followed [408], and the text negotiated by the end of 1991 was very close to the one that was finally approved and adopted at Marrakesh in April 1994.

This text built upon the international framework for IPRs that existed at the time and incorporated by reference many of the provisions of the then existing international agreements on IPRs, notably the Paris Convention and the Berne Convention. In addition, the TRIPS Agreement set out some substantial new international standards for the protection and enforcement of intellectual property rights. The Preamble to the Agreement calls for a mutually supportive relationship between the WTO and WIPO. International agreements established after the TRIPS Agreement, like the WIPO Copyright Treaty, are not automatically incorporated in the TRIPS Agreement, and WTO Members are under no obligation to adhere to them.

The inclusion of the TRIPS Agreement in the multilateral trading framework has given rise to a good deal of debate. Much of this has focussed on the implications of the Agreement for developing countries. Some observers have argued that the area of IPRs is one where a harmonized set of international rules has significant distributional consequences because countries at different stages of development have very different needs for IPR, and in particular, patent protection.[409] Developed countries with important R&D intensive and export-oriented industries are likely to gain from increased patent protection, while many developing countries that are net importers of IPR-embodied production, and have limited prospects of attracting high-technology industries, are likely to lose from an international IPR regime, at least in the short-run.[410]

A full analysis of these implications is beyond the scope of this discussion and in any event would entail making an assessment of the counterfactual, namely what would have been the situation in the absence of TRIPS. However, four considerations that may have played a role in the decision by developing countries to accept the TRIPS Agreement are set out below.

First, in the latter phases of the Uruguay Round negotiations, it became accepted that the TRIPS Agreement was an essential part of a broader package of results of the Uruguay Round negotiations, from which developing countries hoped to gain advantages in other areas – in particular agriculture and textiles. In other words, cross-issue linkages seem to have been important for the conclusion of the Uruguay Round.

Second, the Agreement contained elements of balance and flexibility which allowed developing country Members to fine-tune their intellectual property systems in the light of their development, public health and other public policy objectives. Some important clarifications of TRIPS flexibilities have resulted from the operation of the WTO dispute settlement system, and also from the Doha Declaration on the TRIPS Agreement and Public Health.

Third, developing countries' acceptance of the TRIPS Agreement may reflect a preference for the multilateral rule of law, including the multilateral resolution of disputes, in the area of intellectual property. It was clear at the time of the Uruguay Round negotiations that there was no longer a functioning international

407 Summarized in documents MTN.GNG/NG11/W/32/Rev.2 and 33/Rev.2. In the context of the discussion in this section, the submission by Chile is of interest (MTN.GNG/NG11/W/61). Chile suggested forwarding the proposals on standards made in the Negotiating Group to WIPO, in order that the latter would administer the new standards. Chile also suggested that WIPO be given the responsibility of determining cases of non-application of internationally-accepted intellectual property standards. In cases of non-application, GATT panels would, upon request, determine whether or not there had been "trade-related effects". Although Chile's suggestions were not accepted, they are interesting because of their similarities to the approach taken in the SPS Agreement.

408 MTN.GNG/NG11/W/68, 70, 71, 73, 74 respectively.

409 For example Deardorff (1998) and Howse (2002).

410 See Deardorff (1998).

consensus about the extent to which trading partners should provide for the protection of each other's intellectual property, and this was giving rise to widespread trade tensions, including unilateral trade measures.

Finally, another factor may have been the belief that enhanced IP protection could promote domestic creativity and inventiveness as well as the transfer of technology and FDI, within the context of the more market-oriented reforms that were being undertaken at the time. In some developing countries, especially in East and South Asia, there is evidence of large increases in the use of the patent system by domestic firms and residents, as well as increased in investment in R&D. However, for many developing countries, what is more important is the impact on the transfer of technology, including through FDI. Overall, the empirical literature appears to point to a positive role for IPRs in this regard, although perhaps the strongest conclusion that can be drawn from it is that more research and analysis is necessary.[411]

(iv) Changing approaches towards the limits of trade cooperation

This short summary of the role of internal measures in trade negotiations illustrates distinct approaches towards different types of domestic policies. Labour standards and competition policy were explicitly included in the original Havana Charter. The GATT legal texts incorporated into the WTO legal system do not contain any specific disciplines on harmonization of internal measures, and merely stipulate general disciplines as to which domestic policies would be in conflict with the GATT and which would not.

With the introduction of the Tokyo Round TBT Agreement, trade cooperation went in the direction of a partially more inclusive approach to harmonization of national regulation, but this happened only at the plurilateral level. The Agreement dealt with product characteristics that can often be controlled at the border and can therefore be considered a natural candidate for the inclusion of internal measures in the international trade framework. The Agreement made explicit reference to international standards, encouraging Members to apply relevant international standards where they exist and to collaborate to the extent possible in the preparation of international standards.

The Uruguay Round Agreements went several steps further and gave the multilateral trading system a significantly different character. First, the SPS Agreement and the TRIPS Agreement both brought increased harmonization of policies at the global level. The SPS Agreement does this by making explicit reference to international standard setting bodies like the Codex Alimentarius Commission and the World Organization for Animal Health. The TRIPS Agreement itself contains such international "minimum standards", as it defines, for example, the number of years for which protection will be granted for intellectual property rights related to trademarks and patents. Second, both the SPS Agreement and the TBT Agreement are applicable to process and production methods, implying that WTO provisions deal with internal measures whose implementation can potentially only be verified on production sites within the territory of exporting Members. Third, given its explicit reference to IPR rules, the TRIPS Agreement requires some Members to adapt domestic institutions in order to comply with WTO provisions.

(c) What role for domestic policies dealing with competition, environment and labour?

(i) Competition Policy

Competition (antitrust) policy deals with the behaviour of enterprises and, specifically, the regulation of anti-competitive practices such as cartels, abuses of a dominant position and anti-competitive mergers. As previously indicated, the still-born International Trade Organization (ITO) contained provisions on competition policy in a chapter that was not carried over into the GATT. While there is as yet no equivalent dedicated agreement on competition policy in the WTO, the subject is pertinent to a number of WTO agreements and related instruments in a number of specific ways. First, under each of the three main

411 See Fink and Maskus (2005).

agreements that make up the WTO system – the GATT, the GATS and the TRIPS Agreement – there are procedures for consultations and cooperation on anti-competitive practices.[412] Second, each of these three Agreements also contains broad rules on non-discrimination, transparency and procedural fairness which may relate, at least in some measure, to national competition policies that affect trade.[413] Third, minimum standards relating to specific anti-competitive practices are contained in certain of the WTO Agreements and related instruments – notably the GATS (Article VIII) and the commitments entered into by a large number of WTO Members in regard to basic telecommunications services in the form of the "Reference Paper" which contains competition safeguards and regulatory principles in this sector. Fourth, a number of WTO agreements contain provisions authorizing particular remedies in cases of enterprise behaviour that impacts adversely on trade and/or competition. These include the Anti-dumping Agreement, the plurilateral Agreement on Government Procurement and the TRIPS Agreement.[414] Fifth, the WTO Dispute Settlement Understanding is potentially applicable to measures attributable to governments and affecting trade which in certain situations may involve anti-competitive practices.[415] The need to ensure that anti-competitive practices do not impede or negate the realization of the benefits that should flow from the reduction of tariffs and the liberalization of non-tariff measures affecting international trade is also at the heart of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("the Set") adopted in 1980.[416]

The general question of the treatment of competition policy in the WTO was raised at the Singapore Ministerial Conference in December 1996, in response to an initiative of the European Communities. A Working Group on the Interaction between Trade and Competition Policy (WGCTP) was established with the mandate to consider issues raised by Members relating to the interaction of the two policy fields and to identify any areas that might merit further consideration in the WTO framework.[417] Pursuant to this mandate, in the first two years of its work, the Working Group focused on the following five specific dimensions of the interaction between trade and competition policy: (i) the impact of anti-competitive practices of enterprises and associations on international trade; (ii) the impact of state monopolies, exclusive rights, and regulatory policies on competition and international trade; (iii) the relationship between the trade-related aspects of intellectual property rights and competition policy; (iv) the relationship between investment and competition policy; and, (v) the impact of trade policy on competition.[418]

The first point – the impact of anti-competitive practices on trade – is the most interesting one with respect to the discussion in this section.[419] In the discussions on this item, particular attention was given to the impact of international cartels (i.e. price-fixing and similar arrangements). Note was taken of the extent and effects of such arrangements in the globalizing economic environment. The costs imposed by such cartels on the world economy and, specifically on developing countries, have been shown

412 See, respectively, *Decision on Arrangements for Consultations on Restrictive Business Practices*, BISD 9S/28-29 (with respect to the GATT); GATS, Article IX; and the TRIPS Agreement, Article 40.

413 World Trade Organization (1997). See, for pertinent commentary, Ehlermann and Ehring (2002).

414 See, for details, World Trade Organization (1997).

415 For example, in cases of a failure to adhere either to the above-noted broad rules on non-discrimination or to the minimum standards with respect to the treatment of anti-competitive practices which are embodied in the GATS and the Reference Paper. See, in this connection, the report of the panel in *Mexico: Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004.

416 United Nations, 'The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices', http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm.

417 Singapore Ministerial Declaration, Paragraph 20.

418 See "Checklist of issues suggested for study," reprinted in Report (1998) of the Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/2, 8 December 1998), Annex 1.

419 With regard to the third item it is worth noting that the TRIPS Agreement specifically recognizes that competition policy has an important role to play in protecting against anti-competitive abuses of intellectual property licensing and other practices.

to involve billions of dollars annually.[420] Furthermore, in many such cases cartels are known to have operated extensively throughout the developing world, substantially raising the costs of developing country imports of affected products. Given that such cartels operate in multiple markets it is difficult, if not impossible, for national competition authorities – in particular in developing countries – to discipline possible anticompetitive abuse. In the academic literature it has been argued that increased cooperation among national competition authorities or the establishment of a *supra*-national competition authority could go some way in solving this problem.

Attention was also given to the issue of export cartels – that is, price-fixing arrangements that focus solely on export markets. It was felt by some parties that such practices result in "beggar thy neighbour" effects as their negative impact is mainly felt in the importing country while the relevant cartels in exporting countries register gains. Although they do not represent a classical example of commitment circumvention, the activities of export cartels are often seen as violating the spirit of trade cooperation. In the Working Group, some countries expressed interest in the possibility of eliminating existing exemptions for such arrangements under national competition laws, but others questioned whether the national authorities of the exporting countries would have jurisdiction to prosecute such arrangements.[421]

In the discussions under item (i) mentioned above, attention was also given to the impact on trade of anti-competitive abuses of a dominant position and vertical market restraints in importing countries.[422] If national antitrust laws tolerate such practices this can frustrate effective market entry by foreign suppliers.[423] GATT Article XXIII could be interpreted to provide some protection against these practices and has indeed been invoked – albeit unsuccessfully – in this context in the *Japan-Film* dispute, as mentioned in Section C. Yet, as with all the topics discussed in this section, the question arises whether additional specific rules should be negotiated in order to protect negotiated commitments.

In Doha, Members agreed that negotiations on competition issues would take place after the next Ministerial Conference on the basis of a decision to be taken at that session on modalities of negotiations.[424] But at the subsequent WTO Ministerial Conference in Cancun, Mexico, in September 2003, no consensus was reached on negotiations on a "multilateral framework on competition policy". Subsequently, the General Council of the WTO decided, as part of the so-called 'July package' of 2004, that no further work would be undertaken towards negotiations on competition policy (nor on the issues of investment and transparency in government procurement) in the WTO for the duration of the Doha Round.[425]

The lack of consensus on launching negotiations on competition policy at Cancun merits careful reflection. In addition to possible tactical considerations, the reasons underlying this rejection included concerns about a lack of negotiating capacity in this area, a perception by some that the proposals might intrude on developing countries' "policy space"[426], and, for some, a sense that the proponents' proposals might not be sufficiently strong to yield tangible benefits in the form of cooperation for developing countries.[427]

420 See, for details and relevant discussion, Levenstein and Suslow (2001), Evenett et al. (2001) and Bhattacharjea (2006).

421 Given that negotiations on export cartels are likely to result in win-lose outcomes, the question of issue-linkage arises and has, indeed, been analysedd in the economic literature. Hoekman and Saggi (2003) investigate the feasibility of a deal involving linkage between specific antitrust disciplines of interest to poor countries – a ban on export cartels enforced by high-income countries – and market access commitments.

422 See, generally, Report (1998) of the Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/2, 8 December 1998), paragraphs 81-96.

423 See Hoekman and Saggi (2004).

424 Doha Ministerial Declaration paragraph 23.

425 WT/L/579, 2 August 2004.

426 Policy space that might be used, for example, to promote national champions.

427 See Bhattacharjea (2006). For some, a further concern was the direct financial cost of setting up a national competition agency. The evidence suggests, however, that the annual costs of such agencies pale by comparison to the benefits to public treasuries that can accrue from just one or two successful prosecutions of major cartels or bid-rigging cases (Clarke and Evenett 2003).

Another factor, highlighted in the Working Group also as affecting national competition policies, may have been the public good character of competition law and the related absence of producer lobbies. It is interesting to contrast this absence of producer lobbies in the case of competition policy with the relative active role producer lobbies have played in the context of other internal measures or certain border measures. The observation has also been made that it would be difficult to reach agreement on sound competition rules within the multilateral trading framework as any negotiation on competition issues would probably be affected by progress in trade negotiations in other sectors or on other topics.[428] In other words, cross-sector linkages or cross-issues linkages of negotiations were seen as adding an undesired complexity to negotiations.

This decision in the WTO has not meant an end to international deliberations on competition policy. Work has continued on a number of fronts, including in the OECD and UNCTAD. In addition, even prior to Cancun, an "International Competition Network" (ICN) was founded, on the basis of a US proposal. The ICN is an informal network of antitrust agencies which is open to both developed and developing countries. It focuses on improving worldwide cooperation and enhancing convergence through dialogue, and does not exercise any rule-making or dispute settlement functions.[429]

In any case, the longstanding recognition of the important interdependence of trade and competition policy, reflected in the Havana Charter, the UN Set and the various above-noted WTO provisions, has not been called into question. The work of the Working Group on the Interaction between Trade and Competition Policy has served to elaborate on these relationships. In addition, recently-concluded regional free trade or similar agreements involving both developed and developing countries increasingly contain provisions relating to laws or policies dealing with anti-competitive practices and/or cooperation among relevant agencies of the participating countries.[430] The question is not whether competition policy and trade liberalization can or will be linked but whether and how far the potential synergies will be harnessed in the WTO framework.

(ii) Environment

When the multilateral trading system was established after the Second World War, the environmental consequences of economic integration were not a primary concern for policy makers. This may explain why references to issues of environmental protection in the GATT were basically restricted to Article XX, which provides that policies may under certain conditions entail elements of discrimination if they are necessary to "protect human, animal or plant life or health" or if they are related to "the conservation of exhaustible natural resources ..."

Over time, the impression arose that more clarification was needed on the relationship between trade and environment and in 1971 a Group of Environmental Measures and International Trade was established for this purpose. A request to activate this group was made for the first time in 1990 by the countries from the European Free Trade Association (EFTA).[431] The debate on trade and environment was further institutionalised within the WTO through the Marrakesh Decision on Trade and Environment. In this decision Members noted that safeguarding the multilateral trading system and protecting the environment and promoting sustainable development should be mutually supportive. They further noted

[428] Klein, J.I. (1996), page 14: "A WTO competition policy debate would have to balance many (often diverse) national interests, with the possibility of positions shifting in response to trade-offs in other trade negotiations related to agriculture, services, intellectual property, or any of the myriad fields currently covered by WTO agreements."

[429] See "About the ICN" (http://www.internationalcompetitionnetwork.org/index.php/en/about-icn).

[430] See, for documentation and analysis of such arrangements, Anderson and Evenett (2006) and other sources cited therein.

[431] They expressed the concern that the approach to environmental policy making varied considerably from country to country due to differing geographical settings, economic conditions, stages of development and environmental problems. EFTA countries expressed concern that the resulting policy differences could potentially set the stage for trade disputes and they therefore wished to ensure that GATT's framework of rules provided clear guidance to policy makers and that its dispute settlement system was not faced with issues it was not equipped to tackle. See Annex 1 of Nordström and Vaughan (1999) for more detail.

their desire to coordinate policies in the field of trade and environment, "but without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects". The Marrakesh Decision also foresaw the establishment of the Committee on Trade and Environment (CTE), which took place in January 1995.

The 1994 Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") also introduced new elements in the legal texts that are relevant to the trade and environment debate. The Preamble to the WTO Agreement includes reference to the objective of sustainable development and to the need to protect and preserve the environment. During the Uruguay Round negotiations, a proposal was made to alter GATT Article XX and explicitly mentions the protection of the environment as a legitimate reason for Members to depart under certain conditions from their obligations. Although no consensus was attained on this proposal, Article XX is of relevance for any legal disputes concerning the compatibility of environmental policies with the multilateral trading system.

Protection of the environment also receives specific mention in the TBT Agreement. Article 2.2 of the Agreement refers to protection of the environment as a legitimate objective for a technical regulation.[432] As noted earlier, the Agreement also encourages Members to use relevant international standards as a basis for their technical regulations, although it does not make reference to any particular international standard setting. One may note the contrast between the treatment of environmental questions in the WTO texts with the approach of the SPS Agreement. The latter is a separate, explicit agreement on a set of public policy objectives – that is, measures to protect human, animal or plant life or health – while in the case of environmental protection (in a broader sense), no such specificity has been introduced.

One of the particularities of the relationship between trade and environment is the existence of a large number of multilateral environmental agreements (MEA). In 2005, the UNEP Register mentions over 200 international treaties and other agreements on the state of the environment.[433] A number of these agreements contain explicit trade provisions. The 2001 Doha Declaration refers to the relationship between WTO Agreements and MEAs. Members are called upon "to negotiate on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs) with a view to enhancing the mutual supportiveness of trade and environment".[434]

The current situation, then, is that governments negotiate international environmental standards in multiple fora, separate from multilateral negotiations on trade cooperation. Some co-ordination between the trade and environment community exists and in negotiations in the context of the Doha Round possible procedures for regular information exchange between MEA Secretariats and the relevant WTO Committees are discussed.[435] But international environmental standards largely remain the domain of MEAs.

There have been calls in the public debate for closer international cooperation on trade and environmental issues – making, for instance, trade cooperation conditional on cooperation on environmental matters. The economic literature has analysed two possible reasons for such proposals. The first argument is based on a concern that different rules on environmental measures are needed within the WTO in order to avoid regulatory "chill" or a "race-to-the-bottom" in standard-setting at the national level.[436] The argument is that governments will be increasingly hesitant to increase environmental standards or will even tend to lower their standards in order to remain competitive in global markets. Economists

[432] Other "legitimate objectives" referred to in TBT Article 2.2 are national security requirements, the prevention of deceptive practices, protection of human health or safety and animal or plant life or health.

[433] United Nations Environment Programme, Register of International and Other Agreements in the Field of the Environment, Nairobi: 2005.

[434] Paragraph 31 of the Doha Ministerial Declaration.

[435] Doha Ministerial Declaration paragraph 31 (ii).

[436] See Bagwell and Staiger (2002), Bagwell et al. (2002).

have examined the validity of this concern by analysing whether environmental regulation indeed has a substantive impact on competitiveness. If this were the case, one would observe changes in the pattern of trade as a result of changes in environmental policies. An early study on the trade effects of environmental regulations (Jaffe et al., 1995) found that environmental regulations on US manufacturing had not affected patterns of international trade. A more recent study by Copeland and Taylor (2003) found that differences in pollution regulation do affect trade flows, but their effect is much weaker than the effect of factor endowment differences on trade flows.[437] So far, there is thus no strong evidence that environmental standards have significant effects on trade or that the risk of a race to the bottom or regulatory chill is acute.

The second argument analysed in the economic literature for tying negotiations on trade and environmental standards closer together is that this would increase the probability of negotiations on environmental matters being successful. As mentioned before, cross-issue linkage in negotiations can allow negotiating partners to exchange concessions across different policy dimensions. For example, a country may be willing to accept environmental standards that it considers very costly for its economy if in turn it obtains worthwhile gains from trade negotiations. Conconi and Perroni (2002) have analysed negotiation tie-in for environmental and trade matters in a theoretical framework and find that in some cases, negotiation tie-in could play a positive role, but that in other cases it could become a hurdle to multilateral cooperation in both fields. Their results suggest that making trade cooperation conditional on environmental cooperation and vice-versa, could play a facilitating role in the case of "small" environmental problems.[438] But such conditionality is more likely to be an impediment to cooperation for broader environmental issues such as climate change. Abrego et al. (2001) use a numerical simulation model to compute bargaining outcomes from linked trade and environmental negotiations. Results indicate joint gains from expanding the trade bargaining set to include the environment. But the authors also analyse a third scenario – that of offering cash side-payments to countries that expect to lose from international environmental standards. They find that this approach leads to significantly better negotiation outcomes than making trade cooperation conditional on environmental cooperation.

(iii) Labour

The WTO's official position on labour standards is reflected in the 1996 Singapore Ministerial Declaration that stipulates::

> "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."

This declaration, reaffirmed in Doha in 2001, emphasizes the importance WTO Members attach to core labour standards. It also *inter alia* articulates the view of Members that the ILO is the competent body to set, deal with, and promote these standards.

From past discussions, it is clear that some WTO Members would like to see the issue further explored in the WTO, including the possibility of an explicit reference to labour standards in the Agreements. WTO rules and disciplines, they argued, would provide a powerful incentive for Member nations to improve

[437] See WTO (2005) for references to empirical studies analysing the effect of environmental measures on FDI decisions.

[438] Small, that is, in terms of the associated welfare costs and benefits in comparison with the costs and benefits of trade policies.

workplace conditions and advance "international coherence" – that is, they would support efforts to ensure policies developed in different multilateral settings are consistent and mutually supportive.

Other WTO Members believe the issue has no place in the WTO framework. In this context, some developing countries argue that the suggestion to bring labour issues into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners and could undermine their ability to raise standards through trade and economic development. They also fear that proposed standards could be too high for them to meet at their level of development. These countries further contend that efforts to bring labour standards into the arena of multilateral trade negotiations are little more than a smokescreen for protectionism. They hold strongly to the pronouncement in Singapore that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.

In accordance with the position decided at the Singapore Ministerial Conference, there is currently no work on the subject of trade and labour in the WTO's councils and committees. In line with the Singapore Declaration, the WTO and ILO Secretariats continue existing collaboration and exchange of information. This includes participation by the WTO in meetings of ILO bodies, exchange of documentation, joint research and informal cooperation between the two Secretariats. In 2007, for instance, the two Secretariats launched a joint study on the relationship between trade and employment.[439]

Beyond the discussion among WTO Members on the topic of trade and labour, some interesting dimensions of debate have emerged in the academic literature. Theoretical and empirical economic analyses of the relationship between trade and labour standards have paid particular attention to "race to the bottom" and "regulatory chill" arguments. As in the case of the literature on trade and environment, the relevant studies analyse whether it is indeed the case that changes in labour standards affect competitiveness and thus trade flows. The relevant research has tended to make a distinction between core labour standards and other labour standards.

The term core labour standards refers to ILO Conventions dealing with four areas – freedom of association and bargaining, elimination of forced and compulsory labour, elimination of discrimination in respect of employment and occupation and the abolition of child labour.[440] Maskus (1997) analyses links between core labour standards and international trade policy. He develops a series of simple models to see whether limiting core labour standards in export sectors of developing countries can improve their price competitiveness in export markets. He concludes that deficient provision of core labour standards generally diminishes export competitiveness rather than improving it because of the distortionary effects of those deficiencies. In other words, implementing core labour standards increases workers' productivity and lowers their real costs, rather than the opposite. The author concludes that concerns about the negative impact on industrial countries of limited wage, employment, and labour standards in developing countries are largely misplaced, with one exception – the exploitation of child labour through an expansion of labour supply could expand exports in highly labour-intensive sectors.

Empirical research is not entirely conclusive, but seems to confirm that trade effects are different for core labour standards related to child labour than for core labour standards related to freedom of association and bargaining. Early studies showed the absence of a correlation between labour standards in general and the volume of trade, but those studies did not use reliable indicators of real compliance with labour standards.[441] More recently, Rodrik (1998) found that timework and child labour contribute to a higher share of labour-intensive exports in total exports. Kucera and Sarna (2006) find a robust relationship between stronger freedom of association and collective bargaining (FACB) rights and higher

439 See ILO and WTO (2007).

440 Originally the term "core labour standards" referred to six ILO conventions falling under the above-mentioned four headings: Convention 29, 87, 98, 105, 111 and 138 (see for instance Maskus, 1997). Today the term is used to refer to eight ILO conventions: the six conventions mentioned before, convention 100 and convention 182.

441 See Granger and Siroën (2006) for an overview.

total manufacturing exports. They find no robust relationship between FACB rights and labour-intensive manufacturing exports. These findings are confirmed by Neumayer and de Soysa (2006), who use the measure for FACB rights constructed by Kucera and Sarna (2006) and do not find evidence of a race to the bottom in FACB rights. Instead, they find that countries that are more open to trade have fewer rights violations than more closed ones. Taken together, the evidence of these last three papers appears to confirm the findings by Maskus (1997) that with respect to their effect on trade, it may make sense to distinguish between the core labour standards related to child labour and those related to FACB. While the former could be used to circumvent market access, this would – from an efficiency point of view – not make sense for the other types of core labour standards. But empirical evidence so far is too scarce to allow for a firm conclusion in this respect.

Labour standards also differ among industrialized countries although these differences are stronger with respect to standards not considered core labour standards. As to the existence of evidence of those differences influencing trade flows, Van Beers (1998) analyses the effect of labour standards on trade flows among 18 OECD countries. His measure of labour standards is based on national legislation and goes beyond the so-called core labour standards. The author finds that labour standards do influence trade, thus confirming that the range of labour standards potentially relevant for market access concerns in the context of trade agreements is not necessarily restricted to core labour standards.[442] Blanchard (2005) contends that a trade-off between efficiency and insurance exists and thus hints at a possible trade-relevance of labour standards aimed at insuring workers against adverse professional events.

In the public debate the argument has also been made that trade agreements should make explicit links to labour standards on humanitarian grounds rather than for reasons related to market access concerns, as discussed in the previous paragraphs. Brown (2001) surveys the economic literature that analysess whether trade sanctions actually help those who are the focus of humanitarian concerns and comes to the conclusion that trade sanctions levelled against countries with poor labour practices may well hurt the very workers who are the intended beneficiaries.

(d) Conclusions and challenges ahead

Since the inception of the multilateral trading system there have been calls for more explicit disciplines on certain types of internal measures. In this section a number of policy areas have been considered on which discussions or negotiations have taken place in the context of the GATT or the WTO. The outcome of these discussions or negotiations have differed significantly across policy areas. Separate agreements have been dedicated to some internal measures, like sanitary and phytosanitary measures and intellectual property rights. Other measures, like those targeting environmental protection, are not governed by separate agreements but are explicitly entrenched in legal texts. Yet another set of internal measures receive no mention in the legal texts, but may nevertheless be subject to dispute settlement should a Member see fit to bring a complaint under GATT Articles III, XX or XXIII. There are examples of the WTO setting international minimum "standards", like in the case of TRIPS, and examples of legal texts referring to international standards set by other international bodies, like Codex in the case of SPS.

Other WTO Agreements not explicitly discussed in this section have taken different approaches to disciplining internal measures, like the Agreement on Subsidies and Countervailing measures, the Agreement on Agriculture and the General Agreement on Trade in Services. All this illustrates the broad variety of ways in which disciplines on internal measures can be explicitly linked to the multilateral trading framework. But it is not possible on the basis of this discussion, and nor for that matter on the basis of established theoretical or proven empirical propositions, to conclude whether one approach is better than another.

[442] This may explain why also in the context of regional agreements among industrialized countries, like the European Union, discussions have taken place on the harmonization of social policies. See Sapir (1995) for an extensive discussion.

The analysis here does not allow for general conclusions on whether some internal measures deserve different treatment than others from a welfare perspective. Nor does it reveal whether some internal measures are more deserving of inclusion on the WTO agenda than others, or for that matter what the optimal institutional shape for international cooperation might look like. The discussion does, however, highlight one concern that has received attention in the economic literature. This relates to the possible distributional consequences of multilateral rules on internal measures, in particular if they involve harmonization at the global level. Trade liberalization through tariff reductions is expected, in general, to lead to gains for every trading partner involved, but this is not necessarily the case for multilaterally agreed policy harmonization.

On the other hand, distributional concerns cannot serve as a reason for disregarding the possible benefits from multilateral cooperation on trade and internal measures. Trade-offs and linkages can improve overall welfare, leaving the distributional issue as a challenge to be managed as part of a package. It is a fact that in all the areas discussed in this section some level of policy harmonization is taking place at the international level, either in international institutions, specialized international standard setting bodies, or in the context of international agreements.

The choice of domestic policy issues discussed in this section was intended to be illustrative, in part to address the underlying question whether some form of pre-committed understanding of how the WTO agenda should be shaped could itself be the subject of an agreement. Were this to be possible, a set of accepted criteria would underlie any determination of what to include on the WTO agenda. The complexities and uncertainties surrounding the policy issues discussed in this section provide one good reason why efforts in this direction would be a fool's errand. We have already seen in other parts of this study that governments have very different motivations and priorities when they engage in international trade cooperation. Moreover, an effort to pre-determine agenda formation would need to recognize uncertainty about the future. In sum, this report offers no prescriptions for what ought to be done by way of defining the WTO's agenda as the multilateral trading system moves into the seventh decade of its existence. The best that this report can do is to point to some of the questions that might be asked and issues that might be relevant when governments take up the thorny issue of what, and what not, to negotiate.