WORLD
TRADE
ORGANIZATION

WTO 1997

# Annual Report 1997

## Volume I

## Special topic: Trade and competition policy

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# Abbreviations and symbols

| | |
|---|---|
| APEC | Asia-Pacific Economic Cooperation |
| ANZCERTA | Australia-New Zealand Closer Economic Relations Trade Agreement |
| ASEAN | Association of South-East Asian Nations |
| CEFTA | Central European Free Trade Agreement |
| CIS | Commonwealth of Independent States |
| ECU | European currency unit |
| EFTA | European Free Trade Association |
| EU | European Union |
| EUROSTAT | Statistical Office of the European Communities |
| FAO | Food and Agriculture Organization of the United Nations |
| FDI | Foreign Direct Investment |
| GDP | Gross Domestic Product |
| GNP | Gross National Product |
| HS | Harmonized Commodity Description and Coding System |
| IBRD | International Bank for Reconstruction and Development (World Bank) |
| IEA | International Energy Agency |
| IMF | International Monetary Fund |
| ISIC | International Standard Industrial Classification |
| LAIA | Latin American Integration Association |
| MERCOSUR | Southern Common Market |
| NAFTA | North American Free Trade Agreement |
| OECD | Organisation for Economic Cooperation and Development |
| SAPTA | South Asian Preferential Trade Arrangement |
| SITC | Standard International Trade Classification |
| UNECE | United Nations Economic Commission for Europe |
| UNECLAC | United Nations Economic Commission for Latin America and the Caribbean |
| UNCTAD | United Nations Conference on Trade and Development |
| UNIDO | United Nations Industrial Development Organization |
| UNSD | United Nations Statistical Division |

| | |
|---|---|
| c.i.f. | cost, insurance and freight |
| f.o.b. | free on board |
| n.e.s. | not elsewhere specified |
| n.i.e. | not included elsewhere |

**The following symbols are used in this publication:**

| | |
|---|---|
| ... | not available |
| 0 | figure is zero or became zero due to rounding |
| – | not applicable |
| $ | United States dollars |
| Q1, Q2 | 1st quarter, 2nd quarter |
| I | break in comparability of data series. Data after the symbol do not form a consistent series with those from earlier years. |

Billion means one thousand million.

Minor discrepancies between constituent figures and totals are due to rounding.

Unless otherwise indicated, (i) all value figures are expressed in US dollars; (ii) trade figures include the intra-trade of free trade areas, customs unions, regional and other country groupings; (iii) merchandise trade figures are on a customs basis, and (iv) merchandise exports are f.o.b. and merchandise imports are c.i.f. Data for the latest year are provisional.

**Closing date 31 August 1997**

# Chapter One

# The state of world trade, trade policy and the World Trade Organization

# The state of world trade, trade policy and the World Trade Organization

## I. Introduction

The first year following the Singapore Ministerial Conference has been an active one for the World Trade Organization. At Singapore last December, Ministers strongly reaffirmed their confidence in the multilateral trading system and their commitment to ensuring that the WTO remains a vibrant, relevant and effective rules-based system – a system upon which governments can confidently rely in the conduct of their international trade policies, and as they seek progressively to push forward the process of trade liberalization.

As in previous years, this year's report explores in depth a policy issue of current interest. The topic for this year is the interaction between trade policy and competition policy. The topic was chosen in view of the inclusion by Ministers at Singapore of this subject for examination in a WTO working group. Another subject upon which the report might have focused this year is globalization, in view of the considerable attention that this subject has attracted recently in public debate, and of the central role that the WTO plays in the process of globalization. Moreover, several international institutions have focused on the issue of globalization this year, including the IMF, the World Bank, the UN, UNDP, UNCTAD and OECD. These studies deal with important issues facing policy makers worldwide. The WTO Secretariat intends to prepare its own contribution in the context of the celebration next year of the 50th anniversary of the multilateral trading system.

This first chapter of the Annual Report identifies significant short-term developments and prospects in world trade. It then considers trends in trade policies and some of the major activities of the WTO. The chapters that follow take up these matters in more detail.

## II. Recent trends in world trade

After two years of exceptionally good performance, trade growth in 1996 returned to the more typical trend rate of the last few years. World merchandise trade grew at 5 per cent in real terms in 1996, compared to an average rate of 6 per cent for the first half of the 1990s. The latter average, of course, was pulled up by the unusually high growth rates of 8 per cent or more achieved in 1994 and 1995. Both merchandise production and world GDP grew at $2\frac{1}{2}$ per cent in 1996. This performance was very similar to that of 1995, but significantly better than the average of $1\frac{1}{2}$ per cent achieved in 1990-96. Trade growth has, as usual, outpaced domestic output growth by a significant margin, attesting once again to the onward pace of globalization.

Merchandise trade growth expressed in current dollar value terms was, somewhat unusually, lower than trade growth expressed in volume terms in 1996. Thus, the nominal merchandise export growth rate in 1996 was only 4 per cent. Among the main reasons for lower nominal growth in 1996 was the appreciation of the US dollar, and a reversal in the price rises recorded in 1995 for a range of primary and semi-manufactured products. Notwithstanding these influences on current values, world merchandise exports exceeded the $5 trillion* mark for the first time in 1996, registering a total of $5,120 billion. Exports of commercial services grew in current price terms by 5 per cent in 1996, significantly lower than the 14 per cent growth rate recorded in 1995, but partly explained by the dollar appreciation. The value of commercial services exports in 1996 was $1,260 billion.

Exports of manufactured goods, accounting for some three-fourths of total merchandise exports, grew at $5\frac{1}{2}$ per cent in volume terms, much faster than agricultural and mining products, which only registered export growth rates of 2 per cent and $2\frac{1}{2}$ per cent respectively in 1996. Trade performance varied widely on a regional basis, with values being heavily influenced by exchange rate movements and relative price changes. The Middle East and Africa recorded the highest export growth rates of all major regions in 1996, largely due to the recovery in oil prices in 1996. Latin America recorded an above-average export and import performance in 1996, at 11 per cent, with Mexico's strong trade performance accounting for a significant part of this. While North America and the transition economies achieved export growth rates above the global average for 1996, at 6 per cent each, this was not the case for Western Europe and Asia, which recorded export growth rates of 3 per cent and 1 per cent respectively.

*All references to dollars are to US dollars.

Growth in commercial services trade has been above average in the Americas, and particularly in Latin America, where a growth rate of 8 per cent, or nearly twice the world average was recorded in 1996. A similar figure was recorded for Asia. In Western Europe, by contrast, the rate of export growth of commercial services was only 3 per cent. It should, however, be borne in mind that these are current values, influenced by exchange rate movements, and in particular, the appreciation of the US dollar.

### Prospects

World trade and output are expected to accelerate in 1997. There will be a narrowing of regional differences, with economic activity in Western Europe and the transition economies strengthening. While the dynamic East Asian economies are expected to slow down somewhat, most of them are still expected to record growth rates in excess of the global average. North America is expected to record a strong growth rate, even if growth weakens somewhat in the last part of 1997. Latin America's recovery is expected to continue, resulting in a growth rate higher than that attained in the 1990-95 period. Africa will continue to grow faster than it has done for many years prior to 1996, although it is not expected to perform as well as in 1996. The overall improvement in economic performance expected in 1997 will spill over into improved real export growth. The continued appreciation of the US dollar will, however, depress the nominal value of trade, perhaps to the point of reducing the growth of the current dollar value of trade in 1997 below that of 1996.

Recent developments in the financial sector in a number of South East Asian countries will continue to pose policy challenges to the governments concerned in the months ahead. If the situation is well-managed, however, these difficulties should only pose a temporary setback. A number of these economies were already showing signs of a slowdown when the financial sector difficulties manifested themselves, and as already noted, most of the economies concerned are expected to grow at rates above the world average. Confidence in the medium term prospects of these countries is strong as most factors which contributed to their past growth performance are still in place, namely high savings/investment ratios, high levels of education and training and an open, outward-oriented economic policy.

## III. Trends in trade policies

In the somewhat longer-term perspective taken in last year's report on trends in trade policies, it was pointed out that developments little short of a revolution had taken place in trade policy during the last ten years. The essence of these far-reaching changes lies in the emergence of a virtual global consensus on the fundamental contribution to economic progress made by open trade policies. This, in turn, is reflected in the degree of trade liberalization achieved during and since the Uruguay Round, as well as the continuing consolidation and expansion since 1995 of the multilateral trading system embodied in the World Trade Organization.

While Members continue to implement trade liberalization commitments made in the Uruguay Round, further multilateral, regional and autonomous liberalization efforts have proceeded, in relation to trade both in goods and services. In respect of tariffs, it is notable that prior to the Singapore Ministerial Conference, a significant proportion of trade in manufactures was already free of duty. In the case of industrial products entering developed country markets on a MFN basis, the proportion of the total flow carrying zero duties was at 44 per cent. The Declaration on Trade in Information Technology (IT) Products and new commitments on pharmaceutical products have further pushed up the share of duty-free trade in total trade.

The Declaration on IT Products commits 43 Members, representing approximately 93 per cent of world trade in these products, to eliminate duties thereon by the year 2000 (or 2005 in the case of certain developing countries). In addition, the Members involved in the "zero for zero" initiative on pharmaceutical products added some 465 items to the 600 already on the list of products subject to duty-free treatment.

In the services sector, 69 WTO Members subscribed in mid-February 1997 to wide-ranging liberalization measures in basic telecommunications, as well in most cases to a set of regulatory principles designed to ensure that market-opening measures are translated into real market access. Between them, the Declaration on IT Products and the new commitments in basic telecommunications cover a very large area of economic activity. International trade in IT products amounts to some US$600 billion annually, while domestic and international revenue generated in the basic telecommunications sector is roughly the same amount.

Moreover, these agreements cover goods and services that are fundamental to the working of modern economies, especially in the context of increasing globalization. Another service sector of similar importance in today's economies, the financial services sector, is also the subject of intense negotiations, due for completion at the end of 1997.

In parallel to these multilateral efforts, several countries, most notably but not exclusively in South and South-East Asia, have continued to push ahead with autonomous programmes of trade liberalization and/or regulatory reform. In addition, efforts have continued in these and other regions to consolidate and extend a number of regional arrangements. In Europe, concrete proposals have been made to extend EU membership to several countries, including Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. The EU is also engaged in trade negotiations with Mexico and South Africa, and has defined new frameworks for trade relations with North America, MERCOSUR and Asia.

In the Americas, Canada and Chile have signed a free trade agreement. Mexico is negotiating with several Central and South American countries. MERCOSUR continues to press forward towards full convergence of the common external tariff and to attain fuller integration with respect to a range of other policy areas. A similar process continues among the Andean Group countries, who are also negotiating with the Caribbean Community (CARICOM). In Africa, a customs union has been negotiated, primarily among the Francophone countries of West Africa, while in Southern Africa negotiations continue within the framework of the Southern African Development Community (SADC). A similar process is taking place among members of the Southern African Customs Union (SACU). In Asia, the completion of the Asean Free Trade Area (AFTA) has been brought forward from 2008 to 2005, and membership of ASEAN has been extended to new members. Negotiations are also taking place to achieve a South Asian Free Trade Area (SAFTA) by 2001. Meanwhile, the Asia-Pacific Economic Cooperation (APEC) forum continues to develop programmes and plans aiming at attaining free trade and investment between 2010 and 2020.

When all these different regional initiatives, and others that have not been mentioned, are taken into account, there is virtually no WTO Member which dœs not belong to at least one regional economic grouping. While these regional initiatives are clearly promoting more open trade regimes and economic policies more generally, they do pose certain challenges for the trading system at large. One such challenge is to ensure coherence among the various regional groupings, especially in cases where there are overlaps. Another is to protect the viability of the multilateral trading system by working towards consistent policy approaches and continuing to break down trade barriers on a non-discriminatory basis among and within the regional groupings. A third challenge is to allocate scarce negotiating resources and priorities appropriately, to ensure that adequate attention is paid to the multilateral process. These questions are taken up again briefly in Chapter Three. More generally, it has often been pointed out that an effective way to reduce systemic risks arising from potentially discriminatory regional trading arrangements is to work continually towards the reduction of trade barriers on a multilateral basis through successive WTO negotiations.

Chapter Three takes note of a range of sectoral issues which continue to be important to the work of the WTO. These include the sectoral negotiations left over from the Uruguay Round, such as those involving trade in financial services, and more long-standing issues, such as trade in agriculture and in textiles and clothing products. Another sectoral issue to have emerged recently in more explicit form in the WTO relates to the motor vehicle industry. Governments in many countries will face major policy challenges in this sector in the years ahead, particularly if forecasts of an imbalance between the supply and demand of motor vehicles prove well-founded.

To conclude, the trade policy challenges confronting WTO Members in the months and years ahead can be summarized under four main points. First, the "built-in agenda" carried over from the Uruguay Round (see Chapters Three and Five) must be carried forward expeditiously. Second, it is important to ensure that regional trade arrangements are compatible with the rules and objectives of the multilateral trading system embodied in the WTO. Third, future negotiations and the continuing WTO work programme must take full account of the needs of all the membership, especially those countries facing risks of marginalization. Finally, the new areas of work identified in Singapore in relation to trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation must be effectively addressed under the terms of the relevant mandates.

## IV. WTO activities

The Singapore Ministerial Conference, held from 9 to 13 December 1996, assessed progress made in the implementation of WTO commitments, reviewed ongoing negotiations and the implementation of the Work Programme, examined developments in world trade,

and addressed the challenges facing the evolving world economy. Ministers noted that much of the WTO's Work Programme since the entry into force of the WTO had stemmed from the WTO Agreement and decisions adopted at Marrakesh – that is, from the "built-in agenda." Some elements of the Work Programme, including those dealing with trade in services, agriculture and aspects of TRIPS, involved future negotiations, while many others called for reviews and other work. Ministers emphasized the importance of respecting the various time frames that had been established, while noting that work undertaken would not prejudge decisions that would need to be taken in the future.

Ministers at Singapore were also sensitive to the need to ensure that the WTO remained relevant in light of developments in the multilateral trading system. In this spirit, they established a working group to examine the relationship between trade and investment, and another working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices. These working groups will carefully explore the issues on the understanding that if negotiations are to take place in these areas, they will proceed on the basis of a consensus decision regarding such negotiations. The General Council will take a decision within two years on how work in these areas should proceed. Both working groups have met and begun to prepare the necessary background material for their deliberations. The Secretariat prepared a special study on trade and foreign direct investment in the context of last year's Annual Report, and this year's special study is on trade and competition.

Ministers also decided upon two other new elements in the WTO's Work Programme. The first of these concerned transparency in government procurement. The objectives of the working group established for this purpose are to conduct a study on the subject and to develop elements for inclusion in an appropriate agreement. The other new element of the Work Programme requires the Council for Trade in Goods to undertake exploratory and analytical work on the simplification of trade procedures in order to assess the scope for WTO rules in this area.

A recurring source of concern among Members is the problem of marginalization of least-developed countries, and the risk of it for some developing countries. Members have committed themselves to work for greater coherence and coordination among international agencies in dealing with these issues, including in the provision of technical assistance. In pursuit of this objective, Ministers agreed to a Plan of Action for the least-developed countries. The Plan calls for positive trade measures of benefit to the least-developed countries, in order to improve their capacity to respond to the opportunities offered by the trading system. It also calls for action aimed at enhancing conditions for investment, and export expansion and diversification. A High Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development is to take place in October 1997, which in addition to the WTO, will involve the International Trade Centre, UNCTAD, IMF, UNDP and the World Bank. The main elements to be addressed in the meeting are market access and trade-related technical assistance, training and capacity building. The meeting will provide an opportunity for Members, acting on an autonomous basis, to improve market access conditions for exports of least-developed countries. The least-developed countries will also be offered the opportunity to provide comprehensive assessments of their needs for trade-related technical cooperation.

The technical assistance and training activities of the Secretariat have continued to grow, supported both from the regular WTO budget and from special contributions from governments. Specific technical assistance activities in 1996 and early 1997 have included seminars and workshops on many aspects of the WTO multilateral trading system, training courses, technical missions on specific issues, assistance to governments in their preparations for trade policy reviews, support in preparations by least-developed countries for participation in the High Level Meeting, and the provision of specific information and data upon request.

Ministers at Singapore addressed the question of core labour standards, and reaffirmed their commitment to observance of internationally recognized standards. They also recognized the competence of the International Labour Organization to set and deal with these standards, while noting that economic growth and development, fostered by increased trade and trade liberalization, contribute to the promotion of such standards. Ministers rejected the use of labour standards for protectionist purposes, recognizing that the comparative advantage of countries, especially low-wage developing countries, must not be put in jeopardy.

Another topic upon which Ministers focused some attention was regionalism. They noted that WTO Members were participating increasingly in regional agreements, and that such agreements could promote liberalization and fuller integration into the international trading system. At the same time, they reaffirmed the primacy of the multilateral trading system and renewed their commitment to ensure that regional trade agreements were complementary to and consistent with that system. The Committee on Regional Trade Agreements has

continued its work, both in relation to the examination of regional trade agreements and consideration of systemic issues. The Committee is currently examining 15 agreements, and is scheduled to examine 34 others. A checklist of systemic issues has been prepared by the Secretariat, and discussions are continuing on the best way in which to proceed in examining these issues.

Concern was expressed by Ministers in Singapore at the less than full compliance of Members with their notification obligations, and called for new efforts in this regard. The Working Group on Notification Obligations and Procedures has continued its work, which requires it to develop recommendations on means to simplify and standardize notifications, to improve transparency and compliance, and identify any needs of developing countries for assistance.

Members have been as active as ever in using the WTO's dispute settlement mechanism. This reflects the statement made by Ministers in Singapore in regard to the importance they attached to the improved dispute settlement system, which they considered to have worked well so far. Ministers also stated their renewed determination to abide by the rules and procedures of the Dispute Settlement Understanding and other WTO agreements in the conduct of their trade relations and the settlement of disputes. In the year ended 31 July 1997, the Dispute Settlement Body received 51 notifications of formal requests for consultations under the Dispute Settlement Understanding. Twelve new panels were established during the same period, and five Appellate Body and panel reports were also adopted. Details on these matters are provided in Chapter Five of the present report.

Ministers noted at Singapore that they would work to bring new applicants expeditiously into the WTO, and called on applicant countries to contribute to the accession process by accepting the WTO rules and offering meaningful market access commitments. Work on accessions is continuing in respect of the 29 applications that have been made for WTO membership. Many of the applicants are currently undergoing a fundamental transition in their economies, heightening both the benefits to be derived from WTO membership, as well as the challenges that must be met in order to meet the substantive pre-requisites of membership.

Mention was made above of the successfully completed negotiations on basic telecommunications and the continuing negotiations on financial services. In addition, work is proceeding in the areas of professional services, a work programme on domestic regulation, the negotiation of GATS rules on safeguards, government procurement in services, and subsidies, and an information exchange programme endorsed by Ministers at Singapore. Many other areas of WTO activities, either involving explicit work programmes mandated by Ministers, or the continuing activities of standing bodies, include work on textiles and clothing, trade and environment, agriculture, and many other issues. These are all reported in some detail in Chapter Five of the present report.

The range and depth of the WTO's continuing activities is testimony to the commitment of the membership to make the WTO a responsive and relevant organization, capable of setting sound trade rules, overseeing their implementation, and promoting a continuing process of trade liberalization. But the WTO's intensive and diversified programme of work also represents a significant challenge in terms of the scarce resources available to governments and to the Secretariat. Despite this challenge, the progress that is being made on multiple fronts gives grounds for optimism that, as we enter the 50th year of the existence of the multilateral trading system, governments are as committed as they ever were to making the system work.

# Chapter Two

# World trade in 1996 and prospects for 1997

# World trade in 1996 and prospects for 1997

## I. Main features

After two years of exceptionally high growth, the volume of world merchandise trade slowed to 5 per cent in 1996. Output continued to expand at $2^1/_2$ per cent, the same rate as in 1995. The latter rate turned out to be somewhat different than forecasted. Growth momentum in North America was stronger than expected, while growth in Asia weakened. For Western Europe, the deceleration in GDP growth from last year was roughly in line with the forecasts. Global trade growth slowed down faster in 1996 than most observers predicted, although less dramatically than suggested in the Secretariat's preliminary evaluation in March.[1] In particular, the marked slowdown in Asia's exports and imports was a surprise to many observers, as regional GDP growth remained high by global standards.

Exchange rate developments in 1995 and 1996 strongly influenced nominal trade values. The depreciation of the US dollar in 1995 against the currencies of some major traders (e.g. France, Germany and Japan), was reversed in 1996. Variations in the dollar exchange rate over this period contributed significantly to the sharp rise of dollar export prices in 1995 and to their subsequent slight decline in 1996. If measured in SDR terms, world export prices have increased by about 4 per cent in both years.

Price changes have also influenced trade flows measured in nominal terms. Changes in cyclical demand played a major role in the sharp rise in prices of many primary and semi-manufactured products in 1995, particularly metals, ores and non-fuel minerals. The 1995 price rises were followed by steep declines in 1996. By contrast, prices for (unprocessed) food and crude oil increased significantly faster in 1996 than in 1995. Prices for agricultural products (including processed food) are estimated to have remained unchanged (on an annual average basis) in 1996, after recording an increase of more than 10 per cent over the previous year. On the other hand, the prices of internationally traded mining products increased in 1996 by $11^1/_2$ per cent, which was more rapid than in 1995. Stronger fuel prices were only partially offset by falling prices of ores, non-fuel minerals and non-ferrous metals.

Price information is very scarce for commercial services, making reliable global estimates impossible. However, for the United States, the world's largest exporter and importer of commercial services, available information indicates that export and import prices increased slightly in 1996.

Trade growth exceeded output growth by a factor of four in the 1990-95 period, but was only twice as great in 1996. The question whether the historically high gap between trade and output growth in the 1990-95 period reflects a structural change, or was a temporary phenomenon, has not yet been satisfactorily answered. Many observers, however, are inclined to accept the latter explanation, and look at last year's developments as a return to a more normal pattern. A sectoral breakdown of world trade and output shows that the excess of trade growth over output growth was sharply reduced for manufactures and disappeared for agricultural products. Output growth in the mining sector, which strengthened in 1996, actually exceeded growth in the trade volume of mining products.

The value of world merchandise and commercial services grew at 4 and 5 per cent respectively. This represents a reduction from the 20 per cent rate recorded for merchandise trade and the 14 per cent recorded for commercial services in 1995, but the differences are attributable to exchange rate and price changes. Growth rates by product groups differed markedly for merchandise trade in 1996, ranging from an increase of $18^1/_2$ per cent for fuels, to declines of 5 per cent and more for (agricultural) raw materials, non-ferrous metals, and iron and steel. All product groups which recorded negative growth rates in 1996 had experienced above average rates in 1995. For commercial services, the differences in growth rates among the three major categories – transportation services, travel receipts and other commercial services – are smaller. In 1996, transportation services recorded the lowest growth rate (2 per cent), and other commercial services the highest (7 per cent). Travel receipts expanded roughly at the same rate as commercial services. Last year's relative trade performance among commercial services categories confirms the trend observed throughout 1990-95, which showed transportation services as the slowest growing sector, and other commercial services as the most dynamic.

Merchandise trade developments by region in 1996 differed markedly from those recorded throughout 1990-95. Largely due to the variations in oil prices, Africa and the Middle East recorded the highest regional export growth in 1996, having registered the lowest rates in the 1990-95 period. Latin America's export and import growth rates remained above the global average in 1996, as they did in the first half of the 1990s.

[1]The revision of the Secretariat's estimate for the volume of world trade growth in 1996 is due to the availability of more comprehensive price information, revealing a stronger price decline than estimated in March.

Exchange rate variations and slower economic growth contributed to a sharp slowdown in exports from Western Europe and Asia. Asia recorded the slowest export growth of all regions, while Western Europe's export and import growth fell below the global average.

Western Europe's trade in commercial services also expanded significantly less than the average global rate in 1996. Asia's commercial services exports and imports continued to be more dynamic than world trade, although growth rates in 1996 were less than half those recorded in 1995. North America's exports and imports of commercial services growth decelerated slightly but still exceeded global growth. In contrast to the deceleration in world commercial services trade, Latin America's imports recovered strongly and expanded – as did its exports – faster than the average for the world as a whole. No major change occurred in the net trade positions of regions. North America continues to report the largest net exports in 1996, followed by Western Europe, and Asia remains the largest net importer of commercial services.

Capital flows, in particular foreign direct investment (FDI) flows, which contributed to buoyant trade developments in a number of regions (in particular Asia and Latin America) in the first half of the 1990s, remained at a high level in 1996. The increase in global FDI flows was, however, markedly lower in 1996 than in 1995, although international FDI flows increased to a record level of $350 billion.[2] Net private capital inflows to Asian developing countries also increased to a record level, but at a lower rate of growth than in 1995. In Latin America, net private capital inflows more than doubled in 1996 compared with 1995, as the region regained the confidence of international investors. Net direct investment alone rose by 50 per cent, considerably faster than global FDI inflows. Africa's net inflow of private capital stagnated in dollar terms, at $10 billion, despite an increase in net direct investment.[3]

Efforts to strengthen intra-regional cooperation continued in 1996. The exact impact of these efforts on trade flows is hard to determine. NAFTA and MERCOSUR recorded export and import growth rates exceeding the global average. Trade among NAFTA members and among MERCOSUR members expanded respectively by more than two times and more than three times faster than extra-regional trade, suggesting a deepening of regional integration. For other major regional integration arrangements, growth of intra-trade lagged behind or was roughly similar to that of extra-regional trade. For ASEAN and CEFTA, it is estimated that intra-trade expanded as much as extra-regional trade. The intra-trade of the EU (15), however, increased only marginally, while exports to and imports from third countries rose by 6 and 3 per cent respectively.

## II. Outlook

The expansion of world output and trade volumes are expected to accelerate in 1997. The strengthening of global output is likely to come together with a narrowing of the differences in regional growth rates. Economic activity in Western Europe and the transition economies is expected to strengthen, while the dynamic growth of the Asian economies over the last several years will lose some of its vigour. North America's surprisingly robust growth in the first half of 1997 is likely to ease somewhat in the second half, but GDP growth in 1997 could still turn out to be the highest in the 1990s. Latin America's economic recovery will strengthen further and exceed somewhat the average growth of the 1990-95 period. Africa's strong GDP growth rate in 1996 is unlikely to be sustained in 1997, although GDP growth will still be significantly higher than it was for more than a decade prior to 1996.

Robust demand growth in North and Latin America and the recovery in Western Europe are the major causes for the expected acceleration of world trade. If the momentum of trade growth observed in the first half of 1997 is maintained throughout the second half, the expansion of world merchandise trade is likely to reach 7 per cent for the year as a whole. Double-digit import growth in North and Latin America and acceleration in Western European import growth will be the major stimuli. Asia's import growth is expected to remain roughly unchanged from 1996 and thereby to expand less than global trade for the first time in more than a decade. However, Asia's export growth is expected to accelerate and to exceed import growth for the first time in the 1990s. While Western Europe's exports continue to grow faster than its imports, both North and Latin America are likely to record a more dynamic import than export growth of their merchandise trade in 1997.

The further strengthening of the US dollar vis-a-vis the currencies of major traders in Western Europe and Asia in the first half of 1997, together with weaker commodity prices, resulted in a fall of global trade prices measured in dollar terms. Consequently, the projected acceleration of world merchandise trade in volume terms (i.e., adjusted for price and exchange rate changes) may be offset by the price decline with the result that nominal growth of world merchandise trade could remain unchanged or (expand) less in 1997 than in 1996.

[2]UNCTAD, TAD/INF/2710, 10 July 1997.

[3]IMF, World Economic Outlook, October 1997 (forthcoming).

In the first half of 1997, the nominal dollar value of world merchandise trade rose about 4 per cent on a year-to-year basis, unchanged from 1996. Nominal trade growth rates differed widely by region. North America's merchandise exports and imports grew in value terms at about 10 per cent, and those of Latin America continued to expand at a double-digit rate. Principally due to a recovery of exports from Japan and China (by 2 and 26 per cent respectively), Asia's export growth accelerated to about 5 per cent. Asia's import growth, however, continued to decelerate. Imports slowed down sharply in the Republic of Korea, stagnated in China, Japan and Singapore, and decreased sharply in Thailand. For Western Europe, dollar growth rates for exports and imports turned negative, entirely due to the depreciation of Western European currencies vis-a-vis the US dollar.[4]

# III. World trade in 1996

## I. Global developments

In 1996, the volume of world merchandise exports expanded by 5 per cent. This rate of growth was lower than in the two preceding years. Nevertheless, the rate of expansion exceeded the growth rates recorded in the early 1990s (Chart II.1). World merchandise output rose by $2^1/_2$ per cent in 1996, the same rate as in the preceding year. The reduction in trade growth, combined with constant output growth, led to a reduction of the margin by which trade growth has exceeded output growth over the last seven years.

The lowering of the global trade to output ratio was broadly based, as could be observed across regions and sectors (of merchandise output). Two of the more prominent factors in this development can be highlighted.

First, Western Europe's trade and output growth lagged behind that of all other regions combined. As Western Europe has the highest trade output ratio of all geographic regions the slower growth in West European countries tends to depress the global trade output ratio.[5] Second, trade growth in Asia only marginally exceeded output growth in 1996. This development contrasts sharply with that observed between 1990 and 1995, when trade expanded twice as fast as output. In East Asia, excluding Japan, trade growth (both exports and imports) fell below output growth for the first time since 1985.

Exports of manufactured goods, which account for three quarters of world merchandise exports, grew $5^1/_2$ per cent in volume terms, a much stronger performance than that of exports of agricultural and mining products. Among the three major product groups, exports of mining products experienced the strongest deceleration, as exports rose by $2^1/_2$ per cent

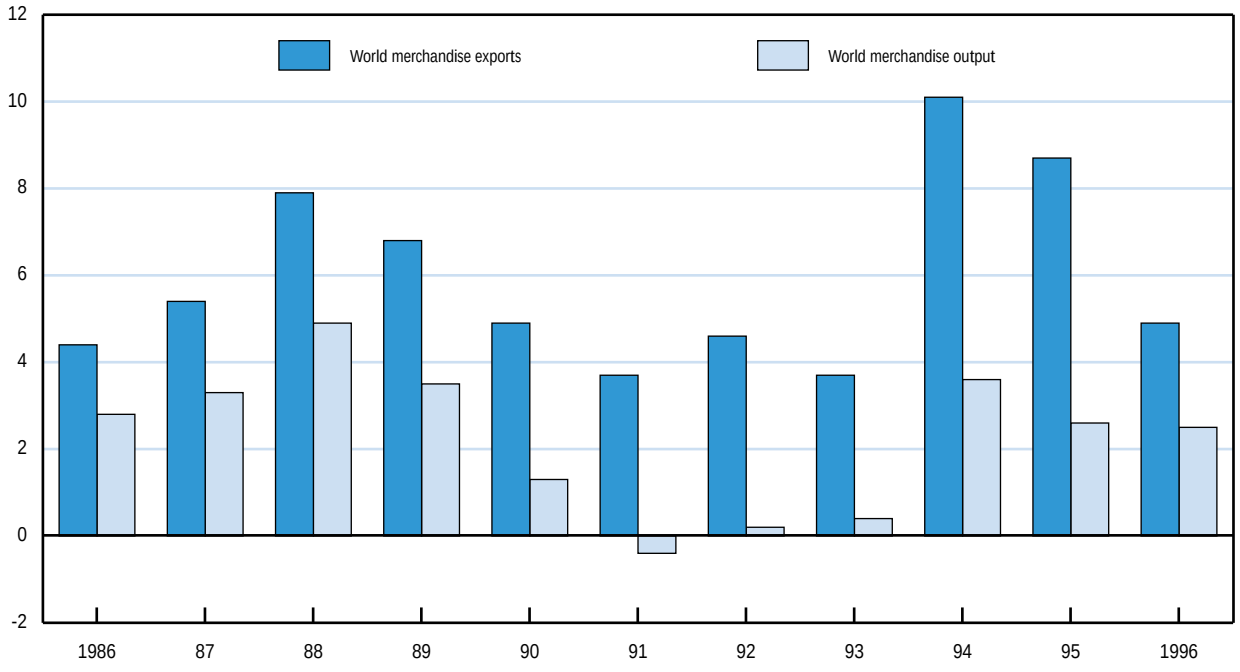
[4]The ECU depreciated by $8^1/_2$ per cent vis-a-vis the US dollar in the first six months of 1997 on a year-to-year basis.

[5]Western Europe accounted for nearly 45 per cent of world exports of goods and services and for less than one third of world GDP.

Chart II.1

**Growth in the volume of world merchandise exports and merchandise output, 1986-96**

(Annual percentage change)



last year after expanding at a global average of 8½ per cent in 1995. Export growth of agricultural products was 2 per cent in 1996, or one third of the exceptionally high rate in 1995. This decline in growth is accounted for by North America and Western Europe (Table II.1).

Table II.1

**Growth in the volume of world merchandise exports and production by major product group, 1990-96**

(Percentage change)

| | Annual average 1990-96 | 1995 | 1996 |
|---|---|---|---|
| **World merchandise exports** | **6.0** | **8.5** | **5.0** |
| Agricultural products | 4.5 | 6.0 | 2.0 |
| Mining products | 4.0 | 8.5 | 2.5 |
| Manufactures | 6.5 | 9.0 | 5.5 |
| **World merchandise production** | **1.5** | **2.5** | **2.5** |
| Agriculture | 2.0 | 2.5 | 2.5 |
| Mining | 2.0 | 2.0 | 3.0 |
| Manufacturing | 1.5 | 3.0 | 2.5 |
| **World GDP** | **1.5** | **2.0** | **2.5** |
| Excluding transition economies | 2.5 | 2.5 | 3.0 |

*Note:* World merchandise production differs from world GDP in that it excludes services and construction. World GDP is calculated by using weights based on GDP in 1990 prices and exchange rates.

The value of world merchandise exports rose by 4 per cent, to a new record level of $5,115 billion. This growth rate contrasts sharply with the rate of 19½ per cent attained in 1995, but more than two thirds of the difference is attributable to dollar price changes, leaving less than one third to be accounted for by "real" changes (Table II.2).

Table II.2

**Growth in the value of world exports by major product group, 1990-96**

(Billion dollars and percentage change)

| | Value 1996 | Annual average 1990-96 | 1995 | 1996 |
|---|---|---|---|---|
| **World merchandise exports**[a] | **5115** | **7** | **19.5** | **4.0** |
| Agricultural products | 586 | 6 | 18.0 | 1.5 |
| Mining products | 574 | 3 | 17.5 | 11.5 |
| Manufactures | 3750 | 8 | 20.0 | 3.0 |
| **World exports of commercial services** | **1260** | **...** | **14.0** | **5.0** |

[a]Including unspecified products.

*Note:* The statistics for exports of commercial services and for exports of merchandise are not directly comparable, primarily because the former are taken from balance-of-payments statistics and the latter from customs statistics.

The importance of price changes is highlighted by sectoral trade developments measured in value terms. The value of mining products rose by 11½ per cent, almost three times faster than the world average. However, this nominal trade growth is largely due to a dollar price increase. Agricultural products registered an export growth rate of 1½ per cent in value terms. This reflected price changes and a reduced rate of volume growth compared to 1995. Exports of manufactures increased by 3 per cent in value, and for the first time in the 1990s, this growth rate was lower than that for global merchandise trade.

Exports of commercial services rose by 5 per cent and amounted to $1,260 billion. For the first time since 1993, the growth of commercial services exports exceeded that of merchandise exports.

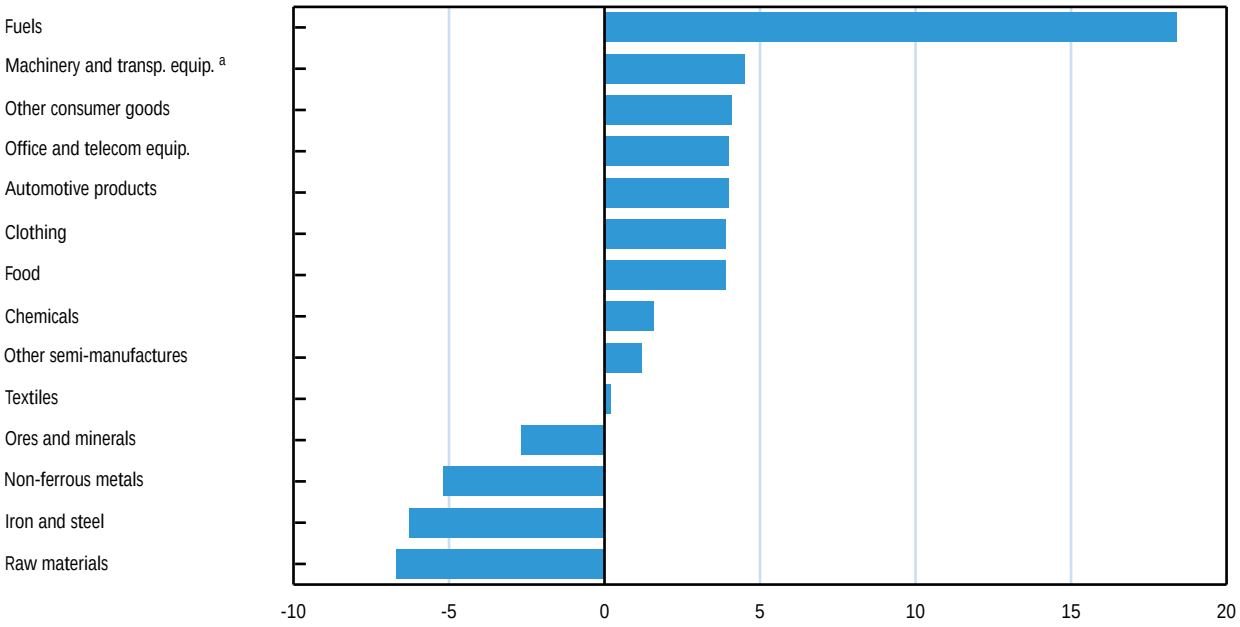
## II. Merchandise trade by product

Trade growth in nominal terms was lower for all product groups in 1996 compared with 1995, with the exception of fuels. The overall deceleration affected various product groups in different degrees. Primary product groups, with their high sensitivity to cyclical demand, recorded the largest variations in dollar prices and in value (Chart II.2).

Chart II.2

**Growth in the value of world merchandise trade by product group, 1996**

(Percentage change)




a Excluding automotive products and office and telecommunications equipment (throughout this report they are included with machinery and transport equipment, unless otherwise noted).

In 1996, world exports of fuels rose by 18½ per cent, while exports of (agricultural) raw materials and non-ferrous metals declined by more than 5 per cent. In 1995, non-ferrous metal exports recorded the highest growth among commodity groups (35 per cent), while fuels showed the lowest growth (11 per cent). The contribution of price fluctuations to these large variations in export value can be illustrated by reference to non-ferrous metals, which after a 19 per cent price increase in 1995, recorded a fall of 12 per cent in 1996 (Table II.3).

Table II.3

**Recent changes in export prices of primary commodities, 1994-97**

(Percentage change)

| | 1995 | 1996 | 1997 Jan.-June[a] |
|---|---|---|---|
| **Food, beverages and tobacco** | **6** | **6** | **-4** |
| Cereals | 17 | 20 | -26 |
| Oil seeds, oils, fats, cake and meals | 8 | 11 | 2 |
| Meat | -17 | -1 | 8 |
| Coffee | 2 | -24 | 39 |
| Agricultural raw materials | 5 | -4 | -3 |
| Minerals and non-ferrous metals (excl. petroleum) | 19 | -11 | 0 |
| Non-ferrous metals | 19 | -12 | 0 |
| **All non-fuel primary commodities** | **8** | **-1** | **-3** |
| Crude petroleum | 8 | 19 | 5 |
| **All primary commodities** | **8** | **3** | **-1** |

a Figures indicate the percentage change over the corresponding period of the previous year.

*Note:* Data are period average based primarily on spot market prices. These prices may differ significantly from the corresponding unit values for primary commodities which, in principle, measure the average price for all transactions in a given period.

Among manufactured goods, only iron and steel products recorded a decrease in their export values in 1996, while the other product groups experienced markedly lower, but still positive growth rates. Office and telecom equipment, which had been by far the most dynamic product group in world merchandise exports over the last decade, recorded a deceleration in growth from nearly 30 per cent in 1995 to about 4 per cent in 1996. Trade in

clothing and other consumer goods, as well as automotive products and other machinery, expanded at some 4 per cent. World exports of textiles are estimated to have stagnated. Declines in textiles trade (both exports and imports) in Western Europe and Asia were balanced by increases in both North and Latin America.

The slowdown in world exports of office and telecom equipment is largely explained by cyclical demand changes, which were accentuated by inventory adjustments and marked price fluctuations for some electronic products (in particular memory chips). Asia, which is by far the largest exporter of office and telecom equipment, recorded an export growth rate below the world average for the second year in a row and an above average increase in imports for the third successive year. Asia accounts for approximately 50 per cent of world exports of these products.

World trade in automotive products, accounting for nearly 10 per cent of world merchandise trade, increased by about 4 per cent to $470 billion in 1996. Western Europe's exports and imports continued to expand faster than global trade, although at a slower rate. North America's export growth decelerated further to 3 per cent. Latin America continued to be the most dynamic exporter in automotive products. Its shipments expanded again by more than one quarter, while imports stagnated. Latin American intra-regional trade rose by 24 per cent (and imports from North America were up by 7 per cent), while imports from both Western Europe and Asia decreased by more than 10 per cent. Asia's export decline in automotive products in 1996 was due to the steep fall in Japan's exports (7 per cent), which was only partly offset by an increase in the Republic of Korea's exports (26 per cent). The share of Asia in world exports of automotive products, which peaked at slightly above one quarter in 1993, has since been eroded steadily, accounting for less than one fifth in 1996. One element of this relative decline is the rather sluggish development of intra-Asian trade in this product group. Between 1993 and 1996, intra-Asian trade in automotive products expanded by less than 20 per cent in dollar values. This growth rate is only one third the average rate of growth of intra-Asian trade in manufacturing products during this period.

The stagnation of world textiles trade in 1996 brought the share of textiles to less than 3 per cent of world merchandise exports, its lowest level since 1990. Western Europe and Asia, which each account for more than 40 per cent of world exports, recorded a decrease in their textile exports and imports. The decline of intra-regional trade in both regions was more pronounced than extra-regional trade. North America's textile exports rose by 10 per cent due to the strength of intra-North American trade and shipments to Latin America.

World clothing exports rose by 4 per cent in 1996, at about the same rate recorded throughout the 1990-95 period. Asia's clothing exports decreased in value terms for the first time in the 1990s. Western Europe and North America, the two large net importing regions, expanded trade for the third year in a row, with exports growing faster than imports. North American import growth of 4 per cent matched the global average, following two years of below average growth. Latin America's clothing exports continued to expand considerably faster than the world average. Since 1990, Latin America's clothing exports have risen at an annual rate of 18 per cent, or 2.5 times faster than the world average. Nearly 90 per cent of Latin America's clothing exports are shipped to the North American market.

## III. Merchandise trade by region

The nominal value of regional merchandise trade flows in 1996 was strongly affected by short-term factors such as relative price changes and exchange rate fluctuations. Due to the strong recovery of oil prices in 1996, the Middle East and Africa recorded the highest export growth rates of all major regions. Although most of the higher export value of oil exports was due to price rises, the volume of oil output and exports also expanded strongly, particularly in Africa (Table II.4).

The Middle East, which has by far the highest share among all regions of fuels in its merchandise exports, was also the only region to record higher export growth in 1996, compared to the previous year. The importance of oil price developments in Africa's export performance is highlighted by the experience of the six major African oil exporters, whose exports increased by 25 per cent, while average export growth in all other African countries fell to 4 per cent in 1996.

Export growth rates slowed down in Latin America, North America and the Transition economies in 1996 compared to the previous year. These rates were, however, above the global average. The relative strength of Latin American exports was largely due to Mexico's outstanding success in the North American market, particularly for exports of manufactured goods (such as automotive products, office and telecom equipment and clothing). Another strongly performing sector in Latin America was oil, benefitting mainly from Venezuela and Ecuador.

Table II.4

**Growth in the value of world merchandise trade by region, 1990-96**

(Billion dollars and percentage change)

| Exports | | | | | Imports | | | |
|---|---|---|---|---|---|---|---|---|
| Value | Annual change | | | | Value | Annual change | | |
| 1996 | 1990-96 | 1995 | 1996 | | 1996 | 1990-96 | 1995 | 1996 |
| **5115** | **7** | **20** | **4** | **World** | **5265** | **7** | **19** | **4** |
| 827 | 8 | 15 | 6 | North America | 994 | 8 | 11 | 6 |
| 249 | 9 | 22 | 11 | Latin America | 273 | 14 | 12 | 11 |
| 96 | 15 | 31 | 21 | Mexico | 90 | 14 | -10 | 24 |
| 153 | 7 | 17 | 5 | Other Latin America | 183 | 14 | 25 | 6 |
| 2282 | 6 | 23 | 3 | Western Europe | 2235 | 5 | 21 | 2 |
| 2110 | 6 | 23 | 3 | European Union (15) | 2053 | 5 | 21 | 2 |
| 169 | 7 | 27 | 6 | Transition economies | 174 | 6 | 26 | 13 |
| 81 | 7 | 26 | 2 | Central/Eastern Europe | 108 | 12 | 28 | 13 |
| 116 | 2 | 13 | 12 | Africa | 127 | 5 | 20 | 3 |
| 46 | 0 | -3 | 26 | Major fuel exporters[a] | 30 | 4 | -5 | 9 |
| 29 | 3 | 10 | 3 | South Africa | 30 | 9 | 31 | -1 |
| 165 | 4 | 14 | 16 | Middle East | 143 | 6 | 13 | 8 |
| 1309 | 10 | 17 | 1 | Asia | 1318 | 11 | 23 | 5 |
| 411 | 6 | 12 | -7 | Japan | 349 | 7 | 22 | 4 |
| 151 | 16 | 23 | 2 | China | 139 | 17 | 14 | 5 |
| 532 | 12 | 23 | 3 | Six East Asian traders[b] | 583 | 13 | 26 | 3 |

[a]Algeria, Angola, Congo, Gabon, Libya and Nigeria.

[b]Hong Kong China, the Republic of Korea, Malaysia, Singapore, Chinese Taipei and Thailand.

The deceleration of export growth in North America in 1996 can be attributed largely to a fall in shipments to Asia. After expanding by nearly one quarter in 1995, exports to Asia grew by only 3 per cent last year. Exports to Western Europe expanded by 4 per cent, again at less than the global average. Western Europe's share in North America's exports fell to an historic low of 18.6 per cent. Intra-North American exports expanded by 7 per cent, markedly less than in the preceding year, but still above the global average. The share of intra-trade in North America's total exports recovered slightly in comparison to 1995, to 36 per cent. In contrast to the overall trend, North America's exports to Latin America expanded by some 13per cent in 1996, more than twice as fast as in the preceding year. This was largely due to a steep recovery in shipments to Mexico, which alone accounts for more than one half of North America's exports to Latin America.

Exports of the Transition economies slowed down mainly due to slow economic growth in Western Europe, which accounts for some 60 per cent of the former economies' exports. Despite this deceleration, the Transition economies continued to increase their share in West European imports, which reached $4^1/_2$ per cent in 1996.

Western Europe, the largest regional exporter in world merchandise trade, recorded an export growth rate of 3 per cent, a sharply lower rate than in 1995. This reduction was largely due to exchange rate movements. The relatively weak dollar in 1995 boosted the dollar value of West European exports by about 10 per cent, while the stronger dollar in 1996 depressed the value of exports.

Asia's export performance in 1996 was a surprise to many observers. Having figured as the most dynamic exporting region throughout 1990-95, Asia recorded the lowest export growth rate of all major regions in 1996. Although exchange rate developments played an important role, especially in the case of Japan, the extent of export contraction among the major East Asian countries was unexpected. Japan, Hong Kong China and Thailand recorded an absolute decline in the value of their merchandise exports. One major element in the lower trade expansion in Asia was the above average deceleration in intra-Asian trade.

All regions reported a deceleration in their import growth in 1996 compared to the previous year. The strongest import growth was reported by the Transition economies, despite their relatively sluggish overall economic performance. Import growth by country in Eastern Europe differed widely, ranging from increases of about one quarter (Poland and Slovakia) to absolute declines (Bulgaria and Romania). The Baltic States and most CIS member countries recorded import growth in excess of 30 percent, while the Russian Federation and Tajikistan reported an import decline. In some cases, the import surge combined with slower export growth has led to a marked increase in the trade deficit. Latin America's import growth, at 11 per cent, was only slightly less than in 1995, largely due to

higher import demand in a number of countries, including Mexico and Argentina. Some Latin American countries, which recorded outstandingly high growth rates, ranging from 30 to 50 per cent in 1995, reported substantially lower growth (e.g. Brazil and Chile) or even an absolute decline (e.g. Ecuador, Paraguay and Venezuela) in their imports in 1996. North America and the Middle East reported above average import growth, although in both cases import growth lagged behind export growth. Asia's imports continued growing slightly faster than the global average. As in 1995, imports grew faster than exports, turning Asia's traditional trade surplus into a slight deficit on a fob-cif basis for the first time. In 1996, only the Transition economies and Asia reported a higher level of import growth than export growth. Africa and Western Europe both recorded import growth below the global average. Relatively slow import growth in Africa contrasts with the strength of its export growth. An important element in Africa's import slowdown was the strong recovery of its agricultural production in 1996,[6] which reduced the need for food imports.

**Selected regional trade developments**

Intra-regional trade continued to expand faster than extra-regional trade in North America and Latin America. Asia's intra-regional trade grew significantly faster than extra-regional trade throughout 1990-95, but these two trade flows grew at the same rate in 1996. For the transition economies, the slide in the share of intra-regional trade in total trade seems to have come to a halt in 1996. For Western Europe, however, the share of intra-regional trade decreased, but at 70 per cent of total trade, remained the highest of all geographic regions.

For both NAFTA and MERCOSUR, intra-regional trade again expanded faster than trade with all other regions in 1996. In 1996, intra-regional trade accounted for 23 per cent of MERCOSUR's exports and 20 per cent of its imports. The corresponding rates for NAFTA were 48 per cent and 39 per cent respectively (Chart II.3).

Intra-ASEAN trade continued to grow faster than imports from third countries in 1996, but at about the same rate as extra-regional exports. The present share of intra-regional trade is estimated to be somewhat below one quarter of total trade. For the CEFTA countries, the available data indicate a slight decrease in the share of intra-regional trade between 1993 and 1996, to less than 15 per cent. In contrast to 1995, intra-EU trade rose at a lower rate than extra-regional trade, and accounted for about 63 per cent of total EU trade.

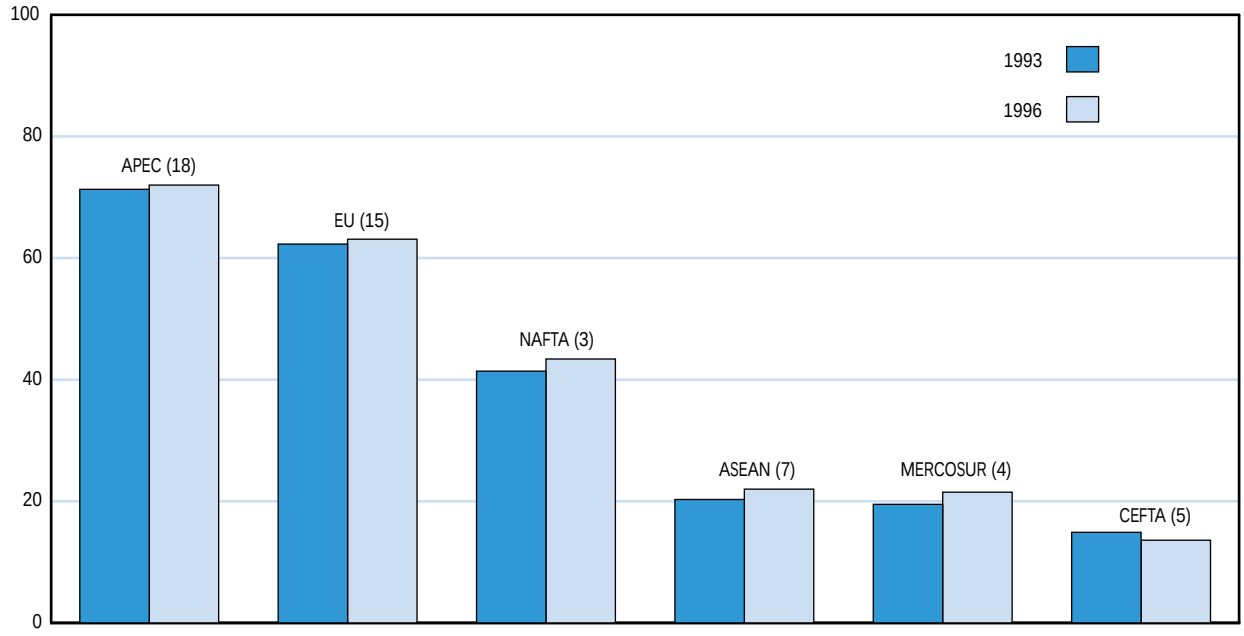
More than one half of the exports and imports of Africa and the transition economies are traded with Western Europe. Western Europe's exports tended to increase their share in the total trade of the transition countries in the 1990s, but the share decreased somewhat in the

[6] According to the FAO, Africa's agricultural production rose by 7½ per cent in 1996.

Chart II.3

**Share of intra-regional trade of selected regional integration arrangements, 1993 and 1996**

(Percentage shares based on value)




*Note:* Shares are an arithmetic average of the shares of intra-regional trade in total merchandise exports and imports. Figures given in brackets indicate the number of members of each regional integration arrangement.

case of Africa. Almost one half of the exports of the Middle East are shipped to Asia. This share has risen sharply over the last six years. Nearly 60 per cent of the Middle East's exports of fuels in 1996 went to Asia.

## Volume developments

The expansion of world merchandise trade in volume terms, that is excluding the price and exchange rate fluctuations, continued to decline in 1996. Global volume growth reached nearly 5 per cent, a rate below that recorded between 1990 and 1995, but still above the rate recorded in the 1980s, and very close to the long-term growth rate of the 1970-96 period.

Western Europe and North America report for the second year in a row a somewhat faster rate of export volume growth than import volume growth. By contrast, Asia, the transition economies and the Middle East expanded their imports last year faster than their exports. Imports grew faster than exports by a larger margin in the transition economies than in any other region, while for Latin America and Africa, export growth roughly matched import growth. In short, external demand from Asia, the transition economies and the Middle East tended to support output (and export) growth in Western Europe and North America (Table II.5).

Table II.5

**Growth in the volume of world merchandise trade by selected region, 1990-96**

(Percentage change)

| Exports | | | | Imports | | |
|---|---|---|---|---|---|---|
| Average 1990-96 | 1995 | 1996 | | Average 1990-96 | 1995 | 1996 |
| **6.0** | **8.5** | **5.0** | **World** | **6.0** | **9.0** | **5.0** |
| 7.0 | 9.5 | 6.0 | North America[a] | 7.0 | 8.0 | 5.5 |
| 8.5 | 12.0 | 10.5 | Latin America | 11.5 | 3.0 | 10.5 |
| 5.0 | 7.5 | 4.5 | Western Europe | 4.0 | 7.0 | 3.5 |
| 5.5 | 7.5 | 4.0 | European Union (15) | 4.0 | 6.5 | 3.5 |
| 7.0 | 9.5 | 4.0 | Asia | 9.5 | 14.0 | 5.0 |
| 1.0 | 3.5 | -0.5 | Japan | 5.5 | 12.5 | 2.5 |
| 10.5 | 14.5 | 7.0 | Six East Asian traders[b] | 11.0 | 15.0 | 5.0 |

[a]Canada and the United States.

[b]Hong Kong China, the Republic of Korea, Malaysia, Singapore, Chinese Taipei and Thailand.

In volume terms, Latin America's import and export growth expanded at twice the global rate. The dynamic performance of Latin America's trade is not evenly spread over the region as Mexico, which accounts for more than one-third of Latin America's merchandise trade, increased both exports and imports by more than 20 per cent, or more than four times faster than all other Latin American countries combined.

At 13 per cent, the transition economies recorded the highest regional import growth rate in 1996 – a rate more than twice that of the global average. The strength of import growth has led to a marked increase in the region's trade deficit.

The growth of North American merchandise exports decelerated in line with global trade in 1996, but remained higher than the global average. As domestic demand has expanded, import growth has also picked up, particularly in the United States. The more marked slowdown in Canada can be partly attributed to sluggish growth of trade in automotive products and lower exports of agricultural products.

Lower economic growth in Western Europe is the major reason why the imports have lagged behind the average global rate of trade growth in each year since 1991. While West European exports expanded faster than imports – not only last year but also throughout the 1990-96 period – they continued to rise more slowly than the global average. For the European Union (15), intra-EU trade in volume terms expanded much less rapidly than extra-EU (15) trade in 1996.

The volume of Asia's merchandise exports and imports, which expanded throughout the years 1990-95 at a rate considerably above the world average, experienced a sharp deceleration in 1996. Exports and imports rose by 4 per cent and 5 per cent respectively in 1996, less than half the double digit rates recorded in the preceding year. Export growth was below the global average for the first time since 1990. While some of the slowdown in exports can be attributed to weaker growth in Asia and other major export markets, other factors such as currency appreciation and a cyclical slowdown in major export industries, such as electronics and steel, have played a major role.

Import growth has fallen below GDP growth in many Asian countries One reason for this may relate to the fact that a large share of imports is used in the production of export goods. Once demand slackens for the exports of finished goods (outside the region), intra-industry exchanges of semi-finished goods and parts decline within the region. The observed deceleration of intra-Asian trade may, in some cases, also be attributable to the import substitution effect of foreign direct investment, particularly in basic industries such as iron and steel, petrochemicals and automobiles.

## IV. Commercial services trade

Relatively slow growth in Western Europe, together with the strength of the US dollar, also affected the rate of growth of world commercial services exports, which rose by 5 per cent and reached $1,260 billion in 1996. North American imports and exports of commercial services decelerated only slightly, to 6-7 per cent (Table II.6).

Table II.6

**Growth in the value of world trade in commercial services by selected region, 1995-96**

(Billion dollars and percentage change)

| Exports | | | | Imports | | |
|---|---|---|---|---|---|---|
| Value | Annual change | | | Value | Annual change | |
| 1996 | 1995 | 1996 | | 1996 | 1995 | 1996 |
| **1260** | **14** | **5** | **World** | **1265** | **15** | **5** |
| 225 | 8 | 7 | North America[a] | 167 | 7 | 6 |
| 47 | 8 | 8 | Latin America | 57 | 3 | 10 |
| 603 | 14 | 3 | Western Europe | 573 | 16 | 2 |
| 538 | 14 | 3 | European Union (15) | 530 | 16 | 3 |
| 25[b] | 10 | ... | Africa | 35[b] | 6 | ... |
| 286 | 19 | 8 | Asia | 354 | 21 | 8 |
| 66 | 13 | 4 | Japan | 129 | 15 | 6 |
| 39 | 16 | 9 | Hong Kong, China | 22 | 15 | 4 |

[a]Canada and the United States.

[b]Refers to 1995.

Latin America's commercial services exports are estimated to have grown at 8 per cent in 1996, unchanged from 1995, but twice the global rate. The strong recovery of Latin America's imports was due to a recovery of demand in Mexico, leading to the fastest import growth among all the major regions in 1996.

Western Europe, which accounts for roughly one half of world trade in commercial services, recorded only a moderate increase in its services exports and imports. For some of the West European countries (e.g., Austria, Germany, Netherlands and Switzerland) exports decreased or stagnated, due to a combination of depreciating currencies and slow growth. In contrast, other West European countries with appreciating or stable currencies (e.g., Ireland, Spain, Sweden and United Kingdom) and, in some cases, with a stronger GDP growth, experienced an increase in commercial services exports and imports – ranging between 6 and 13 per cent. These rates were well above the global average.

In Asia, exports and imports of commercial services continued to expand faster than the global rate. However, the growth of both exports and imports slowed down markedly, from about 20 per cent in 1995 to about 8 per cent in 1996. The excess of services imports over services exports continued to increase. The commercial services exports of Singapore and the Republic of Korea stagnated in 1996, having recorded growth rates of one quarter and more in 1995. On the other hand, Australia and Malaysia reported stronger export growth in 1996 than in 1995. In general, however, most economies (e.g. Chinese Taipei, Hong Kong China, Japan and the Philippines) saw a shift from double to single-digit growth. Preliminary data on world commercial services exports by category indicate that transportation services rose by 2 per cent in 1996, which represents the strongest deceleration and the lowest growth among the three broad services categories. Travel services expanded by 6 per cent – slightly above the average for total commercial services trade. Other commercial services, including communications, financial services, and royalties and license fees, recorded an increase of 7 per cent in global receipts. As in previous years, the "other" category included the most dynamic components of commercial services. A more detailed breakdown of commercial services is not yet possible at the global level. However, for Canada and the United States, further information is provided in Volume II of this report.

## V. Leading traders of merchandise and commercial services

The 25 leading traders accounted for more than 80 per cent of world exports and imports of both merchandise and commercial services trade in 1996.

With respect to merchandise trade, the same countries figured among the top 15 exporters and importers in 1996. Among the 25 leading exporters, only two – Russia and Saudi Arabia – were not also among the leading importers. Their places on the imports side were taken by Brazil and Indonesia. Despite considerable variation in nominal trade growth at the country level, there were no new countries that appeared on the list of the top twenty-five exporters and importers in 1996. The share of this group in world merchandise trade declined slightly in 1996 for both exports and imports, partly due to the gains of many oil exporters in Africa and the Middle East. The rankings of the leading merchandise traders changed very little from the previous year. Among the top ten, Canada moved ahead of the Netherlands on the export side and the United Kingdom moved ahead of France to fourth place among the importers. On account of oil prices, Saudi Arabia moved up two positions ahead of Thailand and Denmark, to become the twenty-second largest exporter of merchandise. Mexico, recording the strongest export and import increases among the leading traders, also gained two positions compared to 1995, and ranked sixteenth in respect of exports and imports in 1996 (Table II.7).

Table II.7

**Leading exporters and importers in world merchandise trade, 1996**

(Billion dollars and percentage change)

| Rank | Exporters | Value | Share | Annual change | Rank | Importers | Value | Share | Annual change |
|---|---|---|---|---|---|---|---|---|---|
| 1 | United States | 624.5 | 11.8 | 7 | 1 | United States | 817.8 | 15.1 | 6 |
| 2 | Germany | 521.2 | 9.9 | 0 | 2 | Germany | 456.3 | 8.4 | -2 |
| 3 | Japan | 410.9 | 7.8 | -7 | 3 | Japan | 349.2 | 6.4 | 4 |
| 4 | France | 290.5 | 5.5 | 1 | 4 | United Kingdom | 278.5 | 5.3 | 8 |
| 5 | United Kingdom | 262.0 | 5.0 | 8 | 5 | France | 275.6 | 5.1 | 0 |
| 6 | Italy | 250.8 | 4.8 | 7 | 6 | Italy | 207.0 | 3.8 | 0 |
| 7 | Canada | 201.6 | 3.8 | 5 | 7 | Hong Kong, China | 201.3 | 3.7 | 3 |
| 8 | Netherlands | 197.5 | 3.7 | 0 | | – retained imports[a] | 47.8 | 0.9 | -8 |
| 9 | Hong Kong, China | 180.9 | 3.4 | 4 | 8 | Netherlands | 180.7 | 3.3 | 2 |
| | – domestic exports | 27.4 | 0.5 | -8 | *9* | Canada | 175.2 | 3.2 | 4 |
| | – re-exports | 153.5 | 2.9 | 7 | 10 | Belgium-Luxembourg | 157.5 | 2.9 | 1 |
| 10 | Belgium-Luxembourg | 169.4 | 3.2 | 0 | | | | | |
| 11 | China | 151.1 | 2.9 | 2 | 11 | Korea, Rep. of | 150.2 | 2.8 | 11 |
| 12 | Korea, Rep. of | 129.8 | 2.5 | 4 | 12 | China | 138.8 | 2.6 | 5 |
| 13 | Singapore | 125.0 | 2.4 | 6 | 13 | Singapore | 131.3 | 2.4 | 5 |
| | – domestic exports | 73.5 | 1.4 | 6 | | – retained imports[a] | 79.8 | 1.5 | 5 |
| | – re-exports | 51.5 | 1.0 | 6 | 14 | Spain | 121.9 | 2.2 | 6 |
| 14 | Taipei, Chinese | 115.9 | 2.2 | 4 | 15 | Taipei, Chinese | 101.4 | 1.9 | -2 |
| 15 | Spain | 102.1 | 1.9 | 11 | 16 | Mexico[b] | 90.2 | 1.7 | 24 |
| 16 | Mexico[b] | 96.0 | 1.8 | 21 | 17 | Switzerland | 79.3 | 1.5 | -1 |
| 17 | Sweden | 84.5 | 1.6 | 6 | 18 | Malaysia | 78.6 | 1.4 | 1 |
| 18 | Switzerland | 80.8 | 1.5 | -1 | 19 | Thailand | 73.5 | 1.4 | 4 |
| 19 | Malaysia | 78.4 | 1.5 | 6 | 20 | Austria | 66.7 | 1.2 | 1 |
| 20 | Russian Fed.[c] | 68.7 | 1.3 | 8 | | | | | |
| 21 | Australia | 60.5 | 1.1 | 15 | 21 | Sweden | 66.6 | 1.2 | 3 |
| 22 | Saudi Arabia[d] | 59.0 | 1.1 | 18 | 22 | Australia | 65.4 | 1.2 | 7 |
| 23 | Austria | 57.1 | 1.1 | -1 | 23 | Brazil | 56.9 | 1.1 | 6 |
| 24 | Thailand | 55.7 | 1.1 | -1 | 24 | Denmark | 45.2 | 0.8 | -1 |
| 25 | Denmark | 50.7 | 1.0 | 0 | 25 | Indonesia | 42.9 | 0.8 | 6 |
| | Total of above[e] | 4424.6 | 83.9 | 3 | | Total of above[e] | 4417.1 | 81.5 | 4 |
| | **World[e]** | **5270.0** | **100.0** | **4** | | **World[e]** | **5420.0** | **100.0** | **5** |

[a]Retained imports are defined as imports less re-exports.

[b]Includes shipments through processing zones.

[c]Excludes trade with the Baltic States and the CIS. Including trade with these States would lift Russian exports and imports to $88 billion and $61 billion respectively.

[d]Secretariat estimates.

[e]Includes significant re-exports or imports for re-export.

*Note:* Data for the 50 leading traders and annual data for 1986-96 are provided in VolumeII, TableI.5 and Appendix Tables A3 and A4.

Among the 25 leading exporters and importers of commercial services, one new entrant appeared in 1996. This was Brazil, on the import side. Germany was the top importer in 1995, but the United States again became the largest importer of commercial services in 1996. The Republic of Korea and Malaysia, moved up two ranks in 1996, as their import growth was three times faster than the world average. The ranking of the 15 leading exporters remained unchanged from 1995 to 1996, with the exception of Austria, which gained the tenth place at the expense of Belgium-Luxembourg. Thailand's services exports rose 18 per cent in 1996, moving the country up three ranks to become the eighteenth largest exporter. Malaysia, which reported the largest increase in exports in 1996, retained its ranking in twenty-second place. (Table II.8).

A comparison of the net trade position of the leading traders reveals that the economies with the largest merchandise trade deficits (e.g. United States, Spain and Hong Kong China) often recorded substantial surpluses on the commercial services side, while those with large merchandise surpluses (e.g. Japan, Germany, Canada and Chinese Taipei) often displayed large deficits in respect of commercial services trade.

Table II.8

**Leading exporters and importers in world trade in commercial services, 1996**

(Billion dollars and percentage change)

| Rank | Exporters | Value | Share | Annual change | Rank | Importers | Value | Share | Annual change |
|---|---|---|---|---|---|---|---|---|---|
| 1 | United States | 202.0 | 16.2 | 7 | 1 | United States | 135.3 | 10.8 | 5 |
| 2 | France | 87.2 | 7.0 | -4 | 2 | Germany | 132.3 | 10.5 | 0 |
| 3 | Germany | 82.8 | 6.4 | 3 | 3 | Japan | 128.7 | 10.2 | 6 |
| 4 | United Kingdom | 74.9 | 6.0 | 6 | 4 | France | 70.4 | 5.6 | -2 |
| 5 | Italy | 69.1 | 5.6 | 6 | 5 | Italy | 66.9 | 5.3 | 3 |
| 6 | Japan | 66.4 | 5.3 | 4 | 6 | United Kingdom | 61.9 | 5.0 | 7 |
| 7 | Netherlands | 48.1 | 3.9 | 2 | 7 | Netherlands | 44.6 | 3.5 | -2 |
| 8 | Spain | 44.0 | 3.5 | 11 | 8 | Belgium-Luxembourg | 33.2 | 2.6 | 1 |
| 9 | Hong Kong, China | 38.9 | 3.1 | 9 | 9 | Korea Rep. of[a] | 31.7 | 2.5 | 15 |
| 10 | Austria | 35.1 | 2.9 | 6 | 10 | Canada | 31.5 | 2.5 | 7 |
| 11 | Belgium-Luxembourg | 34.6 | 2.8 | 2 | 11 | Austria | 30.5 | 2.4 | 7 |
| 12 | Singapore[a] | 29.4 | 2.4 | 0 | 12 | China[a] | 26.3 | 2.1 | 7 |
| 13 | Switzerland[a] | 27.1 | 2.1 | ... | 13 | Taipei, Chinese | 24.5 | 1.9 | 3 |
| 14 | Korea, Rep. of[a] | 25.3 | 2.0 | 1 | 14 | Spain | 23.9 | 1.9 | 11 |
| 15 | Canada | 23.1 | 1.9 | 9 | 15 | Hong Kong, China | 22.3 | 1.8 | 4 |
| 16 | China[a] | 20.5 | 1.7 | 11 | 16 | Thailand[a] | 20.9 | 1.7 | 12 |
| 17 | Australia | 18.1 | 1.5 | 17 | 17 | Sweden | 18.8 | 1.5 | 10 |
| 18 | Thailand[a] | 17.3 | 1.4 | 18 | 18 | Singapore[a] | 18.6 | 1.5 | 13 |
| 19 | Sweden | 17.0 | 1.4 | 12 | 19 | Australia | 18.1 | 1.4 | 10 |
| 20 | Taipei, Chinese | 16.5 | 1.3 | 7 | 20 | Russian Fed. | 17.2 | 1.4 | -9 |
| 21 | Denmark | 15.5 | 1.3 | 6 | 21 | Malaysia[a] | 16.9 | 1.3 | 18 |
| 22 | Norway[a] | 15.2 | 1.2 | ... | 22 | Norway[a] | 16.5 | 1.3 | ... |
| 23 | Turkey[a] | 15.0 | 1.2 | ... | 23 | Switzerland[a] | 15.8 | 1.3 | ... |
| 24 | Malaysia[a] | 14.1 | 1.1 | 27 | 24 | Brazil[a] | 15.2 | 1.2 | 15 |
| 25 | Russian Fed. | 10.6 | 0.9 | 6 | 25 | Denmark | 14.7 | 1.2 | 5 |
| | Total of above | 1047.8 | 83.2 | ... | | Total of above | 1036.7 | 81.8 | ... |
| | **World** | **1260.0** | **100.0** | **5** | | **World** | **1265.0** | **100.0** | **5** |

[a]Secretariat estimates.

*Note:* Growth rates and ranking are sometimes affected by breaks in the time series due to different and/or changing statistical methods. See the Technical Notes. Annual statistics 1986-96 are given in Appendix Tables A5 and A6.

# Chapter Three

# Trade policy developments in the wake of Singapore

# Trade policy developments in the wake of Singapore

The 1996 WTO Annual Report discussed trade policy developments over the period of, and beyond, the Uruguay Round. It focused on the revolution in trade policy making and attitudes to trade policy that has taken place in the last decade or so and the systemic changes brought about with the foundation of the WTO.

The present Chapter seeks to set developments since then in the context of the ambitious agenda ahead for the WTO, through and beyond the success of the Singapore Ministerial Conference. It will draw on major autonomous, regional and multilateral developments, and identify the challenges for trade policy makers resulting from the "built-in" agenda of the post-Singapore period and new issues identified in discussions since.

## Implementation and completion of the Uruguay Round: commitments at and following Singapore

In the Uruguay Round, all WTO Members made substantial binding commitments, under the WTO Agreements, in regard of industrial tariffs and agriculture, and on market access in many areas of services. In general, industrialized and transition countries bound their tariffs on manufactures at existing applied rates, with commitment to reductions averaging just under 40 per cent on a trade-weighted basis for industrialized and 30 per cent for transition economies[1], while there was a significant increase in coverage of bindings by developing countries, often at ceiling rates (see below); since then, a number of Members (particularly within the APEC group) have undertaken advance implementation of their Uruguay Round commitments.

Significant additional sectoral commitments were made during, or following, the first WTO Ministerial Conference held in Singapore in December 1996. In particular, additional commitments of bound duty-free treatment by the year 2000 (or 2005 for a few developing participants) were made on an MFN basis for information technology and pharmaceutical products. The commitments for information technology products have been made by 28 participants (covering 43 Members and states or separate customs territories in the process of acceding to the WTO) representing approximately 93 per cent of world trade in information technology (IT) products and which have signed the Declaration on Trade in Information Technology Products.[2] Although coverage in terms of *potential* duty-free market access for IT products is yet far from complete (the main WTO Member non-participants being major Latin American economies and all African countries), the Declaration is a major complement to the market-access concessions agreed in Marrakesh. Also, at Singapore the WTO Members which under the pharmaceutical initiative had already agreed to tariff elimination on over 600 products, reached agreement to add some 465 products for duty-free treatment. Moreover, the EU and the United States decided to accelerate the elimination of duties on brown spirits resulting from the Uruguay Round, and to include white distilled spirits in the zero-for-zero initiative.

In addition to this, 55 trading entities[3] representing 69 WTO Members – all the industrialized countries, over 40 developing countries from every region of the world, and six central and eastern European transition economies – signed the Agreement on Trade in Basic TelecommunicationsServices in February 1997. Trade liberalization and the opening of domestic services to competition in this important field – with variable coverage among members – covers voice telephone services, including local, domestic long distance, and international services; data transmission; mobile and cellular telephones; other mobile services; leased circuits; and satellite-related communications. Many of the commitments by developing and developed countries will enter into effect on 1 January 1998, others will be phased in over the years to come, in a few cases up to 2013.

The results of the basic telecommunications negotiations and the increased competition that they will encourage reflect the changing economics of the telecommunications business, with costs of communications declining dramatically as new technology changes the face of operations. The consequences have already been seen in changes in the structure of telecommunication pricing by domestic companies, and in new alliances and mergers among the main international operators.

The information technology and basic telecommunications sectors cover a very large area of international business. The reforms incorporated in the two agreements are therefore likely to have an enormous, although as yet incalculable, effect on the costs of doing business and the structure of international relations in these important factor-related fields. Participation in the agreements by a substantial number of WTO Members represents recognition of the

[1]Reductions in averages conceal major variations, especially in sensitive products such as textiles, clothing, and leather and footwear products; on the other hand, major commitments to duty-free treatment were made by many participants through "zero-for-zero" negotiations in areas such as pharmaceuticals, agricultural equipment, construction equipment, medical equipment, beer and certain spirits, paper, steel and toys. It has been estimated that, with these concessions, even before the conclusion of the Declaration on IT Products, the proportion of industrial products entering developed country markets on a duty-free basis would rise from 22 per cent to 44 per cent (ITC/Commonwealth Secretariat, 1996).

[2]The participants in the Declaration on IT Products are Australia, Canada, Chinese Taipei, Costa Rica, Czech Republic, El Salvador, Estonia, EU (15 member State schedules), Hong Kong China, Iceland, India, Indonesia, Israel, Japan, Korea, Macau, Malaysia, New Zealand, Norway, Philippines, Poland, Romania, Singapore, Slovak Republic, Switzerland (with Liechtenstein), Thailand, Turkey and the United States. Participants that are not WTO Members implement their schedules on an autonomous basis, pending completion of their WTO accession procedures, and undertake to incorporate the concessions into their WTO market-access schedule for goods. The Declaration covers five main categories of products: computer hardware, telecommunications products, semiconductors, semiconductor manufacturing equipment, software and scientific instruments. Trade in IT products was valued in 1996 at over US$500 billion.

[3]Antigua & Barbuda, Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Colombia, Côte d'Ivoire, Czech Republic, Dominica, Dominican Republic, Ecuador, El Salvador, EU & its member States, Ghana, Grenada, Guatemala, Hong Kong China, Hungary, Iceland, India, Indonesia, Israel, Jamaica, Japan, Korea, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Senegal, Singapore, Sri Lanka, Switzerland, Slovak Republic, South Africa, Thailand, Trinidad & Tobago, Tunisia, Turkey, United States and Venezuela.

considerable contribution that liberalization of trade in telecommunications and information technology products can make to the development of economies and to the creation of attractive investment environments (notably in developing countries). In particular, countries that remain outside the competitive international market for telecommunications – through maintaining national monopolies, non-competitive pricing for telecommunications, or other impediments to development of the sector – are likely to put themselves at a severe disadvantage in terms of costs for industry and commerce and deprive themselves of an important tool for both personal communication and economic development.

The programme of negotiations inherited from the Uruguay Round is continuing, with strong emphasis on the conclusion of an agreement on financial services with significantly improved market-access commitments. The negotiations seek progressively higher levels of MFN-based liberalization, on a mutually advantageous basis, with appropriate flexibility for individual developing country Members. To date (end-September 1997), 19 participants in the negotiations (including the EU as one) have presented new or revised offers, and a substantial number have announced their intention to present revised offers. Successful negotiations in this area should – as in the case of telecommunications – make a major contribution to opening markets and creating new efficiencies in an infrastructure service vital to the functioning of an increasingly interconnected and "globalized" economic system.

Moreover, a purposeful and business-like start has been made in work on the new areas put in motion at Singapore. The Working Group on Transparency in Government Procurement has made useful progress in coming to grips with relevant international instruments. Outline work programmes, in the form of checklists of issues, have been established for the Working Groups on the Relationship between Trade and Investment, and on the Interaction between Trade and Competition Policy. The preparation of certain background material is also under way.

Members have also identified trade facilitation as a priority area for future work in the WTO. In this area, a Secretariat document compiling information on related activities of international governmental and non-governmental organizations has highlighted the breadth and intensity of trade facilitation work undertaken in these organizations and the importance attached by governments and the business community to such work. Falling trade barriers have brought trade and customs procedures under greater focus and the possibilities of modernization and simplification thrown up by rapid technological advances have heightened interest in regard to these issues. Members are considering to what extent work related to trade facilitation needs to be undertaken in the WTO as well as to complement the ongoing work elsewhere.

## Unilateral, regional, and multilateral liberalization

One of the continuing questions in international trade relations is the inter-relationships between the unilateral (autonomous) actions taken by governments to open their own markets, the spread of regional agreements, and the multilateral commitments made under WTO Agreements. In the corresponding chapter of the 1996 WTO Annual Report, the Secretariat noted the "sea-change" that had taken place in trade policies, through *greater market-orientation, including radical exchange, trade and domestic reforms by many developing and transition countries;* the general adoption of *tariff-based protection, greater tariff stability and increased use of duty-free treatment;* reduction of *non-tariff barriers;* more open markets for *trade and investment;* control of *bilateralism;* the inclusion of *services* in the multilateral system; and the presence under the "built-in agenda" of *specific timetables for further negotiations.* The report also called attention to the control of *bilateralism* by the unified dispute settlement mechanism, covering all areas of WTO activity; the control placed on the operation of *regional agreements* by simultaneous application of WTO commitments; and the facilitating role of the *TPRM* in the process of transition and reform.

Where do things stand, one year later, in these various areas?

### Autonomous liberalization

One question that should be posed is whether the pursuit of *autonomous* liberalization in the developing and transition countries has slowed, or at least entered a period of long-term consolidation of gains made in the past. As noted below, recent Trade Policy Reviews, including work in progress, and other operations in the WTO (including the Balance-of-Payments Committee) show little conclusive evidence that such tendencies have occurred. However, the interaction between autonomous liberalization, regional agreements, and multilateral negotiations has become more complex:

- Economic conditions in many *countries in transition* have become more difficult, and some have taken new temporary trade measures for balance-of-payments reasons. External balances worsened in the face of rising import demand and sluggish export growth, reflecting real appreciation of exchange rates and slow growth of demand in their major market (the EuropeanUnion); although some such countries are currently applying import surcharges or deposits as expedients to deal with balance-of-payments crises, there is no significant evidence of "backsliding". (The 1997 UN Economic Survey for Europe has also noted that, although 1996 was a difficult year for most European transition economies, the process of economic transformation deepened and strengthened.) In the past two years, four transition countries that are WTO Members (Bulgaria, Czech Republic, Hungary and Slovak Republic) have held consultations on import deposits or surcharges in the Balance-of-Payments Committee, simultaneously committing themselves to phase-out programmes for the measures concerned. Thus, the Hungarian surcharge, introduced in March 1995, was eliminated on 1 July 1997, while the import deposit scheme of the Czech Republic, dating from 21 April 1997, was eliminated on 21 August.

- The process of unilateral liberalization in many *Latin American countries* has become more complex as a more negotiated, reciprocity-based approach to trade liberalization has taken hold, whether on a regional basis (see below) or multilaterally. Recent examples examined in the Trade Policy Review Mechanism would include the members of MERCOSUR (Argentina, Brazil, Paraguay, Uruguay), where the adoption of the common external tariff is going along with the conclusion of free-trade agreements with neighbouring countries; Mexico, where regional agreements following the broad pattern of NAFTA are proceeding, together with unilateral reduction of some 1,000 tariffs to zero on an MFN basis and broader initiatives to liberalize trade on a multilateral footing, and Chile, where a flat rate of MFN tariff runs in parallel to the conclusion of free-trade agreements with major trading partners.

- In *South Asian* markets, the process of liberalization is also continuing, governed by overall political constraints. Thus, in India (currently in preparation for its second Trade Policy Review), tariff reform is continuing (the average level of tariffs, already reduced to 35 per cent in 1997/98, is planned to be reduced to "East Asian levels" by the turn of the century and "world levels" by 2003); the share of tariff lines covered by import licensing restrictions has fallen very substantially since 1991 (from around 80 to 28 per cent), and a major political commitment has been made by the Government to phase out remaining licensing restrictions on imports of consumer goods.[4] Sri Lanka is also in the process of eliminating (or redefining under other provisions) restrictions previously maintained under the balance-of-payments (BOP) provisions of GATT, while Bangladesh and Pakistan are also due to provide greater transparency concerning BOP measures in force.

- *South-East Asian* markets appear to be continuing a broad process of deregulation in most areas; the emphasis on regional integration, although strong, appears in some cases to be effectively coupled with broader market-opening initiatives, but at the same time with industrial policy. Thus, for example, Singapore maintains a basically free-trade regime in goods and the Philippines has recently entered into a new and important phase of liberalization. In Malaysia (which will also be subject to trade policy review in 1997), duty-free access has increased significantly, from 13 to 55 per cent of tariff lines, in the past four years and the simple average tariff rate for all items has fallen by some 35 per cent in the same period; at the same time, Malaysia is supporting both the creation of the Asean free-trade area (AFTA) and initiatives in the APEC forum promoting "open regionalism", while liberalization of investment is strongly linked to the promotion of joint ventures and the direction of industrial policy.

- *African countries* are also becoming better integrated into the multilateral trading system; recent trade policy reviews have shown that countries such as Benin, Uganda, or Zambia, have achieved substantial liberalization of their trade policies, both as a result of WTO Agreements and structural adjustment programmes. Also, the strong focus placed on Africa in technical-cooperation activities conducted by the WTO individually, or in conjunction with other agencies such as UNCTAD and the International Trade Centre, is concentrated on encouraging such participation – particularly of least-developed countries – through improving conditions for market access, trade facilitation, and assistance in making the provisions of WTO Agreements, and their utility to developing countries, better known in Africa.

## Tariff commitments by developing countries

In successive rounds of multilateral negotiations, including the Uruguay Round, the possibility of binding tariffs at "ceiling" rates – maximum levels above which duties could not be raised – permitted many developing countries to make meaningful concessions and benefit from the concessions extended by others. However, as autonomous liberalization has

[4]The timing and content of such a phase-out were, at the time of writing, subject to consultations between India and its trading partners.

proceeded, a growing gap has become evident between the MFN tariff rates applied by many developing countries and the legal commitments undertaken by such countries under the WTO Agreements.

Recent trade policy reviews of developing countries illustrate clearly the extent to which ceiling bindings are prevalent in developing countries and the gaps between bound and applied rates. For example, many Latin American countries generally bind tariffs on industrial products at 35 or 40 per cent, with some lines (such as automotive products) at higher levels, while applied rates are considerably lower (e.g. an unweighted average of 10.7 per cent applied by MERCOSUR in 1995).[5] Similar trends can be seen in other regions such as South East Asia. Examples of recent tariff variations under ceiling bindings are described in the Trade Policy Review reports of Brazil, Mexico or Malaysia. These practices effectively mean that bindings – an essential element in the stability of multilateral trade relations – may have relatively little force in the markets concerned, as ceiling rates give considerable scope (albeit with limits) for increases and variations in rates within multilateral disciplines.

## Regional developments

One notable development in recent years is the extent to which regional arrangements (customs unions, free-trade agreements, or looser associations with trade-related objectives such as APEC) have become the norm in international trading relations. Under this definition, there are currently no WTO Members that are not also members of one grouping or another. In the past two years, the process of regional integration has intensified on all continents.

- In *Europe,* the network of agreements between the European Union and other countries has been strengthened by a concrete proposal by the Commission to admit to EU membership Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia as a first group. This proposal, builds on a firmly established structure (which can be seen either as a series of concentric circles or a pyramid) of EU relations with its European, Mediterranean and ACP partners, and takes the process of European integration and linkages with neighbouring countries an important step further. It will have increasingly significant effects on outsiders to the extent that the duty-free access already granted to imports from Central and Eastern European countries (CEECs) (soon to be complemented by quota-free access for textiles and clothing products) is completed by free internal trade in agriculture, integration of the CEECs in the pattern of EU legal relationships through the progressive adoption of the *acquis communautaire,* participation in European regional funding and the eventual extension of EU rules on investment and movement of persons to the CEECs.[6]

At the same time, the EU is reassessing in depth both the pattern of its other free-trade area relationships and the relationships with the WTO Agreements and with MFN trading partners.[7] A new generation of association agreements with Mediterranean countries has been set in the context of a regional free-trade area by 2010; the mid-term review of the fourth (and last) Lomé Convention has been completed and initial discussions are under way to determine the structure of post-Lomé arrangements; and negotiations to liberalize trade with South Africa and Mexico have begun. New frameworks for relations with North America, MERCOSUR and Asia have been created; technical relations with the United States have been reinforced through new mutual recognition agreements covering many areas of standards; and the GSP scheme has been revised, putting access to the EU market on a more highly differentiated footing than hitherto. The question must be asked, whether this process will lead to a more coherent or, rather, to an even more strongly differentiated structure of trade and investment relationships than currently exists.[8]

- In the *Americas,* Canada and Mexico are building on their relationship within NAFTA to conclude similar agreements with trade partners in Latin America. Canada and Chile have concluded a new NAFTA-based free-trade agreement; Mexico, besides opening negotiations with the EU, is also renegotiating its existing agreement with Chile on a NAFTA basis, negotiating similar agreements with Bolivia, Costa Rica, Colombia and Venezuela, and envisaging agreements with virtually all countries in the Americas, including the Caribbean. MERCOSUR seeks to complete its own common external tariff through a process of "convergence" by 2001 for Brazil and Argentina and 2006 for Paraguay and Uruguay, and is also seeking to conclude free-trade agreements with other LAIA countries, including members of the Andean Group, who in turn have also opened negotiations with the Caribbean Community (CARICOM). Chile, which has until recently pursued a trade policy based almost entirely on MFN treatment, with a flat-rate tariff, is now (largely for defensive reasons) moving towards free-trade agreements with its Latin American partners, as well as participating actively in the APEC forum.[9] The Free Trade Area of the Americas (FTAA) project will, effectively, be superseded by existing regional trading arrangements.

The emerging pattern of regional agreements in Latin America again raises questions both about the relationship between regional, autonomous and multilateral liberalization

[5] Laird (1997), *Mercosur: Objectives and Achievements* (conference paper, 1997).

[6] It would be entirely speculative to argue the potential effects one way or the other on traditional "trade creation-trade diversion" grounds: any judgement would have to take into account questions like the effects of a larger Single Market, including the unification of legislation on standards, health regulations and other technical barriers; the course and effects of economic policies in the EU and the CEECs alike, including the possible effects of the single currency; and whether the net effect of the integration process leads to a more or less liberal external trade policy, including the effects of participation in future multilateral negotiations.

[7] A Communication from the European Commission, presented in early 1997, seeks both strengthening the position of the EU's agreements in the WTO and clarification of WTO rules in respect of regional trading agreements.

[8] WTO (1997), *Trade Policy Review – European Union,* forthcoming.

[9] Laird (1997), *Mercosur: Objectives and Achievements,* conference paper: WTO (1997), *Trade Policy Review – Paraguay* and *Trade Policy Review – Chile* (forthcoming).

and about the internal coherence of the regional agreements themselves. How will the establishment of the MERCOSUR common external tariff, and the possible enlargement of MERCOSUR to other countries, chime with the free-trade area approach favoured by Mexico and Chile; how will the different rules of origin prevalent in the region be reconciled; and is a fully-fledged common external tariff structure within MERCOSUR, reflecting (and creating) new common interest groups among its members, likely to favour or inhibit future multilateral trade liberalization?

- In *Africa,* a customs union – with a common external tariff – principally among the Francophone countries of West Africa, is intended to come into effect in January 1998; in southern Africa, a complex negotiation has been engaged among the members of the Southern African Development Community (SADC)[10] to bring into effect the SADC Trade Protocol, which envisages free trade among its members (but not a customs union) eight years after its entry into force (the SADC Protocol has not yet been ratified by any member). The process of negotiation is complicated by the participation in SADC of all the members of the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland), itself currently subject to renegotiation; and by the ongoing negotiations between South Africa and the European Union on the future structure of their trade relations – which will, in turn, inevitably affect trading relations both within the southern African area and between African countries, members of the Lomé Convention, and the European Union.

- In *Asia,* completion of the Asean Free Trade Area (AFTA) has been accelerated from 2008 to 2005, with expansion both of the range of goods covered by the Agreement and in its overall scope to cover services and intellectual property. Negotiations among the members of the South Asian Preferential Trading Arrangement[11] were initiated in 1996, aiming to achieve a South Asian Free Trade Area (SAFTA) by 2001.[12]

Another long-term regional integration project covering Asia and the Pacific zone (including the Americas) is the Asia-Pacific Economic Cooperation (APEC) forum, which aims at reaching free and open trade and investment in the region by 2010 for the developed and 2020 for the developing economies. All progress in these fields is to be MFN based. At its Osaka summit meeting in November 1995, APEC identified 10 principles to guide trade and investment facilitation and liberalization within the group: comprehensiveness, WTO-consistency, comparability, non-discrimination, transparency, standstill, simultaneous start, continuous process with differential timetables, flexibility and cooperation. These are to be put into practice through Individual Action Plans (IAPs) by each APEC member; Collective Action Plans for the group as a whole; and joint activities.

The inter-relationship between regional and multilateral activities is one of the crucial determining features of the trading world today. Among WTO Members, at least, unilateral action – if not dying out – appears at least to have been effectively disciplined by the dispute settlement mechanism, which is being thoroughly tested by the Members; and participation by developing as well as developed countries in the Dispute Settlement Mechanism is growing. Even the use of anti-dumping and countervailing procedures – the measures most criticized for their potential for abuse and discrimination in the past – in developed markets appears to be falling, although an increasing number of developing countries are learning how to use such trade-defence mechanisms. It is therefore in regional/multilateral areas like the gaps between MFN and preferential rates of duty, differences in regional and international standards, product approval procedures and health regulations, and the burgeoning multiplicity of rules of origin, that the "traditional" questions of trade in goods need to be addressed. In services, too, there are obvious risks that multiplying regional arrangements can lead to growing differences in standards for market access through establishment of regional conditions for cross-border access, establishment or investment conditions, or conditions for entry of professional service suppliers or labour.[13]

One very practical danger of the multiplication of regional and multilateral activities is the risk of incoherence stemming from the sheer time taken up by such activities for governments and administrators and the conflicting pressures that they create. Thus, in southern Africa, it is evident that the cross-cutting agenda of SACU renegotiation, the creation of SADC, and other regional issues like the Cross-Border Initiative occupy a good deal of negotiators' time in administrations each of whose developmental tasks are urgent and overwhelming. Similarly, APEC, with an elaborate structure of summit, ministerial and officials' meetings spread over a very wide geographical area, is by definition very intensive in its use of highly skilled human resources.[14] Within the WTO itself, many delegations complain that they are unable to effectively follow developments in Geneva – not to speak of communicating effectively with home – because of the large number of formal and informal meetings and groupings created by the complex structure of the WTO Agreements and the Dispute Settlement Mechanism. There is, for many Members, a real problem of coverage and co-ordination, which if not addressed is likely to get more intense as new topics are introduced to the WTO agenda.

[10]The members of SADC are Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, SouthAfrica, Swaziland, Tanzania, Zambia and Zimbabwe.

[11]Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

[12]WTO (1997) *Trade Policy Review – India,* forthcoming.

[13]For example, labour can move freely within the European Economic Area, and NAFTA contains specific conditions on access for labour.

[14]A Secretariat team visiting one APEC member State was told that two-thirds of its trade negotiators' time was taken up with travelling for APEC meetings around the Asia-Pacific area.

## Sectoral issues

Within the scope of the WTO Agreements, and as seen in various Trade Policy Reviews, there are a number of sectoral issues that appear to be increasing in importance; with strong linkages, in some cases, to broader, cross-cutting questions. Some of these (such as conditions of access for financial services) are left-overs of the Uruguay Round; others, such as further liberalization in agriculture, are to be addressed in new negotiations already provided for under the "built-in agenda" of the WTO Agreements. The pace and scope of the process of "integration" into the WTO for textiles and clothing remains a third issue in which many developing countries have a keen interest; this process is, as noted above, also affected by developments in regional trading agreements, and thus has strong links to the systemic questions raised by the interrelationship between regionalism and multilateralism.

A fourth sectoral area where trade and investment conditions (and government-private sector relationships) are inextricably entwined is the motor vehicle industry. Recent Trade Policy Reviews and other discussions in the WTO have shown both the sensitivity of this area for many of the rapidly industrializing economies (e.g.Brazil, India, Malaysia, Mexico, Indonesia) and the links that exist between (a) trade and investment conditions (both through TRIMs as defined in the WTO, through investment patterns encouraged by protective tariffs or non-tariff measures, and through more general incentives to investment), and (b) the strong interactions that can exist between Government and private sector actions, often involving multinationals (promotion of "national cars", pressure from vested interests of foreign manufacturers already in place to prevent new entrants).

## The "built-in agenda" and future trade negotiations: Challenges for the future

It is clear from the above that the process of trade liberalization is continuing at the unilateral, regional and multilateral levels. The process of economic "globalization" is driven by, and requires continuing efforts to advance, trade and investment liberalization and harmonization of policies. The trade and economic policies pursued by most countries are still geared to external market opening, however much the scope and pace may vary among individual cases. However, the tendencies noted above may illustrate and highlight a number of challenges that the trading system will be forced to face before long.

The *first* of these challenges is to carry forward effectively the "built-in agenda", which is the legacy of the Uruguay Round (as amplified by the Singapore Ministerial Conference). This comprises many areas crucial to the continuation of the process established in 1994: major tasks such as accessions to the WTO, market-access questions (including the pursuit of market-access opportunities for least-developed countries), the furthering of the reform process in agriculture, the conclusion of "left-over" negotiations on trade in certain services as well as the opening of new negotiations in this field, and the review of a number of Uruguay Round agreements. Many of these areas have already been solidly engaged.

The *second* is to ensure that regional trade agreements are compatible with multilateral trade rules. This implies that WTO rules and principles should be the basis for whatever new mechanisms may be put in place. It also implies a need for clear rules, definitions and procedures to ensure such compatibility. Potential conflicts between different sets of regional rules (e.g. rules of origin, trade contingency measures, standards) could also be approached, if possible before they materialize, through a combination of bilateral and multilateral discussions. Ultimately, the scope for gaps between regional and international trade agreements will be significantly reduced, not only by developing rules, but also by the resolute pursuit of trade liberalization at the multilateral level, notably in the tariff area.

The *third* challenge is to ensure that future negotiations build constructively – and inclusively – on new or emerging global patterns of trade and investment relations, by ensuring that no participants are marginalized. The Uruguay Round led to a much greater integration of the major developing economies in the international trading system; but there are still many countries that have been unable to take advantage of the new trade and investment opportunities open to them, because of (individually or in combination) external barriers, physical resource or supply limitations, or self-imposed policy constraints. It is important to address all these issues, to ensure that all participants can benefit from multilateral efforts, in particular by maintaining universal access and promoting fair and transparent circulation of information, while at the same time, preserving efficient decision-making procedures. As suggested above, this may imply serious consideration of the conduct and structure of negotiations. This issue may become even more important as the number of WTO Members increases (there are at present 29 accession Working Parties in operation

and more will apply). How to achieve universality without weakening the multilateral trading system and its daily operation is, today, one of the crucial challenges of the WTO.

The *fourth* and major challenge is to address the new areas identified at Singapore and to consider how they can effectively be addressed in the context of the multilateral agenda for the future. It is evident from successive Trade Policy Reviews of developed, transition and developing countries that the benefit of trade liberalization can be effectively built upon through the opening of investment to external participation and by a complementary process of domestic regulatory reform; otherwise, bottlenecks previously apparent at the border may simply manifest themselves elsewhere. The relations between trade, investment, and the creation of effective conditions for competition have thus become central to economic and trade policies. Within the WTO, the working groups on the new areas have made a positive start in opening up the multilateral debate in these fields. Given the importance of globalization as a challenge to governments, their work needs to go forward and be more closely integrated into the mainstream of WTO thinking.

# Chapter Four

# Trade and competition policy

# Trade and competition policy

## Executive summary and conclusions

There is a growing interest in the interface between trade and competition policy. This is partly explained by a perception that, as governmental trade measures are increasingly brought under multilateral discipline, enterprise practices that distort or restrain international trade are becoming more evident and may be relatively more important than before. Moreover, the growing integration of the world economy has the consequence that anti-competitive practices have increasingly a transborder dimension. Further, the development of international trade rules on countries concerning their treatment of foreign companies operating in their territories (notably rules on investment and intellectual property) has led to attention to parallel international co-operation to deal with possible anti-competitive practices by such companies. It should also be noted that these developments are taking place against the background of a growing worldwide convergence of thinking that open and functioning competitive markets are the economic structure most conducive to economic development; and that, rather than the range of regulatory instruments that have been employed in the past in many countries (sectoral, technology transfer, investment controls, etc.), competition law generally constitutes the preferred remedy for enterprise practices that might damage the functioning of such markets.

This Chapter addresses primarily the practices of enterprises, whether public or private, that may distort or impede international trade and the policy responses of governments in these circumstances. For nearly 50 years, first the GATT and now the WTO have concentrated on bringing under multilateral discipline governmental measures that restrict or distort international trade and this, of course, remains and should remain the primary focus of the work of the WTO. The purpose of this Chapter is not to suggest otherwise, but, by way of a complement, to examine the effects that enterprise practices can have in restricting or distorting trade, the national legal means employed by governments to prevent or remedy such enterprise behaviour and the possible areas where enhanced international co-operation might be explored.

Section II of the Chapter provides an introduction to economic concepts and arguments that are essential to an understanding of competition policy issues. This introduction discusses some basic market structures, as well as the sources and costs of market imperfections. An important conclusion in the economic literature, which is emphasized in this subsection, is that business practices that by themselves are anti-competitive, may under certain circumstances, but not always, improve economic welfare. For instance, a merger may bring gains in productive efficiency that more than offset the losses in terms of higher prices to consumers. Since almost all decisions will involve these types of complex trade-offs, it is in many cases impossible to formulate competition law satisfactorily as *per se* rules, that is, as general prohibitions of certain business practices. Also, the aim of competition policy cannot be put in simple terms such as to strive to maximize "the degree of competition". Instead, a *rule of reason* approach is often necessary, which requires competition authorities to evaluate practices on a case by case basis. The remaining part of Section II deals with legal and institutional aspects of competition policy. It outlines some highlights of current approaches to competition policy in developed countries and discusses factors underlying the growing importance of competition policy in many developing countries. This section also notes the importance of competition advocacy work as an adjunct to competition law enforcement in some countries, and provides a discussion of gaps in the coverage of competition law and policy.

A main reason why the WTO rules benefit Member countries is that they limit their ability to pursue "beggar-thy-neighbour" trade policies which reduce overall welfare. Section III focuses on the question of whether the national pursuit of competition policy is likely to be associated with similar types of effects. The Section thus provides an economic framework within which to evaluate whether enhanced international co-operation on competition policy is warranted on analogous grounds. The Section builds on two basic observations. First, even with extensive liberalization of trade and factor movements there will be a need for competition policy. Secondly, an unavoidable feature of many competition policy interventions is that they benefit certain groups to the detriment of others. Nevertheless, these policies may yield overall benefits that exceed the losses they impose on certain groups. The same type of tension would be inescapable also if competition policy were pursued with the aim of promoting global as opposed to national interests. Hence, the mere fact that a national competition policy decision negatively affects trading partners does not in itself make it unwarranted from a world efficiency point of view. In order for a competition policy decision to be undesirable in this sense, it must be the case that the negative consequences for trading partners exceed the benefits to domestic agents. In such cases there may, but need not, be scope for enhanced international co-operation on competition policy to increase aggregate world welfare. Of course, a welfare-improving competition policy intervention in one country that improves both national and aggregate world welfare may, nevertheless, hurt economic interests in another country. This may give rise to tension in international relations, but it is not something upon which economic theory gives much guidance.

Section III also develops the following observations:

- Trade liberalization tends to increase competition. However, even with extensive liberalization and free factor movements, there will be a need for competition policy.
- From an economic point of view, any stance on competition law or enforcement, including the decision not to have a competition law at all, or not to enforce the existing law, is a choice of competition policy. Consequently, it is not always possible to make a useful distinction between government and private restraints, in particular since private restraints require implicit or explicit consent by governments.
- Just like with any policy that affects the economy, it is almost impossible to conceive of situations where the competition policy choice of one country does not affect other countries.
- It is easy to point to many instances where spillovers exist in practice, even though it is often not clear whether these spillovers also represent distortions in the sense of having negative effects on world welfare. More generally, there is a lack of empirical work that systematically measures the magnitude and prevalence of spillovers and distortions from national competition policies.

The trade-restrictive or distortive effects of enterprise practices are discussed in Section IV in three main categories:

first, practices which may restrict imports, notably vertical market restraints, import cartels and related horizontal restraints (such as abusive non-governmental standard-setting activities), and the activities of enterprises which enjoy monopolies or exclusive or special privileges on the domestic market; second, practices which are aimed at or have the effect of exercising market power in export markets, in particular export cartels and related arrangements, international cartels, mergers and abuses of dominant positions, and certain enterprise pricing practices (predatory pricing, price discrimination, cross-subsidization and dumping); and third, the practices of foreign companies operating within the territory of countries – the link with investment and intellectual property.

The Section examines the legal means available for combatting such trade-restrictive or distortive enterprise practices, in national competition law and also in trade law. It notes that, in most cases, the application of a well-constituted national competition law in the country where the practices are taking place would appear to be the most appropriate remedy[1] and that therefore there are important positive spillovers for trading partners and the international trading system from the existence and enforcement of national competition laws. It should also be emphasized that the liberalization of governmental measures restricting trade and investment and other forms of deregulation can often be the most effective means of preventing or remedying anti-competitive business practices, by introducing greater competition into the market, especially in those instances where such governmental measures are more prevalent. The case for more use of such remedies to be made by national competition laws merits further exploration.

There are, however, a number of factors which limit the role that competition law currently plays in preventing or remedying harmful effects on trading partners resulting from anti-competitive practices. The first is that, whereas some 70 countries, including most major trading nations, have competition laws, a large number of countries do not (although many of them are in the process of developing such laws). A second constraint is that, even where a national competition law exists, enterprise practices may be exempted from its coverage, either because of sectoral exclusions or because of exemptions of a horizontal nature, for example in connection with practices authorized by the government. It is not surprising that many of the sectors exempted are those where anti-competitive practices would appear to be more prevalent.

A third limiting factor on the scope for national competition law to respond to the trade interests of other countries is the possible non-enforcement of such law. Enforcement lies (exclusively or in conjunction with a private right of action, depending on the country) within the discretion of national competition offices. Naturally such administrative bodies have to establish priorities for the use of their limited resources. Questions have been raised as to the extent to which such offices are responsive to complaints lodged by foreign interests, at least in some jurisdictions. Where private rights of action exist, the right of recourse is not usually dependent on nationality, but it is possible that general legal rules on standing may, in some instances, limit the ability of foreign companies, with an export interest but no legal presence within the jurisdiction, to initiate cases.

[1]Although, in some cases where fundamental structural problems exist and the scope for governmental influence is high, the application of market structure reforms and/or pro-competitive regulatory policies may also be warranted.

Further, the ability of national competition law to take into account the interests and concerns of other countries may be limited by the substantive criteria built into national competition law. This is, in part, because some national competition regimes take account, in the law itself and/or in the application of the law, of considerations other than those of allocative efficiency in reaching decisions. Some of these criteria, for example enhancing the export competitiveness of national producers, may lead to decisions that have discriminatory effects vis-a-vis the trade and welfare of other countries. However, even where allocative efficiency and welfare approaches are predominant, national laws are not neutral as to where the efficiency benefits and costs occur. Ultimately, national competition laws are concerned principally with costs and benefits accruing within the respective jurisdictions, and not with those affecting trading partners. The risk of decisions which are harmful to the welfare of trading partners is particularly strong where a total national welfare approach is taken, which allows national producer efficiencies to offset consumer costs. But even where national consumer welfare is the predominant consideration, a divergence between national and foreign welfare effects can arise, the most obvious example being export cartels.

In respect of enterprises with monopolies or exclusive rights on the national market, the Chapter discusses market access problems that can arise not only in the market that is the subject of the monopoly or the position of market power but also in downstream markets, access to which depends upon the use of facilities controlled by an enterprise with a dominant position, and in upstream markets, for example for capital equipment. It is argued that the most effective approach to reducing and eliminating such market-access problems (as well as no doubt many other problems) is that of structural market reform to introduce competition, supplemented by the continuing application of competition law. In some cases, especially those involving natural monopoly situations, pro-competitive regulation will also be necessary to protect domestic welfare and the interests of foreign suppliers. It is desirable that such regulatory arrangements be based, both at the national and at the international level, on competition law principles. This will help ensure not only the mutual coherence of regulatory and competition policies but also that of regulatory policies between different sectors and between different countries. It should also contribute towards safeguarding against the risk of "regulatory capture" and provide a "safety net" of principles which might facilitate the phasing-out of special regulatory regimes if and when technological change and structural reforms engender competitive markets in the sectors in question.

The extraterritorial application of competition law is one means by which a country may seek to deal with practices in other countries which have adverse trade effects on it, particularly in situations where those other countries may not wish, or be able, to take action. However, the scope for extraterritorial application by a country of its competition law, particularly in situations where the enterprises in question do not have a legal presence in its territory, is constrained by practical considerations, notably the difficulty of obtaining the necessary evidence and with enforcing judgements. In any event, as is widely recognized and was illustrated by the recent Boeing-McDonnell Douglas merger, extraterritorial application of competition laws has considerable potential to give rise to disputes between countries as well as difficulties for business faced with differing and possibly conflicting standards and procedures.

These disadvantages of extraterritoriality are one reason why considerable emphasis has been put in recent years on the development of mechanisms for co-operation between countries

in the field of competition law, in particular in regard to its enforcement. These developments, which are reviewed in Section V of the Chapter, have manifested themselves in bilateral and other agreements between competition authorities and in regional trade and economic integration agreements, but also in the context of the WTO.

To take the WTO first, a range of WTO provisions and mechanisms are of possible relevance: the consultation and co-operation arrangements under each of the main WTO agreements, the general rules of the WTO relating to non-discrimination and transparency, the areas where the WTO already provides for some minimum standards that governments are to follow in combatting or regulating anti-competitive enterprise practices (notably in the area of basic telecommunications), the provisions which allow for remedies to enterprise practices, notably in the area of anti-dumping, and the WTO dispute-settlement mechanism. The number of areas where the multilateral trading system is already addressing competition policy issues has proliferated with the results of the Uruguay Round and the subsequent work of the WTO. For the reasons set out in the first paragraph, it is unlikely that this process will slow down or go into reverse. The issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in particular, how coherent will the framework be within which this will be done.

There are also a growing number of competition-related provisions in regional trade arrangements, for example within Europe, the Americas and between Australia and New Zealand, as well as co-operative arrangements relating specifically to competition law and policy, such as the United Nations Set of Multilaterally-Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, the OECD Recommendations and an increasing number of bilateral agreements, incorporating both traditional and positive comity principles. These principles provide for enforcement agencies to take into account the impact on other countries' interests of their actions, or even to initiate action at the request of another country.

The disparate nature of these co-operative arrangements is striking. They exist at the bilateral, regional and multilateral levels, in the context of broader trade arrangements and in isolation from them, of general application or in the context of specific sectors or subject areas, and with widely differing country participation. The most active arrangements appear to be those concluded between the competition authorities of certain OECD countries, where case-specific enforcement co-operation has, in some instances, contributed significantly to the successful investigation and prosecution of cases with a transborder dimension.

However, most of the instruments in question are of a non-binding nature, and/or have commitments expressed in "best-endeavours" terms or at least do not require co-operation in circumstances where perceived national interests conflict. Moreover, most of the existing arrangements are limited in the extent to which confidential information is shared between competition authorities. In addition, because relatively little of a binding nature has been agreed regarding substantive standards and continuing important differences remain, the ability of competition authorities to take into account the interests of other countries, even if they should wish to do so, may be circumscribed by the substantive criteria of national laws. The coexistence of what are essentially consultative mechanisms for attempting to accommodate the interests and concerns of trading partners with essentially rule-of-law systems for the domestic application of competition law is bound to give rise to tensions.

A further constraint on the role that competition policy can play in preventing or remedying enterprise practices that impede or distort international trade relates to the position of smaller countries, especially developing countries, many of which do not yet have competition laws and authorities. These countries are at a disadvantage in combatting certain enterprise practices with an international dimension, both because multinational enterprises are likely to be more responsive to the competition authorities of the major economies where such practices are concerned and because of their greater need for accessing information outside the jurisdiction. This highlights the importance of international co-operation for them. But these countries generally are not parties to the most active instruments (which in any case work well because of a long process of mutual confidence-building), they sometimes do not have competition authorities and, where they do, they may suffer from resource constraints. However, it is encouraging to note that an increasing number of such countries have established, or are in the process of implementing, competition regimes.

In conclusion, competition policy is generally the most appropriate instrument for combatting enterprise practices that restrict or distort international trade, and therefore the application of national law in this area will often have positive spillovers for trading partners. Nonetheless, it cannot be assumed, for the reasons set out above, that national competition regimes will always operate in a way consistent with the interests of trading partners, notwithstanding present co-operation mechanisms. While no empirical information of a systematic nature is available for measuring the size of the problems in practice that remain unresolved through existing laws and mechanisms, there would seem to be a widespread view that enhanced international co-operation is desirable.

A wide range of ideas have been put forward to foster such co-operation. While it is not the purpose here to attempt to assess their individual merits, it might be noted that the proposals advanced would appear to fall within three broad possible approaches:

- At one end of the spectrum, a continuation of the present efforts, focusing on enhanced comity arrangements mainly of a bilateral nature, together possibly with some efforts towards voluntary convergence of substantive standards where feasible and where significant international effects exist. As indicated above, such an approach would seem to have inherent limitations, but it would be for the international community to decide whether the outstanding problems that it does not address are sufficiently important to warrant a higher level of co-operation.

- At the other end of the spectrum, the establishment of a supranational authority together with detailed international norms to be administered by the authority. This approach seems to go beyond the extent of multilateral action that the international community is prepared to envisage at this time.

- In between, a range of suggestions for possibilities for enhanced international co-operation of a binding nature, both on enforcement and substantive standards, without involving the establishment of a supranational institution.

In regard to enforcement, two main categories of suggestions, which could either be alternatives or complements, would seem to be present in many of these "in-between" proposals:

- Ensuring that effective procedures and remedies for the enforcement of competition law through national courts (as the most "nationality-blind" institutions within countries) are available, and providing a private right of action, together with the necessary legal standing, to foreign persons affected by anti-competitive practices. This would be similar in approach to that

adopted in the WTO TRIPS Agreement in respect of the enforcement of intellectual property rights.

- Attempting to make administrative enforcement authorities more responsive to complaints from foreign countries or persons, by increasing the international accountability of such offices for the way in which they respond to and handle such complaints.

In regard to substantive standards, a starting point for many of the ideas that have been put forward is that competition standards should be more exclusively focused on efficiency and welfare, with the implication that countries should be willing to give up the use of standards which might inherently favour domestic economic activity over that in other countries.[2] Various ideas have also been put forward for how to move towards ensuring that efficiency and welfare criteria are applied on a basis which is more neutral as to the weighing of effects within the jurisdiction and those on trading partners. For example, an obvious starting point that has been suggested would be to seek an understanding on the prohibition of export cartels. Suggestions have also been made for a market access criterion, either as a positive norm or in the form of a nullification or impairment of trade concessions rule. Furthermore, there are various ideas on how to combine the need for national authorities to make "rule-of-reason" determinations with minimum standards and procedural mechanisms that would protect the interests of trading partners.

Many of the ideas also address four other major issues. One is the role that general principles relating to non-discrimination should play. A second concerns mechanisms for procedural co-operation, for example on access to information and mergers. Another is that of the applicability of the WTO or some other dispute-settlement mechanism. The fourth is how to take into account the special situation of developing countries, notably the fact that many do not as yet have functioning competition laws and the particularities of their economic circumstances.

A key issue before the international community in considering what nature and level of international co-operation in the application of competition law is appropriate from an international trade perspective can be summarized as follows: will the positive spillovers from competition laws drawn up and applied basically for national purposes adequately address the problems for trading partners from trade-restrictive or distortive enterprise practices? If the answer is that this avenue will sufficiently resolve such problems as they are being experienced in practice, it may be that enhanced international co-operation of an essentially voluntary nature, primarily on enforcement, would be an adequate response by the international community. However, it is pointed out in the Chapter that it cannot be assumed that problems for trading partners will always be resolvable in this way. This is both because of issues of enforcement, related to the degree of discretion given to national authorities in initiating and, in some cases, reaching decisions, and also because of issues of substantive standards, related to the use of non-efficiency criteria and to the ignoring of efficiency and welfare effects on trading partners. If the international community considers that such remaining problems are of a sufficient magnitude in practice, it would need to consider the extent to which mutual interest could be found in going further by way of international co-operation, possibly in the form of some more binding rules addressing situations where national interests diverge. The nature and scope of such rules, for example whether they should relate to competition law generally or be specific to particular problem sectors or subject areas, would have to be considered. The purpose of this Chapter is not to attempt to respond to these questions, which require further work both of an empirical and of an analytical nature, but to attempt to set them out in a way which would facilitate their examination and answer by the international community.

[2]This would be consistent with the main thrust of developments in national competition policies and laws. See discussion in Part II.

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## I. Introduction*

The issue of the possible adverse effects that anti-competitive business practices can have on international trade is one that goes back many decades. Indeed, it was originally conceived after the last world war that the GATT rules on governmental measures would be accompanied, in the Havana Charter for an International Trade Organization, by international rules for the control of restrictive business practices. In recent years, the issue has come once more to the forefront of the international trade agenda, crystallized in the decision taken by WTO Ministers at Singapore in December 1996 to establish a Working Group in the WTO on the Interaction between Trade and Competition Policy. The relationship between trade and competition policy has also been a matter of increasing attention in bilateral and regional contexts.

Increasing interest in this matter can be explained by many factors, four of which are highlighted here. One is the perception that as governmental barriers are peeled back through successive rounds of trade negotiations, trade restrictions and distortions resulting from enterprise practices may be becoming relatively more important than before. Associated with this is the increasing integration of the world economy, spurred not only by trade liberalization but also by the vast expansion of foreign direct investment (FDI). Thus, anti-competitive enterprise practices have increasingly a transborder dimension and effects on several countries and, in some cases, the whole world. A further influence has been the growth of international rules, at the bilateral, regional and multilateral levels, that protect the interests of foreign companies operating within a country's territory. For example, in the WTO, as a result of the Uruguay Round, there are now international trade rules of this nature in the area of services and intellectual property and a working group is studying the relationship between trade and investment. Some countries feel that such international rules should be accompanied by enhanced international co-operation to control anti-competitive business practices by the companies in question. Lastly, an important development has been the growing convergence of views, without the old North/South and East/West differences, that competition law is often the appropriate legal means for addressing anti-competitive enterprise practices, even if convergence on specific details still has a considerable way to go.

This Chapter addresses primarily the practices of enterprises, whether public or private, that may distort or impede international trade. It is, of course, recognized that governmental trade and other measures are major factors in limiting or distorting competition in import and export markets. However, first the GATT and now the WTO have spent nearly 50 years seeking, with some although, as yet, incomplete success, to limit

the adverse trade effects of governmental measures and to bring them under international discipline. The purpose of this Chapter is not to discuss the range of issues that this work has involved but, by way of providing a complementary element, to focus on the trade restrictive and distortive practices of enterprises, the national legal means employed by governments to prevent or remedy such enterprise behaviour, the existing forms of international co-operation and the possible areas where enhanced co-operation might be explored. This also means that the Chapter does not address intergovernmental arrangements which might have implications for competition in international markets, for example for oil or various other commodities.

The term competition policy is interpreted in different ways in different countries and in different contexts. At its broadest, it could include all policies relevant to competition in the market, including trade policy and regulatory policy as well as competition or antitrust law. In keeping with the focus of the Chapter on enterprise behaviour, as indicated in the previous paragraph, the main emphasis is on competition (antitrust) law, although other governmental instruments and activities aimed at promoting competition and regulating enterprise conduct are discussed where relevant. For example, an important adjunct to competition law enforcement in many countries is that of competition advocacy work (i.e., research and promotional activities aimed at removing governmentally-imposed impediments to competition).

The Chapter is made up of five main sections. Section II is a survey of the economics of competition policy and of the main legal instruments of competition policy employed at the national level. Section III discusses some aspects of the economics of competition policy in an international environment, focusing on the effects of national policies on trading partners. Section IV examines a number of areas where enterprise behaviour has been perceived to give rise to problems in international trade relations. Issues relating to market access for imports, the exercise of market power in export markets, foreign investment and intellectual property rights are discussed in turn. The Section aims to identify the issues, to set out the role that competition law and trade law can and does play in addressing these practices and the factors which may limit this. The following section, Section V, examines the various international co-operative arrangements that have been developed, whether in the WTO, in bilateral or regional trade agreements, or bilateral agreements dedicated to competition law matters, with a view to overcoming the difficulties faced by national competition regimes in addressing competition issues with an international trade dimension.

[3]For fuller, but still accessible, presentations, see for instance the textbooks by Carlton and Perloff (1994), Scherer and Ross (1990), and Viscusi, Vernon, and Harrington (1992), or the survey by Kühn, Seabright, and Smith (1992).

[4] Economic analyses of competition policy issues are almost invariably cast in "partial equilibrium" terms, and thus ignore the implications the prescribed policy has for other sectors. This is a short-coming when we turn to trade issues, since the latter typically involve cross-country sectoral cost differences and thus "general equilibrium" effects. The bridging of the gap between these two approaches is an area where further work is needed.

[5]For example, if a consumer would be willing to pay $10 for a book but the price is only $8, consumer surplus is said to be $2. Diagrammatically the consumer surplus corresponds to the area between the demand curve (which may be thought of as a line of consumers sorted in descending order of their willingness to pay) and the market price.

## II. An overview of competition policy

### II.1 The economics of competition policy[3]

From the perspective of economic analysis, competition policy is typically assessed in terms of "economic efficiency" or "Pareto efficiency". An allocation of resources is efficient if there is no alternative way to organize the production and distribution of goods that makes some consumers better off without making some other consumers worse off. A basic policy proposition flowing from the pursuit of economic efficiency is that any government intervention should be targeted as directly as possible at its objective, in order to minimize the undesirable side effects, or distortions, with which policy interventions are sometimes associated. While efficiency is the basic standard of judgement applied in economic analysis, economic efficiency may not be embraced as the sole objective of competition policy – other factors may well influence the decisions of competition policy authorities.

In order to make the notion of economic efficiency operational, most economic analyses view the purpose of competition policy to be to maximize "welfare", defined as the sum of consumer surplus and producer surplus in the industry under consideration.[4] Consumer surplus is a monetary measure of the net benefit accruing to consumers. More specifically, it is the aggregate difference between what the consumers of a product or service would be willing to pay and what they actually pay.[5] Producer surplus is the difference between revenue received by the producer and the cost of production. It should be noted that in this theoretical framework, equal weights are placed on the interest of consumers and producers. This has the important implication that the *distribution* of surplus between consumers and producers is not taken into account *per se*. This is not to say that economists in general do not care about distributional issues. Instead, the assumption stems from a combination of two reasons. The first and fundamental reason why economists prefer not to involve distributional issues in their analyses of competition policy is the difficulty of determining in an economic sense what the distributional outcome should be.

A second reason is the fact that competition policy is a very indirect and costly instrument for governments to achieve a desirable distribution of income. Presumably, the concern for consumers stems from a more basic concern for individuals with low income levels. Consumers constitute, however, a heterogeneous group that comprises individuals with different levels of income. Hence, a policy that redistributes surplus from producers to consumers may be an inefficient way of supporting poorer individuals. Also, in more industrialized economies, many consumers are also owners of firms through, for instance, pension funds, and public ownership of firms. Hence, part of the surplus appropriated from consumers by a firm exercising monopoly pricing will eventually be distributed back to consumers.

Intuitively, the purpose of competition policy can be viewed as maximizing the size of the "cake". How the cake is divided up among different groups within society, however, is a different matter, which is better addressed by other policies, such as redistributive taxes and spending programmes. From this perspective, a monopoly price is not undesirable because it implies a transfer of surplus from consumers to producers – that is, a transfer that leaves the size of the "cake" unaffected. Instead, the monopoly price would be judged as undesirable to the extent it squeezes out consumers who would be willing to pay enough to cover the extra production costs that their consumption would entail, albeit not at the monopoly price; this

type of inefficiency is referred to as the *dead-weight loss* of monopolistic pricing. In addition, monopolistic pricing may be viewed as undesirable because of other costs associated with imperfect competition, which are mentioned below.

### II.1.a Market structures

Any competition policy prescription must be based on some idea of how the market concerned functions in practice. This subsection describes the standard models employed in economic analyses of markets.

#### Perfect competition

An industry is perfectly competitive when among other things firms perceive that they individually have no noticeable influence on market prices. This is most likely to be the case in situations where the industry comprises a large number of small firms. In such a case, a firm will always produce an extra unit of output provided only that the price it can get will cover the cost of producing it, without bringing to bear any more strategic considerations (on how restraining output might raise prices generally). The market outcome in such an industry is efficient in that the cost of the last unit of output would just equal what consumers are willing to pay for that unit. The invisible hand of the market would automatically maximize the social surplus (the sum of consumer and producer surplus), and there would be no basis for a competition policy intervention.[6] The relevance of this market structure may of course be questioned, and indeed, very few, if any, existing markets can be said to be perfectly competitive in the strict sense of the term. However, there are some markets that seem to approximate this structure, such as some agricultural markets, where individual producers (farmers) may be too small to have a noticeable impact on the market price. But, even in agricultural markets there are often some agents, including private intermediaries and government marketing boards, that are large enough to have individual market power.

The usefulness of the perfect competition paradigm hence does not stem from its being a close approximation of actual markets, but from being a bench-mark for evaluating the extent to which other market structures deviate from full efficiency.

#### Monopoly

The opposite extreme to perfect competition is monopoly. The source of the inefficiency with monopoly is not, as pointed out above, that it transfers surplus away from consumers. Instead, the problem is that the producer restricts output so as to lift the price above the efficient, perfect competition level, towards a more profitable one. In this situation, consumers are willing to pay more for some additional consumption than it would cost to produce. Because of this dead-weight loss or inefficiency of monopoly, there is (at least in principle) scope for policy intervention.

It may be noted that this inefficiency results from the inability of a firm to charge individual prices to consumers with different valuations of its product. If a firm is constrained to set only one price that applies to all consumers, it will set that price higher than the level at which some consumers will buy, in order to exploit the greater willingness of others to pay. As a result, some consumers are squeezed out. But if the firm could price discriminate perfectly, that is, charge an individual price to each consumer, it could set each consumer's price equal to the value of the consumption to the consumer. Of course, perfect price discrimination is very difficult in practice.[7] But this reasoning indicates why the hostility toward price discrimination that is reflected in some competition laws, and in the trade context in anti-dumping proceedings, finds limited support in economic analysis.

#### Market structures with intermediate degrees of competition: oligopoly and monopolistic competition

For the most part, industries are neither perfectly competitive nor monopolies, but rather fall somewhere in between. Because of the complexity and variety of different possible market situations, there is no single, all-encompassing description of the working of imperfect competition. *Oligopoly* is a generic term for

[6] This reasoning relies on a number of restrictive assumptions. For instance, it is assumed that there are no *externalities* associated with either consumption or production, that is, that there are no effects of consumption or production on third parties, that are not taken into account by the parties to the transaction. This would not be the case if, for example, the industry is polluting and this pollution is not taken into account in firms' production decisions.

[7] Price discrimination may be difficult for a number reasons. First, it may be difficult to elicit what individual consumers are willing to pay in order to give them an appropriate take-it-or-leave-it offer. Secondly, the monopolist may not be able to prevent resales from consumers offered a low price to consumers offered a high price. Yet, many industries are successful in overcoming such obstacles, even though it often requires some additional services or product characteristics to separate consumers into different groups. For example, the airline industry elicits higher prices from business passengers than from tourist passengers by offering different services levels and different degrees of flexibility in terms of re-booking possibilities.

**Box IV.1: The lack of a simple relationship between market concentration and welfare**

It is often held that markets with a small number of producers, and an unequal size distribution, are prone to generate less competitive outcomes. This notion motivates the use of "concentration indices", measures that find frequent applications in actual competition policy enforcement. One of the most simple measures is the "four-firm" concentration ratio, which considers the combined market share of the four largest firms. A measure that is more sophisticated is the "Herfindahl-Hirschman index", which gives proportionally speaking higher weight to large firms when calculating market concentration.

Unfortunately, the interpretation of such indices is often unclear. Firms may be large either because of anti-competitive behaviour against competitors, or because of difficulties in entering the market. Or it may simply be that large firms are more efficient producers. This variety of explanations for why an industry may exhibit a skewed size distribution of firms, or comprise one or few dominant firms, may have very different implications for policy. But concentration indices are not able to distinguish among these cases. This illustrates the fact that there is no unambiguous relationship between concentration in an industry and welfare.

Reflecting the acknowledged limitations of concentration indices, in their analysis of actual competition law cases, competition agencies typically look for information about entry conditions, economies of scale, the nature and extent of change and innovation, customer perceptions of performance and the degree of inter-firm rivalry and other variables, in addition to the degree of concentration in the markets under examination.

such market structures with a limited number of firms, where the firms are few enough for each firm to take into account its influence on the market price.[8]

While perfectly competitive industries and monopolies are relatively simple to analyze and prescribe policy recommendations for, these intermediate forms of competition are considerably more complex, because of the variety of possible interactions among firms in these structures. The appropriate policy prescription is highly sensitive to the details of the market structure and the "strategic" decisions taken by firms with respect to such variables as price, quantity, product design, marketing outlays, and so on. Most models of oligopoly and monopolistic competition predict that firms will charge prices above marginal costs.[9] However, since these models portray situations in which firms are not able to collude, these firms are not able to charge monopoly prices. If it were the case that all firms charged a price set by a monopolist, then each individual firm would have an incentive to lower its price and thereby increase its sales. Consequently, firms may find it difficult to sustain a monopoly price, in the absence of some mechanism that facilitates collusion.

### Tacit collusion

The discussion above did not account for the possibility that firms in an oligopolistic market structure may be able to raise prices through collusive agreements, including implicit arrangements based on sophisticated business strategies. While open cartel arrangements are often prohibited *per se* by national competition laws (with the notable exception of export cartels), tacitly collusive arrangements are by their nature more difficult to detect and stem as no open agreements can be pin-pointed. To understand the nature of collusive behaviour, we shall briefly consider some of the strategies employed to foster implicit collusion and the difficulties they may encounter.

The basic problem facing an oligopoly is the incentive facing each firm to produce more, leading to an output level higher than that which would maximize profits for the industry as a whole. In the absence of the possibility to write legally enforceable contracts that restrict the output of firms, any agreement among firms to hold back output is threatened by the temptation to cheat. If some firms hold back their output in an effort to raise prices, others have an incentive to expand their output in order to profit from the higher prices. Unilateral efforts to boost profits would then be self-defeating.

The basis for tacit collusion, like many other types of voluntary co-operation, is repeated interaction. When firms interact frequently, they have the possibility to "punish" deviations from tacit agreements. This possibility does not exist when firms encounter each other only sporadically (as is typically assumed in the simplest oligopoly models). Collusive pricing may be fostered by threats of more competitive pricing (or even price wars), in response to cheating by some firms on the implicit understanding to hold back output in order to support the collusive price. If the temptation to cheat (the short-run gain in terms of increased profit from the exploitation of the collusive price) is less than the punishment for the cheating (the loss of profits due to a price war, say) then the implicit collusive arrangement may be self-sustaining, and not in need of explicit contracts. In this case, the future losses associated with a break down of the cartel outweigh the initial gains of cheating.

The reasoning above also suggests circumstances under which tacit collusion may be difficult. For instance, the longer it takes for other members of the tacit agreement to detect cheating, or the more difficult it is to associate an observed price fall with cheating rather than unfavourable external events, the more tempting it is to cheat, and the more difficult it may be to keep the arrangement intact. These problems tend to be more severe the larger the number of firms that participate in the arrangements. Similarly, the less weight firms put on future profits relative to current profits, the more problematic it is to hold together the tacit agreement. Collusive arrangements may also be more difficult to achieve when firms differ significantly in production costs, since they then tend to have different interests with regard to desired output levels and prices.

A related means of achieving a collusive outcome, and to overcome coordination problems among firms, is to let one firm take on the role of price leader. This firm openly announces its intention to change, and lets other firms follow suit with similar announcements. If they do not, the price change will not be carried out. Such price announcements to "feel" the market reaction can be observed in many industries. Yet another possible coordination mechanism is to set up an industry association that, besides serving as a forum for discussion of questions of mutual interest, can be given the seemingly innocuous task of collecting and disseminating data on output and prices to members. Both the fostering of a common outlook on industry matters, as well as the provision of prompt statistics, help the industry define suitable collusive prices, as well as to detect disloyal competition.

## II.1.b The sources and costs of imperfect competition

Why does imperfect competition arise? Or put slightly differently, what economic factors tend to limit the degree of competition in various industries? Three such factors shall be discussed here – scale economies, entry barriers, and product differentiation.

### Scale economies

When unit costs fall with the volume of production of the individual firm, (internal) scale economies in production are said to exist. Scale economies may arise from fixed costs in production, which can be spread out more thinly over a larger production volume.[10] Moreover, as technologies are not always divisible, production facilities must sometimes be of a certain size to encompass the most efficient technology available. The minimum efficient scale varies from industry to industry, but in the presence of scale economies, it is possible that the market cannot support more than a limited number of firms – if more firms enter, the average costs in each firm may become too large relative to consumers' willingness to pay. In the extreme case of "natural monopoly", only one firm is economically viable.

### Barriers to entry

The conditions of entry into an industry can be extremely important for economic performance. If entry is costly or impossible, there are good reasons to expect that an industry will be imperfectly competitive. At least three related kinds of alleged

[8]The two best known oligopoly models are associated with the names of Bertrand and Cournot.

[9]As previously noted, in perfect competition, the price would be set at marginal cost.

[10]While the line between fixed and variable costs is sometimes difficult to draw, the essential idea is that certain costs may not be avoided in the short-run even if production volume is below capacity. For example, the cost of machinery and buildings may essentially be the same whether the firm produces at half the capacity or at full capacity. It should be noted, however, that in practice firms can often choose between different production techniques associated with different levels of fixed and variable costs. In such cases, the relationship between fixed costs and economies of scale is less straightforward.

entry barriers can be distinguished – legal barriers, entry costs that have already been borne by incumbent firms, and strategic barriers.[11]

Legal entry barriers are those imposed by formal restrictions. It is not uncommon, for example, that governments restrict entry into such sectors as telecommunications, medical services, taxi services, and many other service industries. Such entry limitations may be predicated on public policy objectives, such as protection of consumers, and they may be more or less restrictive in practice. On the other hand, trade restrictions are legal entry barriers whose explicit objectives is to inhibit market entry by foreign firms.

Another source of entry barriers is the advantages that incumbent firms may enjoy in terms of lower production costs or established commercial networks. For instance, incumbents may have long-run contractual relationships with suppliers, or they may have access to lower cost, patented production technologies. Similarly, they may have reputational advantages in the form of established brand names. The essential feature of these factors is that they deter entry by making it costly for outsiders to break into the market; for instance, it may require large expenditures on marketing, and very low prices initially to attract a sufficient consumer base. These type of phenomena may give rise to "first-mover advantages", which, in turn, are reflected in uncompetitive market structures.

The significance of non-legal barriers is determined to a degree by the actions of incumbents. These firms may have acted strategically in order to erect such barriers, that is, to *deter entry*. Such behaviour can take many forms. For instance, in cases where there are large learning-by-doing effects, firms may have an incentive to increase output (and lower prices) beyond what would be indicated from the point of view of current profits, in order to reduce production costs faster, and gain advantages relative to competitors. Another example is an established firm using pricing policies and loyalty bonuses to reward long-term commitment. Incumbents may tie up distribution channels through exclusive dealing arrangements, or engage in excessive advertising to increase consumer loyalty. Technological leaders may increase the rate at which new products are introduced, in order to discourage cloning, or they may patent products excessively so as to pre-empt other firms from using the technology.

On the other hand, if incumbents pursue monopolistic behaviour beyond a certain point, entry may be encouraged. The notion of a *contestable* market is often used in the policy debate to describe a market where threats of entry effectively discipline incumbents.[12] This notion relies on an assumption that is not always made explicit. An incumbent firm may charge monopoly prices as long as new entrants stay out of the market, but be ready to increase output and charge a competitive price should a new supplier attempt to enter the market. If new suppliers are aware of this, they will not find it profitable to enter the market, and the threat of entry does not discipline the incumbent. Thus, for the threat of entry (as opposed to actual entry) to discipline an incumbent, there must be some form of inertia, so that the price charged by the incumbent prior to entry is similar to that should entry occur. One possibility is that the incumbent firm is temporarily restricted by the capacity it has at the time of entry, which makes the threat of immediately expanding output and reducing price in case of entry non-credible. In such cases, it may be profitable for the incumbent initially to choose a capacity which is sufficiently high to discourage entry. This would then imply that the incumbent firm is disciplined by the mere threat of entry.

### Product differentiation

Product differentiation means that the characteristics of the goods offered by competing producers differ in ways that make them less than perfectly inter-changeable from the perspective of consumers. For example, cars in a certain market segment may be similar, but they could embody important differences in terms of looks, performance, and quality. In other industries, the differences may have more to do with product image and brand names than with tangible differences. For example, few consumers may in a blind test be able to tell the difference between two bars of soap. Yet some consumers would be willing to pay a premium for their favourite brand.

Product differentiation gives the individual producer some degree of monopolistic or pricing power. The less inter-changeable a variety is with competing brands, the higher the price that can be sustained without losing ground to competing brands. As suggested above, products are not just designed to be different in the development stage, but the differences are often reinforced through marketing strategies.

A unique feature of markets with product differentiation is that variety has a value of its own, for two reasons. First, different consumers may value different characteristics, and the more variety of choice that the industry offers, the easier it is for each consumer to find a product that corresponds closely to a consumer's "ideal" specification. Secondly, consumers may appreciate variety *per se*. For example, most people prefer variety in food and in clothing. Product differentiation then adds an additional consideration for competition policy – that of safeguarding choice and variety in order to satisfy differences in taste.

### The costs of imperfect competition

There are three main economic costs usually associated with imperfect competition. First, as mentioned above in the discussion of monopoly, a basic concern with imperfect competition (monopoly as well as oligopoly) is that consumers will not be supplied a certain expansion of output, although they would be willing to pay enough to cover production costs, i.e. there is a dead-weight loss. As noted earlier, in the best of all worlds, production should be extended to the point where the consumer valuation of the last unit of output just equals the (marginal) cost of production.

A second cost from imperfections in competition is *organizational inefficiency*, that is, the misallocation of resources *within* firms. Such inefficiency, which is manifested in higher costs of production, can reinforce the tendency among firms with market power to contract their production.[13] The root of the problem of organizational inefficiency could involve a variety of factors, such as incomplete knowledge of the contributions of different employees, of the scope for technical improvements, and of the scope for improvements in the characteristics of the product or service. These inefficiencies are often said to be

[11]For a more extended analysis, see Gilbert (1989).

[12]The term "contestability" was originally used in a more narrow sense, referring to the theory of contestability developed by Baumol *et al* (1982) which seeks to highlight the role of potential entry, and more generally to markets where entry in some vague sense is easy. For a formal description of the theory of contestability, see e.g. Tirole (1988).

[13]While it is often observed how in the absence of competition, firms adopt production practices that are inefficient from the firm's point of view, it is not clear how much of this increased cost should be viewed as an inefficiency from a social point of view. The slack in the firm may, for example, reflect employees' dislike of effort. Thus, what is an increased cost for the firm may at least partly represent savings of effort on the part of employees, and these savings must be taken into account in the welfare analysis.

integral features of public monopolies, but there is no real presumption that they are less of a problem in private monopolies or, for that matter, in cartels in oligopolistic markets. Hence, replacing a government monopoly with a private monopoly may not solve the problem of organizational inefficiency. What is needed is real competition to stamp out organizational slack. It should be noted that many economists view organizational slack as a main cost of imperfect competition.[14]

Imperfectly competitive industries tend to generate super-normal profits, or "economic rents". These rents can appear as profits to owners, but may also take other forms, such as higher wages to employees or higher prices to suppliers of intermediate products.[15] In order to capture and protect these potential profit opportunities, firms invest resources in *rent-seeking*. For instance, they may engage in excessive advertising, choose product standards with limited compatibility with the products of other firms, lobby for protection or the granting of exclusive production rights, and so on. The real resources used in this process (including scarce management time) represent a cost to society, on top of deadweight losses and the costs of organizational inefficiency. Empirical studies have shown the costs of rent-seeking to be substantial in some circumstances.[16]

### II.1.c Some basic economic considerations

In view of some of the arguments advanced in regard to the costs of imperfect competition, it might be concluded that it is the task of competition policy to maximize the degree of competition. This would minimize costs from dead-weight losses, organizational inefficiencies, and rent-seeking. Matters are, however, more complicated than that, for a number of reasons. It will be explained below, for example, why not all contractual arrangements between firms that limit competition are socially undesirable, and why some firms' behaviour, ostensibly hostile to competition, may be defensible on welfare grounds.

#### Competition policy and the theory of second best

A basic reason why such arguments can be made, is that in some cases there is *more than one source* of divergence from a fully efficient solution, and this makes trade-offs necessary. For instance, as will be shown, trade-offs could arise as a result of the simultaneous presence of monopoly power and economies of scale, or of monopoly power at several stages of a production chain, or of monopoly power in combination with externalities. The above proposition has been generalized as the "theory of second-best". An implication of this theory is that the complete removal of one source of distortion, like the elimination of monopoly pricing in a given market, does not necessarily improve welfare when there are other distortions at play. In practice, there are almost always several sources of inefficiencies. The implication of the theory of the second best is that a belief in "maximal" competition as an unreserved goal for competition policy is almost never warranted in practice. This economic insight is also consistent with the legal practice of evaluating business practices using a rule of reason approach, which drives many decisions taken by competition authorities.

Clearly, a main concern of competition policy is not to interfere unduly with the normal competitive process, which from time to time drives out inefficient firms from the market. The problem was concisely phrased in the US antitrust decision involving Alcoa: "The successful competitor, having been urged to compete, must not be turned upon when he wins."[17] The difficulty, of course, is to distinguish the achievement of a dominant market position or monopoly through superior efficiency and foresight, from cases where a position has been gained by, for example, predatory tactics.

#### Dynamic trade-offs

The trade-offs facing competition policy mentioned above were largely static, that is, mostly they did not involve a time dimension to any important degree. However, there is another category of trade-offs, for which time is essential, and that adds substantial complications to already difficult decisions. As will be explained below, temporary imperfections are sometimes necessary in order, for example, to give entrepreneurs incentives to invest in product development. The patent system, which grants temporary exclusive rights, is a manifestation of this fact. While it is easy to see that such arrangements are necessary, it is far more difficult to determine how they should be designed. Moreover, trade-offs between short-run and long-run interests also arise in competition policy decisions.

A related example of a difficult dynamic trade-off is the case where firms make investment decisions today in order to enter a market tomorrow. If firms expect the degree of competition tomorrow to be strong, perhaps because of vigorous competition policy enforcement, then the expected profitability may be so low that they refrain from entering. The purpose of the patent system is to prevent this mechanism from impeding entry into industries in which R&D is important, by promising (limited) monopoly positions to successful firms in the future.

It is clear that the impact of competition policy in areas such as research and development may be substantially more important for long run welfare than its static effects. Unfortunately, our understanding of the dynamic effects of competition policy is limited due to the inherent complexity of the issues involved.[18]

#### Diverging views on the need for competition policy

A basic source of divergence on the question whether competition policies are needed relates to the interpretation of what, at least, at first sight, seem to be rents from imperfectly competitive positions. Do the associated rents represent justified compensation for previous investments in, for example, research and development (R&D), or are they windfall gains to firms that happen to be in the right place at the right time, or are they the result of anti-competitive behaviour? The "Schumpeterian School" would argue along the first-mentioned lines. According to this view, perfect competition does not yield maximal efficiency, except in a static sense. Instead, welfare is maximized through a high rate of innovation. This actually requires the possibility that firms might make sufficiently large profits in order to recoup earlier outlays on R&D.

Another line of reasoning with somewhat similar policy conclusions is associated with the University of Chicago.[19] According to this view, market imperfections arise mainly from government interventions. Privately created imperfections are either temporary, since the resulting profits will soon enough induce entry by other firms, or they are reflections of the superior production and product technologies of incumbents. The role of

[14] See, e.g., Scherer and Ross (1990).

[15] Studies such as Salinger (1984) indicate that in unionized industries as much as 70 per cent of monopoly rents may go to employees.

[16] A classic study is Krueger (1974). For a discussion of rent-seeking, see also Viscusi *et al* (1992).

[17] *United States v. Aluminum Co. of America*, 148 F. 2d. 416 (2d Cir. 1945).

[18] Recently, competition agencies have made significant efforts to ensure that their enforcement policies are in line with current economic thinking regarding the optimal market conditions for fostering innovation and dynamic efficiency. See discussion in Part II.5, infra.

[19] See, e.g., Posner (1976) and various papers in Goldschmid, Mann and Weston (1974).

competition policy is then mainly to ease entry into markets, not least by limiting undue government interference, and also to prevent the most unambiguously inefficient business practices, such as horizontal cartels.

A third view is provided by the "new theory of industrial organization". The distinguishing feature of this voluminous body of literature is the reliance on detailed models of strategic aspects of interactions among firms.[20] The general picture that arises is much less optimistic concerning the efficiency of markets when left to themselves. But the theory does not suggest any simple rules for the conduct of competition policy. On the contrary, a main common feature of the results is that they are highly sensitive to the details of technology and strategic interaction. This body of theories strongly supports a rule-of-reason approach to competition policy. It can be seen partly as a reaction to more simplistic arguments about the efficiency of markets, and also refutes some of the more sweeping claims deriving from other approaches, such as that of the Chicago School. Unfortunately, this approach gives rise to an "embarrassment of riches" in the sense that the literature is so rich that it can potentially justify or condemn a broad range of restrictive business practices or competition policy interventions.

There are also other "schools of thought" about competition policy. But the essential point for the purpose of this Chapter is the fact that economic theory does not provide a single, uniform depiction of the working of imperfectly competitive industries, and, in particular, does not give a simple, unambiguous prescription for the design of competition policy. Furthermore, even where they agree on the appropriate models to apply in analysing industries, experts often disagree as to application of the models to particular sets of facts.[21] It is important to bear this in mind when discussing competition issues from a policy-making perspective. On the other hand, as pointed out below, in the past decade or so, there has nevertheless been a partial convergence of views with respect to the appropriate goals and optimal design of national competition laws, and a significant degree of consensus on the analytical tools of competition policy has emerged.

## II.2 The stated objectives of competition law and policy

The competition laws of most countries having such laws share certain fundamental objectives. At the most basic level, a core objective of competition policy in most countries having such policy is to maintain a healthy degree of rivalry among firms in markets for goods and services. In most countries, however, the goal of maintaining inter-firm rivalry is also linked to broader economic and social policy objectives, which in turn influence the manner in which the relevant laws are applied and cases are decided. Some of these wider objectives include[22]:

- protecting consumers from the undue exercise of market power;
- promoting economic efficiency, in both a static and dynamic sense[23];
- promoting trade and integration within an economic union or free trade area;
- facilitating economic liberalization, including privatization, deregulation and the reduction of external trade barriers;
- preserving and promoting the sound development of a market economy;
- promoting democratic values, such as economic pluralism and the dispersion of socio-economic power;
- ensuring fairness and equity in marketplace transactions;
- protecting the "public interest", including (in some cases) considerations relating to industrial competitiveness and employment;
- minimizing the need for more intrusive forms of regulation or political interference in a free market economy;
- protecting opportunities for small and medium-sized businesses.

The legislation, jurisprudence and enforcement policies of jurisdictions with well-developed competition law systems typically reflect a number of these underlying objectives, at least to an extent. Nonetheless, individual jurisdictions often place special emphasis on a particular objective or goal as the guiding principle of their respective policies and laws. Various examples of national approaches to competition policy in developed and developing countries are noted below in subsections 5 and 6.

It is important to note that conflicts can arise between some of the stated objectives of competition policy. For example, the goals of promoting "fairness" and protecting opportunities for small and medium-sized businesses will not always be consistent with the objective of maximizing economic efficiency. In this context, it should be noted that, in the past decade, there has been a tendency toward convergence in the objectives of competition policy in the major jurisdictions having such policies, toward the "core" values of promoting competitive rivalry, efficiency and (in some jurisdictions) economic integration. This trend is evidenced not only in official policy statements but also in statutory enactments and proposals put forward in recent times[24], and in exchanges of views in fora such as the OECD

[20]See, e.g., Schmalensee and Willig, eds. (1989) and Tirole (1988).

[21]As an illustration, in most major (non-criminal) anti-trust cases in the US, one will find economic expert witnesses on both sides, providing economically sound, but conflicting arguments.

[22]Much has been written about the objectives of competition policy over the past couple of decades. For pertinent sources, see, e.g., Khemani (1992), Jacquemin (1994), Valentine (1997), Goldman and Barutciski (1997), Khosla and Anderson (1989), Bork (1978) and Pitofsky (1979).

[23]The concept of static efficiency refers to the optimal allocation of society's resources to meet its needs and wants at the lowest possible cost, at a given point in time. Dynamic efficiency refers to the achievement of an optimal rate of innovation and the diffusion of new technologies over time. Emphasis on the goal of overall economic efficiency (as opposed to consumer welfare *per se*) is sometimes referred to as a "total welfare approach". For useful clarification, see Crampton (1994).

[24]For example, the purpose clause of the Canadian Competition Act, adopted in 1986, refers to four specific underlying policy objectives: (i) "to promote the efficiency and adaptability of the ...economy"; (ii) "to expand opportunities for Canadian participation in world markets, while at the same time recognizing the role of foreign competition in Canada"; (iii) "to ensure that small and medium-sized businesses have an equitable opportunity to participate in the Canadian economy"; and (iv) "to provide consumers with competitive prices and product choices". See Competition Act, section 1.1. Legislation adopted in Norway refers to the following objective: "To achieve the efficient utilization of society's resources by providing the necessary conditions for effective competition." Similarly, the competition statute of Denmark refers to the goal: "To promote competition and thus strengthen the efficiency of production and distribution of goods and services, etc., through the greatest possible transparency of competitive conditions." Legislation adopted by Venezuela refers to the following goals: "To promote and protect the exercise of free competition" and "efficiency that benefits the producers and consumers." As quoted in UNCTAD (1995c); see also Goldman and Barutciski (1997).

Committee on Competition Law and Policy.[25] The apparent convergence in objectives is an important factor that is fostering overall consistency in approaches to competition policies across countries that have implemented such policies.

## II.3 The main elements of competition policy

This subsection provides on overview of the main elements of competitive law as they are found in the statutes of most countries having such laws, while also reflecting on the economic significance of these provisions.[26]

### Horizontal agreements

Horizontal agreements refer to implicit or explicit arrangements between firms competing with identical or similar products in the same market. Two broad classes of explicit horizontal agreements may be distinguished: first, there is a class which is sometimes referred to as that of "hard core" or "naked" cartel agreements, including agreements to fix prices, reduce output, or allocate customers to individual suppliers in a market. Such arrangements serve no purpose other than to shift surplus from consumers to producers, at the cost of dead-weight losses, organizational inefficiencies and rent-seeking. The same holds for agreements between firms to divide up markets. There is a consensus among experts that such agreements are unambiguously harmful to consumer welfare. Accordingly, deterring such agreements is a primary concern of most competition agencies.

Hard-core cartel agreements typically involve attempts by two or more domestic enterprises to fix prices or otherwise limit competition in local markets. However, they may also involve arrangements between foreign firms to share amongst themselves the domestic markets of host countries. While the extent of cartel activities is intrinsically difficult to assess (for obvious reasons, the firms involved prefer to keep their arrangements secret), there are some indications that a growing proportion of cartel agreements are international in scope.[27] In practice, it can be difficult for competition agencies in smaller countries, acting individually, to mobilize the resources to detect, investigate and prosecute such conduct. Consequently, in some cases, there may be a need for international co-operation in investigating and prosecuting horizontal agreements that transcend national boundaries.[28]

A second class of horizontal market arrangements comprises agreements that, in some cases, may generate cost savings for the firms involved, and therefore generally are not condemned outright. These agreements may include R&D consortia, co-operative arrangements for setting product standards and certain types of strategic alliances which involve the transfer of know-how across firms or specific, productive efficiencies.[29] Many countries provide limited exceptions for such arrangements from general prohibitions of horizontal agreements in their competition legislation.

In addition to the above two classes of horizontal agreements, competition in markets can be limited through the practice of tacit collusion or oligopolistic coordination. Although such behaviour can certainly yield results that are less-than-optimal in terms of welfare, it is exceedingly difficult to control directly, since it is achieved without explicit agreements or co-operation. Consequently, competition authorities typically focus on detecting and prosecuting instances of explicit agreements. In addition, competition authorities can seek to minimize the scope for tacit collusion in their respective jurisdictions by advocating structural economic policies that facilitate competitive entry into markets.

### Mergers

One can distinguish between three fundamentally different types of mergers:[30] horizontal, vertical and conglomerate mergers. *Horizontal mergers* bring together two or more firms in the same line of business and in the same geographic market. Such mergers reduce the number of competitors in the market, which in itself tends to push prices upward, exactly as with a cartel. However, the competition policy decision with regard to horizontal mergers is complicated by the fact that, since a merger allows former rivals to integrate their production facilities, it may also affect the costs of production. If a merger lowers variable costs, it may actually lead to lower market prices than before the merger, and such a merger may then be desirable from a social point of view. Even if variable costs are unaffected, a merger may still be desirable if it saves sufficiently on fixed costs. For example, there may be cost savings from the avoidance of duplicative efforts in product and process development, marketing, distribution, administration, and so on. This presents the competition authorities with a difficult trade-off that does not appear with horizontal cartel arrangements where no, or only very limited, cost savings can be expected. Thus, economic theory provides no general answer as to the desirability of a merger, but instead suggests that the answer must be found through a careful consideration of the specific circumstances in the industry concerned.[31]

*Vertical mergers* involve firms that are engaged in different stages of production and marketing within an industry. This type of merger activity is often undertaken to achieve efficiencies by reducing transaction and other costs through internalization of different stages of production and distribution, but may also be employed to foreclose sources of inputs or distribution channels to competitors.

*Conglomerate mergers* integrate firms operating in unrelated lines of business. Such mergers normally do not raise concerns from a competition policy point of view, since typically they do not increase the degree of market power that can be exercised by the firms in the relevant product markets. However, they sometimes give rise to concerns about cross-subsidization and reciprocal arrangements to limit competition that cut across different markets.

In practice, the principal question that is addressed by competition agencies in evaluations of mergers is whether a proposed transaction would substantially increase the ability to exercise market power.[32] Typically, this is determined by considering the impact of the merger on market shares or concentration levels in the relevant product and geographic

[25]See OECD (1994c). See also Federal Trade Commission (1996), Valentine (1997) and Barutciski and Goldman (1997).

[26]For additional background on the main elements of competition law, see OECD and World Bank (forthcoming 1997), Khemani and Dutz (1995), Boner and Krueger (1991), and UNCTAD (1995b).

[27]See US, Department of Justice (1996), and European Commission (1995).

[28]See the discussion in Part V, infra.

[29]See Schmalensee (1992).

[30]For background, see Scherer and Ross (1990) or Carlton and Perloff (1994).

[31]See, for instance, Scherer and Ross (1990) for a discussion of the somewhat mixed evidence on the welfare consequences of mergers.

[32]In general, the concept of market power refers to the ability of a firm (or group of firms acting jointly) to maintain prices above competitive levels (and thereby to reap economic profits) over a significant period of time.

**Box IV.2: Some key definitions and analytical concepts of competition policy**

*(a) Per se rules vs. the rule of reason*

This is a fundamental distinction in competition law. Per se rules indicate that a particular practice (e.g., bid rigging or horizontal price fixing) is prohibited outright; normally reflecting a view that such conduct is unambiguously harmful. "Rule of reason" treatment of a practice means that the legality of the practice is evaluated with reference to its economic effects in the relevant markets. For example, in many jurisdictions, vertical market restraints are subject to a rule of reason – reflecting a view that such restraints are not always harmful and may, in fact, be beneficial in particular market circumstances.

*(b) Market Power*

The existence of market power or the possibility that such power will be created or augmented is a key consideration in the analysis of many competition law cases. Generally speaking, this term refers to the ability of a firm (or a group of firms acting jointly) to profitably maintain prices above competitive levels for a significant period of time.

Factors that tend to create market power include a high degree of market concentration, the existence of barriers to entry and a lack of substitutes for a product supplied by firms whose conduct is under examination.

In addition to higher than competitive prices, the exercise of market power can be manifested through reduced quality of service or a lack of innovation in the relevant market(s).

*(c) Relevant product and geographic markets*

Definition of the relevant product and geographic markets is a key step in the analysis of many competition law cases. Generally, this involves identifying the range of close substitutes for a product and the range of geographic space within which consumers can easily turn to alternative suppliers of the product.

Relevant geographic markets in competition law cases can be local, national, international or even global depending on the particular product under examination, the nature of revelry in the supply of the product, and the presence or absence of factors (e.g., transport costs, tariffs or other measures) that prevent imports from counteracting the exercise of market power domestically.

markets, along with a range of additional factors such as the extent of barriers to entry and the nature and extent of innovation in the markets (see Box IV.2 on Some key definitions and analytical concepts of competition Policy).[33] In addition, consideration may be given to efficiency effects flowing from the merger, to the extent that this is permitted under the relevant national laws.[34]

**Vertical market restraints**

Vertical market restraints or restrictions refer to agreements between operators at different stages of the production and marketing chain. Such arrangements are often the subject of specific provisions of national competition legislation, or are dealt with as possible instances of abuse of dominant positions under a rule-of-reason or case-by-case approach. Examples of such arrangements include exclusive dealing (restrictions on a firm's choice of buyers or suppliers), exclusive territories (restrictions on the firms' choice of location), tying arrangements (restrictions on the source of supplies for particular inputs used by firms), and resale price maintenance (restrictions on the price to be charged by downstream firms).

The difficulty in evaluating these types of arrangements is that while they arguably put restrictions on firms' ability to compete freely, they may at the same time be efficiency-enhancing.[35] A simple example of the efficiency-enhancing role of these arrangements is that of "double marginalization", in which each firm in a vertical chain imposes a mark-up on its input costs, in order to make a profit. The price to the consumer will be inefficiently elevated by the fact that mark-ups in later stages are made on top of earlier mark-ups. This problem arises because of a lack of coordination in pricing decisions between vertically related firms. Economic theory suggests that welfare would increase if firms upstream could prevent down-stream firms from adding mark-ups by imposing the prices that the downstream firms charge their customers – i.e. by employing resale price maintenance.[36]

Another example of a vertical arrangement is where a manufacturer sells through several retailers. The manufacturer may then benefit from a reduced "intra-brand" competition among different outlets.[37] For example, a supplier may require all dealers to resell its product at the same price. Such "resale price maintenance" arguably reduces intra-brand competition to the detriment of consumers. It may also facilitate collusion, since it becomes easier to collect price statistics and thus detect cheating from an agreed cartel price. A related contractual arrangement is the establishment of exclusive territories which may also limit intra-brand competition. For example, a producer

[33]See, e.g., United States, Department of Justice and Federal Trade Commission (1992; updated 1997).

[34]Firms seeking to merge their operations often believe this will yield significant cost savings by achieving economies of scale, rationalization of production across plants, or by other means. Where such savings actually occur, they can offset the anti-competitive effects of a merger. See Williamson (1986). However, it is often difficult for competition agencies to evaluate, a priori, the likelihood that such gains will materialize. For a useful overview of practical issues in this area, see Sanderson (1997).

[35]See Brenner and Rey (1992), and Carlton and Perloff (1994).

[36]Referring back to the discussion of the theory of second best, note that there is again more than one distortion at play here, since there is monopolistic pricing by firms at different stages of the production chain. Vertical arrangements that remove double marginalization can therefore be beneficial for the parties involved as well as for consumers, even though such arrangements in themselves restrain competition.

[37]This insight was first developed in Telser (1960). Note that the policy implications of this view are controversial: many countries favour a strict prohibition of resale price maintenance.

may assign different areas to different retailers with exclusive rights to sell within their respective territories. By limiting competition among retailers, the manufacturer may provide each retailer with stronger incentives to undertake investments that are to the benefit of consumers such as provision of valuable information. Such vertical restraints may also serve to protect goodwill investments in trademarked consumer goods, or be employed by firms as a device to facilitate their entry into new markets, by helping to establish effective distribution channels. Again, it is clear that anti-competitive contractual arrangements may increase welfare, and that competition policy decisions have to take into account the interplay between various distortions.[38]

**Abuse of dominant position**

The classification of restrictive business practices into horizontal and vertical restraints follows an economic logic. Most competition laws, however, also distinguish between agreements among firms and the "abuse of dominant position"or "monopolization".[39] The latter is defined as a practice employed by dominant firms to maintain, enhance or exploit a dominant position in a market. The practices that can be dealt with under this rubric include exclusive dealing, market foreclosure through vertical integration, tied selling, the control of scarce facilities and vital inputs or distribution channels, price and non-price predation, price discrimination, exclusionary contractual arrangements and, in some jurisdictions, even the simple charging of higher than competitive prices, or the imposition of other "exploitative" abuses.[40] [41]

It is clear from the discussion above that the evaluation of possible abuses of dominant positions involves complex trade-offs and thus requires detailed analysis. Questions that are sometimes employed in analysing allegations of abuse include: (i) whether the firm(s) involved has sufficient market power to engage in predatory conduct with some hope of pecuniary gain; (ii) whether there is a clear pattern involving multiple instances of abuse or just an isolated instance; and (iii) whether there are plausible alternative explanations for the conduct involved which suggest it may have served a legitimate business purpose. Even the assessment of whether a firm occupies a dominant position may not be straightforward. Different countries specify different market share thresholds. As was pointed out above, firms' market shares or the industry's concentration level do not clearly signal the degree of competition and monopoly in a market – agencies must also consider factors such as the degree of barriers to entry, and the nature and extent of innovation in the market.[42]

## II.4 Competition policy and economic regulation

Under competition law, interventions by government authorities are limited in the sense that they mainly set the "rules-of-the-game", and do not require involvement in the day-to-day operations of firms. An alternative method of intervention is to rely less on the market mechanism, and instead to specify in much more detail the conditions under which operations shall take place, or to go even further and ensure that entire activities are conducted by publicly-owned firms. This alternative to competition policy – *regulation* – affects many parts of the economy in practice. For instance, water, electricity and gas utilities, telephone services, agriculture, transportation and the professions are subject to regulation in many countries.

The main instruments of regulation are controls on prices, quantities, quality, entry and exit. Three basic situations that may call for regulatory interventions are natural monopolies, externalities in production (such as when production may expose others to health hazards), and informational problems (such as when consumers cannot judge the quality of services provided). It is well-established in economic literature, however, that regulation has often been sought by incumbent firms principally for the purpose of protecting them from the rigours of competition, without necessarily serving a valid efficiency-related function.[43]

In contrast to competition policy, regulation tends to involve an ongoing relationship between the regulator and those regulated.[44] As a rule, regulation tends to be used in market economies where distortions are deemed sufficiently severe that the market mechanism, even when disciplined by competition policy, is believed not to produce a satisfactory result. Currently, there is a trend in many developed and developing countries away from detailed regulation, and toward increased reliance on market solutions, motivated in part by difficulties encountered with the former.[45]

Regulated industries are typically exempted from competition policy laws, either explicitly or implicitly,[46] at the same time as they are associated with the most severe competition problems. Regulation will often have international dimensions, for instance, where it governs the possibility for foreign producers to enter markets. It may also have indirect effects, such as in the case of regulation of electric utilities, by influencing input prices in tradable sectors.

The treatment of essential or "bottleneck" facilities is an interesting example of the interface between regulation and competition policy which is receiving increasing attention in today's economy, particularly in the context of network industries. The essential facilities doctrine recognizes that, in some industries, the ability of competing firms to use certain unique assets or facilities which are controlled by a single firm and cannot efficiently be duplicated may be a pre-requisite for competition to take place in the supply of particular goods or services. Examples of essential facilities may include electricity transmission lines, oil or gas pipelines (in some markets) and some aspects of telecommunications networks which constitute essential inputs to downstream services. Under US antitrust law,

[38]See Brenner and Rey, op. cit.

[39]There are important differences in the design of national competition laws relating to abuse of dominant position and monopolization. For a useful comparative analysis, see Campbell *et al.* (1995).

[40]Predatory pricing occurs when a firm initially lowers its price to drive out competitors from a market, and then increases its price to profit from the lessening of competition. Non-price predation refers to situations where the same end is achieved by means of other actions than price cuts.

[41]EC competition law recognizes both "exploitative" and "exclusionary" abuses of a dominant position; in general, the law dealing with abuse of a dominant position or monopolization in Canada and the United States is concerned only with exclusionary practices.

[42]For elaboration, see the chapter on "Abuse of Dominant Position" in OECD and World Bank (forthcoming 1997).

[43]See the discussion of "Regulatory capture", below.

[44]For a comparative evaluation of regulation and competition policy, see Anderson *et al* (forthcoming 1998).

[45]See e.g., OECD (1997).

[46]See discussion of relevant legal doctrines in Part II.7, infra.

denial of access by competing firms to an essential facility can be treated as an act of deliberate monopolization.[47]

Mandating access to essential facilities, while undoubtedly a necessary remedy in particular cases, entails its own significant problems. First, in order to properly compensate the owner of the facility while not permitting gouging or anti-competitive "squeezing" of returns available to competitors, it is often necessary to specify a particular price or set of prices at which access to the facility will be provided. The setting of prices is intrinsically difficult and may require ongoing monitoring of the firm's costs and rate of return. Furthermore, once an effort is made to enforce a specific price for access, it may prove necessary to regulate the quality and timeliness of service provided, to ensure that the monopolist does not evade the effect of price regulation by shading these attributes. Finally, experience in industries such as the telecom sector over the past decade has demonstrated that many facilities which appear at one point in time to be unique and essential inputs can in fact be replaced by alternative technologies. In such industries, mandating access to existing facilities may reduce the incentive for new competitors to "invent around" existing bottlenecks – thereby reducing the rate of technological progress in the industry. For all these reasons, caution is warranted in deeming particular assets to constitute essential facilities and in mandating access to such facilities.[48]

Nevertheless, in appropriate cases, provision for mandatory access can be an important tool for remedying monopolistic situations, and for promoting access to markets by foreign competitors.[49]

**Regulatory capture**

There is an important distinction between the expressed aim of laws and regulations, and the purposes they serve in practice. It may sometimes be observed that economic policies, such as competition and trade policies, serve certain well-organized interest groups rather than the public at large. The concept of *regulatory capture*, or regulation to protect incumbent producers or other interest groups, addresses this issue.[50] The starting point for this view of regulation is the observation that firms in many industries may actually seek regulation for their own benefit, since it may limit entry into the industry, and may help incumbent firms enjoy higher prices for their output. The insights underlying this concept apply not only to regulation in the strict sense of the term, but to any government policy that seeks to affect the behaviour of the private sector, and is of immediate relevance also to competition policy.

The term "capture" refers to a situation when a regulator does not defend the interests that it is supposed to defend, by promoting the regulated industry's interests, instead of the welfare of the public at large.[51] This may be the result of outright corruption. But, more interestingly, it may also take more subtle forms, and the regulator need not even be aware of the capture. For instance, regulatory bodies need expertise on the regulated industries, and therefore find it useful to employ individuals who have previously worked in the industry. These employees are likely to be more positively inclined toward the views of the industry. There is also often considerable movement of personnel in the opposite direction, from the regulatory body to the industry. Regulators who expect to work for the regulated industry in the future are likely to be more favourably inclined toward the industry than might otherwise be the case. These are, then, additional considerations to be taken into account when governments impose regulation on an industry, to counteract perceived anti-competitive practices or for other reasons.

Reflecting the tension between aspects of economic regulation and the goals of competition policy, in an increasing number of countries, the advocacy of pro-competitive changes in regulatory and other government policies is viewed as an important element of competition policy.[52] Such work involves agency staff conducting research analyses, making formal representations to regulatory agencies and working with other government departments to help frame broader government policies and approaches to economic governance. A recent OECD Report on Regulatory Reform highlights the importance of advocacy work by competition agencies as a tool for counteracting the detrimental effects of excessive government regulation, and recommends that governments provide explicit authority and resources for agencies to carry out such work.[53]

## II.5 The institutional structure and orientation of competition policy in developed countries: A survey of national approaches

National approaches to competition policy can be described with reference to a variety of characteristics, including their institutional structure, overall orientation or objectives and substantive content. With regard to institutional structure, a question of interest concerns the degree of "independence" of

[47]Specifically, for a firm to be liable under the essential facilities doctrine, four elements must be proven: (i) control by a monopolist of a facility which is essential to production of a good or service; (ii) the inability of competitors to practically or reasonably duplicate the facility; (iii) the feasibility of the monopolist's providing access to the facility by competing firms; and (iv) an actual denial of access to the facility by the monopolist. See Otter Tail Pipe Co. v. U.S., 410 U.S. 366 (1973), and MCI Communications Corp. v. AT&T Co., 708 F. 2d 1081 (7th Cir.), cert. denied, 464 US 891 (1983). Related doctrines are contained in the competition laws and policies of other countries. For example, in Canada, the act of "pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market" can be treated as an abuse of dominant position under the Competition Act (section 78). In the European Communities, denial of access to essential facilities can be treated as an abuse of dominant position under Article 86 of the Treaty of Rome. Ensuring open access to essential facilities is a key element of Australia's new competition policy.

[48]See Werden (1987), and Areeda (1990).

[49]See the discussion of the "Reference Paper on Competitive Safeguards and Essential Facilities" which was adopted by most parties in the context of the recent Negotiations on Basic Telecommunications Services, in Part IV, infra.

[50]The classic papers on this topic are Stigler (1971), Posner (1971) and Jordan (1972). Jordan (1972) observes that "Regardless of the diverse aims and hopes of the consumers, industry leaders and legislators who [originally] brought about the extension of regulation over various industries, the actual effect of such regulation [in many cases] has been to protect producers."

[51]For useful discussion, see Neven, Nuttal and Seabright (1993).

[52]See OECD (1997), Anderson *et al* (forthcoming, 1998), and Khemani and Dutz (1995).

[53]OECD (1997).

competition agencies from political pressures.[54] It should be noted, however, that different countries seek to achieve the degree of independence in the administration of competition law that they consider appropriate in various ways. For example, some countries place considerable importance on the structural separation of competition agencies from other organs of government.[55] However, in other countries, it is felt that the appropriate degree of independence can be achieved through procedural rules or traditions that circumscribe the scope of Ministerial involvement in individual cases,[56] perhaps buttressed by a corporate culture of independent decision-making. In still other countries, the administration of competition law has deliberately been made subject to explicit elements of Ministerial control.[57] From an institutional point of view, other important characteristics of competition law that are manifested in the regimes of many countries are a high degree of transparency achieved through public information activities, and the existence of effective checks and balances on investigative and enforcement actions, consistent with prevailing legal and administrative requirements and doctrines in the respective countries.[58]

Different countries also manifest differing emphases on the overall goals of competition law and policy. For example, the protection of consumer welfare is generally recognized as the over-riding goal of competition (antitrust) policy in the United States, although recent policy guidelines also demonstrate sensitivity to the goal of facilitating efficiency gains, particularly in the context of merger enforcement.[59] The objective of promoting economic integration is central to the role and application of competition policy in the European Community. In Germany, the strengthening of competition policy was associated with the effort to restore a robust market economy and democratic society following World War II. In Japan, the overall goal of competition policy is to assure the interests of consumers in general, and also to promote the democratic and wholesome development of the national economy.[60] In the United Kingdom, the concept of the public interest has played an important role in the historical development of competition jurisprudence; nonetheless, policy statements by officials have downplayed this aspect of the legislation, and current legislative proposals would make the UK legislation more consistent with EC rules, in addition to modernizing and streamlining it generally.[61] In Canada, the overall goal of promoting economic efficiency as well as the role of competition policy in facilitating regulatory reform and trade liberalization have been emphasized.

Highlights of national approaches to competition policy in a number of developed countries are summarized in the Box IV.3.[62]

Two institutional features of competition policy that are considered to be important in many countries should be noted.[63] The first is that competition law generally is indifferent regarding the nationality of firms operating in a market, focusing instead on their contribution in ensuring a high level of inter-firm rivalry. The second is that competition law is concerned with protecting competition as a process, rather than with advancing the interests of individual firms in a market.[64]

Another important variable relating to the institutional structure of competition policy concerns the role of public authorities as compared to private firms and individuals in initiating complaints. In most developed and developing countries, public authorities have the primary responsibility for investigation and prosecution of offenses under the law. However, in some jurisdictions (notably the United States), actions brought before the courts by private parties play an important role in ensuring vigorous enforcement of the law.[65] In fact, there are indications of a trend in some countries toward permitting or encouraging a greater role for private parties in enforcement of the law.[66] A potential benefit of providing private enforcement rights is that it can free up resources in public enforcement agencies to focus on cases having greater significance in terms of economic effects or the evolution of national jurisprudence.

An important development in the institutional orientation of competition policy in various developed countries in recent years

[54]Some degree of independence from political interference, particularly with respect to the investigation and prosecution of individual cases, is considered by many observers to be important to the overall effectiveness of competition policy. See, e.g., Khemani (1994). In fact, ensuring an appropriate degree of independence is important for at least two reasons: First, from a legal standpoint, it is important to ensure that decisions regarding the investigation and prosecution of particular cases (particularly where the rights of individuals are at stake) are consistent with considerations of "natural justice" or procedural fairness. Second, ensuring an adequate degree of independence can help to ensure that the administration of competition law does not itself become an instrument of rent seeking.

[55]Examples of such countries would include Germany and Italy. It should be noted that the former does provide for Ministerial reversal of decisions by the Federal Cartel Office in certain cases. However, the scope for such involvement is limited in that reversals can be made only on specific grounds that are enumerated in the Act against Restraints to Competition, and then only following a public hearing by the German Monopolies Commission.

[56]A possible example would be Canada. See Addy (1993).

[57]A notable example, until now, has been the United Kingdom. However, the administrative structure of competition policy in the UK is to be substantially overhauled, under proposals tabled recently by the Government (see below).

[58]Checks and balances that are considered important in many countries include separation of the investigative and adjudicative functions in competition law administration, adherence to well-developed rules of evidence and judicial procedure, and the provision of rights of appeal to the courts regarding issues requiring legal interpretation.

[59]On 8 April 1997, the United States Department of Justice and Federal Trade Commission announced a revision to the treatment of efficiencies in their 1992 Merger Guidelines. The revised wording clarifies the various ways in which mergers may generate efficiencies that will be recognized by the United States enforcement authorities. They nevertheless re-affirm that the focus of efficiency analysis under the United States Guidelines is on whether the asserted efficiencies will be sufficient to reverse the potential harm to consumers resulting from a merger. See United States Department of Justice and Federal Trade Commission (1992; Revised 8 April 1997).

[60]See, generally, Japan, Anti-monopoly Act.

[61]See proposed amendments to United Kingdom competition legislation (tabled 7 August 1997).

[62]For further background on comparative approaches to competition policy, see, for example, Anderson and Khosla (1995), Boner and Krueger (1991) and Doern and Wilkes (1996).

[63]See, e.g., Wood (1996), for a discussion of the importance of these factors in the context of US law.

[64]A guiding principle that is often referred to by competition agencies and tribunals or courts is that: "competition law protects competition, not competitors".

[65]In fact, in the US private actions account for a considerably greater proportion of total competition law cases than do actions initiated by public authorities.

[66]For a useful background analysis, see Roach and Trebilcock (1996).

**Box IV.3: Approaches to competition policy in developed countries**

*The United States*

Some key features of the United States' approach to competition policy are: (i) a strong consumer welfare orientation in enforcing the law; (ii) strict prohibition of "hard core" cartel agreements, including price fixing, bid rigging and market sharing agreements, reinforced by criminal penalties; and (iii) extensive scope for enforcement of the relevant laws by private citizens and state attorneys-general, as well as by two federal authorities, the Department of Justice (Antitrust Division) and the Federal Trade Commission.

*The European Community*

From its inception, competition policy in the European Community (EC) has been deliberately employed as an instrument to foster the integration of the European Market, as well as to foster opportunities for small and medium-sized enterprises. A distinctive characteristic of EC competition law is its wide ambit, which encompasses state aids to industry and regulatory structures that distort competition as well as private business practices. Other key features of EC competition policy are: (i) the Merger Regulation, which enables the community to block mergers that would create or enhance a dominant position in a market; and (ii) extensive use of block exemptions to permit inter-firm agreements and practices which would otherwise be prohibited under Articles 85 and 86 of the EC Treaty.

*Japan*

Japan adopted a modern competition statute, the Anti-monopoly Act, in the years following World War II. Many features of the Act were modelled on United States antitrust legislation. Since the 1980s, numerous initiatives have been announced to strengthen enforcement of the Act by the Japanese Fair Trade Commission.

*The Federal Republic of Germany*

The German competition law, the *Act against Restraints of Competition [ARC]*, was adopted in 1958. The Act initially focused on dealing effectively with the threat posed to Germany's economic recovery and reconstruction by cartels, other affiliated groups of firms and trusts. In 1973, the scope of the *ARC* was broadened to include statutory provisions for control of anti-competitive mergers. The law is enforced by the Bundeskartellamt (Federal Cartel Office), which is an independent decision-making authority. In certain cases, decisions by the Bundeskartellamt can be over-ridden by the Minister of Finance, on specific grounds.

*France*

Some aspects of the present French legislation dealing with competition date back to the immediate post-war period. Significant modifications to the legislation were adopted in 1977 and again in 1986. The main adjudicatory body, the Conseil de Concurrence, is an independent body that investigates mergers that are referred to it by the Minister of Finance. The Conseil also has parallel responsibilities for the investigation of cartel agreements and other quasi-criminal offenses.

*The United Kingdom*

The existing competition legislation of the United Kingdom is based on a "public interest" approach, and is administered by a complex set of institutions. Recently, the Government has tabled proposals to streamline and modernize the legislation and enforcement machinery, and make it more consistent with EC rules.

*Canada*

Canada substantially strengthened its competition law in the mid-1980s, in the same period that it entered into significant external trade liberalization arrangements (the Canada-United States Free Trade Agreement and, subsequently, the NAFTA). A key feature of Canadian competition policy is an explicit "total welfare approach" which permits the adjudicatory authority, the Competition Tribunal, to balance potential efficiency gains against anti-competitive effects resulting from a merger.

*Sweden*

In 1993, Sweden adopted a new (and stronger) competition law. The Swedish Act is modelled on and substantially replicates the corresponding articles of the European Community Treaty (i.e., Articles 85 and 86). The administering agency, the Swedish Competition Authority, also has a general responsibility for promoting a "competitive culture" in Sweden.

*Australia*

Australia has recently adopted a new "comprehensive" approach to competition policy. This approach emphasizes: (i) enforcement of relevant legislation; together with (ii) administrative action to provide mandatory access to essential facilities; and (iii) a vigorous competition advocacy programme relating to all policies that affect the competitive market system.

has been a greater sensitivity to the dynamic aspect of competition, and a "fine tuning" of the application of competition law vis-a-vis knowledge-based industries, research and development, and intellectual property licensing practices. The concept of "innovation markets" was developed as a tool for use in assessing the effects of particular business practices, and possible competition policy interventions, on the incentives for innovation in particular industries.[67] The role of competition policy in relation to knowledge-based industries was a central focus of public hearings by the US Federal Trade Commission in 1995-96. In general, the hearings highlighted the overall

[67] An innovation market consists of research and development activities aimed at particular new goods or services, and close substitutes for such activities. For background, see Gilbert and Sunshine (1995).

importance of competition as a stimulus to innovation and dynamic efficiency, and affirmed the general content and orientation of competition policy as it is practised in the US while also suggesting scope for minor adjustments in enforcement policies as they are applied in innovative industries.[68] Related developments have also occurred in other countries.[69]

Finally, a major development in the institutional structure and orientation of competition policy in developed countries over the past decade has been the increasing internationalization of enforcement activities, and particularly the growth of multilateral and bilateral co-operation agreements as a tool for addressing anti-competitive conduct that cuts across international borders. Typically, these agreements provide a framework for notification and consultations regarding enforcement activities touching on more than one country's interests. In some cases, they also provide for the possibility of joint investigations, and the application of principles of international comity, including both "positive" and traditional comity, with regard to enforcement actions.[70] These agreements have played a role in a number of successful enforcement actions.[71] Another reflection of globalization is that, in their assessments of particular business arrangements, depending on the nature of the products involved and the scope of competition in each particular case, competition agencies increasingly define markets as being international in scope, and give significant weight to the role of imports as a factor that can prevent the exercise of market power within their respective jurisdictions.[72]

[68]See US, Federal Trade Commission (1996). Subsequent to the hearings, the treatment of efficiencies in the US Horizontal Merger Guidelines underwent revision. See United States Department of Justice and Federal Trade Committee (1992; revised 1997).

[69]For example, amendments adopted to Canadian competition legislation in 1986 refer specifically to "the nature and extent of change and innovation in a market" as a factor to be considered in merger analyses.

[70]Under traditional comity, a country may voluntarily refrain from taking measures that would affect important interests of another country. Under positive comity, enforcement authorities in one country may request that another country take action to address or assist in addressing conduct that harms the interests of the first country. For discussion, see Part V.2, infra.

[71]The nature and scope of existing international co-operation agreements are discussed further in Part V.2 of this Chapter.

[72]For useful discussion, see US, Federal Trade Commission (1996).

## II.6 The growing role of competition policy in developing countries and economies in transition

Until about a decade ago, the group of countries that had well-developed competition law systems was largely limited to developed countries. In recent years, however, a large and increasing number of developing countries and economies in transition have adopted new or substantially improved competition legislation, as part of a drive to establish healthy market economies. Information on the adoption of competition legislation in developing countries and economies in transition is summarized in Table IV.1.

In general, the increasing importance of competition policy in developing countries and economies in transition reflects a growing appreciation of the relationship between the objectives of competition policy and those of market-oriented reforms, including both internal reforms and trade liberalization. In particular, reforms adopted in many developing and transition economies in recent years have the broad objective of improving the functioning of

Table IV.1

**Adoption of competition or anti-monopoly legislation in developing and transition economies***

| *Latin America and Caribbean* | *Africa* | *Asia and Pacific and Middle East* | *Central and Eastern Europe* |
|---|---|---|---|
| Argentina (1980) | Algeria (1995) | China (1993) | Albania (1993) |
| Brazil (rev. 1994) | Côte d'Ivoire (1978) | Fiji (1993) | Belarus (1992) |
| Chile (1973, rev. 1980) | Gabon (1989) | India (1969) | Bulgaria (1991) |
| Colombia (1992) | Kenya (1994) | Pakistan (1970) | Croatia (1995) |
| Costa Rica (1992) | Mali (1992) | Republic of Korea (1980) | Czech Republic (1991) |
| Jamaica (1993) | South Africa (1955, amended 1980) | Sri Lanka (1987) | Estonia (1993) |
| Mexico (1992) | Tunisia (1991) | Thailand (1979) | Georgia (1996) |
| Panama (1996) | Zambia (1994) | Chinese Taipei (1992) | Hungary (1996) |
| Peru (1990) | Cameroon** | Jordan** | Kazakhstan (1991) |
| Venezuela (1991) | Egypt** | Malaysia** | Kyrgyszstan (1994) |
| Bolivia** | Ghana** | Philippines** | Latvia (1991) |
| Dominican Republic** | Madagascar** | Nepal** | Lithuania (1992) |
| El Salvador** | Malawi** | Mongolia** | Poland (1990) |
| Guatemala** | Morocco** | | Romania (1996) |
| Honduras** | Zimbabwe** | | Russian Federation (1991) |
| Nicaragua** | | | Slovakia (1994) |
| Paraguay** | | | Slovenia (1993) |
| Trinidad and Tobago** | | | Tajikistan (1993) |
| | | | Ukraine (1992) |
| | | | Azerbaijan** |
| | | | Turkmenistan** |

*Year in parentheses indicates the year in which competition legislation was adopted (or substantially updated or modernized). Note that the information in this table may not be complete or comprehensive, due to continuously evolving developments in this area.

**Competition law in preparation or under consideration.

*Sources:* UNCTAD and World Bank.

product, capital and factor markets domestically, while also facilitating adaptation to international competition. Competition policy is a tool that reinforces the beneficial effects of such reforms in promoting efficiency gains and helping to ensure they are passed on (at least partially) to consumers, while also facilitating successful adaptation to international competition.[73] For example, the existence of an effective competition policy can help to ensure that industries which are privatized and/or deregulated cannot reorganize themselves as private monopolies. In addition, in both developing and transition economies, competition policy has been deliberately employed as an instrument of regional economic integration.[74]

A question that sometimes arises in contemplating the role of competition policy in economic development is whether the needs of developing countries may better be served through industrial policies that promote the role of "national champions" (i.e., large domestically-based firms with mandates for the domestic and international marketing of particular product lines). There is, however, a large body of evidence that suggests that the international competitiveness of domestic firms is more likely to be enhanced than undermined by the existence of vigorous competition in home markets, in that the exposure to competition domestically assists firms in upgrading their products and marketing techniques and adapting quickly to changing market conditions.[75] In some cases, it may be important also to take into consideration the need for firms to achieve economies of scale, but even here the goal of promoting international competitiveness may be better served by the implementation of competitive disciplines in conjunction with trade liberalization measures that permit firms to produce for international markets.[76] The existence of a healthy competitive environment and the availability of competition policy as a tool for dispute resolution that is consistent with the rule of law can also be a factor in enhancing the attractiveness of host countries for foreign investment and technology transfer.

The competition laws of developing and transition economies have often been modelled on those of developed economies, while also being adapted to the special needs of emerging market economies. For example, the laws of the transforming economies of Eastern Europe are based, to a large extent, on those of the European Community and Germany, while those of Latin America draw, to an extent, on the laws of the United States and Canada as well as the European Community.[77] Of course, the adoption of competition laws per se is only one means by which countries can strengthen competition and the role of market forces in their economies. Other important tools include liberalization of trade and investment, the elimination of inefficient regulatory regimes and, where appropriate, structural demonopolization of industries. Indeed, competition policy undoubtedly works most effectively when it is introduced in conjunction with other market-oriented reforms. In this regard, an intriguing feature of competition laws implemented by some economies in transition is that they incorporate specific provisions relating to review of market reforms such as prospective privatization.[78]

## II.7 Gaps in the scope and coverage of competition law

The existence of exceptions and exemptions from competition law is an important factor that can limit their overall effectiveness. Two major categories of exceptions and exemptions from the application of competition law can be identified: (i) explicit exemptions, which are given in legislation or regulations; and (ii) implicit exemptions, which arise when the application of competition law is displaced by industry-specific regulatory regimes or other manifestations of state ownership or direction.[79] A recent major study of the scope and coverage of competition law highlighted a number of sectors in which such exemptions tend to be present, in developed countries. These sectors are shown in Table IV.2.

Table IV.2 indicates that exemptions from competition law in developed countries tend to be found in sectors that are subject to industry-specific government regulation. These sectors include agriculture, fishing and forestry, energy and utilities, transportation, and postal services. Other sectors in which partial or total exemptions may be found include defence, communications, financial markets (including insurance), media and publishing, and in some countries, elements of the distribution and manufacturing sectors.[80] Another broad area of exemptions for many developed economies is that of small and medium-sized businesses.[81] Less

[73]See OECD (1989b) and Khemani and Dutz (1995).

[74]See the discussion of regional economic arrangements in Eastern Europe as well as Latin America, in Part V, *infra*.

[75]This is a key finding, for example, in Michael Porter's cross-country empirical research on the sources of competitive advantage and economic growth. Porter observes that: "Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry ... Domestic rivalry not only creates pressures to innovate but to innovate in ways that upgrade the competitive advantages of a nation's firms." Porter (1990). Related findings are reported in Baily and Gersbach (1995).

[76]For useful discussion and elaboration, see Scherer (1996).

[77]Boner (1995).

[78]Boner (1995); Fox (1996).

[79]In some countries, the interaction between regulation and competition policy is governed by specific jurisprudential doctrines that give rise to limited immunity from competition law in particular circumstances. For example, in the United States, one of the relevant jurisprudential doctrines is referred to as State Action Immunity. This doctrine holds that the antitrust laws do not apply to activities that are undertaken in compliance with certain government-imposed requirements. Two specific elements that must be present for this doctrine to apply are: (i) the regulation or restraint in question must be clearly articulated and affirmatively expressed as state policy; and (ii) any anti-competitive conduct must be actively supervised by the state. See Southern Motor Carriers Rate Conference v. US, 471 US 48 (1985). Another doctrine providing an implicit exemption from US antitrust law is referred to as the Noerr-Pennington Doctrine. The latter holds that individual or group conduct that is undertaken to influence legislative, executive, administrative or judicial decision-making generally is not subject to the antitrust laws. This doctrine would normally ensure, for example, that a good-faith petition for anti-dumping relief would not be subject to attack under the antitrust laws. Appeals for government intervention which are deemed to constitute nothing more than a baseless attempt to interfere with a competitor's ability to compete may nonetheless be subject to antitrust attack: this possibility is known as the "Sham exception to the Noerr-Pennington Doctrine." See Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), and California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972). But see also Professional Real Estate Investors v. Columbia Pictures, 113 S.Ct. 1920 (May 1993), which sets a high standard for finding a violation of good faith.

[80]OECD (1996d).

[81]OECD (1996d).

Table IV.2

**Some examples of sectoral exemptions from the application of competition policy**

| *Sector* | *United States* | *Japan* | *Germany* | *France* | *United Kingdom* | *Canada* | *Mexico* | *Portugal* | *Sweden* | *European Community* |
|---|---|---|---|---|---|---|---|---|---|---|
| *Agriculture, forestry and fisheries* | | | | | | | | | | |
| Agriculture | CO, AG | CO, CA | AG, RPM | AG | AG | | | | CO | AG |
| Fishery | CO, AG | CO, CA | | | AG | AG | | | | |
| Forestry | | | | | AG | | | | CO | |
| *Manufacturing* | | | | | | | | | | |
| Tobacco | | CO, CA | | | | | | | | |
| Sericulture | | CA | | | | | | | | |
| Liquor | | CA, RPM | SE | | | | | | | AG |
| Sugar | | CA | | | | | | | | |
| Books | | RPM | RPM | RPM | RPM | | | RPM | | |
| Newspaper | AG | RPM | | ME | ME | | | RPM | | |
| Cosmetics | | RPM | | | | | | | | |
| Pharmaceuticals | | RPM | SE | AG | RPM | | | | | |
| Coal and Steel | | | SE | SE | SE | | | | SE | SE |
| *Energy* | | | | | | | | | | |
| Electricity | | NM | AG | | SE | SE | SE | | | |
| Gas | | NM | AG | | SE | SE | | | | |
| Oil | | | AG | | AG | | | | | |
| *Transportation* | | | | | | | | | | |
| Airline | AG | | AG | | AG | | | | | AG |
| Railroad | ME, AG | NM | AG | | AG | | | | | AG |
| Road transport, trucking | ME, AG | CA | AG | | AG | | | | | AG |
| Maritime and inland water shipping | AG | CA | AG | | AG | CA | | | SE | AG |
| Harbour | AG | CA | CA | | | | | | SE | |
| Warehouse | AG | CA | | | | | | | | |
| *Communication* | ME | | | | SE | | | | | |
| Audiovisual and radio broadcasting | | | | ME | | | | | | |

*Note:* This is a partial list only. Abbreviations indicate the type of exempted activities. The types of exemption include: NM (natural monopoly); CO (co-operatives and association); RPM (resale price maintenance); CA (cartels and recommendations); AG (certain types of agreements); SE (statutory exemptions); and ME (merger).

*Source:* OECD (1996e), Table 8. For additional information, see OECD (1996d).

information is available on exemptions from competition law in developing counties, but there are indications that the application of competition policy is also affected by significant exceptions and exemptions in these countries.[82]

The existence of exceptions and exemptions from competition law is attributable to a range of factors. For example, labour-related exceptions reflect domestic policy considerations relating to the role of unions. Exceptions relating to public utilities or the telecom sector may, to an extent, be based on perceptions regarding the existence of natural monopolies, and defence-related exceptions may reflect national security concerns. In some cases, however, the need for exemptions in these industries may well have been overtaken by technological change, which has made competition feasible in many contexts in which it was previously considered unworkable. In other cases, the existence of exemptions from competition law may simply be a manifestation of successful lobbying for protection (rent seeking). Consequently, there is growing recognition internationally of the need for periodic reassessments of the need for exceptions and exemptions from competition law.[83]

## II.8 Concluding remarks

Competition policy is a difficult branch of economic policy making. There is no all-encompassing model of imperfect competition that can guide the actions of competition authorities in all circumstances. And even when theory can identify common principles, the lessons may be difficult to implement because they depend on market characteristics that are intrinsically difficult to observe. The analysis has to take into account both potential as well as actual competitors, possible efficiency gains from restrictive business practices, implications of competition policy decisions for the economic growth and so on. Indeed, while certain kinds of blunt anti-competitive behaviour, such as price fixing and horizontal market segmentation should according to most observers be prohibited *per se*, much adjudication has to rely on the rule-of-reason. This is equally true whether evaluating business practices at a national or at an international level.

The stated objectives of competition policy, as reflected in legislation and judicial institutions, embody a broad set of goals

[82]See Boner (1995).

[83]The importance of re-examining the need for exceptions and exemptions from competition law is emphasized in OECD (1997).

including those of fairness and protection of opportunities for small and medium-sized businesses as well as economic efficiency and other ends. Conflicts can sometimes arise among these objectives. However, in the past decade, there has been a significant degree of convergence in the goals of competition policy as it is practised by many countries toward the core values of promoting economic efficiency and consumer welfare. This is an important development that helps to ensure an overall degree of consistency in approaches to competition policy as it is practised in many countries.

The main elements of competition policy include legislative provisions relating to horizontal and vertical market restraints, abuse of dominant position or monopolization, merger control and other matters. In addition, an increasing number of countries recognize the importance of competition advocacy as an element of competition policy. Although there is considerable variation in the institutional structure of competition policy across countries, there are also elements of commonality in that many countries try to ensure a degree of independence, with appropriate checks and balances, in their investigative, prosecutorial and adjudicative processes.

A significant development in the past decade has been the implementation of competition policy in a large and growing number of developing countries and economies in transition. Another important development in the institutional structure of competition policy has been an effort by competition authorities to enhance their ability to deal with anti-competitive conduct that cuts across national borders, through the development of multilateral and bilateral co-operation arrangements. Finally, a factor that limits the ability of competition policy to address anti-competitive practices in many jurisdictions is that of exemptions from competition law. There is growing recognition internationally of the need to review the extent of such exemptions.

## III. Competition policy in international markets

The purpose of this section is to throw some light on those aspects of competition policy that economic theory might suggest are special to international markets, and to point to circumstances under which there may be scope for enhanced international co-operation that would promote welfare.[84] The first part of this section lays out the basic ways in which trade policy affects the degree of competition, and also argues that, while liberal trade is of fundamental importance for curbing market imperfections, even with extensive liberalization and free factor movements, there will still be a need for competition policy. This is followed by a discussion of the role and impact of national competition policy in international markets. In particular, it highlights the distortions that might arise from nationally pursued competition policies, and draws some conclusions on the basis of the preceding analysis about the efficacy of various methods to address problems of distortions. The final section briefly summarizes the main points of the analysis.

[84]For examples of the emerging literature in this area, see Bliss (1996), Levinsohn (1996), and Neven and Seabright (1997).

[85]On the other hand, high tariffs may induce "tariff-jumping" foreign direct investment, which may tend to depress prices. The incentives and impact of such investment will depend on the size of the local market and the competitive pressure therein.

[86]For details, see e.g. Markusen et al. (1995) or Brander's (1985) overview of "strategic trade policy".

### III.1 The impact of trade policy interventions on firms' behaviour

A first step in the direction of uncovering the relationship between trade policy and competition policy is to consider the effect of trade barriers on competition. In the case of tariffs, it is clear that these measures increase the cost to importers of supplying markets, and as a result reduce the competitiveness of imports. Consider the role of tariffs in the presence of a domestic monopolist. The tariff increases the range of prices a monopolist can charge without losing customers to foreign suppliers. Hence, whenever foreign suppliers are competitive enough without a tariff to sell at a price that restricts the monopolist's ability to charge a monopoly price, the tariff enables the monopolist to increase its price to domestic consumers. When the domestic industry is an oligopoly, the tariff will still increase the consumer price, but the mechanism will be more complicated, and the outcome will depend on firms' perceptions about the degree to which higher costs for foreign producers will affect their prices, the degree of competition between domestic firms, and so on.[85]

These consequences of tariffs, and of many other trade barriers, are straightforward. However, there are also some more subtle ways in which competition is affected by such barriers. First, the competitiveness of existing foreign suppliers is affected not only by trade barriers, but also by the number of such suppliers. The higher the barrier, the smaller the market from the point of view of the exporters to the market, and the fewer the number of firms that find it profitable to enter when there is a fixed cost involved in entering the market. This by itself tends to reduce the degree of competition in the market, in addition to how a trade barrier influences the competitiveness of existing firms. Moreover, tariffs, like other trade barriers, may also affect firms' incentive to collude (see below).

Certain trade barriers, including import and export quotas, and voluntary export restraints (VERs), directly restrict traded volumes. Again, the direct negative impact of these measures for competition is obvious. They also clearly benefit those firms in the industry that are not directly restricted by the trade measure, since by reducing supply in the market, they tend to increase the market price – that is, is the quota rent.

In general, the above discussion suggests that there are strong reasons to believe that trade liberalization in the form of reduced tariffs and the relaxation of the restrictiveness of quotas tends to increase the degree of competition. However, there are important differences between tariffs and quantitative restrictions (QRs). First, a tariff is typically detrimental to exporters to the market. However, QRs may be desired by both local firms and foreign competitors who enjoy satisfactory allotments of import licenses, on account of the anti-competitive effects involved. A price increase resulting from a QR may be sufficiently pronounced to outweigh the negative impact of the reduction in sales even for existing exporters to the market. This feature of QRs is likely to have important political economy ramifications. Secondly, there are reasons to believe that the negative implications of QRs for the degree of competition in the importing market are more severe than those of tariffs, in the sense that with imperfect competition a quota will lead to higher domestic prices than a tariff that yields the same level of imports.[86] This is because when foreign suppliers are constrained by QRs, they are unable to secure a greater share of the market when incumbent suppliers restrict output in order to increase prices.

Export subsidies can have ambiguous effects on the degree of competition in a market. As mentioned in Section II.1, the distinguishing feature of imperfectly competitive markets – and

these are the markets that are of principal interest from a competition policy point of view – is *under*-production relative to a more competitive situation. This under-production provides the main vehicle for firms to extract consumer surplus. Subsidies to imperfectly competitive firms, however, have a tendency to induce these firms to increase their production. Competitors may respond by holding back their production. But, if the export subsidies increase total production in the export market, they will tend to ameliorate the effects of any lack of competition in this market.[87] Of course, this does not mean that these subsidies are necessarily socially desirable, for a number of reasons. For instance, they must be financed, and the levying of taxes has its own costs in terms of distortions. Subsidies may also be captured by interest groups. For instance, if they go to industries in which the subsidizing country has lost a comparative advantage, they tend to prevent adjustment to an efficient international pattern of specialization. Moreover, subsidies to inefficient incumbent firms may enable these firms to prevent the entry of potentially more efficient ones, thus leading to long run efficiency losses. While practical experience suggests that the latter costs typically dominate any hypothetical gains from subsidies, it should nevertheless be noted that the consequence of subsidies for the degree of competition is not as straightforward as it is with regard to many other trade policy instruments.

A fourth category of trade measure comprises various forms of non-tariff measures other than traditional quotas and VERs, such as health requirements, product standards, and labelling requirements. Even if motivated by other concerns, such non-tariff measures may not only affect trade flows, but may also represent a barrier to market entry and therefore constrain competition. Diverging national product standards may imply significant costs for exporters. Thus, there are incentives for firms to concentrate on one particular market (one product standard). This, in turn, will tend to increase market concentration.

A fifth category of trade measure with immediate implications for competition is anti-dumping measures. Where dumping causes adverse effects upon the country of import, for example by pricing below cost to drive out competitors and enjoy subsequent monopoly profits, in this sense, anti-dumping procedures can be considered as an international extension of domestic competition laws which are designed to prevent abuses of dominant positions. In principle, therefore, anti-dumping regulations can have a procompetitive effect. However, as an empirical matter, predatory behaviour is extremely difficult to identify in international markets and the rules used to evaluate dumping allegations cannot easily distinguish normal competitive practices, such as "meeting the competition", from predatory practices.[88] Many economists have argued that anti-dumping procedures are often used in order to reduce competition in the market.[89] A fuller discussion of the relationship between anti-dumping and competition policy is contained in Section IV.

Empirical evidence on the effects of trade liberalization on incentives for firms to behave more or less competitively generally tends to confirm the pro-competitive hypothesis of trade liberalization. However, it should be emphasized that empirical studies of the impact of trade liberalization on the degree of competition, are beset with a large number of problems. As pointed out in Section II.1, there is no simple relationship between measures of competition and welfare and thus no simple way in which to measure the procompetitive impact of trade liberalization on welfare. The effects on welfare largely depend on the consequences of trade liberalization for prices. It goes without saying that trade liberalization reduces prices and thus increases welfare.

Efforts to measure the extent to which trade liberalization increases competition involve difficult conceptual issues. In order to address this question, one needs a measure of the degree of competition in markets. One such measure is firms' price-cost margins, which is the deviation between an actual situation and a hypothetical perfectly competitive situation.[90] In practice, trade liberalization will typically affect both the actual imperfectly competitive situation, as well as the bench-mark scenario of perfect competition. Consequently, a paradoxical result of using this measure is that the observed deviation from perfect competition may actually go up as a result of trade liberalization, even though prices have fallen. For instance, consider a reduced tariff on a product sold by a foreign monopoly firm. This tariff cut is equivalent to a cost reduction from the firm's point of view. Hence, trade liberalization as such has the effect of *increasing* this firm's price-cost margin. Of course, the firm will expand its output in response to the liberalization, and the price will consequently also come down. However, there is no presumption that the price must fall by more than the cost reduction – if anything the opposite is likely to occur. Hence, it may well be that the price-cost margin increases as a result of the liberalization. Needless to say, this should *not* be interpreted as reflecting a reduction in consumer welfare, or of competition, but merely as a limitation of the measure employed.

The foregoing has important implications for the interpretation of empirical studies of the correlation between firms' mark-ups and tariffs across industries, countries and time. The idea is that if the correlation is positive, then firms that are highly protected tend to behave less competitively (have a higher price-cost margin).[91] The few studies that exist tend to support this view.[92] However, the measured pro-competitive effects are in some cases rather small, or even statistically insignificant. For instance, in a recent study (European Economy, 1996) by the European Community, it has been argued that the creation of the European Single Market has induced a decline of price-cost margins of 0.2 per cent per year, which over the period 1986-1992 implies a total decline of less than $1\frac{1}{2}$ per cent. Obviously, these are aggregate estimates and some firms or industries may experience much larger effects. Moreover, these studies do not reflect other aspects of the gains from trade liberalization and competition, such as downward pressure on costs and increased incentives for innovation.[93]

To conclude, there is a strong presumption, based on theoretical considerations, as well as practical experience, that trade liberalization in the form of reduced tariffs, the elimination of QRs and so on, has pro-competitive effects.

[87]For instance, some commentators have argued that the subsidies to Airbus have increased the degree of competition in the market for wide-bodied aircrafts.

[88]See Messerlin (1994) and Lipstein (1997).

[89]See, for example, Messerlin (1990).

[90]The price-cost measure assumes that firms in the hypothetical case set prices equal to marginal cost.

[91]Some authors have suggested that high price-cost margins may be seen as an indicator of firm efficiency rather than anti-competitive behaviour. Later studies have sought to control for this possibility.

[92]For instance, Levinsohn's (1993) study of Turkey's unilateral trade liberalization in 1984 is consistent with the hypothesis of declining price-cost margins. Jacquemin and Sapir (1991) show that extra-EU imports exert a disciplinary pressure on domestic producers. More generally, Schmalensee (1989) in his review of the empirical literature of studies of developed countries suggest that trade liberalization has pro-competitive effects. For a more recent overview, see Feenstra (1995).

[93]See, e.g., Baily and Gersbach (1995).

**Why competition policy is needed, even with trade liberalization**

A natural question that arises is how far the pro-competitive effects of international trade go. Would free trade, coupled with free mobility of factors of production, ensure a sufficient degree of competition to render competition policies superfluous, whether national or international? The idea behind this question is that any oligopolistic profits created by the actions of firms (as opposed to those that stem from government regulations) would be competed away under a policy regime of free-trade and free factor mobility, due to competitive pressure in a unified world market.

Even if this argument were valid in principle, there would still be a need for competition policy in practice. First, there are a number of impediments to trade that are not caused by trade policy, such as physical transport costs, language barriers, lack of information about local demand conditions, differences in product safety laws and so on, and these trade barriers are likely to remain for the foreseeable future. These barriers tend to segment markets, and thus to create geographical market niches where firms can exercise market power. These niches may in some cases comprise whole countries, and in other instances smaller geographical areas.

Secondly, there are also a number of actions that firms can undertake in order to limit competition, in the choice of design of products (compatibility with other products, for instance), in the design of contracts with distributors and retailers, in advertising (e.g. creation of brand images), or in their contracts with consumers (such as brand loyalty bonuses). All of these actions may limit the amount of competition that firms are exposed to.

Thirdly, there are also technological reasons why markets may be imperfectly competitive, as pointed out in Section II.1. For instance, the existence of pronounced economies of scale, economies of scope, as well as irreversibility in investments, may lead to market structures with only a limited number of firms also after trade liberalization. In these markets firms are likely to exploit their monopoly power, and thus to create inefficiencies that may call for some form of competition policy intervention. In the same vein, it may be viable for firms to form international cartels which would also require intervention.

Fourthly, while international trade is growing at a fast pace relative to production, it is still small relative to what is locally supplied. For instance, among the OECD countries, some 80 per cent of the production of manufactures is sold domestically. True, the threat of international entry will tend to discipline domestic producers, but there are reasons to doubt that the latter's pricing decisions will be much affected by such threats, as was pointed out in Section II.1. Furthermore, in many economies, most production still takes place in sectors that are not directly exposed to international competition, i.e., that are non-tradables. For instance, the public sector is rarely exposed to foreign competition, nor are many types of services. On the other hand, non-tradable sectors can be exposed to international competition through the entry of foreign firms via direct investment. For this to have a more pronounced pro-competitive effect, the entry should be in the form of new investments (greenfield) rather than through acquisitions and mergers involving local firms. However, the predominant form of FDI in the OECD countries has been mergers and acquisitions during the last decade, which is likely to mitigate the extent of competitive pressure exerted through the foreign direct investment.[94]

Fifth, practical experience also suggests that integration *per se* does not suffice. For instance, even large markets with small internal trade barriers, such as the European Community and the US markets, still seem to require an active competition policy despite their far-reaching state of integration.

For the above-mentioned reasons, there will be a need for competition policy for most countries, even if trade and investment liberalization is far-reaching. However, as will be discussed in the ensuing section, the pursuit of such policies at a national level will affect trading partners. Many of these effects will be positive. But it is also likely that some decisions will negatively affect trading partners. Depending on the character of these latter spillovers, countries may end up in a Prisoners' Dilemma situation, posing a problem that may need an international agreement for its resolution. We now turn to a closer examination of these issues.

## III.2 Spillovers from nationally pursued competition policies and the scope for international co-operation[95]

Section III.1 argued that trade liberalization has important pro-competitive effects. This reasoning implicitly assumed that governments do not change the "rules of the game" for competition between firms, for instance, by changing their competition policy in a less competitive direction. While simplifying, this assumption is not innocuous: it is sometimes argued that trade liberalization, by preventing countries from using trade policies to promote their national interests at the expense of other countries, will induce them increasingly to use other policies for this purpose, perhaps including competition policy.

It should be emphasized that from an economic point of view, *any* stance on competition law or enforcement, including the decision not to have a competition law at all, or not to enforce the existing law, is a policy choice. This implies that it is often difficult to separate out private restraints from government policy, since the fact that the private restraints exist might be attributable to the government's choice not to intervene, or not to implement laws under which it could intervene.

When competition policy is pursued at a national level it seems reasonable to assume that it seeks to promote the interests of national agents, leaving aside those of foreign agents. As mentioned in Section II.1, most (but certainly not all) economic analyses identify the interests of national agents with the notion of national welfare. Following this convention, this section will seek to highlight the incentives facing welfare maximizing countries with regard to their choice of competition policy. The purpose is to point to circumstances under which the pursuit of national interests may have negative consequences for trading partners, such as to warrant exploration of enhanced co-operation on competition policy.[96] The basic economic problem in such a situation stems from the fact that the undesirable consequences for other countries are, from the world point of view, not fully compensated by the positive impact for the country pursuing the policy. Thus, the focus is on "beggar-thy-neighbor" features of national competition policies as a rationale

[94]During the first half of the 1990s, the ratio of cross/border mergers and acquisitions to FDI ranged between 30 and 80 per cent. See UNCTAD (1997b).

[95]This section draws heavily on Bacchetta *et al* (1997).

[96]It should be noted that the approach is general enough to also describe situations in which policies have other objectives. For instance, it could depict situations in which consumer interests are weighted more heavily relative to those of producers than the national welfare criterion would imply.

for international co-operation. Needless to say, there are several other, and possibly economically valid, reasons for such an agreement that this analysis does not address; some of these are discussed elsewhere in this Chapter.

In the analysis to follow, it will be assumed that governments are only concerned with national welfare, and that there are gains from international co-operation only insofar as it increases the sum of national welfare levels. This implies that no weight is attached to the distribution of welfare across countries. It should be emphasized that this assumption is only maintained for presentational simplicity, and does *not* represent a statement concerning what objectives countries should have. As noted in Section II.1, the neglect of distributional concerns is standard in economic analyses of competition policy issues. However, while it may be defended in circumstances where mainly domestic interests are involved, because of scope for domestic redistributional taxation schemes, etc, it may be less defensible when considering international competition policy issues.[97]

### III.2.a The possible costs of nationally pursued competition policy

Consider a situation where a "home" country is to make a decision between two competition policy decisions A and B, with implications for a foreign trading partner. Let A be the decision that maximises global welfare. If a national competition authority were to choose policy A, its choice would maximize total welfare of the two countries. There would then be no deviation from the socially desirable allocation of resources resulting from the policy intervention, despite the fact that it would be intended to serve the national interest only.

On the other hand, if the national competition authority were to choose policy B there would be a misallocation of resources from a global point of view – that is, there would be a *distortion*.[98] [99] If such distortions were empirically pervasive, they would provide a strong case in favour of enhanced international co-operation in respect of national competition policies.

There are two basic sources of international distortions from nationally pursued competition policies. The first stems from the fact that a country's competition policy affects *foreign consumers* but fails to take their interests into account. The most obvious case is that of an export cartel. Such co-operative behaviour between domestic firms may increase national welfare, precisely because it imposes a burden upon foreign consumers. Similar examples can be found in the case of mergers. Suppose two domestic firms in a country propose to merge. The merger will be approved by the welfare-maximizing competition authority, in the country concerned if the positive impact of the merger on the merging firms' profits is considered to outweigh its possible negative impact on the country's consumers. Assuming that this is the calculus of the competition authority, then no consideration is given to possible negative consequences of the merger for consumers in foreign countries, and the merger may be approved despite the fact that it reduces global welfare.[100]

The second reason why nationally pursued competition policy may give rise to distortions is the fact that it does not address the interests of *foreign producers*. For instance, a merger between two domestic firms may be approved because it shifts profits from foreign firms to the merging entities. Or predation affecting foreign firms may not be challenged, even though it would be, if it had been directed against domestic firms.

It is important to note that there may be competition policy decisions that adversely affect other countries, but which may still increase total world welfare (disregarding distributional aspects). In other words, there can be *negative spillovers from national competition policy that are not distortions*. For example, a merger between two home country firms that increases competitiveness may benefit the home country, but may at the same time be to the detriment of a foreign country through a reduction of the profits of firms in that country. Such a merger would be permitted by the home country when acting without any consideration of foreign interests, but may also be permitted when the home country is taking account of global welfare, if the foreign loss is more than offset by the domestic gain. Hence, decisions A and B are in this case the same, and there is *no* distortion in the sense of the term used in this Chapter. Put differently, the reason why there is no distortion in this case is that the decision to allow the merger not only increases the share of the "cake" that goes to the home country, but also positively influences its total size from a global perspective. This is not true in the case of export cartels, where the method of capturing a larger share of the cake – monopolistic pricing – reduces the total size of the "cake".

Two further observations concerning distortions can be made. First, even when national competition policy in a country seeks to maximize only consumer surplus, without any weight attached to domestic producer surplus, it may still have negative repercussions on foreign consumers. For instance, the merger discussed above may have beneficial consequences for consumers in the home country, and may thus be approved (even if producer surplus is not taken into account), despite its possible detrimental effects on foreign consumers.[101] If the gain for domestic consumers is dominated by the loss for foreign consumers, a distortion would then arise from the national competition policy. As a general proposition, however, it seems

[97] The assumption (apart from the analytical difficulties associated with the alternatives) is more defensible where countries are fairly symmetric, because what is lost in certain sectors due to an international agreement is more than compensated for in other sectors. This type of reasoning also underlies much of trade liberalization.

[98] The term "distortion" is here applied somewhat differently from how it is used in traditional trade theory. While in both cases referring to a misallocation of resources, in trade theory the term denotes a misallocation from the point of view of the welfare of an individual country, whereas here the focus is on global welfare. The size of this distortion can be measured as the difference between the global welfare levels with policy A and with policy B.

[99] In many situations, competition policy decisions are of binary nature such as the choice whether to allow or contest some business practice. The presentation in this section for simplicity deals with such cases. In other cases, there are more policy choices. For instance, consider a situation with three possible choices A, B, and C, and let A continue to be the choice which maximizes global welfare. Both B and C would thus imply distortions relative to A.

[100] Similar conflicts may also arise in cases involving business practices that would legally fall under the heading of abuse of dominant position, and that would also from an economic point of view be considered anti-competitive. For instance, a country's welfare may be higher if it permits a firm with a monopoly position in both home and foreign markets to price discriminate, while taking into account foreign consumers may instead result in a decision to prohibit price discrimination. The same type of distortion may also arise from the competition policy treatment of other forms of business practices.

[101] Such a case may arise when the competition policy influences the choice of location of production. Consumers residing in the market where the firm is located may benefit from lower prices due to lower trade costs, adaption of products to local standards, etc.

likely that negative consequences for foreign consumers are in general smaller, the more the emphasis there is on maximization of consumer welfare, as opposed to producer interests.

A second observation is that competition policy distortions might arise in the home market of the country pursuing the policy as well as in its export markets. An export cartel causes distortions that are experienced in foreign markets, while the opposite situation arises in the case where domestic firms are allowed to foreclose foreign firms' access to the domestic market. From an economic perspective, there is no distinction between these two types of situation when the distortions affect the foreign country. But the situations differ from a legal point of view – when the distortions arise in the domestic market, the competition authority of the foreign country may be unable to intervene, whereas it might be required to do so when the restrictive practice takes effect in the foreign country.

### III.2.b Distortions as a motive for international co-operation on competition policy

Several proposals for international agreements have recently been put forward that intend to address competition policy issues at the international level. One purpose of these proposals is to limit the negative consequences for trading partners of competition policies that are pursued for the national interest. The point of the analysis above has been to illuminate the consequences of such competition policies. This section considers the extent to which negative spillovers of national competition policy provide a case for international co-operation that seeks to increase total welfare by limiting such spillovers. Again, however, it must be emphasized that this line of argument is abstracting from distributional questions, which may well entice governments to seek mutual accommodation through some kind of co-operative arrangement, independently of the overall welfare implications.

In principle, *all* of a country's competition policy interventions are bound to affect *all* other countries, wherever in the economy they take place. To take an extreme but illustrative example, suppose a country intervenes via competition policy in a sector in which there is no international trade, in which there is no FDI, and in which there are no imported inputs, so that the intervention does not have a direct impact on firms from other countries. A competition policy intervention in this sector would nevertheless have indirect implications for this country's trading partners. For instance, the intervention would affect sales in the sector, and thus the sector's demand for factors of production. This would influence factor prices in general, and thus also the cost conditions in the tradable sector. As a result, the competition policy intervention would affect the trading partners of the country, despite the fact that it took place in the non-tradable sector. This would in turn change the conditions under which these partners trade with third countries, and so on. In practice, of course, most of these effects will be very small or in any case almost impossible to quantify. However, the point of the example is to illustrate the fact that the question is not *whether* competition policy affects other countries, since it always does, but instead whether these spillovers motivate governments to explore the possibility of international cooperative action.

On the basis of the assumptions and arguments spelled out above concerning the possibility that national welfare has been enhanced at the expense of foreign welfare, but without any reduction in global welfare, the foreign welfare loss would not, in and of itself, make the case for international co-operation in competition law enforcement. It must also be the case that at least some country's competition policy decisions reduces total welfare. That is, there must be some *distortions* present. This conclusion, of course, sets aside any consideration of the distributional aspects of competition policy interventions – a consideration that may well influence the manner in which governments choose to act. As was emphasized in Section II, competition policy inherently involves trade-offs between different interests. Such trade-offs would exist even if competition policy were pursued by a competition authority that maximized *global* welfare. The decisions by such an authority would often imply gains for parties residing in some countries, at the expense of parties in other countries, even though the total gains would exceed the total losses. Differently put, some decisions made in order to maximize national welfare will also maximize overall welfare.

The definition of a distortion discussed so far has only looked at a single country's policy in isolation. In an international setting encompassing an international agreement of some kind, the focus would be upon all participating countries' policies. The consequences of these policies are in the simplest cases independent of each other. For instance, if there are two countries that each allow for an export cartel in the other country's home market, then the negative impact on world welfare from one country's decision is independent of the other country's decision. Clearly, in this case the existence of distortions would provide an economic rationale for an agreement.

The export cartels case represents an example of a "Prisoners' Dilemma" situation.[102] There are two essential features of the Prisoners' Dilemma situation when applied to competition policy. First, regardless of whether one country chooses a beggar-thy-neighbour competition policy or a more "co-operative" policy, the other country is always better off pursuing a beggar-thy-neighbour policy. As a result, both countries will choose this type of policy. Secondly, the resulting welfare level for each country is lower than it would be if the two countries instead behaved co-operatively. The dilemma hence lies in the fact that countries have a common interest in curbing "strategic" competition policies, but nevertheless prefer to pursue such policies, regardless of the policy pursued by the other country.[103] The role that an international agreement on competition policy might play under

[102]The Prisoners' Dilemma is a game-theoretic representation of situations in which decision makers abstain from making choices that are mutually beneficial in order to make gains at the expense of others, and as a result end up with an unfavourable outcome. Cast in its original setting, it portrays two persons that are arrested by the police on suspicion of being thieves. Since they are kept in different cells, they cannot communicate. Each faces the choice of either confessing or pleading not guilty. If neither confesses, they will go free, which is a good outcome for the two. However, if one of them confesses while the other claims not to have been stealing, the one who confesses goes free and in addition gets a reward, while the other prisoner receives a longer sentence than if they were both to confess. The distinguishing feature of this game is that it is better to confess, regardless of what the other prisoner does. As a result, they both end up in jail, despite the fact that if they both did not confess, they would both go free. This simple game has innumerable applications to social interactions. For instance, it is often used as a description of trade policies in the absence of international agreements; each country may have an incentive to behave in a beggar-thy-neighbour fashion regardless of what other countries do. As a result, the world trading system ends up in an undesirable situation which could have been attenuated by an international agreement.

[103]The term "strategic" is here employed to denote competition policy that seeks to affect the strategic interactions between firms in international markets, similarly to the way it is used in the case of "strategic trade policy.

**Box IV.4: Spillovers, distortions and the gains from an international agreement on competition policy**

Assume there are two countries that both produce and consume a product, Home and Foreign. There are initially two firms in each economy in this industry. The two home country firms and the two foreign firms are proposing to merge. Each merger would reduce the firms' production costs because of synergies between the merging firms. The countries may choose to allow or contest the merger between the domestic firms, but they cannot challenge the merger in the other country. There are then four possible outcomes: where neither country allows the merger; where one of the two countries but not the other allows the merger to go through; and where both countries allow the respective mergers.
The two rows represent the two possible choices for the home country, and the two columns those of the foreign country. Each of the four entries in the table represent one possible outcome. The first number in each entry is the home country welfare, and the second number the foreign country welfare, for this particular policy outcome.

*A Prisoners' Dilemma as a motive for international co-operation*

Consider first the case where an approval of both mergers would lead to collusion between the resulting two firms. The (monetary equivalent of the) contribution to national welfare for the four different policy outcomes are as follows:

Table 1

| | | *Foreign* | |
|---|---|---|---|
| | | Contest | Allow |
| *Home* | Contest | 100\100 | 50\120 |
| | Allow | 120\50 | 75\75 |

The two rows represent the two possible choices for the home country, and the two columns those of the foreign country. Each of the four entries in the table represent one possible outcome. The first number in each entry is the home country welfare, and the second number the foreign country welfare, for this particular policy outcome.
This table depicts a classical Prisoners' Dilemma situation. For instance, consider the decision problem from the point of view of the home country: if the other country does not allow the foreign merger, then it is better for the home country to allow a merger, since this results in a welfare level of $120 m rather than $100 m. Likewise, if the foreign country does allow the foreign merger, it will still be better for the home country to allow a merger and obtain $75 m, rather than not to approve the merger and receive a welfare level corresponding to an income of $50 m. Hence, allowing the merger is a dominant strategy for the home country, and also for the foreign country, since its situation is symmetric. Secondly, the resulting welfare for each of the countries – $75 m – is lower than the $100 m that the countries could achieve if both blocked their domestic merger. An important feature of this example is the assumption that allowing a second merger reduces total welfare, from $170 m ($120 m + $50 m) to $150 m ($75 m + $75 m). This reduction in aggregate welfare was motivated by the assumption that two firms can more easily collude and monopolize the market than can three firms.

*A potentially distortionary situation with no gains from international co-operation*

Now consider an alternative situation where the two firms do not collude. Let the welfare level of each country now be $110 m if both allow their respective merger, as illustrated in Table 2:

Table 2

| | | *Foreign* | |
|---|---|---|---|
| | | Contest | Allow |
| *Home* | Contest | 100\100 | 50\120 |
| | Allow | 120\50 | 110\110 |

It can easily be demonstrated that the outcome is still that both countries choose to allow their respective merger. But note that there is no dilemma in this case – the countries prefer this outcome to the one where both do not allow for mergers, because of the cost-reducing effect of the mergers ($110 m + $110 m > $100 m + $100 m).
However, there are still some distortions in this case, in the following sense: whenever the foreign (home) country chooses not to allow its merger, it will be better for the home (foreign) country to allow a merger, even if this reduces total welfare. The point of this example is to illustrate the fact that the existence of distortions is not a sufficient condition for a dilemma to arise.

*A situation with negative spillovers but no distortions, and no gains from international co-operation*

A third possibility is that there are no distortions at all, but countries still choose the policies associated with negative spillovers, as is illustrated

Table 3

| | | *Foreign* | |
|---|---|---|---|
| | | Contest | Allow |
| *Home* | Contest | 100\100 | 50\120 |
| | Allow | 120\90 | 110\110 |

Here the interaction between both countries' policies implies that both countries allow their respective merger. This is the most preferred outcome from a global perspective, with a total surplus of $220 m, instead of $210 m or $200 m, which are the other possibilities.

such circumstances is to change the costs and benefits associated with the different outcomes for each participant, in order to circumscribe the scope for pursuing a beggar-thy-neighbor approach to competition policy.

It may also be the case that countries' decisions affect the same industries. In this case, one has to take into account the *combined* impact of these policies. If two distortions reinforce each other, the argument for international co-operation is even stronger than when the effects appear in different sectors. But, it is also possible (at least in principle) that they more or less counteract each other. In this case, international co-operation may not be warranted within the present theoretical framework despite the fact that there are some distortions. Box IV.4 contains numerical examples illustrating this possibility and a Prisoners' Dilemma situation.

What empirical evidence exists concerning the prevalence and magnitudes of distortions in practice? Unfortunately, the literature has very little to contribute in this respect. There are many studies that try to assess the dead-weight losses from imperfect competition in general. But there are no systematic studies of the magnitudes or prevalence of actual distortions. It is clear that such studies would be beset with a large number of difficult conceptual and practical problems. One observation that does suggest the possibility that actual competition policy interactions sometimes have features of a Prisoners' Dilemma situation, however, is the fact that countries take unilateral measures, and/or form international agreements, that seem intended to deal directly with these problems.

## III.3 Concluding remarks

It is an obvious observation that unregulated national trade policies typically seek to benefit certain interest groups at the expense of other interest groups, domestic as well as foreign. This feature is a prime rationale for the various WTO Agreements. The purpose of this Section has been to explore the possible problems that the pursuit of national competition policies may give rise to in international markets and to investigate whether the logic which applies in the trade policy area also applies to nationally pursued competition policies. Competition policy interventions in non-tradable sectors typically benefit certain domestic interest groups to the detriment of other domestic groups. The interventions may nevertheless be justified in that they enhance the economic efficiency of resource allocation. The same type of conflicts also arise in tradable sectors, and interventions may still be justified on efficiency grounds. Hence, the mere fact that a national competition policy decision negatively affects a foreign country does not in itself make it unwarranted from a world efficiency point of view. In order for the competition policy to be undesirable in this sense, it must involve a distortion, that is the negative consequences for foreign interests must exceed the benefits to domestic agents. Only then does the national competition policy give rise to an inefficient allocation of resources from a global point of view. In such cases there may, but need not, be scope for international co-operation on competition policy that enhances world welfare. The analytical framework from which this conclusion is derived does not take in consideration the implications of income distribution effects occurring across jurisdictions as a result of competition policy interventions.

More specifically, the main observations in this section can be summarized as follows:

- Trade liberalization tends to increase competition. However, even with extensive liberalization and free factor movements there will be a need for competition policy.
- From an economic point of view, any stance on competition law or enforcement, including the decision not to have a competition law at all, or not to enforce the existing law, is a choice of competition policy. Consequently, it is not always possible to make a useful distinction between government and private restraints, in particular since private restraints require implicit or explicit consent by governments.
- In theory, it is almost impossible to conceive of situations where the competition policy choice of one country does not affect other countries, and it is also easy to point to many instances where such spillovers also exist in practice.
- Negative spillovers from one country to another arising from the application of competition policy do not necessarily imply a reduction of global welfare. A reduction of the latter occurs when negative spillovers also entail distortions. These relationships are relevant in considering the nature of international co-operation in the field of competition policy. Another relevant consideration is the distributional consequences of competition policy interventions.
- There is a lack of empirical work that systematically measures the magnitude and prevalence of these distortions.

# IV. Issues in international trade relations with a competition policy dimension

This section discusses a number of areas where enterprise behaviour has been perceived to give rise to problems in international trade relations and the responses of governments to such behaviour. The aim is to identify the issues, to set out the role that competition law plays in remedying any adverse consequences for trade and the factors which may limit that role, and to indicate the way such matters are dealt with (if they are) in the WTO framework.

These issues are discussed under four subheadings:

- Market access for imports. This looks in turn at the implications of vertical market restraints, import cartels and private standard-setting activities, and state trading, exclusive or special privileges and monopolies.
- Exercising market power in export markets. This subsection looks in turn at export cartels and related arrangements, international cartels, mergers and abuses of dominant positions and predatory pricing and price discrimination.
- Foreign investment.
- Intellectual property rights.

The section concludes by examining, on the basis of the discussion of the specific issues, a number of general factors influencing the extent to which competition law can remedy the problems for international trade identified.

## IV.1 Market access for imports

### IV.1.a Vertical market restraints

Vertical market restraints (i.e. contractual arrangements that link firms at successive levels of a product distribution chain) may have adverse effects on market access. Typically, such trade concerns have arisen in circumstances where vertical restraints prevent foreign firms from having access to distribution networks that are controlled by domestic suppliers. A range of practices are at issue including exclusive dealing requirements that prevent distributors from marketing competitors' products, tied selling that makes the purchase of one product of a given

brand conditional on purchasing another product of the same brand, loyalty or sales rebates that provide a financial incentive not to distribute products of competitors, exclusive territories that prevent distributors from selling outside a certain geographical area, and distributor boycotts that may be employed to enforce vertical restraints.

A number of trade disputes relating to vertical restraints have surfaced in the GATT/WTO, notwithstanding the limited provisions of the GATT/WTO relating to these matters. The best known is the dispute between Japan and the United States relating to consumer photographic film and paper, which, in addition to issues concerning business practices, involves related governmental measures (for further details see Box IV.5 on US-Japan Disputes on Consumer Photographic Film and Paper).[104]

As noted in Part II, in those countries with modern competition laws, non-price vertical market restraints are subject to case-by-case or "rule of reason" treatment under competition law, rather than being prohibited *per se*. This reflects the fact that such restraints can enhance efficiency in various ways, for example by reducing transaction costs and free-riding, and are unlikely to limit competition when entered into by firms that do not enjoy a dominant position. In most jurisdictions, vertical restraints by a dominant firm that foreclose access to a distribution network would be actionable where no alternative to the foreclosed distribution channels exists; but, even here, much will depend on the existence of legitimate efficiency considerations, the definition of the relevant market, and the time, costs and barriers involved in establishing a parallel distribution system.[105]

While, in principle, the application of competition law may generally be able to tackle market access problems for foreign supplies and suppliers resulting from exclusionary effects of vertical restraints in the jurisdiction in question, a number of factors need to be analyzed to assess the extent to which such trade problems will be resolved in practice:

- One is the general issue of whether a competition law exists and, where it does, whether it is actually applicable or applied, especially where foreign rather than domestic producer interests are perceived to be adversely affected. These issues are discussed in greater detail in Subsection 5 below.
- There is also an issue as to whether the criteria commonly employed by competition authorities in "rule of reason" cases may make relief more difficult to obtain in cases involving foreclosure of access for foreign supplies and suppliers. In some countries, criteria such as equity or fairness, the protection of small and medium-sized enterprises, or effects on employment or domestic industry may play a role. But even where pure "competition" criteria are employed, involving an assessment of the efficiency and welfare effects, obtaining relief may be difficult. This is because, in weighing costs and benefits under the rule-of-reason, enforcement actions relating to vertical restraints may not take into account the adverse effects of such restraints on foreign producers.
- The question has also been raised as to whether the proper and efficient application of purely "neutral" competition law criteria (in terms of weighing domestic and foreign consequences of business practices) would resolve all legitimate trade problems associated with vertical restraints. Some observers have suggested that, even where sufficient competition is already provided by multiple domestic suppliers in a market, each of which has vertical exclusionary arrangements with its distributors, this may tend to foreclose access to foreign supplies and suppliers (as well as to new domestic entrants), or at least make entry very costly (because of the need to establish a new distribution network). An example might be an automobile market dominated by a handful of competing domestic suppliers, each one of which has an exclusive dealer network.[106] [107] The question is whether this constitutes a market access problem that deserves a remedy.

Vertical restraints, such as exclusive dealership arrangements, may, as stated earlier, be justified by efficiency considerations; in some cases, these may be of particular value to new entrants, including those dealing in foreign goods and services, and facilitate market access. Therefore, a further point that may merit analysis is whether, for the reasons indicated in the first and second indents above (e.g. discretion in taking action, inattention to efficiency benefits accruing outside the borders), there may be a risk in some jurisdictions of national competition law being applied in a way which would discriminate against vertical restraints entered into by suppliers from abroad compared to domestic ones.

There are no provisions in the WTO which put specific obligations on Members to take action against vertical restraints restricting or impeding international trade. The consultation and co-operation procedures of the 1960 GATT Understanding, of the GATS and of the TRIPS Agreement could be invoked in their respective areas. The other major WTO provisions of possible relevance are the general non-discrimination, transparency and, nullification and impairment rules which are discussed in Section V.1 of this Chapter.

[104]Another example related to the sheet steel loyalty rebate scheme of the British Steel Corporation. In 1967, a GATT working party was established to conduct consultations under Article XXII:2 of the GATT (which provides for multilateral consultations in respect of any matter on which it has not been possible to reach a mutually satisfactory outcome through bilateral means) on behalf of the CONTRACTING PARTIES on this matter (document L/2958). The GATT provision at issue was Article XVII, the British Steel Corporation being, at that time, a state enterprise. Subsequently the United Kingdom delegation informed the GATT that the loyalty rebate scheme had become non-operative as from 14June 1969 and the working party was terminated (document L/3271). The disputes between the United States and Japan relating to semi-conductor chips in the 1980s and imports of automobiles and automobile parts in 1995, in respect of aspects of which the GATT/WTO dispute settlement mechanism was invoked, included issues relating to alleged market foreclosure resulting from vertical restraints.

[105]For useful elaboration, see Comanor and Rey (1997).

[106]See Janow (1996).

[107]In this regard, it might be noted that the European Community has adopted a policy toward vertical market restraints focused more on the goal of ensuring that such restraints do not constrain the free flow of goods and services, while giving less weight to potential efficiency benefits that the use of vertical restraints may entail. Under this approach, vertical restraints, and particularly restraints that involve territorial market limitations, are generally condemned unless they meet specific requirements that are set out in relevant block exemptions. This approach reflects the high importance attached in the competition policy of the Communities to the goal of market integration. It is worth noting, however, that this approach has been criticized and that recently the EC Commission has issued a Green Paper which raises the possibility of the moving toward a somewhat more permissive stance toward vertical market restraints. EC Commission (1996b).

**Box IV.5: US/Japan – Disputes relating to consumer photographic film and paper**

As they have manifested themselves in the WTO, the differences between the United States and Japan relating to consumer photographic film and paper have four components – the United States invocation of the WTO Dispute Settlement Understanding (DSU) against Japanese Government measures affecting trade in goods and services and the United States and Japanese invocation of the 1960 GATT Understanding in regard to alleged restrictive business practices.

Specifically, in June 1996, the United States invoked the following WTO procedures with respect to Japanese measures affecting consumer photographic film and paper:

- A request for consultations with Japan under the DSU concerning Japan's laws, regulations and requirements affecting the distribution and sale of imported consumer photographic film and paper. In September 1996, the United States requested the establishment of a panel, alleging that a number of Japanese Government measures relating to, *inter alia*, distribution and business practices were inconsistent with Article III (national treatment in respect of internal measures) and Article X (transparency) of the GATT. The United States also made a claim of "non-violation" nullification and impairment. The panel was established in December 1996.[a]
- At the same time and supplemented by a further request in September 1996, the United States requested consultations under the DSU with respect to a number of measures affecting distribution services (in this case not limited to consumer photographic film and paper). The United States alleged breach of Articles III, VI, XVI and XVII of the GATS. The United States also made a claim of "non-violation" nullification and impairment.[b]
- The United States requested consultations with Japan under the GATT 1994 in accordance with the 1960 Decision of the GATT CONTRACTING PARTIES in respect of business practices in Japan that restrict competition in international trade for consumer photographic film and paper by adversely affecting the channels of distribution and limiting price competition in the Japanese market.[c]

In October 1996, Japan requested consultations with the United States pursuant to the 1960 Decision on "Restrictive Business Practices: Arrangements for Consultations" in regard to certain business practices in the United States market that restrict and adversely affect competition in international trade of consumer photographic film and paper.[d]

[a] Documents WT/DS44/1-3.

[b] Documents WT/DS45/1 and Add.1.

[c] Document WT/L/154. A similar request for consultations was made by the European Community in July 1996 (document WT/L/158).

[d] Document WT/L/180.

It is also important to note that the extent to which vertical restraints may in practice foreclose market access for foreign supplies or suppliers is heavily influenced by governmental measures which govern the ease or difficulty of establishing alternative distribution channels. In this regard, commitments under the GATS relating to the establishment by foreign companies of a local commercial presence and the removal of quantitative limitations on competition allowed in the market, in addition to competition advocacy by enforcement agencies, can play an important role in reducing or eliminating such governmental constraints.

### IV.1.b Import cartels and related issues

Import cartels formed by domestic importers or buyers and similar measures (such boycotts of, or collective refusals to deal with, foreign competitors) are of obvious concern from a market access perspective. Related issues are exclusions of foreign competitors from, or discriminatory terms of membership of, trade associations and, in particular, the exclusionary use of standards-setting by such associations.[108] "Hard core" cartels such as price fixing, output restraints, market division and customer allocation are normally prohibited outright under competition law, although not always unambiguously (in some jurisdictions, they may be permitted if importers are faced with dominating foreign suppliers and competition on domestic markets is not held to be substantially restrained).[109] Other co-operative arrangements among competitors, such as in standard-setting and joint-purchasing, are often subject to a "rule-of-reason" analysis.

Import cartels whose function is solely to attempt to exercise monopsony power in order to get a better price from foreign suppliers may be viewed more favourably from a national efficiency and welfare perspective than cartels which also exercise market power within the country on the selling side or which seek to exclude foreign suppliers by operating a collective

[108] The importance of competition policy disciplines on standard setting organizations and their relevance to trade policy concerns is illustrated by two US antitrust cases from the 1970s. In *US v. The American Society of Mechanical Engineers, Inc.* the US Department of Justice (DOJ) filed a complaint against the American Society of Mechanical Engineers (ASME) and the National Board of Boiler and Pressure Vessel Inspectors (Board). The DOJ alleged that since at least as early as 1949, a conspiracy involving the ASME and Board had reduced product options for United States purchasers, restricted imports into the US market, and generally restrained competition in the United States. The case was settled by a consent decree issued in 1972 whereby ASME and the Board were "enjoined and restrained from directly or indirectly treating foreign manufacturers or foreign-made boilers or pressure vessels differently from domestic manufacturers ... with respect to issuance of stamps [and other matters]." (1972 Trade cas. (CCH) para. 74,028.)

Another consent decree settled a civil complaint filed by the DOJ against the Material Handling Institute (MHI) and several affiliated trade associations, all representing firms selling material handling equipment. The DOJ's complaint asserted that the trade associations had agreed to restrict the production of material handling equipment in locations outside of the United States and the sale of foreign-made equipment to domestic United States customers. The consent judgement entered by the court obliged defendants to terminate all membership eligibility restrictions regarding foreign product origin or content. (1973-1 Trade Cas. (CCH) para. 74,362.)

[109] For example, in Canada, the European Community and the United States, domestic import cartels are covered (assuming that they have, respectively, the requisite effect on competition in Canada, trade between EU member states, or an actual and intended effect on the United States import or domestic commerce). In the United Kingdom, competition laws ordinarily will apply, although particular requirements (e.g. supply in the United Kingdom) may not be met in individual cases. Import cartels also are sometimes subject to special rules. In Germany, import cartels may be authorized if the importers are faced with market-dominating foreign suppliers and if domestic competition is not substantially restrained. See OECD (1996d).

boycott.[110] The latter types of horizontal restraint are likely to fall foul of competition law, where it is enforced, while the former may be tolerated to the extent that they are subject to a rule-of-reason test, notwithstanding their effects on trading partners.

An issue that has arisen in international trade relations has concerned the effectiveness of enforcement by importing countries of their competition laws in respect of such practices, particularly where import-buying cartels or oligopolies are perceived as restricting access to the importing market.[111] These general issues are discussed in Subsection 5 below. In the early 1990s, concern about inadequate domestic enforcement of competition law against import cartels in markets for United States' exports prompted a revision of US guidelines regarding international enforcement, to permit application of the United States antitrust laws to foreign-based activities such as import cartels that restrict United States producers' access to foreign markets.[112] This represented a return to the enforcement stance prevailing prior to the 1980s, when the US antitrust laws were used to attack foreign arrangements that were perceived as impeding US firms' access to foreign markets. [113] To date, however, the newly re-asserted US antitrust jurisdiction over practices affecting US producers in export markets has not been employed in particular cases, perhaps reflecting difficulties of accessing necessary evidence and/or a continuing preference for enforcement by the responsible domestic authorities.

Apart from the 1960 GATT Understanding which recommends consultations and the provisions of the GATS and TRIPS Agreement which relate to co-operation in the enforcement of competition law, the major WTO provisions of possible relevance are the general national treatment, MFN, transparency and nullification and impairment provisions. These are discussed in greater detail in Section V.1 below. Moreover, existing WTO rules address in some detail the setting of technical standards, including by industry associations. The WTO Agreement on Technical Barriers to Trade is aimed at ensuring that technical regulations and standards, whether governmental or non-governmental, do not discriminate against imports of goods and are not such as to create unnecessary obstacles to trade. WTO Members are enjoined to take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies comply with the basic provisions of the Agreement as well as accept and comply with a Code of Good Practice for the preparation, adoption and application standards that is attached to the Agreement. Similar provisions can be found in the Agreement on the Application of Sanitary and Phytosanitary Measures.

[110]A distinction should be made between import boycotts which involve a collective refusal to deal by the companies in the relevant market and public campaigns to buy local or boycott the produce of certain countries where the degree of concerted action involved is unlikely to match the requirements for a horizontal restraint to be considered to exist under competition law. Competition law would usually be capable of remedying the former type of boycott, but is unlikely to be able to do so with respect to the latter type.

[111]Concerns about alleged import-deterring practices and the adequacy of competition law enforcement efforts were raised, for example, in the US-Japan Structural Impediments Initiative and Framework talks. See Helou (1990) and Bergsten and Noland (1993).

[112]See the United States, Department of Justice and Federal Trade Commission (1995).

[113]An example of such a case is Continental Ore Co v. Union Carbide & Carbon Corp., 370 US 690 (1962).

### IV.1.c State trading, exclusive or special privileges and monopolies

The impact that state trading enterprises, enterprises with exclusive or special rights and monopolies can have on market access for imports has been a matter of long standing concern in international trade relations. This is reflected, for example, in Article XVII:3 of the GATT which recognises that such enterprises might be operated so as to create serious obstacles to trade as well as in the provisions of Article VIII of the GATS.

As mentioned in the Introduction, the focus of this special Chapter is on the practices of enterprises, whether public or private, which may distort or restrict international trade. It thus might be useful to say a few words about why we are addressing issues that might appear to have more to do with state measures than enterprise behaviour. There are five points to be made. First, the area is one where international trade problems can arise from a lack of domestic competition. Second, it is an area which straddles the worlds of state measures and of enterprise behaviour; it is often difficult to tell whether restrictive effects on international trade, resulting from the conduct of these enterprises, are due to governmental measures of general application, government discretionary direction or the autonomous behaviour of the enterprises themselves. Third, competition laws address these issues to varying degrees. Fourth, the main approach taken in the WTO Agreement is to seek to regulate the market behaviour of such enterprises, through putting obligations on Member governments in this respect, irrespective of the determinants of that behaviour. Fifth, some of the relevant WTO rules apply to private monopolies as well as to those resulting from state action.

In international trade relations, three types of market access problems have been more particularly perceived to arise in connection with the operations of enterprises which enjoy monopolies or positions of market power on a national market:

- One concerns access to the market for goods and services that is the subject of a monopoly or special or exclusive privileges, whether in the area of services (e.g. basic telecommunications services) or in the area of goods (e.g. agricultural produce the import of which is controlled by state marketing boards, monopolies in such areas as alcohol and tobacco, and other state trading monopolies).

- A second issue has been the implications of monopolies or positions of market power for the ability of foreign goods, services or service suppliers to supply downstream markets, access to which depends on the use of facilities that are the subject of the monopoly or position of market power. This has been a prime consideration in the negotiations in the telecommunications sector.

- A third area of trade tension has been access to upstream markets for inputs, especially capital equipment, into the production of the goods and services by a dominant or privileged enterprise. The areas of power generation and telecommunications equipment are good examples.

Before discussing each of these in turn and the way they are addressed in trade, regulatory and competition law, a few general points about the WTO provisions relating to state enterprises, monopolies and enterprises granted special or exclusive rights should be made.

Only to the extent that an enterprise is insulated from competitive market disciplines and therefore enjoys market power is there likely to be scope for it to operate in such a way as to restrict market access for the goods and services of other countries. It is therefore not surprising that the rules of the GATT and the GATS pay special attention to import monopolies in the area of goods (GATT Article XVII:1(a) and 4(a) and (b), and

Article II:4) and monopoly service suppliers (GATS Article VIII:1-4) as well as to enterprises enjoying exclusive or special privileges (GATT Article XVII:1) or exclusive service suppliers substantially insulated from competition (GATS Article VIII:5).[114]

Another noteworthy feature of the WTO rules is that, while they are implicitly addressing situations where a government may be in a position to exercise discretionary control over the activities of an enterprise which may affect trade, the criterion of government control is not generally applicable to determine whether an enterprise is subject to the obligations. There is nothing in the rules to suggest that autonomous behaviour by enterprises in a manner contrary to the standards set out in the relevant WTO provisions would escape the scope of the obligations accepted by Members in those provisions.[115]

### Access to the market that is the subject of the monopoly or position of market power

The GATT 1994 allows Members to maintain import monopolies. Indeed, it provides a "General Exception" from other obligations for "measures necessary to secure the enforcement" of such monopolies.[116] Rather than require the existence of the monopoly or special or exclusive privileges to be an object of negotiation and rules, the approach in the GATT has been to encourage negotiations[117] and establish rules about the competitive relationship between imports and domestically produced products that should be reflected in the market behaviour of the monopolies or privileged enterprises themselves. Thus, state import monopolies must not operate so as to afford protection in excess of the bound tariff rate.[118] State enterprises and enterprises which enjoy special or exclusive privileges must not discriminate in their decisions on imports on the basis of the country of origin of the goods but make decisions on the basis of commercial considerations.[119] State trading operations must not be used to give effect to import restrictions inconsistent with the general rules of the GATT 1994 on such measures.[120] The right to maintain an import monopoly does not entail the right to discriminate against the internal distribution of imported products.[121]

However, this emphasis on enterprise behaviour carries with it a weakness that has been widely perceived in the GATT rules as they apply to state enterprises and enterprises granted exclusive or special privileges, namely that of monitoring and enforcement – how to ensure that government discretionary control or the autonomous interests of such enterprises does not lead, in practice, to the acts referred to in the previous paragraph, when what has to be monitored is the behaviour of enterprises, not government rules of general application. To attempt to address this problem, considerable emphasis has been put on transparency, the notification of information about the operations of such enterprises.[122] However, the transparency arrangements have not worked well, as is reflected in the fact that the Uruguay Round Understanding seeks to remedy this by establishing a working group to review not only the notifications but also the questionnaire itself.[123] But even if more adequate information on the operation of such enterprises were to be available, it remains a question as to whether that in itself would be sufficient to enable a ready determination of whether decisions affecting imports reflected some degree of discrimination, especially in less homogeneous product areas.

Most concessions relating to the operation of state trading enterprises negotiated under the GATT have taken the form of tariff bindings[124], although the possibility of other forms of commitment is explicitly recognized in Articles XVII:3 and II:4. While, as mentioned earlier, the GATT does not require the existence of import monopolies or exclusive or special rights to be up for negotiation, there is nothing that prevents this and it is noteworthy that, in the context of recent accession negotiations, especially with formerly state trading countries, commitments have been sought not just on the behaviour of enterprises granted exclusive rights over imports but on the existence of such rights – the market structure itself (the issue has become referred to as that of "trading rights").

The approach in the GATS to the trade effects of monopolies and enterprises with exclusive rights is in some ways similar to that as in the GATT. The basic obligation is to ensure that the enterprise does not behave in a way that would impair the competitive relationship between domestic services and service suppliers and those of other WTO Members that is established by the MFN obligation and the specific commitments of the Member.[125] However, an important difference compared to the GATT is that the structure of the GATS as an agreement covering the supply of services through the commercial presence of foreign service suppliers (i.e. through foreign investment) as well as through the transborder supply of a service means that, in relation to markets that are the subject of monopolies and exclusive rights, the GATS explicitly provides for negotiations and commitments on market entry and thus on the monopolies or exclusive rights themselves. Indeed, the right of foreign service suppliers to establish in markets which are the subject of monopolies or exclusive rights has been a major issue of negotiation and area of commitment, especially in the field of telecommunications. In this regard, the GATS provides not only for commitments on according national treatment to foreign suppliers in respect of measures affecting their commercial

[114]The rules of Article XVII of the GATT also apply to state enterprises even if they operate in a competitive environment and thus could be expected to have little scope not to behave in the same way as private enterprises operating in such an environment. In this regard, it is noteworthy that the more recently negotiated GATS does not have a similar provision and that, in the WTO Understanding on Article XVII of the GATT, the "de-emphasis" on such enterprises is implicit in the fact that the "working definition" for transparency purposes of the enterprises to be covered only covers enterprises, governmental and non-governmental, that have been granted exclusive or special rights or privileges. (Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, paragraph1.)

[115]An exception is the note to Article XVII:1(a) of the GATT stating that "privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute 'exclusive or special privileges'".

[116]Article XX(d).

[117]Article XVII:3.

[118]Article II:4.

[119]Article XVII:1.

[120]Note to Articles XI, XII, XIII, XIV and XVIII.

[121]Panel Report on "Canada – Import, distribution and sale of certain alcoholic drinks by provincial marketing agencies", DS17/R, adopted on 18 February 1992, paragraph 5.15.

[122]See Article XVII:4, the 1960 Questionnaire (BISD, 95/184) and the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 that forms part of Annex 1A of the WTO Agreement.

[123]Ibid.

[124]This is all the more so since the WTO Agreement on Agriculture has required the tariffication of non-tariff measures including those maintained through state trading enterprises.

[125]GATT Article VIII:1 and 5.

presence[126], but also for "market access" commitments in regard to special or exclusive rights that take the form of quantitative limitations on market entry, whether or not such limitations discriminate against foreign services or suppliers.[127]

As regards competition law, its applicability to, and actual enforcement against, trade-restrictive or distortive behaviour of enterprises which have been accorded state monopolies or exclusive rights, is often constrained. This is because the sectors in question are often excluded from the jurisdiction of competition law (see discussion and Table IV.2 in Part II), or because of "state action" or similar legal defences of a general nature which provide immunity. While competition offices can play an important advocacy role in these respects, it is not surprising that states often do not provide for national competition law to negate other deliberate acts of the same state. Even where they do, enforcement action may be limited.

However, there are some exceptions. A far-reaching example is that of the European Community, the law of which applies both to the measures of its member governments governing their state enterprises and enterprises with special or exclusive rights as well as to the behaviour in the market of these enterprises. This is of particular interest from the perspective of the multilateral trading system in that it constitutes public international law heavily motivated by the objective of removing obstacles to trade.[128] Under these provisions, the Community has made considerable strides to open up previously closed sectors to competition and, where this has not been considered possible or desirable, to regulate in order to avoid restrictions on intra-Community trade. The main provisions in question are:

- Member States are required not to enact measures that would enable private enterprises to escape the constraints of the EC competition rules.[129]

- In the area of trade in goods, Articles 30 and 37 of the EC Treaty have been employed with respect to state monopolies of a commercial character to ensure the elimination of measures having equivalent effect to a quantitative restriction and the avoidance of discrimination between nationals of EC member States. In particular, Article 37 has been interpreted as requiring the adjustment of commercial monopolies so as to eliminate any exclusive import rights.[130]

- In respect of state enterprises or enterprises with special or exclusive rights, Article 90 of the EC Treaty requires state measures not to be inconsistent with the other rules of the Treaty including those on competition and on the free movement of goods and services.[131] The Commission has taken action under this Article not only to regulate the behaviour of enterprises enjoying special or exclusive rights but also to require the removal of exclusive rights, notably in the telecommunications sector.[132] The European Court has upheld this, ruling that while the mere creation of a dominant position by the grant of an exclusive right was not as such incompatible with Article 86 of the EC Treaty, a member State would be in contravention of Articles 86 and 90 if, in merely exercising the exclusive right, the enterprise in question could not avoid abusing its dominant position.[133]

As regards private monopolies or positions of dominance, competition law generally seeks to prevent abusive behaviour rather than to remedy any imperfection in the market structure. In the first half of the 20th century, structural demonopolization was extensively employed in the United States, but this approach has been used much more selectively since then. The major recent example of such far-reaching structural intervention is the consent decree of 1982 relating to AT&T (subsequently superseded, in part, by the 1996 Telecommunications Act), which concerned a partly regulated industry. The changes brought about in the AT&T case played a critical role in establishing the basis for the subsequent growth of competition and innovation in the US telecommunications sector.[134]

### Access to downstream markets

As mentioned earlier, an issue that has arisen in international trade relations relating to the market access implications of

[126]GATS Article XVII.

[127]For example, on the number of authorized service suppliers, on the total value of service transactions, operations, output, or assets allowed, on the number of employees, or in the form of an economic needs test (GATS ArticleXVI).

[128]Albeit only among EC member States (now extended to members of the European Economic Area). Of course, it cannot be assumed that the degree of political commitment that these rules reflect can be replicated at the multilateral level.

[129]This results from a combination of what is now Article 3(g), which defines as one of the fundamental tasks of the Community the establishment of "a system ensuring that competition in the internal market is not distorted", the requirement in Article 5 of the Treaty on member States to refrain from any measure that would jeopardize the attainment of the objectives of the Treaty and the provisions on competition in Articles 85 and 86 (see NV GB-Inno-BM v. ATAB, Case 13/77, [1977] ECR 2115). In its case law on this question, the European Court of Justice has identified three situations in which conduct of member States is in breach of the competition rules: (1) member States impose or favour the adoption of anti-competitive agreements, decisions or concerted practices; (2) member States reinforce the effects of existing anti-competitive agreements, decisions or concerted practices; or (3) member States entrust undertakings with the power of a public authority thereby depriving legislation of its state character (see, e.g., Van Eycke v. ASPA, Case 267/86, [1988] ECR 4786; Re Meng, Case C-2/91, [1993] ECR I-5751; Re Ohra Schadeverzekeringen NV, Case C-245/91, [1993] ECR I-5851; Delta Schiffahrts – und Speditionsgesellschaft, Case C-153/93, [1994] ECR I-2517).

[130]Pubblico Ministero v. Flavia Manghera and Others, Case 59/75 [1976] ECR 91.

[131]This is subject to an exception in Article 90(2) which mainly concerns situations where application of these rules would obstruct the operation of services of general economic interest entrusted to those enterprises (such as supply of a universal service at affordable prices), but is subject to the proviso that the development of trade should not be affected to an extent contrary to the interests of the Community. The European Court has interpreted this exception narrowly, for example in Procureur du Roi v. Corbeau, Case C-320/91, [1993] ECR I-2533.

[132]Commission Directive 88/301/EEC of 16May 1988 on competition in the markets in telecommunications terminal equipment (OJ L 131, 27.5.1988); Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990); and Commission Directive 96/19 of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. The latter Directive requires the complete liberalization of voice telephony and telecommunication infrastructures from 1 January 1998. It should be noted that these Directives not only treat the granting of exclusive rights as inconsistent with Article 90 in conjunction with Article 86 but also treat the granting of exclusive or special rights as inconsistent with Article 90 in conjunction with Article 59 of the EC Treaty (freedom to provide cross-border services).

[133]Kingdom of Spain and Others v. Commission of the European Communities, Joined Cases C-271/90, C-281/90 and C-289/90, [1992] ECR I-5833.

[134]See Crandall (1991).

enterprises that enjoy monopolies or positions of market power has related to the ability of foreign goods, services or service suppliers to supply downstream markets, access to which depends on the use of facilities controlled by the enterprise with a dominant position. That enterprise may seek to use that position to give itself a competitive advantage over other suppliers in these downstream markets. This has been a particularly important consideration in the area of telecommunications, where national networks often are still controlled by a major supplier and constitute an essential facility for competitors to provide such downstream services. But it may be of importance in a range of industries and service activities, notably the so-called "network" industries (e.g. gas, electricity, water and transport).

The potential problems of market access for downstream suppliers that have been identified are of three main types:

- Interconnection. Where access to the downstream market depends on use of an "essential facility", the terms of access to and use of that facility are of critical importance to the competitive relationship in downstream markets between services provided by the enterprise that controls the facility and its competitors. Moreover, terms of access can be used to discriminate in favour of domestic non-affiliated supplies and suppliers and against or between foreign ones.
- Misuse of information. The monopoly supplier or supplier with a dominant position which controls an essential facility will have access to information about the operations of its competitors in downstream markets which can be used in an anti-competitive way to give it a competitive advantage in supplying such markets.
- Anti-competitive cross-subsidization. An enterprise which enjoys a monopoly or a dominant position may use rents earned as a result to cross-subsidize activities in competitive downstream markets to the detriment of competitors.

In the WTO, these issues have so far been primarily perceived as of relevance to the area of trade in services and have been treated in the area of telecommunications in particular. Article VIII of the GATS contains a general requirement that, where a monopoly supplier of a WTO Member (or an exclusive service supplier substantially insulated from competition) competes in the supply of a service outside of its monopoly rights, that Member shall ensure that the supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with the basic MFN obligations and specific commitments made in respect of such a service. In regard to interconnection, this general obligation is elaborated in the Annex to the GATS on Telecommunications which requires, for example, that each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available and that such access or use is on reasonable and non-discriminatory terms.

The issue of interconnection has been taken a step further in the so-called "Reference Paper" which forms part of the commitments made by many WTO Members as a result of the negotiations on basic telecommunications concluded in February 1997. This addresses, in particular, the situation where a public telecommunications transport network or service constitutes an essential facility that is exclusively or predominantly provided by a single or limited number of suppliers and cannot feasibly be economically or technically substituted in order to provide a service. The Members in question have committed themselves to maintain appropriate measures to prevent a major supplier[135] from not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide a service. The Reference Paper also includes, in some detail, provisions on ensuring that downstream service suppliers are able to interconnect with a major supplier on non-discriminatory terms, conditions and rates of a quality no less favourable than that provided by the major supplier to its own like services or those of its affiliates as well as to those of other non-affiliates. An independent domestic body has to be established to settle disputes about interconnection.

In regard to possible misuse of information, the Reference Paper includes a commitment on the Member to maintain appropriate measures to prevent major suppliers from using information obtained from competitors with anti-competitive results.[136] As regards cross-subsidization, Article VIII of the GATS contains the general requirement on Members to ensure that any monopoly supplier of a service or exclusive service supplier enjoying market power does not abuse its position of market power to act in a way inconsistent with Members' specific commitments in downstream markets. The Reference Paper on Basic Telecommunications, incorporated into many Members' national Schedules, commits them to take appropriate measures to prevent major suppliers from engaging in anti-competitive cross-subsidization.

The treatment of these issues in competition law varies from country to country. For some countries, the scope of competition law to address such matters is circumscribed by sectoral exclusions (see Table IV.2 and discussion in Part II). Where sectoral exclusions do not apply, competition law may well be applicable, especially since the possibly anti-competitive practices under consideration are in markets outside the scope of the monopoly or exclusive rights and therefore the defence of mandatory legislation would not normally be applicable.[137] As mentioned earlier, the competition law of the European Community is unusual in that its rules apply also to measures which may be enacted or maintained by member States in regard to state enterprises and enterprises with special or exclusive rights. Under Article 90 of the EC Treaty, the Commission has taken measures to address the possible abuse of monopoly positions or positions of market power in downstream markets in the telecommunications sector. While

[135] A major supplier is defined as a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunication services as a result of either its control over essential facilities or the use of its position in the market.

[136] It might be noted that, elsewhere in the WTO, the Agreement on Preshipment Inspection contains a similar type of provision which is designed to address a situation which has some analogous characteristics. Preshipment inspection enterprises can be regarded as controlling a facility that is essential to have access to the market of the country employing the enterprise, in the sense that importation into that country is normally only possible with the prior clearance of the preshipment inspection entity. The WTO Agreement puts particular emphasis on the protection of confidential business information obtained during the course of the work of preshipment inspection enterprises, and requires WTO Members using such preshipment entities to ensure that such entities maintain procedures to avoid conflicts of interest, for example with divisions of the preshipment inspection entities engaged in other activities (Article 2.14).

[137] Some jurisdictions have narrowly construed the mandatory legislation defence. See, for example, Heintz van Landewyck Sàrl and Others v. Commission of the European Communities, Joined Cases 209 to 215 and 218/78, [1980] ECR 3125.

these measures are inspired by case law under EC competition law on essential facilities, refusal to deal and related matters, they differ from the usual application of competition law in that they require a combination of structural market reforms and national pro-competitive regulatory regimes.

Competition law is generally applicable where a private monopoly abuses its market power in downstream markets, notably through denial of access to an essential facility. Under United States competition law, denial of access to an essential facility by a monopolist that threatens to eliminate competition in a downstream market can be treated as constituting an act of deliberate monopolization, where it would be reasonably practicable for the monopolist to offer open access to the facility and other conditions are met.[138] However, as in the case of the European Communities and its member States, control of anti-competitive practices in downstream activities in the United States is often shared with regulatory authorities, for example the Federal Communication Commission (FCC) and state bodies in the area of telecommunications.

Misuse of commercial information by a vertically integrated firm is another issue that can cut across the domains of competition law and regulatory policy. In most jurisdictions, this is not the subject of specific competition law provisions, but rather is a matter that can arise in the context of judicial proceedings or negotiations with parties relating to mergers, monopolization or abuse of a dominant position. Typically, concerns about potential abuses are addressed through the erection of barriers to the sharing of confidential information across units of a vertically integrated enterprise. Such arrangements have been an important factor in competitive restructuring in the telecommunications sector in the United States and other jurisdictions.[139]

Cross-subsidization by enterprises of their activities in competitive markets, using revenues obtained from protected or monopolized markets, is still another practice which spans the realms of competition law and regulation, and has been a major concern in the telecom sector. This can be viewed as an example of "leveraging" of market power from one market to another. This concern is particularly relevant in the context of firms operating simultaneously in regulated and unregulated markets, since in such circumstances, the firm may have strong incentives to cross-subsidize its operations in the competitive market by allocating additional costs to the regulated market. This can enhance both: (i) the firm's competitiveness in the unregulated market; and (ii) its rate base or the price that it can charge (under regulation) in the regulated market. Such concerns figured importantly in the 1982 consent settlement in the AT&T case in the United States.[140]

The issue of "leveraging" of market power also arises in monopolization cases not involving regulation. For example, it is sometimes alleged that tie-in requirements are used to expand a monopolist's control over a tied product into another (previously unmonopolized) market. Economic analysis demonstrates, however, that the circumstances in which leveraging is a viable tool for monopolization are limited since, in general, market power cannot be simultaneously exploited in one market and used to expand control in another market.[141]

### Access to upstream markets

Enterprises which enjoy a monopoly or position of market power are insulated in some degree from market disciplines over their purchases of inputs. This has been a particular source of tension in international trade in regard to purchases of power generating, transportation and telecommunications equipment by utilities, particularly where such enterprises are owned by the state or, as a result of the grant of special or exclusive privileges, susceptible to state direction. But trade issues have also arisen in relation to the procurement policies of private enterprises with a dominant position in utility markets.

In the area of goods, the GATT addresses these matters through a combination of its rules relating to state trading enterprises (including private enterprises enjoying exclusive or special privileges) and those relating to government procurement. In respect of government procurement, WTO Members are exempted from the GATT rules that forbid discrimination in favour of national products.[142] The non-discrimination provision of Article XVII:1 also does not apply and is substituted by a "fair and equitable treatment" standard. In order to qualify for these exemptions, goods have to be purchased for "governmental purposes" and not with a view to commercial resale or use in the production of goods for commercial sale. For the time being, government procurement of services is excluded from the scope of the main obligations under the GATS.[143] The extent to which procurement of equipment and other inputs by public utilities would benefit from these exemptions and constitute government procurement under the GATT and GATS has not been tested through the GATT or WTO dispute-settlement mechanisms.

Notwithstanding the lack of clarity as to where the rules of the GATT and the GATS relating to government procurement end and those relating to purchases by state-trading enterprises begin, 26 Members of the WTO have committed themselves in the plurilateral WTO Agreement on Government Procurement to comply with its rather detailed rules, requiring both non-discrimination and the respect of specific tendering procedures, in regard to purchases by a range of public enterprises, in particular in the water, electricity, urban transportation, port and airport sectors.[144] It should be recognized that the Agreement constitutes a far from comprehensive attempt to ensure that purchases of goods and services by state monopolies and enterprises with special or exclusive privileges are open to competition on a non-discriminatory basis: the majority of the

[138] See discussion in Part II, supra.

[139] For example, the issue of possible misuse of confidential information arose in the context of a 1994 consent settlement in the United States relating to the acquisition of shares in MCI Communications Corp. by British Telecommunications plc. In July 1997, the Department of Justice asked the US District Court that approved the initial settlement to modify the terms of the settlement to ensure that the merger does not disadvantage competitors and raise prices for consumers. A specific thrust of the revised terms of settlement will be to revise confidentiality provisions contained in the original court decree to reduce the risk that sensitive business information that British Telecom obtains through its relationships with other United States telecommunications service providers is not disclosed to MCI. See "Justice Department asks Court to modify and extend previous British Telecom/MCI settlement after reviewing new deal," (United States, Department of Justice, Press release, 7 July 1997.

[140] See Brennan (1987).

[141] See Kaplow (1985).

[142] Article XII:8(a) carves government procurement out of the obligation to give national treatment in respect of internal taxation and regulation.

[143] The GATS requires that multilateral negotiations on government procurement in services shall take place within two years from the date of entry into force of the WTO Agreement. A Working Party on GATS Rules is presently working on this matter.

[144] Subject to the payment of the normal customs tariff consistent with a country's GATT bindings.

Members of the WTO are not Parties to the Agreement; not all purchases by state enterprises are covered but only purchases by those designated[145]; and, even in respect of the covered entities, not all advantages are extended on a non-discriminatory basis to all other GPA Parties.

The European Communities once again constitutes an interesting example of an approach to forestalling trade problems that can arise as a result of the procurement practices of utilities. In its internal regime, it has gone one step further than under the WTO Agreement on Government Procurement in that the Community procurement rules have been extended to apply to the procurement of entities operating in the water, energy, transport and telecommunications sectors whether or not state-owned.[146]

The ability of competition law to address concerns relating to discriminatory purchasing policies by state entities is limited both by the substantive terms of laws and by issues relating to state action immunity. Where the enterprises in question are private, enforcement and/or advocacy efforts by competition agencies have played an important role in some cases. A notable example relates to equipment purchasing decisions in the US telecommunications sector, where antitrust enforcement was instrumental in achieving substantial liberalization.[147]

Some concluding remarks

The discussion above of market access problems resulting from the operation of state monopolies and other enterprises with a dominant position suggests a number of points:

- The inherent difficulty of monitoring and enforcing rules aimed at ensuring that enterprises which enjoy structural market power and are susceptible to state influence do not discriminate against imports or foreign suppliers has led to an increasing interest in seeking solutions to possible trade problems through rules addressing the market structure itself (demonopolization). This type of approach is built-in under the GATS and is also evident in some accession negotiations under the WTO. Moreover, as noted, it has been a course of action adopted by the European Community. Such an approach is in tune with the widespread adoption of demonopolization and privatization policies around the world for other than international trade purposes.

- Where structural reform cannot remedy market imperfections, whether because of overriding public policy considerations, historically-rooted positions of market power, or "natural monopoly" reasons (overwhelming economies of scale or scope), market access problems may to some extent be addressed by ensuring that the enterprises in question are, in principle, subject to competition law disciplines. However, in situations of fundamental structural market failure, where the scope for governmental intervention is high, reliance on the application of general competition law principles may not be sufficient to protect the interests of foreign supplies and suppliers, in particular where essential facilities are controlled by dominant enterprises. Pro-competitive regulatory regimes may be necessary to forestall market access problems.

- It should be noted that trade liberalization, the application of competition law principles and pro-competitive regulatory arrangements have and should play complementary and mutually supportive roles. For example, Article VIII of the GATS incorporates into that Agreement some very basic rules on competition where monopolies and exclusive service suppliers are concerned; these have been elaborated into more detailed regulatory principles in the results of the WTO negotiations on basic telecommunications; and these regulatory principles in turn require individual Member governments to maintain national regulatory regimes and authorities. A similar pattern can be seen in the relationship between the competition rules of the EC Treaty, EC Directives and the national regulatory authorities of EC member States. The mutually supportive role that competition and regulatory policy can play is also apparent in some aspects of recent experience in the telecommunications sector in the United States and Canada.[148]

- The basing of international rules relating to regulatory regimes on general competition policy principles is likely to be conducive towards not only the mutual coherence of these two policy areas but also the mutual coherence of regulatory policies in different sectors and between different countries. It should also help safeguard against the risk of "regulatory capture" and thus of regulatory regimes being used to put problems in the way of foreign supplies and suppliers. Another possible advantage to international rules on regulatory regimes being based on an international consensus about basic competition law principles is that the existence of a permanent "safety net" of such principles might facilitate the phasing-out of special regulatory regimes if and when technological change and demonopolization steps engender competitive markets in the sectors in question.

- There is also a case for ensuring that competition authorities have and play an active advocacy role in addressing the trade-restricting effects of regulatory policies and in advancing pro-competitive reforms. As discussed above in Part II, in many countries this is already a recognized element of competition policy. It encompasses formal interventions by competition authorities in the proceedings of regulatory boards and tribunals, and "behind-the-scenes" involvement in policy development committees and other fora within governments.[149]

## IV.2 Exercising market power in export markets

This part of the Chapter addresses the following topics: (i) export cartels and related arrangements; (ii) international cartels, mergers and abuses of a dominant position; and (iii) predatory pricing, price discrimination, cross-subsidization and dumping.

### IV.2.a Export cartels and related arrangements

Export cartels vary somewhat in their nature and scope. "Pure" export cartels are those whose efforts are directed

[145]This excludes notably the telecommunications sector. International trade issues relating to purchases of telecommunications equipment are the subject of a number of bilateral arrangements or discussions.

[146]Council Directive 93/38 of 14 June 1993. The rules apply to private enterprises only where they operate on the basis of special or exclusive rights granted by the state. Moreover, where certain activities are directly exposed to competitive forces in markets to which entry is unrestricted, they are not covered.

[147]See Klein (1997) and Dick (1997).

[148]The goal of promoting competition is incorporated in the United States Telecommunications Act of 1996 and the Canadian Telecommunications Act of 1993. In some countries, regulatory authorities are involved in a continuing relationship with competition authorities (e.g. OFTEL in the United Kingdom and AUSTEL in Australia).

[149]A recent OECD study highlights the importance of these activities and the successes that have been achieved by competition agencies in helping to build support for pro-competitive changes in regulatory policies through moral suasion. See OECD (1997). A key recommendation of the Report states that governments should "Provide competition authorities with the authority and capacity to advocate reform".

exclusively at foreign markets. "Mixed" export cartels are agreements that restrain competition in the exporting country's home market as well as in foreign markets. Pure export cartels are treated as being outside the scope of most countries' competition laws, either because: (i) they are considered to be outside the jurisdiction of domestic competition laws; and/or (ii) they are explicitly exempted from the application of the laws.[150] Mixed export cartels are generally subject to essentially the same requirements or outright prohibitions as cartels that affect the domestic market alone, although some countries provide special exemptions for such cartels where the domestic restraint or effect is ancillary to the restraint on export trade.

While toleration of export cartels may have a mercantilist dimension in some cases, it may also be viewed, in part, as reflecting appropriate restraint in the exercise of jurisdiction by domestic competition authorities in regard to arrangements whose impact is felt wholly or primarily outside the home country.[151] This approach reflects the policy orientation of an era when competition policy was principally concerned with protecting consumer welfare in the domestic economy. In a time of increasing recognition of the mutual interdependence of economies, however, exemption of export cartels may also be viewed as a "beggar-thy-neighbour" policy: it implies that conduct which would be unacceptable in the domestic marketplace is permissible if its impact is felt only in foreign markets.

Another important category of horizontal arrangements where concerns have been expressed about possible implications for the exercise of market power in international markets through promoting national champions is that of co-operative arrangements for research and development, particularly where the design of legislative provisions for R&D joint ventures make then susceptible to "strategic" use.[152] Most jurisdictions with modern competition statutes make some form of special provision for inter-firm co-operation (joint ventures and consortia) to undertake research and development programs that otherwise might not be carried out. It has been noted, however, that provision for such arrangements should not take the form of blanket exemptions from competition law, since competition also has an important role to play in providing incentives for timely innovation and adoption of new technology.[153] Competition considerations are especially important when such arrangements also involve the production stage; in such situations, application of merger rules is sometimes considered appropriate.

An issue closely related to that of export controls concerns the continuing use of state-owned or sanctioned international marketing companies by many countries. These are employed, for example, in the international marketing of agricultural products as well as minerals and other commodities. Such organizations can be used for achieving results which are substantially the same as those of export cartels (i.e., exploiting market power in export markets).

While in principle the competition law of importing countries would generally be applicable to export cartels or similar arrangements in other countries because of the "effects doctrine", it is often difficult, for practical reason, for them to initiate appropriate enforcement actions, since the evidence needed to prove the existence of the cartels is typically located outside the importing country's jurisdiction (in the home country). Thus, satisfactory resolution of the problem of export cartels raises two issues: in exporting countries, repeal of applicable exemptions, where these are a barrier to enforcement and co-operation, and, to facilitate action in the importing country, expanded co-operative arrangements between national enforcement authorities.

WTO rules, as they presently stand, can play little role in respect of purely private export cartels. The 1960 Understanding and the consultation provisions of the GATS and TRIPS Agreement could be invoked, but they do not require any specific action. The general MFN obligations of the GATT and the GATS are applicable to national competition law as it applies to such arrangements, but the "national treatment" obligation of the GATT concerns only the treatment of imports, not exports, and that of the GATS is only concerned with the treatment by a WTO Member of the services or service suppliers of other WTO Members.

In regard to state-owned or sanctioned international marketing companies, the rules of the GATT generally prohibit their use to give effect to quantitative restrictions on exports[154] (subject to some exceptions) but do not prevent the use of such bodies to exert market power in export markets through prices charged.[155] Government-sponsored export cartels might also fall foul of the GATT rules generally prohibiting export restrictions.

The issue of the relationship between competition laws and principles and government-sponsored arrangements whereby enterprises regulate their export prices or quantities has been the subject of much discussion. While these arrangements have often been entered into at the request of importing countries and,

[150]For example, France, the European Community and the Netherlands exclude "pure" export cartels from the scope of their cartel laws and do not provide for notification of them. Canada exempts "pure" export cartels, but the exemption does not apply to agreements that reduce the value of export products or restrict a person from entering or expanding an export business, or lessen competition unduly in the supply of services facilitating exports from Canada. Germany, Japan and the United Kingdom exclude "pure" export cartels from the coverage of their cartel law but provide for authorization, notification, or a similar procedure. In the United States, the antitrust laws do not prohibit export cartels with no domestic anti-competitive effects; however, exporters can obtain greater certainty about the application of the law to their activities by registering or applying under legal provisions that make this exemption explicit. In Mexico and Hungary, export sales associations are, under certain conditions, exempt from the competition law. See OECD (1996d).

[151]In certain cases, toleration may also reflect a view that some export cartels can help countervail the buying power of foreign cartels. Export arrangements among competitors that fall short of being hard core cartels may in some cases be viewed as likely to improve efficiency and therefore competition by enabling smaller exporting firms to achieve economies of scale in distribution and information gathering.

[152]In this regard, US legislation known as the National Co-operative Production Amendments of 1993 extends the limited immunity that previously was provided to certain R&D joint ventures to cover also certain joint production ventures. The wording of the amendments indicates that certain benefits provided under them are available only in respect of ventures for which the principal production facilities are located in the US. In addition, the legislation requires that qualifying joint ventures must be controlled by either: (i) a US person; or (ii) a person from a foreign country which provides national treatment to US persons in respect of the competition law treatment of joint production ventures. See 15 U.S.C § 4306(2) (Supp.1993). For discussion, see Warner and Rugman (1994).

[153]For related discussion, see Khemani and Schöne (1997).

[154]Article XI plus note to that provision.

[155]This could theoretically be subject to a "tariff" binding in respect of export duties or binding with a similar effect (such as on export mark-ups).

therefore, are not, in such cases, motivated by a desire to exercise market power on the part of exporting companies, from a competition perspective they would raise issues similar to those connected with private export cartels, were it not for the role of governments in initiating and/or supervising them.[156]

The WTO Agreement on Safeguards requires WTO Members to "not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side". Examples of similar measures referred to in the Agreement include export moderation, export price monitoring systems, export surveillance and discretionary export licensing schemes, where they afford protection to the importing country. This prohibition includes actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. The Agreement further requires Members not to encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures.[157] The Agreement thus recognizes that it is sometimes difficult to establish what is the degree of government involvement in such measures.[158]

[156]For example, in the 1980s there was considerable discussion about the relationship between voluntary export restraint arrangements, price undertakings and competition policy. Export industries, for example steel, automobiles and conductors, that were cooperating to restrict exports or respect minimum prices sometimes sought assurances that their actions would be exempt from or withstand challenge under competition law in the country of importation. See Waller (1994), Chapter14.

[157]WTO Agreement on Safeguards, Article 11.1 and 11.3.

[158]In this connection, a key issue before the GATT panel which reported in 1988 on certain Japanese practices related to the Japan/US arrangement in semi-conductor trade was whether administrative arrangements regarding guidance to companies on their export prices combined with monitoring of information provided by them constituted government export restrictions for the purposes of Japan's obligations under the GATT, in this case Article XI:1. The panel came to the conclusion that they did. Report of Panel on Japan – Trade in Semi-Conductors, adopted on 4 May 1988 (BISD 35S/162).

[159]Similar considerations would arise where the "relevant market" is regional rather than worldwide.

[160]See Scherer (1994) and Davidow (1983).

### IV.2.b International cartels, mergers and abuses of dominant positions

Important issues in international trade relations can arise from attempts on the part of enterprises to exert market power in the world market, whether through collective action (international cartels, joint ventures, alliances, etc.) or through the acquisition by a single enterprise of a dominant position in the world market (through mergers and acquisitions) and its possible abuse. These situations raise concerns not only for nations who are essentially consumers of the product or service but also for nations whose producers of the product or suppliers of the service may be adversely affected by anti-competitive behaviour or an individual or collective position of dominance on the world market.[159]

International cartels and market sharing agreements between firms in two or more countries are generally recognized as being akin to horizontal price-fixing and other collusive agreements within a single country. In both case, competition is limited, prices are raised, output is restricted, and/or markets are allocated for the private benefit of firms. To the extent that their effects in a jurisdiction are similar to those of national cartels, the enforcement of existing competition law should go far in providing a remedy. For example, in the 1940s and 50s, the United States antitrust authorities prosecuted a large number of cartel cases involving international markets for primary products and manufactured goods.[160] These cases involved price fixing and the direct allocation of national markets among firms that would otherwise be in competition, reinforced by prohibitions against importing and exporting by the participating firms. In many of these cases, the cartels were built around patent cross-licensing schemes.

In the 1990s, there has been a major resurgence of competition law enforcement activity in relation to international cartels by leading competition law jurisdictions. For example, in early 1997, the Antitrust Division of the Department of Justice

**Box IV.6: Some recent examples of cases relating to actual and alleged international cartels**

(a) The Citric Acid Conspiracy – In this major recent conspiracy case prosecuted by the US Department of Justice, most of the members of the cartel were located outside the US The conspirators agreed on the prices the firms would charge for citric acid and the precise percentage of the total market that each participant was allowed to sell worldwide. The members of the cartel also agreed to a sophisticated enforcement system to police their agreement. As of early 1997, fines in the case totalled more than $170 million, and the investigation was still ongoing.

(b) Thermal Fax Paper – After a two-year joint investigation by US and Canadian authorities, pursuant to the US-Canada Mutual Legal Assistance Treaty, criminal charges were brought by both countries under their respective laws against an international cartel that had fixed prices in the $120 million a year thermal fax paper market. The conspiracy was primarily directed at small businesses and home fax machine owners. Heavy fines were imposed against a number of corporate defendants including foreign corporations and domestic subsidiaries of such corporations.

(c) The International Industrial Diamonds Case – The De Beers Group, together with General Electric Co., controls approximately 80-90per cent of the world's industrial diamond supply. In 1994, it was alleged in a US Government antitrust suit that employees of General Electric had discussed the stabilization of industrial diamond prices with De Beer's officials in Europe. However, the case was dismissed. A senior US official subsequently noted that the government's case suffered from difficulties in obtaining documentary evidence located outside the US.

(d) The Wood Pulp Case – Wood pulp manufacturers from Canada, Scandinavia and the US combined to fix prices for export of pulp to the European Community. The EC Commission held that this conduct was subject to, and in violation of, Article 85 of the Treaty of Rome, notwithstanding that the parties were located outside the Community, on the basis that the arrangement was "implemented" in the EU. The case also illustrated that registration of some of the parties pursuant to the US Webb-Pomerone Act, which provides a limited exemption for the US antitrust laws for business associations to engage in collective export rules, did not immunize them from prosecution by the EC Commission.

*Sources:* US Department of Justice and Competition Bureau of Canada, various speeches and press releases; US v. General Electric Co. et al, CCH 1994-2 Trade Cases, paragraph 70, 806 (December 1994); and Cases 89/85, etc., A. Ahlstrom Osakeyhtio v. Commission ("Wood Pulp"), 1988, E.C.R. 5193.

reported that approximately 20 per cent of corporate defendants in cases brought by it recently were foreign-based.[161] Improved arrangements for international co-operation in competition law enforcement have been critical to success in this area (see Box IV.6 for some recent examples of enforcement actions relating to actual and alleged international cartels).

Vigorous enforcement efforts by national competition agencies relating to international cartels, coupled with voluntary co-operation among national authorities in cases where this is permitted, yields important positive spillovers and will bring satisfactory results in many cases. In some cases, however, concerns may arise that the likelihood of active enforcement by a country's authorities may be reduced to the extent that the cartel, although operational in its territory, is perceived to have export advantages for national industry that dwarf its domestic anti-competitive effects. Such a situation might have some similarity to that of export cartels, discussed above. This similarity might also extend to practical difficulties of enforcement of national competition law against such cartels in countries which are importers of the products or services in question, notably access to necessary evidence on the conduct of the producers located in jurisdictions in which the authorities may not perceive an interest in tackling the cartel.

The effects on the trade interests of importing countries of a single-firm position of dominance on the international market can be similar to that of an international cartel. Competition law provides remedies to deal with abuses of dominant positions or monopolization, and to prevent the creation or strengthening of market power through mergers and acquisitions. In many respects, the law as it applies in the two areas is similar, but with the difference that the mere establishment of a position of dominance in a market through legitimate competition is not generally actionable[162], whereas the creation of a dominant position (or substantial lessening of competition) through mergers and acquisitions may be prevented. An example of a dominant position in global markets might be that of Microsoft in respect of computer operating systems; certain practices of Microsoft were investigated in 1994 by the competition authorities of the United States and the European Community (see Box IV.7).

Issues relating to overlapping competition law jurisdiction also arise in the context of mergers. The recent merger between Boeing and McDonnell Douglas was investigated, again by the United States' and the European Community's authorities, as to its effects on competition in the international market for large civil aircraft. In some cases, national authorities interested in cases with international dimensions have taken similar views of business arrangements (see Box IV.7 on the Microsoft case); in other cases, divergent positions have been taken, at least initially (see Box IV.8 on multijurisdiction merger review, including the recent Boeing-McDonnell Douglas matter).

A question that merits attention is whether the remedies presently available through the application of national competition law are sufficient to protect the interests of the international trading community at large when faced with the abuse or creation, through mergers, of positions of dominance in the international market. While it is clearly in the interests of the international community that countries, especially the major economies, have effective competition laws capable of addressing these issues, and that these have often been employed successfully (sometimes in a co-operative manner), questions remain as to whether the outcomes will necessarily reflect a common interest between nations in all cases:

- One reason for this lies in the fact that national competition law, as currently applied, is principally concerned with anti-competitive effects that are felt by consumers (or, in some cases, producers) that are subject to the national jurisdiction, and not with conduct that primarily affects other jurisdictions. A merger may be approved because efficiency gains which accrue in the country examining the merger may be considered to outweigh any losses arising in that jurisdiction from a reduction in competition; but consumer and producer losses resulting from the reduction in competition in other countries would not necessarily be factored into the calculation. A similar situation can arise in weighing the efficiency benefits of practices by an existing dominant firm against the negative effects of such practices. As discussed in Section III, such an asymmetry is inherent in the "total [national] welfare" approach, but can also arise from an approach that gives predominance to national consumer interests in cases where the international market is segmented. Moreover, some competition laws explicitly provide for increased international sales of domestic firms to be taken into account on the positive side of the balance, in evaluating mergers and similar arrangements.[163]

[161]Spratling (1997); see also US, Department of Justice (1996).

[162]Competition law in most jurisdictions attempts to avoid penalizing enterprises for success.

[163]An example is the Canadian merger law which provides for a likelihood of a significant increase in the real value of exports to be taken into account in assessing the efficiency gains of mergers (section 96(2) of the Canadian Competition Act).

**Box IV.7: International co-operation in a case of abuse of dominant position/monopolization – The Microsoft case**

In 1994, Microsoft corporation was charged by both the United States and the European Community with violations of their respective provisions relating to monopolization and abuse of dominant position. The case marked the first time that the United States and the European Community had cooperated in an antitrust investigation under their 1991 agreement relating to co-operation in competition law and resulted in similar settlements between Microsoft and the competition authorities in the two jurisdictions.

The charges against Microsoft centred on various licensing practices employed by the company. These included "per processor" licences which required personal computer manufacturers to pay a fee to Microsoft even when shipping computers that did not contain Microsoft software, contracts which bound individual manufacturers to deal with Microsoft for long periods, and restrictive information disclosure agreements that made it more difficult for software companies that worked with Microsoft to also do business with its competitors. In settlements reached with both the US and EC authorities, Microsoft committed itself to discontinue the practices.

The Microsoft case is an example of co-operation between leading competition law jurisdictions in a case where both jurisdictions had similar interests and concerns. It should be noted that such co-operation was greatly facilitated by Microsoft voluntarily allowing confidential information supplied by it to each competition authority to be shared between the two authorities. The case is also noteworthy in that similar settlements were reached notwithstanding conceptual differences between the US law on monopolization and EC law on abuse of dominant position.

*Sources:* US v. Microsoft Corp. (District Court for the District of Columbia, 14 July 1995); Antitrust and Trade Regulation Report, 21 July 1994, vol. 67, p.106; Van Miert (1996b).

**Box IV.8: Multijurisdiction review in merger cases**

(a) The Boeing-McDonnell Douglas Merger – The merger of Boeing Co. and McDonnell Douglas Corp. will bring together the two major US-based players in the international civil aircraft industry, leaving only one other major competitor – the Europe-based Airbus Industry consortium. A recent examination of the proposed transaction by the US and EC competition authorities initially led to divergent positions being taken as to the desirability of allowing the merger to proceed. In the US, the Federal Trade Commission determined not to oppose the transaction, due partly to a view that, in many respects, McDonnell Douglas was no longer a vigorous competitor and hence its absorption by Boeing would not adversely affect the state of competition in the industry. In contrast, the EC Commission signalled fundamental concerns about the merger early in the review process, leading to an apparent impasse – and to concerns about potential wider repercussions for international trade of a failure to agree. The impasse was resolved when Boeing agreed to make concessions relating to long term exclusive dealing contracts it had previously negotiated with major customers and other matters.

(b) The Gillette-Wilkinson Merger – The 1992 merger between Gillette and Wilkinson in the market for wet-shaving razor blades underwent review by competition agencies from fourteen separate jurisdictions – imposing heavy administrative and other costs on the parties.

(c) The DeHavilland Case – In 1991, Alenia of Italy and Aérospatiale of France, attempted to acquire DeHavilland, a Canadian-based commuter aircraft manufacturer which at the time was owned by Boeing Co. The competition authorities of both the European Community and Canada examined the transaction. While the Canadian Competition Bureau chose not to challenge it, the EC Commission prohibited the merger, on the ground that it would restrict effective competition in the market for commuter aircraft. Therefore, the merger could not be completed, notwithstanding its approval in the jurisdiction where the acquisition would take place.

*Sources:* Pitofsky *et al.* (1997); Aribaud (1997) and OECD (1994d).

- In addition to the possible effects of these asymmetrical competition law criteria (perceived from an international perspective), there is always a risk that, in some jurisdictions, the initiation of, and determinations resulting from, merger and abuse of dominance proceedings may not result from fully independent and apolitical processes. There may be a concern that there will be less enthusiasm to tackle mergers or abuses of positions of dominance which are perceived to give rise to net benefits to the home country, even if at the expense of other nations.

- Another consideration is that of who can act against abuses of worldwide positions of dominance or creations of such positions through mergers and acquisitions. The practical reality appears to be that, in many cases where mergers are concerned, smaller countries feel constrained to accept the merger control of the bigger countries or jurisdictions, in particular the European Community and the United States. A small importing country faced with a merger that has adverse effects on its consumers might fear that an attempt to enforce a standard of control against that merger higher than that in the major markets might simply induce the companies concerned to cease to do business in its territory.[164] Moreover, smaller countries may find it difficult to obtain the necessary information from the companies, especially in the absence of a commercial presence by them in their territory. In the case of abuse of dominance, smaller countries may be able to take action against specific practices where they can be pursued by the enterprise independently of its practices in other markets, but where this is not the case, for example where a remedy might require the disclosure of confidential information which would become known internationally, it is once more likely that effective action would have to depend on the competition authorities in the major markets.[165]

[164]Where the merger of multinationals might create a dominant position in the domestic market of a small country, it may be able to enforce local divestiture in order to prevent this, but it is unlikely to be able to prevent consumer welfare losses from a reduction in competition in situations where the relevant market is global.

[165]An example is the settlement in 1984 between IBM and the EC Commission, under which IBM agreed to make available, in certain circumstances, interface information regarding certain of its computers to enable compatible hardware and software to be developed by competitors. It is noteworthy that the practices of IBM at issue were viewed differently by the competition authorities of the United States and European Community. The EC Commission filed a statement of objections to IBM for abuse of dominance despite protests from the United States that IBM's conduct was pro-competitive and efficient. See Fox (1986).

[166]Analytical underpinnings of this approach are set out in Joskow and Klevorick (1979).

### IV.2.c Predatory pricing, price discrimination, cross-subsidization and dumping

Under this heading, the treatment in competition and trade law of enterprise practices which involve pricing in export markets at levels that are considered, in some sense, to be harmfully low is examined.

Under competition law, such issues relating to anti-competitive pricing arise in three principal contexts:

- *Predatory pricing*. The issue here is whether an enterprise is attempting to monopolize the market by driving competitors out of business through sales at prices below the cost of production, so that subsequently prices can be raised in such a way that the enterprise will recoup more than the cost to it consequent on the low selling prices. Such practices are considered to be anti-competitive in most jurisdictions with competition laws. An approach to the examination of predatory pricing which is favoured amongst many competition authorities is the so-called two-tier approach. This involves, first, looking at the structure of the market (including the degree of market power exercised by the alleged predator and the extent of entry barriers) to ascertain whether the alleged predator would be able to exercise market power after successful predation and, second, a detailed examination of the firm's costs and prices, if the first test is met.[166] In some competition jurisdictions, sales at below average variable costs are considered to constitute a presumption of predatory intent, with sales above average variable costs constituting a rebuttable presumption of the contrary even if below average total costs.

- *Price discrimination*. In some jurisdictions, discrimination in the prices charged by an enterprise to its clients which is not warranted by underlying differences in costs of supplying the clients may be considered an anti-competitive practice, subject to certain conditions, whether or not this is associated with predatory intent. These laws may protect clients against discriminatorily high prices, but harm to other sellers of the

product may also be addressed. In the United States, the defence of aligning prices with market conditions established by competitors may be admitted. Under European Community competition law, discriminatory pricing (and the associated practice of refusal to deal) is treated as a possible abuse of a dominant position, in particular where a dominant supplier fails to deal equitably with its regular customers and where this affects intra-Community trade.

- *Cross-subsidization*. Cross-subsidization is not a category of practice specifically addressed by most competition laws. However, the issue does arise in the treatment of possible abuses of a dominant position or attempted monopolization. It may be viewed as a form of "leveraging" of profits earned as a result of market power in one product or geographical market to obtain a competitive advantage in another product or geographical market through low-selling prices. The practice may constitute a form of predatory pricing and be addressed as such. However, even where predatory pricing is not at issue, cross-subsidization may be considered unfair or anti-competitive in particular contexts.[167] This is particularly the case where the position of market power in one market, which is being "levered" into another market, results from a monopoly or exclusive right granted by the state (for further discussion of this point see Subsection 1.c above).

International trade law as embodied in the WTO authorizes Member governments, notwithstanding their other WTO obligations relating to market access, to impose anti-dumping duties or accept price undertakings to respond to certain enterprise pricing activities, namely dumping, where they cause or threaten material injury to an established industry or materially retard the establishment of a domestic industry. The basic definition of dumping in the WTO Agreement on the Implementation of Article VI of the GATT (the Anti-Dumping Agreement) is contained in its Article 2.1. This reads as follows:

> "2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

When there are no sales of the like product in the ordinary course of trade[168] in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in that market, such sales do no permit a proper comparison, the Anti-Dumping Agreement provides, in its Article 2.2, that "the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".

Article 2.4 of the Anti-Dumping Agreement deals with the way in which comparisons should be made between the export price and the normal value. The Agreement sets out further procedural and substantive rules governing the application of anti-dumping measures.

The concurrent existence of two legal regimes, competition law and anti-dumping law, with different substantive criteria and procedures for addressing possible enterprise practices involving low-price sales has led to considerable discussion as to their relationship with each other and possible conflicts between them. In WTO legal terms, competition law is subject to the GATT national treatment standard, which requires that, in respect of internal regulation, treatment accorded to imported products be no less favourable than that accorded to products of domestic origin, while this obligation does not apply to anti-dumping regimes which are border measures under Article VI of the GATT. The key issue, therefore, is why those countries that have availed themselves of the right to have anti-dumping regimes have considered that the protection against abusive low-pricing that is afforded by competition law is not sufficient where imports are concerned and why an additional system of protection with the characteristics of the anti-dumping system is warranted in these situations.

The WTO provisions on anti-dumping are silent as to their underlying rationale. However, a range of justifications have been put forward for having a regime, with its own criteria and procedures, addressing "unfair" pricing of imports, different from that applicable to similar products of domestic origin[169]:

- *Cross-subsidization*. Historically, it appears that anti-dumping laws had their origin in concerns that companies in other countries, located behind protective barriers and possibly cartelizing their domestic markets, were able to gain an "unfair" competitive advantage by cross-subsidizing exports with the profits earned through high prices on their domestic markets. This would appear to be a continuing underlying motive. For example, the absence of application of the dumping remedy in trade within the European Community (now extended to the European Economic Area) has been explained by the possibility of arbitrage (re-importation of dumped products) within the Community and the existence of competition laws to prevent anti-competitive practices.[170]

- *Predatory pricing*. Sometimes anti-dumping systems are considered necessary to combat predatory pricing. However, it is not clear how many anti-dumping cases would meet the tests of predation contained in modern competition laws.[171] In this connection, the parallel anti-dumping and competition law cases relating to the sale of televisions in the United States by Japanese producers are of interest (see Box IV.9).

- *Strategic dumping*. It is argued that export sales below average total costs of production may be pursued in order to increase output so as to move rapidly down the learning curve and reap economies of scale with a view to obtaining a strategic

[167]Of course, it can be argued that such behaviour would not make sense to a profit maximizer unless there is some predatory intent to monopolize the market in which the cross-subsidized sales are made. On the other hand, enterprises sometimes have goals other than, or additional to, profit maximization, such as gaining market share. However, the point that is being made here is not whether action against non-predatory cross-subsidization is warranted but a purely empirical one, that in some situations cross-subsidization practices may be considered anti-competitive without predatory pricing having to be established.

[168]Sustained sales below cost may be treated as not in the ordinary course of trade, and thus disregarded in determining normal value, as set forth in Article 2.2.1.

[169]See, for example, Miranda (1996) and Morgan (1996).

[170]Article 91 of the Treaty Establishing the European Community concerning dumping forms part of the EC Treaty rules on competition and provides for anti-dumping relief in respect of intra-Community trade only during the transitional period leading to the elimination of obstacles to that trade.

[171]A recent study of more than 1,000 dumping cases filed since 1980 by the United States, Canada, Australia and the European Community concluded that less than 10per cent of cases leading to anti-dumping measures (roughly two-thirds of those initiated) involved dumping that potentially would lead to monopolization. See OECD (1996e), paragraph10 and Table 6.

**Box IV.9: Parallel competition law and anti-dumping proceedings relating to Japanese consumer electronics products in the US**

Beginning in the 1960s, US producers sought relief from low-priced imports of Japanese televisions and other consumer electronics products initially under anti-dumping and subsequently under competition laws as well as other trade remedy laws.

A series of cases brought against Japanese manufacturers included an anti-dumping complaint (1968), followed by two private action suits for damages under antitrust law (1971 and 1974), and finally a "201" petition for escape clause protection (1976). The allegations focused on dumping of Japanese televisions in the US, and conspiracy among Japanese producers, which kept prices high in Japan while US prices were below costs in an attempt to injure US competitors and finally drive them from the market. As a result, the US decided to impose anti-dumping duties on Japanese TVs in 1971. Subsequently, it entered in an Orderly Market Agreement with Japanese producers in 1977, which limited Japanese exports to the US.

The competition law case was finally decided by the US Supreme Court in 1986. In a 5-4 split decision, a majority of the Court expressed the view that the market for consumer electronics products in the US was fundamentally incapable of being successfully monopolized through a predatory pricing conspiracy as had been alleged by the US producers, due to the number of firms competing in the market (including firms from exporting countries other than Japan), the relative ease of entry and the nature and extent of change and innovation in the market. The majority noted allegations about a lack of competition in the Japanese domestic market for the relevant products, but considered that pricing decisions in the US market were essentially independent of conditions in the Japanese market. On the other hand, a minority (four justices) argued that the Japanese firms' pricing practices in the US could reasonably be viewed as being directly related to a lack of competition in the home market.

*Source:* Matsushita Electric Industrial Co. Ltd. *et al.* v. Zenith Radio Corp. *et al,* 475 US 574, (US Supreme Court, 26 March 1986); Levine (1988).

advantage over competitors. This line of argument has been put forward in connection with research and development intensive industries characterized by a high degree of learning by doing, such as the semi-conductor industry.

- *Exporting recessions*. It has been argued that, since national economies have business cycles that differ in their timing, there is scope for disruption to result from dumped exports by companies located in economies in recession, especially in capital-intensive industries characterized by a high proportion of fixed costs and where the domestic market in the country of export is not fully competitive. A concern that has been expressed is that, since such low-priced exports are linked to the business cycle and therefore likely to be of short duration, the adjustment of the industry of importing countries, both downwards to meet the new competition and upwards after its termination, would represent welfare losses to the economy which might more than offset any gains to consumers from the temporary low prices.

- *Jurisdictional problems*. It has been argued that the ability of competition law to address low-priced imports is circumscribed by the fact that the exporting companies in question are located outside the jurisdiction, with the effect that the information necessary to sustain competition law cases may be difficult to access and legal decisions resulting from such proceedings difficult to enforce.

- *Political economy*. The argument is made that the possibility to obtain anti-dumping relief is one of the conditions under which countries have committed themselves to market opening measures and that it is unreasonable to expect trade measures to combat dumping to have a higher degree of rationale in terms of efficiency and welfare effects than other trade measures; without the "safety-valve" provided by the possibility of anti-dumping relief, countries would be less disposed to make tariff and other market access commitments. For these reasons, the principle underlying anti-dumping is different from that underlying competition law in that it seeks to protect competitors not competition. Other justifications along these lines are that the alternative protective measures that would be employed if anti-dumping relief were not permissible (such as safeguard measures) would be more negative in terms of their trade and welfare effects.

It might be noted that several of these arguments are dependant, in whole or in large part, on imperfect market conditions in the exporting country. To the extent that enhanced international co-operation can help remove such market imperfections, the perceived need for anti-dumping should decline. There is also the question of whether the specific criteria and procedures of the anti-dumping system are sufficiently well-adapted to the reasons that underlie the system and whether the experience of competition law in tackling price discrimination should be drawn upon in this connection.

The substantive and procedural differences between anti-dumping law and competition law are too numerous and complicated to address within the scope of this Chapter. They relate to such matters as how the relevant market or the domestic industry is defined, injury to competitors and injury to competition, the treatment of producer and consumer welfare, the treatment of intent, the treatment of fixed and variable costs, and various considerations of legal process such as the accessing of evidence, the allocation of the burden of proof and the independence of the institutions administering the law. While a comparison with competition law applied purely on the basis of allocative efficiency and limited to predatory pricing would tend to highlight the differences, it should not be overlooked that competition law frequently involves other considerations, both in law and in practice. It should also be noted that many of the concerns expressed about anti-dumping regimes relate to the way they are applied in practice rather than to their substantive provisions.[172]

In addition to these basic issues, there are a number of operational interfaces between competition and anti-dumping law which might be noted. These include:

- Anti-dumping law requires a complaint to be lodged by the domestic industry. This may entail a degree of concerted action between the companies which make up the industry that might, in the absence of the state authorization consequent on the anti-dumping law or on more general doctrines allowing concerted action to petition, in good faith, the government (such as the Noerr-Pennington doctrine in the United States), be actionable under competition law. However, should the degree of concerted action involved, for example the exchange of information, go beyond that which is necessary to lodge the complaint or should the complaint be made in bad faith, the companies may be in breach of the provisions of competition law.[173]

[172]See, e.g., Boltuck and Litan (1991).

[173]United States, Department of Justice and the United States Federal Trade Commission (1995), and Lang (1998).

- Price undertakings between the authorities and exporters found to be dumping are separate for individual exporters. To the extent that they do not constitute arrangements among competitors, they would not fall within the scope of competition law. But any concerted action between exporters and the industry in the country of import would bring them into the ambit of competition law.

- One issue is the extent to which the competitive situation in the domestic industry that is making an anti-dumping complaint can be taken into account in anti-dumping proceedings, in particular where the industry is not fully competitive and where there is reason to believe that the complaint may be being made with a view to protecting that situation. In this regard, Article 3.5 of the WTO Anti-Dumping Agreement requires that, in determining whether there is a causal relationship between the dumped imports and injury to the domestic industry, the authorities shall examine any known factors other than the dumped imports which at the same time are injuring the domestic industry including, *inter alia*, trade restrictive practices of and competition between the foreign and domestic producers. Furthermore, the Anti-Dumping Agreement requires the authorities to provide an opportunity for consumer and industrial user interests to present information relevant to an investigation, with respect to dumping, injury and causality.[174] It should also be noted that, in some jurisdictions, provision is made for the authorities to take into account the national interest in deciding whether to impose anti-dumping remedies or determine their level.[175] This authority has the potential to be used to deal with situations where the domestic industry is seeking to consolidate a monopolistic or oligopolistic market through anti-dumping complaints. It is not clear to what extent this authority has been used in this way in practice. Moreover, in some jurisdictions, the competition authorities either have a specific legislative right to present their views in anti-dumping procedures[176] or have such possibility under general legal provision or doctrines which provide for interested third parties to present *amicus* briefs to courts or administrative tribunals.[177] Again, it is not known to what extent such interventions are of influence.

- A further operational interface between competition law and contingent measures of protection concerns the definition of the relevant geographical market under competition law. Normally, with trade liberalization the market will be increasingly international, but the possible future application of anti-dumping or other contingent measures of protection creates a degree of uncertainty which makes competition authorities less disposed to a broad geographical market definition.

## IV.3 Foreign investment

Foreign direct investment has become an increasingly important way for companies to supply foreign markets – by UNCTAD estimates, it is now more important in this respect than cross-border trade – and is increasingly integrated with trade. Indeed, the WTO General Agreement on Trade in Services treats the supply of services markets through the commercial presence of a foreign supplier as a form of international trade. The very rapid increase of foreign investment in recent years, both in total value and in the number of companies involved (UNCTAD estimates there are now over 40,000 multinational companies, many of them based in developing countries) means that increasingly competition law issues, in particular those involving mergers and abuses of dominance, relate to the activities of such companies. This gives rise to a number of issues in the application of competition law of importance from an international perspective.[178]

One component of the relationship between foreign investment and competition policy is the important role that the latter can play in removing obstacles to market entry for foreign investors. While vertical restraints can play a positive role in facilitating access for new entrants, they can also be used, either by a dominant existing firm or by collective action on the part of existing firms, to prevent entry to the market for foreign investors, for example through foreclosing access to distribution channels.[179] Thus, there is a synergy between investment liberalization and the effective application of competition policy similar to that between market access for imports and competition policy.

In addition to helping remove obstacles to entry, an effective competition policy can facilitate desirable foreign investment by forming part of a legal and regulatory environment for foreign investors which is perceived as based on principles which the investors understand, to which they are accustomed and which circumscribe the scope for arbitrary decision-making. Control of the business practices of investors through competition law is likely to be less trade and investment restrictive or distortive than other policy instruments that have been used for this purpose in some countries (e.g. investment control and performance requirements, and transfer of technology regulations).

Frequently, the initial effect of foreign direct investment will be to increase competition in local markets. This will particularly be the case where the investment is of the greenfield sort (as is most such investment in developing countries), but the takeover and rejuvenation of a local enterprise can also have this effect. However, there is a possibility that over time the market may become increasingly concentrated and become characterized by one or a small number of dominant players. The likelihood of this may be greater where multinational enterprises are concerned, because of the greater efficiency they normally bring and the because markets which give such companies a competitive advantage are those characterized by economies of scale with a concomitant tendency to concentration. Of course, if governments have provided incentives to such enterprises to establish themselves, whether financial or through protection from competition, this tendency will be exacerbated.

There is thus reason to believe that a country opening itself up to foreign investors needs to have in place legal means for dealing with anti-competitive business practices by such

[174]Article 6.12.

[175]For example, the Anti-Dumping Law of the European Community enables the Community institutions to decide whether anti-dumping relief would be "in the interests of the Community".

[176]For example, in Canada, the Canadian International Trade Tribunal, following an injury determination, may hear representations by interested persons regarding the question of whether the imposition of anti-dumping duties, or the imposition of such a duty in the full amount that is potentially available, would be in the public interest. See Special Import Measures Act, Section 45.

[177]This, for example, is the case in the United States where briefs can be filed *amicus curiae* before the United States International Trade Commission. This was widely done by the United States Justice Department before 1981 and, after that, on occasion, by the United States Federal Trade Commission, but the frequency of this practice now seems to have declined.

[178]See, generally, UNCTAD (1997b).

[179]Governmental grants of monopoly or special or exclusive rights can have the same effect, but as discussed earlier, the scope for competition law to address these problems is frequently constrained.

investors (as well as by national companies). This is all the more so because the traditional means by which many countries have sought to address such concerns (e.g. the *ex ante* screening of investment, various performance requirements and technology transfer regulations) have been increasingly perceived as often less well adapted to the assessment of welfare effects and to have undesirable consequences in terms of discouraging foreign investment and raising the cost of attracting it. Moreover, international obligations are making it more difficult to maintain rules that discriminate against foreign companies (because of commitments entered into under the GATS and TRIPS Agreement or bilateral and regional investment agreements) or imports of foreign products (for example, because of the TRIMs Agreement). Competition law provides a non-discriminatory mechanism for addressing anti-competitive practices damaging to national welfare not only when entered into by foreign-based companies but also by local ones. A further reason why an increasingly wide number of countries are establishing or considering the establishment of competition laws and authorities is that the growing presence in their territories of foreign companies has the consequence that they are more and more affected by decisions of competition authorities of other countries in which these companies operate and which have a bearing on their worldwide activity, for example in respect of mergers; the possibility of cooperating with and influencing the decisions of such authorities will be much greater where a national competition authority exists.

A number of aspects of competition law and its application are often seen as of particular relevance to foreign investment. In most developed countries and increasingly in some developing countries, the largest part of foreign investment consists of mergers, acquisitions and related arrangements such as joint ventures. Thus, the initial contact of foreign investors with national competition law is often with the rules and procedures relating to mergers. As mentioned earlier, these typically are aimed at ensuring that mergers and similar arrangements do not establish or strengthen a position of dominance in a market, at least unless there are sufficient offsetting efficiency advantages. Normally, mergers in excess of certain threshold levels relating to the size of the companies are subject to notification and possible *ex ante* investigation and approval. They may be rejected or only permitted subject to certain conditions aimed at remedying adverse effects on competition.

In regard to the *ex post* application of competition law to the practices of multinational companies, an area which has attracted attention because of its transnational nature is that of vertical arrangements within the enterprise in question which, for example, prevent subsidiaries from exporting to certain markets or which require them to purchase specific inputs from the parent corporation. Intra-firm arrangements do not generally fall within the scope of competition law, in that individual companies are not expected to compete with themselves. However, to the extent that what is being alleged is that companies are making decisions on purchases and sales on grounds other than those of efficiency and commercial considerations, competition law and policy can play an important but indirect role in minimizing the scope for such decisions. It is only where companies are insulated from competitive pressures and market disciplines that they will be able to take such decisions and remain in business. By helping to maintain competitive markets and prevent abuses of positions of dominance, competition law can ensure that companies do not have the leeway to act inefficiently. Moreover, it might be noted that acting in such a way would be incompatible with the "efficiency seeking" that increasingly characterizes foreign investment and the transnational vertical integration of enterprises.[180]

Another competition law issue of special relevance to foreign direct investment is that of access to necessary evidence to challenge effectively the conduct of multinational corporations or to understand fully the consequences of mergers and acquisitions. This will be particularly difficult for smaller host countries with limited resources. These issues relating to accessing information and international co-operation in this regard are further discussed in Subsection 5 below.

While competition law has a desirable and legitimate role to play in respect of foreign direct investment, it is also important that it should not unnecessarily restrict it. In this regard, problems can potentially arise in three areas:

- One concerns the burdens on merging companies from the duplication of competition law proceedings in different markets, often with substantially different notification and procedural requirements, involving the application of differing substantive competition law criteria and with differing timing. Moreover, as discussed earlier, even the application of formally identical competition law criteria may yield outcomes that differ between jurisdictions depending on the geographical location of the efficiency gains. Duplicative proceedings are particularly an issue in respect of mergers between multinational companies. In the case of the merger between Gillette and Wilkinson Sword, the merger was reviewed by 14 jurisdictions. Such duplication of proceedings not only puts significant costs on the companies and competition authorities in question but is also likely to be detrimental to investment and trade through the business uncertainty that it engenders.[181]

- While merger approval procedures under competition law are generally neutral as to the nationality of the companies involved, there is a risk that they can be used to discriminate against foreign investors or imports of foreign goods and services and thus, to some extent, substitute for the more overtly discriminatory screening systems that were at one time common. This may result from a number of factors: the competition law criteria themselves may explicitly put emphasis on the maintenance of local industry and employment or, as mentioned elsewhere, value efficiency gains accruing in the territory higher than those elsewhere; or a degree of politicization of the decision-making process in initiating and concluding proceedings.

- Merger approval procedures can also be used to put restrictions in the way of outward investment. Thus, a country may be tempted to block, or put conditions on, the takeover of a foreign company by a national company if it believes that this would be detrimental to national economic activity and employment.

The link between foreign investment and competition policy is implicit or explicit in a number of WTO provisions. Article 9 of the TRIMs Agreement provides that, in the course of the review of the Agreement to be held not later than the year 2000, consideration shall be given to whether the Agreement shall be complemented with provisions on both investment policy and competition policy. This linkage reflects, in part, a perception during the negotiation of this Agreement on the part of some

[180] A related issue concerning the transnational nature of foreign direct investors is that of transfer pricing. In general, artificially high or low transfer prices are not addressed through competition law, at least unless used for predatory purposes, but rather through other legal means.

[181] For a thorough discussion of issues relating to the administrative and other costs of multijurisdiction merger review, see OECD (1994d).

countries that performance requirements on foreign investors were sometimes necessary in order to offset anti-competitive business practices. They considered that, if the Agreement were to go further in prohibiting or disciplining such performance requirements imposed on foreign investors than the ones covered which were already inconsistent with the GATT rules, it would be necessary for exploration of such a possibility to go hand in hand with exploration of international co-operation on competition policy as another means by which the business practices in question could be tackled.[182]

The GATS and TRIPS Agreement also reflect a similar concern on the part of some countries that commitments to extend advantages to foreign enterprises operating in their territories need to be balanced by enhanced international co-operation to deal with anti-competitive practices by such enterprises. Thus, Article IX of the GATS and Article 40 of the TRIPS Agreement provide for consultation and co-operation between Members on such matters.

Some of the horizontal provisions of WTO Agreements are of relevance. As a general rule, Article II of the GATS and Article 4 of the TRIPS Agreement require MFN treatment of foreign investors in the application of competition and other laws regulating business behaviour in the areas covered by these Agreements, while Article 3 of the TRIPS Agreement and, to the extent that a specific commitment has been made, Article XVII of the GATS require national treatment in this regard. The transparency provisions of Article 63 of TRIPS and Article III of the GATS are also of relevance.

## IV.4 Intellectual property rights

Anti-competitive practices in connection with intellectual property rights have been a long standing issue in international economic relations, for example in connection with the work under the auspices of UNCTAD on the development of a Code of Conduct on the Transfer of Technology. With the negotiation and conclusion of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and also the General Agreement on Trade in Services, these issues have acquired a more specific trade dimension.

Anti-competitive practices involving the use of intellectual property rights are usually addressed by competition law within the basic framework relating to vertical and horizontal restraints, abuses of dominant positions and mergers. However, application of competition law to cases involving the use of intellectual property rights raises a number of special issues:[183]

- First, a need to distinguish between restraints on competition which have been intended by the legislators to fall within the scope of the intellectual property right in question and those which do not and may therefore be actionable under competition law. The traditional focus of competition law on short-term allocative efficiency has meant that there has existed a certain tension between competition law and intellectual property law in finding this dividing line. More recent developments in competition law thinking which put emphasis on the promotion of dynamic efficiency (which corresponds to the key underlying rationale for the grant of intellectual property rights) are contributing towards a more comfortable accommodation between the two policy areas.

- Intellectual property rights may generate or contribute towards a position of market power. In this regard, a significant development over recent decades has been a reduction in the tendency of courts and competition authorities to presume that intellectual property rights, such as patents, necessarily give rise to market power. There is now a much greater readiness to examine this issue on its merits on a case-by-case basis, recognizing, for example, that of the hundreds of thousands of patents granted each year only a relatively small minority will provide significant market power.[184]

- A third specific characteristic of intellectual property rights is their inherent vulnerability to misappropriation compared to other forms of property. In assessing the pros and cons of particular provisions in licensing contracts, the effect in reducing this risk may be taken into account in their examination by competition authorities, as an ameliorative factor.

- The territorial nature of intellectual property rights means that frequently national law enables them to be used by right holders to prevent parallel imports and therefore to enforce geographical exclusivity arrangements.[185]

In line with normal competition law practice, horizontal restraints involving the use of intellectual property rights are generally treated more severely than vertical restraints. Particular concerns arise where intellectual property licensing agreements amongst competitors, such as patent pooling, serve as vehicles for establishing cartels that fix prices, limit output and/or divide markets (see Box IV.10). As is the case with vertical restraints generally, competition law as it applies to licensing arrangements between vertically-related companies has generally moved in the direction of a stance that entails a more widespread recognition of efficiency benefits. Intellectual property rights can also be a

[182]Among the performance requirements which are not addressed by the Agreement but which some Members would have liked to have seen covered are: export performance requirements, manufacturing limitations, technology transfer requirements, remittance restrictions and local equity requirements. Those already explicitly covered are local content, trade balancing and export restriction requirements.

[183]See, generally, OECD (1989a), and Anderson and Gallini (forthcoming, 1997).

[184]See McGrath (1984).

[185]The situation regarding the extent to which right holders can use their intellectual property rights to prevent parallel imports varies between countries and categories of intellectual property rights. Traditionally, the scope for market segmentation has been somewhat greater in the areas of patents and copyright than in that of trademarks.

**Box IV.10: The interface between international trade, competition law and intellectual property: The Pilkington case**

In the 1994 Pilkington Case, the US Department of Justice alleged that a British firm, Pilkington plc, and its United States subsidiary had conspired to unreasonably restrain trade in the construction and operation of float glass plants and in technology for producing glass. According to the Department's case, markets around the world had been allocated in a conspiracy based on restrictions in licences for patents and other intellectual property relating to the float glass process, even though the underlying patents had expired. A consent decree that was approved by the court in the case prohibited the defendants from restraining United States and foreign firms from bidding on plant construction projects in the United States, and from restricting the ability of United States firms to bid on plants elsewhere.

*Source: US v Pilkington plc and Pilkington Holdings, Inc.* (District Court for Arizona, October 19, see also Federal Trade Commission (1996).)

factor in monopolization or abuse of a dominant position case. A number of such cases have arisen in high technology network industries, in which the need for compatibility of products and systems can substantially reinforce the market power conferred by patents and copyrights.[186]

One area where horizontal agreements relating to the exercise of intellectual property rights have generally been found acceptable under competition law is that of collecting societies representing right holders in the area of copyright and neighbouring rights. In this case, the efficiency benefits accruing from such collective administration of licensing compared to individual licensing by the very large number of separate right holders can be found to outweigh the anti-competitive effects.[187] Of course, even where such collective action is deemed to be acceptable in principle, the application of competition law can be useful in preventing the abuse or unwarranted extension of collective activities where they are inappropriate.

While there is a substantial degree of commonality in the criteria applicable to the examination of practices involving intellectual property rights, there are also important differences. For example, the emphasis on market integration underlying European Community competition law has caused it generally to prohibit the use of intellectual property rights to prevent parallel imports and therefore segment markets within the Community, even in situations where intellectual property legislation among EC member States has not been harmonized.

Some countries, in particular developing countries, have relied upon special transfer of technology laws or regulations as a means of preventing abuses in connection with the licensing of intellectual property rights. Such laws and regulations have differed from the competition law approach in a number of important respects, notably their focus on transactions involving foreign companies, the application of criteria and objectives perceived to be related to development and not just to "competition" (in particular, improving the bargaining position of the importing country), and the emphasis on *ex ante* screening for approval of technology transfer transactions.[188] In line with the widespread move towards more open and market-oriented economic policies, many countries have abandoned or diluted these laws and regulations, in part because of a recognition that they have sometimes had a deterrent effect on the transfer of technology and were less well-suited than competition law for assessing the pros and cons for national welfare. It should also be noted that intellectual property laws themselves may incorporate remedies which can address abuse of rights, without this being subject to competition law tests. This is particularly the case in the area of patents, where many national laws provide for the grant of compulsory licences in certain situations, for example failure to supply the reasonable needs of the market.

One of the themes in the negotiation of the WTO TRIPS Agreement was a concern on the part of some countries, especially developing countries, that commitments to protect intellectual property should be balanced by a recognition of the right of Members to prevent anti-competitive practices involving the use of intellectual property rights and by international co-operation to facilitate such action, especially for the benefit of countries with more limited resources. These concerns are addressed in Articles 8.2 and 40. Article 8.2 recognizes that "Appropriate measures, provided they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". Article 40 is concerned with the control of anti-competitive practices in contractual licences. It affirms the right of Members to specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having adverse effects on competition in the relevant market and to adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices. There is no explicit agreement on practices which would have to be considered to fall in this category, or indeed on practices which should not do so. However, the Agreement contains a short illustrative list of practices which may be treated as abuses: these are exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing.

As indicated, measures to remedy anti-competitive practices involving the use of intellectual property rights have to be consistent with the provisions of the TRIPS Agreement. One type of remedy explicitly foreseen is compulsory licensing in the area of patents and the layout-design of integrated circuits. Article 31 contains detailed conditions aimed at protecting the legitimate interests of the right holder in regard to compulsory licensing, but a number of these are relaxed where the compulsory licence is granted to "remedy a practice determined after judicial or administrative process to be anti-competitive" (for example, the conditions relating to seeking first a voluntary licence, to the level of remuneration to be paid to the right holder, and to the limitation of the supply of the product in question to the domestic market).

Article 40 includes a provision under which a Member considering action against a firm of another Member can seek consultations with that Member, who is required to cooperate through the supply of publicly available non-confidential information of relevance and of confidential information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality. Similarly, a country whose companies are subject to such action in another Member country may also ask for consultations.

The TRIPS Agreement would appear to enhance the case for countries who wish to protect themselves against anti-competitive abuses of intellectual property rights to establish a functioning competition law and competition authority. The provisions of Article 40 and the special provisions of Article 31 relating to the grant of compulsory licences to remedy anti-competitive practices are based on the application of competition law criteria and proceedings. Given that for many countries, especially developing ones, the bulk of technology

[186]Some leading examples of monopolization or abuse cases involving intellectual property and standardization issues include Lotus Dev. Corp. v. Borland International Inc., 799 F. Supp.203 (D. Mass 1992), reversed 49 F.3d 807 (1st Cir. 1995), United States v. Microsoft, 1995-1 CCH Trade Cases para. 70,928, and Radio Telefis Eireann (RTE) & Anor v. Commission of the European Communities [the Magill case], 1995 CCH CEC para. 400. For discussion, see Church and Ware (1997).

[187]While in some countries such collecting societies find their justification through this type of efficiency test, in some others they are explicitly excluded from the coverage of competition law. A further approach has been to justify their activities on the ground that a collective licence is a fundamentally different product from a series of individual licences and therefore the market is not the same (see Columbia Broadcasting System v. Broadcast Music Inc., 441 US 23 (US Supreme Court, 1979).

[188]It has been suggested that competition law mechanisms may, in some cases, also have been used in this way, particularly where "non-competition" criteria are employed. See, for example, Davidow (1989).

transfer contracts are likely to involve dealings with foreign companies, enforcement action against alleged anti-competitive practices may often require access to information outside their jurisdictions. Thus, the importance that has been attached to the arrangements for co-operation provided for in Article 40, which are likely to work best when they can be implemented between the competition authorities of the countries concerned.

A further link between the TRIPS Agreement and competition law is the stress in its Part III on Enforcement on providing safeguards against abusive enforcement proceedings. Attempts to enforce invalid intellectual property rights or ones obtained by fraud or inequitable conduct, or objectively baseless litigation to enforce intellectual property rights may be actionable under competition law.

## IV.5 Concluding remarks on factors affecting the extent to which competition law can deal with trade problems

The previous subsections of this section discussed a range of specific problem areas in international trade arising from enterprise behaviour and how competition law and trade rules relate to them. It would seem that, in most cases, the application of competition law would be the most appropriate remedy for such problems (although, in some cases where fundamental structural market problems exist, and the scope for governmental influence is high, a combination of market structure reforms and pro-competitive regulatory policies may be warranted). Drawing on the discussion in Section III, the purpose of this section is to assess the general factors influencing the extent to which competition law may be applied in practice to prevent or remedy trade problems arising from enterprise behaviour and, where it is applied, whether it will deliver outcomes that reflect the interests of trading partners as well as of the country enforcing its competition law.

Before moving on to this, it should be emphasized that the liberalization of governmental measures restricting trade and investment and other forms of deregulation can often be the most effective means of preventing or remedying anti-competitive business practices, by introducing greater competition into the market. Indeed, in some countries, such liberalization can be recommended under national competition law by competition authorities and courts as a remedy to anti-competitive business practices.[189] The extent to which this possibility exists and is used in practice might be a useful area for work by the international community.

### IV.5.a Existence of competition law

An obvious precondition for the use of competition law to address trade policy concerns is that a national competition law exists. It appears that some 70 countries, including most major trading nations, whether developed, in transition, or developing, have competition laws. But this means that a large number of countries do not. For further details see Table IV.2 on Exemptions from the application of competition policy, in Part II.7, above.

In some instances, extraterritorial application of the competition law of affected trading partners may be capable of addressing business practices in a territory where no national competition law exists, but such an approach has limitations and difficulties which are discussed below. It may also be that in some countries which do not have competition laws alternative policy instruments exist for controlling at least some of the business practices that might be subject to competition law. A key issue in this regard is the extent to which such mechanisms might be available to redress problems experienced by trading partners.

### IV.5.b Exemptions

Even where a national competition law exists, it may not apply to a given enterprise practice because the scope of its jurisdiction is limited by exemptions. Such exemptions may be either of a horizontal nature, for example in respect of practices mandated by a government, or of a sectoral nature. Further details can be found in Box IV.2. It might be noted that the scope of such exemptions is often quite wide and affects some sectors where anti-competitive practices may be quite prevalent.

### IV.5.c Non-enforcement of competition law

Where competition law exists and is applicable to a given business practice, a key issue from an international perspective is the extent to which it will be applied in practice, particularly in cases which are perceived within the country concerned as mainly involving possible damage to the interests of trading partners. This question can be viewed from two perspectives:

- the extent to which foreign companies have a private right of action to secure enforcement of competition law; and
- the extent to which administrative authorities responsible for the enforcement of competition law will act in situations where foreign interests are at stake.

Private right of action

If enterprise practices in an importing country are creating market access problems for exporting enterprises, for example as a result of vertical restraints, the existence of a private right of action before the courts or other competent adjudicatory bodies which could be invoked by such exporting companies would be one way of securing the enforcement of national competition law. This in turn depends on two considerations: one is whether private antitrust suits are possible under the national law of the country concerned; and the other is whether exporting companies have legal standing.

On the first of these two points, that of the existence of a private right of action, work under way in the OECD shows that the situation differs between countries. In some countries, private actions can be initiated directly in the courts on the whole range of competition law practices. In some others, this is only possible in respect of certain practices. Even where the possibility exists, the actual frequency of recourse varies widely; for example, it is common in the United States but rare in the United Kingdom. In countries with an administrative enforcement system or specialized tribunals, direct access to the ordinary courts is uncommon, but may be possible after review by the specialized body or bodies.

Where private rights of action do exist, an important question is whether foreign companies which are not incorporated or have no other legal presence in the jurisdiction have standing to file a competition law case. While it would appear that normally competition law does not discriminate on the basis of the

[189] For example, in Canada, the Competition Act (section 31) provides specifically for the lowering of tariffs as a special remedy in cases where: (a) competition in respect of an article has been prevented or lessened substantially; and (b) such adverse effects on competition can be reduced or eliminated by removal or reduction of a tariff. Furthermore, in at least two cases, decisions not to challenge a merger were made partly on the basis of commitments obtained from the parties to seek accelerated reduction of tariffs under the Canada/US Free Trade Agreement. See the discussion of the Consumers Packaging Inc. – Douglas Inc. and Asea Brown Boveri – Westinghouse mergers in Canada, Director of Investigation and Research (1990).

nationality of enterprises and tests to be satisfied to have standing generally do not differ according to the nationality of the firms involved, further work is necessary to clarify the extent to which enterprises without a legal presence in the market would have standing. While a rule which requires a domestic legal presence would de facto discriminate against foreign companies, it need not formally do so, in the sense that all companies, whether national or foreign, with a presence in the jurisdiction would be treated equally.[190]

Administrative discretion in initiating enforcement proceedings

In situations where private parties have no direct rights of action, the decision to prosecute will depend on the administrative antitrust enforcement agencies. Evidently, such agencies, like any administrative body, will have limited resources and have to establish priorities for their use. From the perspective of trading partners, key questions are whether the resources will be adequate to enable cases adversely affecting their trading interests to be tackled and whether, in the drawing up of priorities, competition offices would tend to discriminate against the initiation of cases which are perceived to involve adverse effects on trading partners more than on domestic welfare and efficiency.

One aspect is the extent to which private companies are entitled to petition or make complaints to competition authorities to take action, have their complaints investigated, obtain an explanation of a decision not to act and appeal against such a decision. The existence of such rights may be a factor in influencing the likelihood that competition authorities will act in a way which does not discriminate against affected enterprises outside the jurisdiction. While the possibility to petition the competition authority would appear to be generally well-established and not to discriminate on the basis of the nationality of the petitioning enterprise, it is not clear that enterprises which do not have a local legal presence would always have standing to do so, even where they are affected by an alleged anti-competitive practice. As to whether the investigation of complaints by competition authorities is mandatory, work under way in the OECD suggests that in most jurisdictions this is not the case. On the issue of the right to a response from the petitioned competition authority, the situation appears to differ from country to country, both as to whether a response is due and whether it must be motivated.

In regard to the extent to which enterprises can appeal against the failure of a competition authority to take action in response to a complaint, work under way in the OECD suggests that this right does not exist in some jurisdictions.

### IV.5.d Competition law criteria

Where enforcement proceedings are initiated in cases where business practices are alleged to be harming foreign countries, an important question is whether the criteria employed by the competition authorities are such that the interests of such foreign countries will be adequately taken into account. The previous discussion in this Chapter raises three issues which may merit further study in this connection:

- In some countries' national competition legislation, what might be regarded as pure competition criteria (relating to securing allocative efficiency) are still accompanied by a number of other considerations which might be used to support giving priority to domestic producer interests over those of domestic consumers and of foreign consumers and producers. Even where such considerations are not explicitly set out in the legislation, it is sometimes alleged that they nonetheless sometimes in practice would appear to underlie decisions of competition authorities and courts.[191] As mentioned in Section II of this Chapter, such other objectives of competition law may include notions of equity and fairness, avoidance of excessive concentration of economic power and protection of small and medium-sized enterprises, the promotion of domestic industry and employment, and enhancing the export competitiveness of national producers and suppliers of goods and services. Moreover, it is worth noting that, while the competition rules of the European Community are specifically aimed at preventing anti-competitive practices that may restrict or distort trade, this is limited to trade between the member States of the Community and under various regional agreements with other European countries and does not extend to trade with the rest of the world.

- Even where criteria of allocative efficiency are solely applicable, the fact that such criteria are generally applied in respect of efficiency and welfare within the jurisdiction in question and may not take into account adverse effects on the welfare of producers and consumers abroad may lead to situations where the enforcement of national competition law will not adequately take into account the interests of trading partners. This will be particularly the case where a total national welfare analysis approach, which allows national consumer costs to be offset by national producer efficiencies, is followed. Even where the emphasis is predominantly on national consumer welfare, normally it will be the case that such welfare will correspond to that of trading partners, but it cannot be assumed that it will always be so. This is most obvious in the case of export cartels, where there is a divorce between the effects on national consumers and those on consumers throughout the rest of the world, but can arise in other situations where markets are segmented, for example mergers and vertical restraints affecting foreign producers.

- A question has also been raised, in connection with vertical restraints, as to whether even the application of efficiency criteria which are neutral as between affected countries would satisfactorily resolve all legitimate trade issues, i.e. whether there are vertical restraints which may not pose competition problems but nonetheless restrain market access unreasonably. This would appear to be an open question which requires further study before an answer could be advanced by the international community.

### IV.5.e Independence of competition authorities

It can be expected that the more independent the competition authority is from political processes, the more it will be ready to initiate and handle, on their merits, cases involving alleged anti-competitive practices adversely affecting foreign interests. By independence here, one is referring to, first, the degree to which the competition authorities are autonomous, in their handling of specific cases, of the executive and legislative branches of government and, second, the extent to which their decisions are subject to political overrule and, if so, subject to what safeguards. However, it is also important to note that a strong culture of independence, possibly combined with rules preventing interference in the conduct of proceedings regarding specific cases, can lead to a degree of autonomy in practice greater than that which the institutional arrangements would suggest, and vice versa.

[190]For a useful discussion of these issues, see Khemani & Schöne (1997).

[191]See, e.g., Neven, Nuttal and Seabright (1993).

As is to be expected, the situation differs greatly between competition authorities. At one extreme is the situation where the competition authorities may be simply part of a ministry which is under day-to-day political control. At the other extreme are authorities who have complete autonomy in their operations under the law, whose principle officers enjoy a higher degree of security tenure and whose decisions can only be challenged before the courts. But no government office which depends on annual allocations of public funds for its budget can be completely independent.

### IV.5.f Extraterritoriality

The extraterritorial application of competition law is one means whereby countries may seek to prevent or remedy anti-competitive practices in another jurisdiction which have adverse effects on them. The extraterritorial application by a country of competition law in cases where enterprise practices abroad are considered to be harming competition and, in particular, consumers in its territory is not uncommon, being based on the so-called "effects doctrine".[192] This presents, in particular, an avenue by which a country can address enterprise practices abroad aimed at exerting market power in exports to its market, for example through export cartels or mergers. More uncommon, is the possible application of competition law by a country to practices in another territory which are considered to be adversely affecting its exports. This approach theoretically could respond to situations where another country's competition authorities were not taking action against practices restricting access for imports.

In reality, the scope for extraterritorial application by a country of its competition law, particularly in situations where the enterprises in question do not have a legal presence in its territory, is constrained by practical considerations. One is the difficulty of obtaining the information necessary to support a case when the information is not within the jurisdiction and the enterprises may not wish to cooperate. In some situations, the governments of the home countries of those enterprises may be indisposed to cooperate themselves or see their enterprises cooperate; some countries have "blocking statutes" to prevent their enterprises from disclosing information in such situations. Even where competition authorities wish to cooperate by exchanging information, their ability to do is generally restricted by provisions in national laws prohibiting the exchange of confidential information. A further practical difficulty may be with the enforcement of judgements, again more particularly where the enterprise in question does not have a legal presence within a jurisdiction.

It should also be noted that extraterritorial application of competition laws is not without the potential to give rise to disputes between countries and difficulties for business, faced with differing and possibly conflicting standards and procedures. This is particularly the case where countries have differing perceptions of where their national interests lie. The Boeing-McDonnell Douglas merger illustrates the sensitivities that exterritorial application can give rise to, even in a country which makes widespread use of the practice itself. Although the application of the "effects doctrine" as it relates to consumers is now quite common, it continues to be a source of considerable tension between countries.[193] The extraterritorial application of competition law in cases where the issue is adverse effects on producers and exports has the potential, if it were to be exercised, to give rise to even greater difficulties in relations between countries. These disadvantages of extraterritorial application are widely recognized by competition authorities themselves and are one of the reasons why they have sought enhanced international co-operation between them, in particular through the positive comity principle.

### IV.5.g International co-operation

A range of bilateral, regional and multilateral agreements providing for co-operation in the enforcement of competition law have been developed with a view to responding to and overcoming some of the difficulties that have been identified above. These arrangements are the subject of the next section of this Chapter.

## V.Existing international agreements and activities on competition law and policy

This section looks in turn at relevant provisions of the Agreement Establishing the World Trade Organization, arrangements between competition authorities for co-operation and enforcement of competition law, and provisions on competition law in international trade agreements other than the WTO.

### V.1 WTO provisions

#### V.1.a Historical background

The General Agreement on Tariffs and Trade (GATT) was based on the Chapter on Commercial Policy in the Havana Charter for an International Trade Organization (ITO).[194] The Havana Charter provided for an International Trade Organization that would have integrated into a single agreement the treatment of restrictive business practices that might restrain competition in international trade and the treatment of governmental measures also having this effect. Chapter V, entitled Restrictive Business Practices, contained nine Articles on the obligations of member governments to address such practices and on the establishment of international machinery under the framework of the ITO to facilitate dealing with complaints lodged by Members. The purpose of these provisions was defined as being:

"... to prevent, on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives [of the Charter]."[195]

[192]The "effects doctrine" is often associated with the application of US antitrust law. See, generally, US, Department of Justice and Federal Trade Commission (1995). In the European Community, reference is sometimes made to an "implementation doctrine" which permits the application of EC competition law to arrangements that are entered into abroad but are "implemented" in the EU. See, e.g., Cases 89/85, etc., A. Ahlstrohm Osakeyhtio v. Commission ("Wood Pulp"), 1988 E.C.R. 5193.

[193]For a recent statement of concern, see Japan Industrial Structure Council (1997).

[194]Final Act and related documents, United Nations Conference on Trade and Employment, held at Havana, Cuba, from 21November 1947 to 24 March 1948.

[195]Article 46.1, ibid.

The Chapter specified six practices[196] that were to be considered harmful on trade when made effective by an enterprise or enterprises that, individually or collectively, possess effective control of trade among a number of countries in one or more products and provided for a procedure for inclusion of additional practices by agreement. The Organization would investigate any complaint where it decided an investigation was justified. If the complaint were upheld by the Organization, the Member concerned would be requested to take every possible remedial action.

When it became clear that the Havana Charter would not enter into force, the GATT CONTRACTING PARTIES held in 1954-1955 a review session to examine to what extent it would be desirable to amend or supplement the General Agreement. This work led to the adoption by the GATT CONTRACTING PARTIES in November 1960 of a Decision on Arrangements for Consultations on Restrictive Business Practices.[197]

### V.1.b Consultation and co-operation arrangements

Under each of the main agreements that make up the WTO Agreement, the GATT, the GATS and the TRIPS Agreement, procedures for consultations and co-operation on anti-competitive practices are provided for. In the case of the GATT, these procedures are found in the above-mentioned Decision of the GATT CONTRACTING PARTIES. This Decision recognizes that business practices which restrict competition in international trade may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade. It further recognizes that international co-operation is needed to deal effectively with harmful restrictive practices in international trade. It records, however, that the CONTRACTING PARTIES considered that in the then prevailing circumstances it would not be practicable for them to undertake any form of control of such practices nor to provide for investigations. The Decision recommends that, at the request of any contracting party, a contracting party should enter into consultations on harmful restrictive practices in international trade on a bilateral or multilateral basis as appropriate. The party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects. These arrangements have only been invoked on three occasions (see Box IV.5, above).

Article IX of the GATS recognizes that certain business practices of service suppliers may restrain competition and thereby restrict trade in services. It requires each Member to enter into consultations, at the request of any other Member, with a view to eliminating such practices. The Member addressed must accord full and sympathetic consideration to such a request and cooperate through the supply of publicly available non-confidential information of relevance to the matter in question, as well as other information, subject to its domestic law and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality.

The TRIPS Agreement contains a similar provision, which is discussed in more detail in Section IV.4 above.

### V.1.c Non-discrimination

The three main WTO agreements contain broad national treatment and most-favoured-nation rules which may have some applicability to situations where the competition law or other laws of a WTO Member aimed at combatting anti-competitive behaviour of enterprises, or the application of such laws, discriminate against or between the goods and services or the nationals of other WTO Members. To take the area of trade in goods and the GATT first, such laws would fall within the scope of the national treatment rule of Article III:4 to the extent that they affect the internal sale, offering for sale, purchase, transportation, distribution or use of goods. While a provision of law which *de jure* accords less-favourable treatment to imported goods than to like goods of domestic origin would appear clearly to fall foul of Article III, the provision could also be applicable to a situation where the discrimination was *de facto* in nature; Article III has been interpreted to require effective equality of opportunities for imported goods.[198] GATT jurisprudence also makes it clear that enforcement procedures as well as substantive laws and regulations are subject to the requirements of Article III.[199] In regard to the GATS national treatment obligation (Article XVII), two important differences compared to the GATT national treatment provision should be noted: first, the rule is not one of general application but depends on a specific commitment to give national treatment in the sector in question being made in the WTO Member's Schedule; second, the rule applies not only to the treatment of the *services* of other WTO Members but also to the treatment of the *service suppliers* of other WTO Members. It should be noted that, while these rules have potential applicability to cases where measures to combat anti-competitive enterprise behaviour discriminate against imported goods or services or foreign companies supplying services on the domestic market, they have no applicability in regard to discriminatory treatment of exports compared to the treatment of goods and services on the domestic market.

The most-favoured-nation treatment rules of the GATT and GATS[200] are also of wide applicability and could be relevant to situations where measures to combat enterprise practices discriminate *between* other WTO Members in respect of the treatment of goods for import from or export to them or services and service suppliers of them.

As regards the TRIPS Agreement, its national treatment and most-favoured-nation treatment obligations[201] prohibit, subject to a short list of exceptions, discrimination against and between the nationals of other WTO Members with regard to matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those

[196] Those practices were: (a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product; (b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas; (c) discriminating against particular enterprises; (d) limiting production or fixing production quotas; (e) preventing by agreement the development or application of technology or invention whether patented or unpatented; and (f) extending the use of rights under patents, trademarks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants. Article 46.2 ibid.

[197] BISD 9S/28-29.

[198] Panel report on "United States – Section 337 of the Tariff Act of 1930", adopted 7November 1989 (BISD 36S/345).

[199] Ibid.

[200] Article I of the GATT and Article II of the GATS. These rules are subject to certain exceptions, for example for regional trading arrangements.

[201] Articles 3 and 4.

matters affecting the use of intellectual property rights specifically addressed in the Agreement.

Various other WTO agreements also contain national treatment and MFN standards, for example the Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures. The same is true of the plurilateral Agreement on Government Procurement.

### V.1.d Transparency

Many WTO agreements contain obligations relating to the publication and notification of national laws, regulations, judicial decisions and administrative rulings of general application which pertain to the subject-matter of the agreement in question.[202] These provisions are of broad applicability, generally covering all measures which affect the area of trade in question. In the case of the TRIPS Agreement, specific reference is made to measures concerning the "prevention of the abuse of intellectual property rights". As indicated in Section IV.1.c above, GATT rules relating to enterprises with monopolies or exclusive or special privileges put particular emphasis on the notification of information concerning their activities. The GATS also contains special procedures for the provision of information in respect of monopolies and exclusive service suppliers.[203]

### V.1.e Minimum standards

On the whole, the WTO does not specify minimum standards which Members must employ in determining enterprise practices which should be prevented. There are, however, some exceptions. The most important of these are the WTO rules which relate to enterprises with monopolies or exclusive or special privileges. These are discussed in Section IV.1.c above. Perhaps most significant in this area are the rules contained in Article VIII of the GATS and their elaboration in the annex to the GATS on Telecommunications and, in particular, in the commitments entered into by a large number of WTO Members in regard to basic telecommunications services in the form of a "Reference Paper" setting out anti-competitive safeguards and regulatory principles.

The Agreements on Technical Barriers to Trade (TBT) and on the Application of Sanitary and Phytosanitary Measures also contain minimum substantive and procedural norms aimed at ensuring that technical regulations and standards and sanitary and phytosanitary measures do not create unnecessary obstacles to international trade. Members commit themselves to take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies comply with these norms, for example by adhering to a Code of Good Practice for the Preparation, Adoption and Application of Standards that is annexed to the TBT Agreement.

[202]For example Article X of the GATT, Article III of the GATS and Article 63 of the TRIPS Agreement.

[203]Paragraphs 3 and 4 of Article VIII.

[204]Article II.3. Such measures include voluntary export restraints, orderly marketing arrangements and similar measures which afford protection such as export moderation, export price or import price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes.

[205]Articles 3.4, 4.1, 8.1 and 9 of the Agreement on Technical Barriers to Trade and Article 13 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

[206]Article XV:1(a).

[207]Article 40.2.

[208]Article 8.2.

It might also be noted that a number of WTO agreements contain a standard of a negative nature, by which Members commit themselves not to prevent enterprises from behaving in a non-trade distorting or restricting way or not to encourage or support behaviour by enterprises that would restrict or distort trade. Article XVII:1(c) of the GATT requires Members not to prevent any enterprise under its jurisdiction from acting in accordance with the principles set out in subparagraphs (a) and (b) (making decisions relating to purchases or sales involving either imports or exports in accordance with commercial considerations and affording the enterprises of other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales). The Agreement on Safeguards requires that Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to the "grey area" measures which the Agreement requires to be eliminated.[204] The Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures forbid Members from taking measures which require or encourage non-governmental bodies to act in a manner inconsistent with their provisions.[205]

### V.1.f Remedies

A number of WTO agreements specifically authorize remedies to address enterprise behaviour which is considered to have adverse effects on international trade. Article VI of the GATT and the Agreement on Implementation of Article VI (the Anti-Dumping Agreement) authorize, subject to certain conditions, Members to impose anti-dumping duties or obtain price undertakings to respond to certain enterprise pricing practices, namely dumping, which Members recognize in Article VI:1 is to be condemned if it causes or threatens material injury to an established industry or materially retards the establishment of a domestic industry.

The plurilateral Agreement on Government Procurement provides that, as an exception to the normal rules requiring open or selective tendering procedures, limited tendering may be employed in situations where collusive tenders have been submitted.[206]

The TRIPS Agreement recognizes the right of Members to take, consistently with the other provisions of the Agreement, appropriate measures to control licensing practices or conditions that may, in particular cases, constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market[207], and, more generally, to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonable restrain trade or adversely affect the transfer of technology.[208]

### V.1.g Dispute settlement

In general, the WTO dispute settlement mechanism is applicable in situations where a Member considers that any benefit accruing to it directly or indirectly under the WTO Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of:

(a) the failure of another Member to carry out its obligations under the Agreement; or

(b) the application by another Member of any measures, whether or not it conflicts with the provisions of the Agreement; or

(c) the existence of any other situation.

The first of these causes of action, namely the allegation that another Member is not carrying out its obligations, could be invoked in respect of any of the obligations on Members referred to above where they have a relation to enterprise practices.

Cases based on the second cause of action listed above, where it is alleged that benefits accruing to a Member under the Agreement are being nullified or impaired by a measure even if it does not conflict with the provisions of the WTO, are often referred to as non-violation cases.[209] There has been considerable discussion as to whether the failure of a Member to enforce its competition laws to prevent enterprise practices that are impeding market access to trading partners could be successfully challenged under this provision.[210] However, to establish such a case, there are some important hurdles that have to be overcome. First, the onus of proof is very much on the complaining party to provide a detailed justification of its claim that the "non-violating" measure at issue has had the effect of nullifying or impairing benefits accruing to it under the WTO. Second, it would have to be established that an act of omission, namely a failure to enforce the law, constitutes an "application" of a "measure" by the Member concerned. Third, it would have to be demonstrated that the measure could not, at the time the obligation or concession was negotiated, have been reasonably anticipated. While, on the face of it, there would appear to be significant obstacles to the use of the non-violation route to challenge the failure of a Member to take action against anti-competitive practices impeding trade, there may be more scope in situations where the application of competition law has involved positive action on the part of the Member to tolerate enterprise action impeding trade, for example through approval of a merger or granting of an exemption. It should be noted that, in the event of a successful non-violation complaint, there is no obligation to withdraw the measure (Article 26 of the Dispute Settlement Understanding), although that is obviously an option for the parties to the dispute. The panel or Appellate Body would only recommend the parties agree on a mutually satisfactory adjustment.

Cases based on the cause of action referred to in (c) above are often referred to as "situation complaints". While the potential scope is large, not being limited to governmental measures, it is important to note that no panel established under the GATT or the WTO has ever ruled on such a complaint.[211] Moreover, the strengthened rules of the WTO Dispute Settlement Understanding in regard to the adoption, and surveillance and implementation, of recommendations and rulings do not apply to such cases, but rather the old rules of the GATT, which required consensus for the adoption of panel reports.

[209]The scope for such cases under the GATS is limited to situations where the allegation is that benefits accruing from a specific commitment, not a rule of general application, are being nullified or impaired. In the case of the TRIPS Agreement, there is a moratorium on the application of causes of action (b) and (c) until the year 2000. In the intervening period, the scope and modalities for such actions are to be examined. Failing a consensus decision to the contrary, these causes of action will become applicable as from 1 January 2000.

[210]See, for example, Bacchetta *et al.* (1997) and Matsushita (1997).

[211]In 1983, the European Community requested the establishment of a working party under Article XXIII:2 (the dispute settlement provision of the GATT) alleging that the situation in Japan constituted a nullification or impairment by Japan of the benefits otherwise accruing to the European Community under the GATT, and an impediment to the attainment of GATT objectives. The Community claimed that the benefits of successive GATT negotiations with Japan had not been realized owing to a series of factors peculiar to the Japanese economy which had resulted in a lower level of imports, especially of manufactured products, as compared with other industrial countries. The complaint was not subsequently pursued. (Documents L/5479 and C/M/167).

[212]Document WT/MIN(96)/DEC.

### V.1.h WTO activities relating to competition policy

Built-in agenda

Each of the main WTO agreements (relating to goods, services and intellectual property) contain "built-in agendas" for further negotiations or review, which can include issues related to competition law and policy. In regard to trade in goods, the Agreement on Trade-Related Investment Measures provides, in its paragraph9, that, in the context of a review of its operation to take place within five years of the entry into force of the WTO Agreement (i.e by the year 2000), consideration shall be given to complementing it with provisions on investment policy and competition policy. Amendments shall be proposed, as appropriate, to the Ministerial Conference.

The GATS constitutes a framework for further negotiations aimed at the progressive liberalization of trade in services through successive rounds, the first of which should begin by the year 2000. Moreover, a range of other activities under the GATS, in particular in respect of unfinished business left over from the Uruguay Round, may also be of relevance. It was in this context that important concessions were agreed in the area of basic telecommunications in February 1997, including on competition policy and regulatory issues (see Section IV.1.c above), and negotiations are under way on financial services. Further negotiations on maritime transport services are foreseen. A Working Party on Professional Services is exploring the scope for the development of multilateral disciplines on qualification requirements and procedures and licensing requirements in this area and the use of international technical standards.

The TRIPS Agreement is to be reviewed after the year 2000.

Working Group on the Interaction between Trade and Competition Policy

At their first Ministerial Conference, held in Singapore, December 1996, WTO Ministers decided, having regard to the existing WTO provisions on matters related to competition policy and the built-in agenda in this area, including under the TRIMs Agreement:

"to establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework".

The decision specifies that the work will not prejudge whether negotiations will be initiated in the future, and that future negotiations, if any, regarding multilateral disciplines will take place only after an explicit consensus decision among WTO Members. The decision stresses the importance of co-operation with UNCTAD and other appropriate intergovernmental fora. It also requires that the Working Group on the Interaction between Trade and Competition Policy and that established in parallel on the Relationship between Trade and Investment draw upon each other's work where necessary. The Working Group is to report to the General Council which will determine after two years how its work should proceed.[212]

Trade Policy Review Mechanism

The Trade Policy Review Mechanism, established in Annex 3 of the WTO Agreement, provides a broad mandate for multilateral surveillance of Members' trade policies and practices. Competition issues are frequently raised in terms of their effects on a Member's imports or exports of goods and services and the efficiency of allocation of domestic resources. Secretariat reports,

and discussions in the Trade Policy Review Body, have generally covered the basic principles, legal provisions and institutional arrangements governing competition law and practice in Members (e.g. the admissibility of domestic, import or export cartels and similar restrictive business practices; the legal powers given to competition authorities; the provisions covering, and the effectiveness of, implementation; and such factors as extraterritoriality in the application of competition policies). Other related areas covered in reviews include the role of state enterprises, regulated monopolies and privatization; conditions governing parallel imports under both competition and intellectual property laws; the relationship between domestic deregulation and trade policies; and other relevant questions that may arise in individual cases.

Other WTO activities

In working parties examining applications for accession to the WTO, questions have been asked and issues raised regarding such matters as trading rights, privatization, deregulation and national competition law. In some instances, commitments have been sought, for example regarding trading rights and the future provision of information.

In the examination of certain regional trade agreements, by the Committee on Regional Trade Agreements or earlier in the relevant working parties, questions have been asked and issues raised regarding competition-related provisions of such agreements.

## V.2 Co-operative agreements relating specifically to competition law enforcement

### V.2.a Multilateral arrangements to promote co-operation in competition law

The UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which was adopted in 1980 is a multilateral instrument which aims at fostering co-operation and harmonized approaches to competition law enforcement. The Set defines restrictive business practices as including:

- Acts or behaviour of enterprises which, through an abuse or acquisition of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having, or being likely to have, adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.[213]

The Set also includes norms and procedures for facilitating co-operation. A wide-ranging and informative set of commentaries relating to implementation of the Set and related matters has been published by the UNCTAD Secretariat.

The principles and rules embodied in the Set are not legally binding. Implementation of the Set by UNCTAD member countries has been encouraged through regular annual meetings of a group of experts, and related outreach activities of the Secretariat.[214] The UNCTAD Group of Experts is a uniquely broadly-constituted body of technical experts on competition issues.

In the framework of the OECD, international co-operation in the field of competition policy has taken place since 1967 under successive versions of a Council Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, which was revised most recently in July 1995.[215] Under this Recommendation, members are encouraged to provide notification to another country of investigation or proceedings which may affect important interests of the other country. Such circumstances include situations in which information will be sought from the territory of another country; when the matter concerns practices that are carried out in whole or in part on the territory of another country; when the matter may be expected to lead to an enforcement action which may affect conduct in another county; and, in the case of a merger, when one of the merging parties is incorporated or organized under the laws of another country. Detailed notification procedures are set forth in the Recommendation.

Second, the OECD Recommendation encourages participating countries to consider coordination of investigatory efforts in appropriate cases. Possible means of coordination include: providing notice of applicable time periods and schedules for decision-making; sharing factual and analytical information, subject to national laws governing confidentiality of information; encouraging subjects of investigations and proceeding to permit voluntarily the sharing of confidential information by coordinating countries; and coordinating discussions or negotiations of remedies in situations where the interests of more than one country could be affected.

Third, the Recommendation encourages Member countries to respond to requests for assistance by other OECD member countries. Such assistance may take the form of: assisting in obtaining information; providing information from investigative files; employing compulsory processes to obtain information from subjects located in the requested country; and providing information in the public domain. The OECD Recommendation is non-binding and subject to prevailing laws in participating countries. Its provisions have been an important source of inspiration in the conclusion of bilateral agreements between a number of OECD member countries.

Finally, it should be noted that regular meetings of countries signatory to the OECD Recommendation are convened under the auspices of the OECD Committee on Competition Law and Policy (CLP). The Committee provides a forum for exchange of experiences and insights among many of the countries that are most experienced in the application of competition law and policy, and for elaboration of technical issues and policy

[213] "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (UNCTAD, 1980).

[214] For example, the UNCTAD Secretariat publishes commentaries on a model competition law, prepares a handbook on competition legislation, and participates in extensive technical assistance activities relating to competition law and policy.

[215] While this Recommendation is limited in scope to procedural aspects of co-operation between competition law authorities, another OECD instrument, the (non-binding) Declaration on International Investment and Multinational Enterprises which was adopted in 1976, sets forth certain substantive standards for enterprise behaviour in the area of competition. Guidelines for Multinational Enterprises annexed to this Declaration provide that enterprises should: (i) refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power; (ii) allow purchasers, distributors and licensees freedom to resell export, purchase and develop their operations; refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements; and (iii) be ready to consult and cooperate with competent authorities of countries whose interests are directly affected in regard to competition issues or investigations.

applications. In 1994, the Committee completed an Interim Report on Convergence in Competition Policies. The report found that, notwithstanding remaining significant differences in the particulars of competition legislation, procedures and policies, a substantial degree of convergence had been achieved in member countries' approaches to competition endorsement issues, through: (i) an increasing consensus on the fundamental goals and appropriate concerns of competition policy; and (ii) a proliferation of common analytical tools and methodologies relating to enforcement questions.[216]

Subsequently, the CLP Committee has pursued a large number of projects including a study on convergence in merger pre-notification procedures and, more recently, the development of a common approach to competition law enforcement vis-a-vis "hard core" horizontal cartels. Members of the CLP Committee also participate in a Joint Group on Trade and Competition Policy in conjunction with members of the OECD Trade Committee. Currently, the work program of the Joint Group includes analysis of the impact of vertical market restraints on market access, the rights of foreign firms under competition laws, and other matters.

### V.2.b Bilateral arrangements

A number of arrangements exist to foster co-operation in competition law enforcement at the bilateral level. Agreements concluded in the 1970s and 1980s between the United States and Germany, Australia and Canada and between France and Germany contain provisions similar to those of the OECD Recommendation with respect to notification, exchange of information, coordination of action and consultation.[217] More recent bilateral agreements contain more elaborate mechanisms for co-operation.[218]

A prominent example of these recent bilateral co-operation arrangements is the Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, which was concluded in 1991.[219] This Agreement provides for notification by either party of enforcement activities affecting the important interests of the other party and for exchanges of information, both of a general nature relating to competition policy in each country and relating to specific anti-competitive conduct. The Agreement does not, however, require disclosure of information that is prohibited by the laws of the requested party or that would be incompatible with important interests of the requested party. A party receiving confidential information is obligated to maintain the confidentiality, and to oppose applications for disclosure thereof by a third party. The Agreement also contains provisions for co-operation and coordination of enforcement activities in situations in which both parties have an interest in pursuing enforcement activities with regard to related situations.

In order to avoid conflicts over enforcement activities, the Agreement requires each party to take into account the important interests of the other party in its enforcement activities, particularly with respect to decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought and sets forth a number of principles which the parties have to take into account in seeking to minimize the adverse effects on the other party of their enforcement activities. The principle underlying this provision aimed at mitigating the negative consequences of enforcement activities, which may lead to a decision to refrain from initiating enforcement action as a way of accommodating the interests of a foreign country, is referred to as the "traditional" doctrine of comity.[220] A novel feature of the US-EC Agreement, in comparison with previous bilateral co-operation arrangements, is that it provides not only for such traditional comity but also includes a principle of "positive comity", under which a party which believes that anti-competitive activities carried out on the territory of the other party are adversely affecting its important interests may notify the other party and request that the other party's competition authorities initiate appropriate enforcement activities. The competition authorities of the notified party are required to consider whether or not to initiate enforcement activities or to expand ongoing enforcement activities with respect to the anti-competitive practices identified by the notifying party and to advise the notifying party of its decision in this regard. However, it is explicitly provided that this procedure does not limit the discretion of the notified party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anti-competitive activities and does not preclude the notifying party from undertaking enforcement activities with respect to such anticompetitive activities. More recently, the EC and US have developed a draft Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, which will further facilitate co-operative enforcement approaches.

The Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws, which was reached in 1995, resembles the US-EC Agreement in important respects.[221] It contains provisions regarding notifications, exchanges of information, coordination of enforcement actions, co-operation regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party ("positive comity"), avoidance of conflicts ("traditional comity"), and consultations. The Agreement specifies certain obligations imposed on a party receiving confidential information from the other. In addition, it specifically provides for co-operation and coordination with respect to the enforcement of deceptive marketing practices laws, including exchanges of information and coordination of detection and enforcement activities in this field. As with the US-EC Agreement, any sharing of information under the Canada-US Agreement is

[216] OECD (1994c).

[217] See e.g., Marceau (1994) pp.79-84 for a description of these agreements.

[218] An important issue that arises in this context relates to the need for safeguards to govern the sharing of confidential information between competition law enforcement agencies. For discussion, see Rill and Goldman (1997).

[219] This Agreement was initially concluded in September 1991 between the European Commission and the United States. Following a judgement of the European Court of Justice in which the Court annulled the act by which the Commission had concluded the Agreement on grounds of lack of competence, the Agreement was approved by a joint decision of the European Commission and the Council of the European Community in April 1995. The decision provides for the application of the Agreement with effect from the date on which it was concluded by the Commission.

[220] In addition to intergovernmental agreements, the role of the traditional doctrine of comity is recognized in the jurisprudence of some jurisdictions. See e.g., Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597 (9th Cir. 1976), regarding the situation in the US.

[221] Earlier arrangements relating to co-operation in competition law enforcement between Canada and the United States were implemented in 1984 and 1956.

subject to national laws governing confidentiality of information supplied by parties.

Co-operation between the competition authorities of Canada and the United States is also supported by the Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (MLAT), which entered into force in 1990.[222] The MLAT permits the enforcement authorities of either country to request the assistance of the other in order to obtain evidence regarding possible criminal offenses. This may include the use of compulsory processes such as search warrants. The sharing of information is subject to strict confidentiality requirements. The MLAT applies to mutual assistance in criminal matters generally, not just to competition law matters.

The Co-operation and Coordination Agreement Between the Australian Trade Practices Commission and the New Zealand Commerce Commission, which was implemented in 1994, provides for notifications of enforcement activities that may affect important interests of the other party. It also facilitates exchanges of information of a general nature, as well as coordination of enforcement activities and exchanges of information on specific enforcement matters, including obtaining information and documents on behalf of the other party.

In 1994, the United States enacted legislation entitled the "International Antitrust Enforcement Assistance Act (IAEAA)". This legislation permits the US antitrust authorities to enter into agreements with foreign competition authorities that satisfy various criteria relating to the handling of confidential information and other matters. Following the entry into force of such agreements, the authorities are authorized to disclose confidential information in their files to foreign antitrust authorities, and to employ certain compulsory processes to acquire information on behalf of a requesting foreign authority. Recently, the first agreement to fall within the terms of the IAEAA has been concluded, between the United States and Australia.[223]

## V.3 Competition-related provisions in international trade agreements other than the WTO

### V.3.a Treaty of Rome

The Treaty of Rome (EC Treaty) provides a prominent example of the use of competition law as a tool of trade liberalization and economic integration. As is well known, competition-related provisions were built in to the Treaty from its inception and have been explicitly linked to its fundamental goals. The EC Treaty explicitly defines the achievement of "a system to ensure that competition in the internal market is not distorted" as one of fundamental objectives of the Community. The Treaty rules in the field of competition cover agreements or concerted practices between undertakings (Article 85) abuses of dominance by undertakings (Article 86), public undertakings and undertakings to which member States grant special or exclusive privileges (Article 90) and subsidies granted by member States (Article 92). In 1989, rules were adopted with respect to the control of mergers. The competition rules of the EC Treaty are unique because of their supranational character, as manifested, *inter alia*, in the role of EC institutions, primarily the EC Commission, in their enforcement, the possibility of direct effect of these rules in the domestic legal order of the member States and the principle of supremacy of EC competition law over inconsistent national competition laws. As the reach of EC competition rules is confined to practices and conduct which may affect trade between EC member States, they have not displaced national competition laws of the member States.[224]

While the application of EC competition law is primarily the responsibility of the EC Commission, in the exercise of this responsibility the Commission cooperates in various manners with the competition authorities of the member States:[225]

- In regard to cases investigated by the EC Commission itself, the most important documents in each case are shared with the competition authorities of member states, which can also be represented at the oral hearings of firms.
- National authorities may make their opinions known on the draft decisions in individual cases within the Advisory Committee on Restrictive Practices and Dominant Positions and the Advisory Committee on Merger Control.
- Member State authorities may assist the Commission, at its request, during investigations carried out on the premises of firms within their respective jurisdictions.

In addition to the role of competition authorities of Member states in investigations conducted by the Commission, it should be noted that certain EC competition rules can also be applied by national courts and by national competition authorities. This aspect has gained increasing importance in recent years as the Commission is encouraging a more decentralized application of EC competition law.[226] Another important facet of the relationship of EC competition law to national legislation pertains to the interrelationship between Articles 3, 5, 85 and 86 of the EC Treaty. As noted previously, in a number of cases the European Court of Justice has held that it was incompatible with these treaty provisions read together for a member State to adopt measures such as those which impose or favour anti-competitive conduct or which reinforce the effects of anti-competitive agreements.

### V.3.b Competition-related provisions in other trade agreements

In analysing approaches to competition policy matters found in agreements other than the EC Treaty, it is useful to focus on: (i) the extent of coordination of substantive competition rules; (ii) mechanisms for consultation and co-operation; (iii) the settlement of disputes in respect of the competition policy issues; (iv) the treatment of monopolies and enterprises with special or exclusive rights; and (v) the relationship of the competition policy rules to the application of trade remedies.

(i) Coordination of substantive competition rules

A distinction can be made between, on the one hand, trade agreements which contain a general obligation of the parties to take action against anti-competitive business conduct, sometimes accompanied by an obligation to adopt domestic competition law, but without articulating specific substantive standards and, on the other, trade agreements which lay down

[222] For useful background, see Matte (1996).

[223] See US-Australia Antitrust Enforcement Co-operation Agreement (1997).

[224] In this regard, it may be noted that in cases where the economic effects of practices fall principally within the jurisdictions of individual Member States, the competition authorities of a number of member States are authorized to apply substantive EC competition law directly to the conduct in question. Member States can also take the initiative in some cases affecting the Community as a whole. In the view of some observers, this potentially establishes a degree of healthy competition in the actual application of EC competition law. See Marsden (1997).

[225] See European Commission (1995).

[226] See e.g. the Commission's draft Notice on Co-operation between National Competition Authorities and the Commission in Handling Cases Falling within the Scope of Articles 85 or 86 of the EC Treaty, OJ 1996 C 262/7.

common substantive rules. An example of the former approach is the North American Free Trade Agreement (NAFTA) which requires each Party to adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto and provides that the Parties shall consult from time to time about the effectiveness of measures taken by each Party.[227] A similar provision exists in the recent Canada-Chile Free Trade Agreement.

In contrast, coordination of specific substantive competition rules has occurred in particular in trade agreements concluded by the European Community with third countries. The extent of such coordination varies in function of the degree of economic integration contemplated by the agreement. Thus, while substantive competition policy norms already appeared in the Free Trade Agreements concluded by the Community in the early 1970s with individual EFTA States, more detailed competition rules have been included in certain trade agreements concluded by the European Community since the beginning of this decade which aim at a closer degree of economic integration than the creation of a mere free trade area, notably the Europe Agreements concluded with countries in Central and Eastern Europe[228], and the Agreement on the European Economic Area.

The competition policy provisions in each of the Europe Agreements[229] declare as incompatible with the proper functioning of the Agreement, in so far as they affect trade between the Community and the central or eastern european country in question: (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; and (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of the country in question as a whole or in a substantial part thereof.[230] These practices shall be assessed on the basis of criteria arising from the application of the rules of Articles 85 and 86 of the EC Treaty.[231] While these provisions apply specifically to anti-competitive conduct affecting trade between the parties, the Europe Agreements contain separate provisions requiring the Central and Eastern European countries to align their existing and future legislation with EC competition law more generally, i.e. not only with respect to conduct affecting trade between the parties.

The Agreement on the European Economic Area (EEA) provides for the application of primary and secondary EC competition law to anti-competitive practices and conduct occurring within the EEA area which may affect trade between the Contracting Parties. Thus, competition rules applicable to undertakings in Articles 53 and 54 of the EEA are virtually identical to Articles 85 and 86 of the EC Treaty. In addition, the competition rules of the EEA extend to the control of mergers, which are declared to be incompatible with the EEA if they create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by the EEA or a substantial part of it. Secondary EC competition law is incorporated into the EEA in a comprehensive list of rules adopted pursuant to the competition rules of the EC and ECSC Treaties in areas such as merger control, exclusive dealing agreements, patent licensing agreements, specialization and research and development agreements, etc. Provisions of the EEA identical to provisions of primary and secondary EC legislation are to be interpreted in accordance with relevant rulings of the European Court of Justice given prior to the date of signature of the EEA.

Substantive coordination of competition rules within a regional trading arrangement is not confined to trade agreements concluded by the European Communities but also features in the EFTA Convention, the free-trade agreements recently concluded by individual EFTA states with countries in central and eastern europe, and a number of trade agreements concluded among developing countries. Examples of trade agreements among developing countries in the context of which substantive competition rules have been adopted or are being developed are the Andean Pact,[232] the MERCOSUR Treaty[233] and the Treaty establishing the Common Market for Eastern and Southern Africa.[234] Finally, as noted below, Australia and New Zealand have taken steps to expand the substantive and jurisdictional reach of their domestic competition laws so as to make them more easily applicable to anti-competitive conduct occurring within the territory of the other country.

(ii) Consultation and co-operation

Obligations regarding consultation and co-operation with respect to the application of measures against anti-competitive conduct appear in many trade agreements, including those that do not lay down specific substantive requirements regarding the control of anti-competitive practices. An interesting development in this connection is the inclusion in trade agreements of co-

[227]NAFTA Article 1501. A somewhat comparable approach has been taken in the context of the Energy Charter Treaty which requires the Contracting Parties to work to alleviate market distortions and barriers to competition in economic activity in the energy sector and to ensure that within their jurisdictions they have and enforce such laws as are necessary and appropriate to address anti-competitive conduct in economic activity in the energy sector. A similar obligation exists in the Partnership and Co-operation Agreements concluded by the European Communities with countries of the former Soviet Union.

[228]Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

[229]Comparable rules have been adopted in connection with the entry into force in 1996 of the final phase of the customs union between Turkey and the European Communities.

[230]As part of the provisions on competition policy, there are also rules on the granting of state aids.

[231]Implementing rules adopted by the Association Councils established under the Europe Agreements also provide for the application of the principles of the EC block exemption regulations.

[232]In March 1991, the Commission of the Cartagena Agreement adopted Decision No. 285 containing rules regarding the control of anti-competitive practices (anti-competitive agreements and concerted practices among enterprises and abuses of dominance by enterprises) which may affect trade in the Andean subregion.

[233]A protocol on competition policy adopted by the parties to the MERCOSUR Treaty in December 1996 defines a range of practices which may distort condition and adversely affect trade between the mercosur countries and lays down detailed provisions for co-operation between two intergovernmental commissions and the competition law authorities of the member states in the conduct of investigations of such practices.

[234]Article 55 of this Treaty, which was concluded in December 1994, provides that the Members agree to prohibit any agreements between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common market. The Council of Ministers may declare this prohibition inapplicable in the case of agreements or concerted practices which improve production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits.

operation mechanisms originally developed in the context of the bilateral co-operation arrangements discussed in the previous subsection. For example, "positive comity" procedures allowing a party to request the competition authorities of another party to initiate appropriate enforcement action with respect to anti-competitive conduct carried out within the area of the other party are provided for in the Energy Charter Treaty and in the implementing rules adopted pursuant to the various Europe Agreements.[235]

While most trade agreements that contain competition rules relay primarily on non-institutionalized procedures for notification, exchange of information, consultation and co-operation, some agreements assign a key role to international institutions in the enforcement of the competition rules. Thus, in the case of the Agreement on the European Economic Area, the responsibility for the enforcement of the competition rules of the EEA is divided between two "surveillance authorities", the EC Commission on the one hand and an EFTA Surveillance authority[236] created under Article 108 of the EEA, on the other. Article 56 of the EEA regulates the allocation of jurisdiction between these two authorities over individual cases arising under Articles 53 and 54. The surveillance authority which is competent in a given case must carry out its investigations in co-operation with the competent national authorities and with the other surveillance authority. Specific rules for co-operation between the surveillance authorities in the conduct of investigations are laid down in Protocols to the EEA. They provide, *inter alia*, for the initiation of investigations by one surveillance authority at the request of the other surveillance authority if the requesting authority considers such investigations to be necessary. The requesting authority is entitled to be represented and take an active part in such investigations. A separate set of rules delimits the respective scope of jurisdiction of the surveillance authorities in the area of merger control and lays down requirements for co-operation between them.

The competition rules adopted in 1991 in the framework of the Andean Pact assign to the Board of the Cartagena Agreement the responsibility for the initiation of investigations of particular cases of alleged infringement, upon application by a member state or by an affected enterprise. The protocol on competition policy adopted by the MERCOSUR member countries in 1996 provide for co-operation between national authorities of the member states and international bodies in the enforcement of the competition rules.

[235]The NAFTA and the Canada-Chile Free Trade Agreement incorporate broad requirements for the Parties to cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies.

[236]As required by one of the Protocols to the EEA, the EFTA Surveillance Authority has been entrusted by the EFTA States with equivalent powers and similar functions to the powers and functions of the EC Commission for the application of the competition rules of the EC and ECSC Treaties. Decisions by the EFTA Surveillance Authority in the field of competition are subject to judicial review by an EFTA Court.

[237]The NAFTA and the Canada-Chile Free Trade Agreement preclude any recourse to dispute settlement regarding matters arising from the provisions on competition policy while the ECT explicitly states that disputes relating to the article on competition are to be settled exclusively through diplomatic channels.

[238]The NAFTA contains specific rules on monopolies in the telecommunications sector.

(iii) Settlement of disputes

An important feature of competition policy provisions in current trade agreements discussed in the preceding paragraphs is that disputes over their implementation are generally not subject to binding dispute settlement mechanisms which may exist in such agreements. This is the case not only of agreements which contain fairly general obligations on competition policy[237] but also of agreements with more detailed rules and procedures for consultation and co-operation in the enforcement of those rules. As an example, the implementing rules adopted in relation to the competition provisions of the Europe Agreements provide that if the procedures set forth in these rules concerning consultation and information do not lead to a mutually acceptable solution, an exchange of views must take place in the Association Council at the request of one Party within three months following the request. The Association Council may make recommendations for the settlement of such cases but this is without prejudice to the right of the Parties to take unilaterally the appropriate measures and without prejudice to any action under the respective competition laws in force in the territory of the Parties.

(iv) Monopolies, state enterprises and enterprises with special or exclusive rights

Many trade agreements, including agreements which do not include generic provisions on competition policy, provide for obligations of the parties regarding public enterprises, monopolies and enterprises with special or exclusive rights. The NAFTA obliges each Party to ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that a Party designates and any government monopoly that it maintains or designates: (1) acts in a manner not inconsistent with the Party's obligations under the NAFTA if such monopoly exercises delegated governmental authority in connection with the monopoly good or service; (2) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market; (3) provides non-discriminatory treatment to investments of investors, to goods and service providers of another party in its purchase or sale of the monopoly good or service in the relevant market; and (4) does not use its monopoly position to engage in anti-competitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct.

With respect to state enterprises, the NAFTA requires each Party to ensure, through regulatory control, administrative supervision or the application of other measures that any state enterprise that it maintains or establishes acts in a manner not inconsistent with the obligations of the Party under the provisions of the NAFTA on investment and financial services wherever such enterprise exercises delegated regulatory administrative or other governmental authority, and to ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of another Party.[238]

Provisions of the Europe Agreements with respect to public undertakings and undertakings to which special or exclusive rights have been granted require the Association Councils to ensure that not later than a certain period after the entry into force of the Agreement the principles of the EC Treaty, in particular Article 90, are upheld. State monopolies of a commercial character are to be adjusted progressively so as to ensure that by the end of a specified transition period no

discrimination exists between nationals of the Parties regarding the conditions under which goods are procured and marketed.

The Agreement on the European Economic Area requires the Contracting Parties to ensure with respect to public undertakings and undertakings with special or exclusive rights, that there are no measures contrary to the rules in the EEA, in particular the rules in Article 4 which prohibit discrimination on grounds of nationality, the competition rules applicable to undertakings in Articles 53-67 and the rules on state aid in Articles 61-63. In the case of undertakings entrusted with the operation of services of a general economic interest or having the character of a revenue-producing monopoly, the EEA rules, in particular those on competition, apply in so far as their application does not obstruct the performance of the particular tasks assigned to them.[239]

The Free Trade Agreement between Mexico, Colombia and Venezuela requires each Party to ensure that its state enterprises accord non-discriminatory treatment in its territory to the natural or legal persons of the other parties in the sale of goods and the provision of services. Each Party is also under an obligation to ensure that its government monopolies and its state enterprises: (i) act solely in accordance with commercial considerations in the purchase or sale of the monopoly good or service in the relevant market in the territory of that Party; and (ii) do not use their monopoly position to engage in anti-competitive practices in a non-monopolized market that could adversely affect persons of the other Parties.

(v) Relationship to the application of trade remedies

Some regional trading arrangements provide for the non-application of anti-dumping measures in the mutual trade of the parties in the light of the co-operation on competition policy matters that they entail. Thus, the Agreement on the European Economic Area precludes the application in the relations between Contracting Parties of anti-dumping measures, countervailing measures and measures against illicit commercial practices.[240] In the context of their Closer Economic Relations Trade Agreement, Australia and New Zealand agreed to abolish the application of anti-dumping measures to their mutual trade as of 1 July 1990 and to amend domestic competition laws to make them fully applicable to anti-competitive transactions occurring within the Australia-New Zealand region. This involved notably the expansion of the provisions in the domestic competition laws of Australia and New Zealand on abuse of dominant positions by bringing within their scope dominant positions in the other country or in a combined market in Australia and New Zealand. Closely related, the jurisdictional reach of the competition laws of Australia and New Zealand was amended to include conduct of persons resident or carrying on business in the other country. These substantive amendments were accompanied by changes in the field of enforcement which, *inter alia,* allow the courts of one country to sit in the territory of the other country in appropriate circumstances and provide for reinforced co-operation between the enforcement agencies of the two countries.

The Free Trade Agreement between Canada and Chile also provides for the reciprocal exemption from the application of anti-dumping duty laws, even though it addresses competition policy only in general terms.[241] The NAFTA, which contains identical provisions on competition policy to those in the Canada Chile Free Trade Agreement, does not affect the Parties' right to apply anti-dumping measures and countervailing measures. A Working Group on Trade and Competition is to report and make recommendations on further work as appropriate, within five years after the entry into force of the NAFTA, on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area. A similar provision regarding future work on the relationship between trade and competition policies appears in the Free Trade Agreement between Mexico, Venezuela and Colombia.

### V.3.c Additional competition-related activities in the context of regional trade arrangements

Apart from the foregoing agreements that deal specifically with competition related matters, a few additional activities that take place in a regional context should be noted. To begin with, the Asia-Pacific Economic Council (APEC) provides an important forum for technical co-operation and discussion of competition issues in the Pacific Basin. This includes the development and regular updating of national Action Plans on regulatory reform and privatization as well as more general discussions and the holding of meetings and seminars on particular issues.

Discussion of technical aspects of competition policy and the role that competition policy can play is also taking place in a working group established pursuant to the Free Trade Area of the Americas (FTAA) initiative. Among other matters, the working group is compiling an inventory of member's competition legislation, including substantive provisions and procedural aspects.

## V.4 Concluding remarks

The large number of mechanisms for co-operation between governments in combatting anti-competitive enterprise practices would seem to reflect a clear recognition of the need for intergovernmental co-operation. Given that the conduct of enterprises that has to be addressed increasingly cuts across borders, this is not surprising.

The disparate nature of the co-operative arrangements is striking. Arrangements exist at the bilateral, regional and multilateral levels, in the context of broader trade arrangements and in isolation from such arrangements, in the context of specific sectors or subject areas, and with widely differing country participation. It appears, perhaps not unexpectedly, that the most active arrangements are those concluded between the competition authorities of certain OECD countries. Case-specific enforcement co-operation between competition authorities pursuant to such agreements has yielded significant benefits in

[239] As in the EC Treaty (Article 37), the EEA provisions on free movement of goods include a requirement for the progressive adjustment of state monopolies of a commercial character with a view to ensuring that no discrimination will exist between nationals of EC Members States and of EFTA States regarding the conditions under which goods are procured and marketed. EEA Article 16.

[240] EEA, Article 26. The exemption of intra-EEA trade from these measures is limited to the areas covered by the provisions of the EEA and in which the Community *acquis* is fully integrated into the Agreement. Moreover, the Contracting Parties may take measures against the circumvention of these measures applied to third countries.

[241] Canada-Chile Free Trade Agreement, Chapter M. This exemption is to take effect with respect to all goods of the other Party as of the earlier of 1 January 2003 or the date on which the tariff of both Parties is eliminated at the subheading level. The issue of elimination of the need for countervailing duty measures between the two Parties is to be the subject of consultations in a Committee on Anti-Dumping and Countervailing measures established under Article M-05.

terms of successful investigations and prosecutions in a number of cases with transborder dimensions.[242]

However, these co-operative arrangements also have some built-in limitations. Some of them take the form of non-binding legal instruments and/or are expressed in "best endeavours" terms. This would include the UN Set, the OECD Recommendation and the consultation and co-operation provisions in several WTO agreements. The bilateral negative and positive comity arrangements do not require co-operation in situations where compelling national interests demand otherwise. Such instruments, while serving many useful functions, can only be expected to work in situations where perceived national interests of the countries concerned do not diverge, or do not diverge to the point that voluntary co-operation, based on a mutual interest in making such mechanisms work, cannot resolve the difficulties.

It is noteworthy that, with a few exceptions such as within Europe, between Australia and New Zealand and in certain WTO commitments, relatively little of a binding nature has been agreed regarding substantive standards. The continuing differences in this respect between jurisdictions circumscribe the scope for co-operation under comity arrangements since national competition authorities cannot take into account the interests of other countries, even if they should wish to do so, where this would not be consistent with national law. As discussed earlier in this Chapter, there are reasons why national competition criteria will not always be consistent with the interests of other countries. Moreover, where competition authorities are tempted to use the discretion available to them in a generous way with a view to accommodating concerns expressed by another country under a comity agreement, there remains a risk that such decisions could be overturned by the courts. This may be particularly relevant where national competition law provides for private rights of recourse to the courts.[243] These considerations illustrate the limitations of what are essentially consultative mechanisms for attempting to accommodate the interests and concerns of trading partners in the context of rule-of-law mechanisms for the domestic application of competition law.[244]

[242]For example, officials of both the United States and Canada have referred to specific examples of cartel agreements that were successfully prosecuted as a result of co-operation between their respective agencies. These include cases involving fax paper, seamless iron pipe and plastic dinnerware. See Bingamann (1996), Klein (1997), Matte (1995) and Spratling (1997). Officials of the European Community and United States also refer favourably to their co-operative arrangement, adopted in 1991, which provided the basis for coordinated enforcement action in the Microsoft case. See, for example, Van Miert (1996b).

[243]See, generally, Roach and Trebilcock (1996).

[244]It should be noted, however, that at least in the US, there is support for the view that it is *not* the role of the courts to "second-guess the executive bench's judgement as to the proper role of comity concerns", at least in some circumstances. See US v. Baker Hughes Inc., 731 F. Supp.3, 6m.5 (DDC, 1990) aff'd 908 F. 2d 981), and US, Department of Justice and Federal Trade Commission (1995).

[245]See OECD (1994d); Baker and Campbell (1996), and Campbell and Trebilcock (1997).

[246]See, for example, Bacchetta *et al.* (1997), Baker *et al.* (1997), Barutciski and Crampton (1997), Brittan and Van Miert (1996), European Commission (1995), Fikentscher (1994), Fox (1995) and (1997), Fox and Ordover (1995), Hoekman (1997), Hoekman and Mavroidis (1994a) (1994c) (1996), Khemani and Schöne (1997), Klein (1996) and (1997), Mattoo and Subramanian (1997), Pitovsky (1995), Petersmann (1994) and (1996), Rosenthal and Fox (1997), Scherer (1994) and (1996c) and Wood (1995).

A further significant limitation of most of the existing co-operation arrangements relating to competition law enforcement is that they do not provide for the sharing of confidential information between competition authorities. While efforts are under way to enhance co-operation in this area, the progress so far, with few exceptions, has been slow. The same goes for arrangements to provide for the recognition and the enforcement of decisions reached in other jurisdictions. The continuing limited scope of international co-operation in these areas may be particularly handicapping for the capacity of smaller economies and competition authorities to address practices with a significant transborder dimension. Of course, many countries do not yet have competition laws and authorities, which itself presents an important obstacle to using co-operation arrangements that are explicitly or implicitly likely to function best between competition authorities.

Another area where co-operation may be warranted and is still limited is in harmonizing procedural requirements in situations where the same case is dealt with in several jurisdictions. This is particularly relevant to the treatment of mergers and acquisitions.[245]

Reflecting the above considerations and other concerns noted in this Chapter, there would seem to be a widespread view that enhanced international co-operation is desirable to respond to the limitations of the present mechanisms. A wide range of ideas have been put forward.[246] While it is not the purpose of this Chapter to attempt to assess their individual merits, it might be noted that they would appear to fall within three broad possible approaches:

- At one end of the spectrum, a continuation of the present efforts, focusing on enhanced comity arrangements mainly of a bilateral nature, possibly together with some efforts towards voluntary convergence of substantive standards where feasible and where significant international effects exist. As indicated above, such an approach would seem to have inherent limitations, but it would be for the international community to decide whether the outstanding problems that it does not address are sufficiently important to warrant a higher level of co-operation.

- At the other end of the spectrum, the establishment of a supranational authority, together with detailed international norms that would be administered by the authority. This approach seems to go beyond what multilateral action the international community is prepared to envisage at this time.

- In between, a range of suggestions for possibilities for enhanced international co-operation of a binding nature, both on enforcement and substantive standards, without involving the establishment of a supranational institution.

In regard to enforcement, two main categories of suggestions, which could either be alternatives or complements, would seem to be present in many of these "in-between" proposals:

- Ensuring that effective procedures and remedies for the enforcement of competition law through national courts (as the most "nationality-blind" institutions within countries) are available, and providing a private right of action, together with the necessary legal standing, to foreign persons affected by anti-competitive practices. This would be similar in approach to that adopted in the WTO TRIPS Agreement in respect of the enforcement of intellectual property rights.

- Attempting to make administrative enforcement authorities more responsive to complaints from foreign countries or persons, by increasing the international accountability of such offices for the way in which they respond to and handle such complaints.

In regard to substantive standards, a starting point for many of the ideas that have been put forward is that competition

standards should be more exclusively focused on efficiency and welfare, with the implication that countries should be willing to give up the use of standards which might inherently favour domestic economic activity over that in other countries.[247] Various ideas have also been put forward for how to move towards ensuring that efficiency and welfare criteria are applied on a basis which is more neutral as to the weighing of effects within the jurisdiction and those on trading partners. For example, an obvious starting point that has been suggested would be to seek an understanding on the prohibition of export cartels. Suggestions have also been made for a market access criterion, either as a positive norm or in the form of a nullification or impairment of trade concessions rule. Furthermore, there are various ideas on how to combine the need for national authorities to make "rule-of-reason" determinations with minimum standards and procedural mechanisms that would protect the interests of trading partners.

Many of the ideas also address four other major issues. One is the role that general principles relating to non-discrimination should play. A second concerns mechanisms for procedural co-operation, for example on access to information and mergers. Another is that of the applicability of the WTO or some other dispute settlement mechanism. The fourth is how to take into account the special situation of developing countries, notably the fact that many do not as yet have functioning competition laws, and the particularities of their economic circumstances.

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[247]This would be consistent with the main thrust of developments in national competition policies and laws, at least in OECD countries. See OECD (1994c).

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# Chapter Five

# WTO Activities

# WTO activities

## Part I

The World Trade Organization (WTO) is the legal and institutional foundation of the multilateral trading system. It provides the principal contractual obligations determining how governments frame and implement domestic trade legislation and regulations. It also serves as the platform on which trade relations among countries evolve through collective debate, negotiation and adjudication.

The WTO was established on 1 January 1995. Governments concluded the Uruguay Round negotiations on 15 December 1993 and Ministers gave their political backing to the results by signing the Final Act in Marrakesh, Morocco, on 14 April 1994. The "Marrakesh Declaration" affirmed that the results of the Uruguay Round would "strengthen the world economy and lead to more trade, investment, employment and income growth throughout the world". The WTO is the embodiment of the Uruguay Round results and the successor to the General Agreement on Tariffs and Trade (GATT). It held its first Ministerial Conference in Singapore from 9 to 13 December 1996.

At the end of July 1997, 131 countries and territories were members of the WTO. Another 29 governments were engaged in negotiating their terms of entry with other WTO members. Not only does the WTO have a potentially larger membership than GATT (128 by the end of 1994), it also has a much broader scope in terms of the commercial activity and trade policies to which it applies. The GATT covered trade in goods; the WTO covers trade in goods, trade in services and "trade in ideas" or intellectual property.

The essential functions of the WTO are:

- administering and implementing the multilateral and plurilateral trade agreements which together make up the WTO;
- acting as a forum for multilateral trade negotiations;
- seeking to resolve trade disputes;
- reviewing national trade policies;
- cooperating with other international institutions involved in global economic policy making.

The WTO Agreement contains 29 individual legal texts which lay out the procedures and rules for trade in services and goods and for enforcing intellectual property rights. The WTO also comprises the GATT 1994 agreements on trade in goods. The structure of the WTO is dominated by its highest authority, the Ministerial Conference, composed of representatives of all the WTO Members. It is required to meet at least every two years and can take decisions on all matters under any of the multilateral trade agreements. The next WTO Ministerial Conference will be held in Geneva, Switzerland in May 1998.

The day-to-day work of the WTO, however, falls to a number of subsidiary bodies, principally the General Council. The latter is composed of all WTO members and reports to the Ministerial Conference. The General Council also convenes in two other forms – as the Dispute Settlement Body, to oversee the dispute settlement procedures, and as the Trade Policy Review Body, which conducts regular reviews of WTO Members' trade policies and practices. Other main bodies which report to the General Council are the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights. Under these Councils are various committees, each responsible for administering specific agreements and preparing and adopting decisions for approval by the respective Council. This Chapter provides an outline of the main activities of the WTO from 1 August 1996 to 31 July 1997.

## I. WTO accession negotiations

An important task facing the WTO is that of making the new multilateral trading system truly global in scope and application. The 131 Members of the WTO (as of 31 July 1997) account for more than 90 per cent of world trade. Many of the nations that remain outside the world trade system have requested accession to the WTO and are at various stages of a process that has become more complex because of the WTO's increased coverage relative to GATT. With many of the candidates currently undergoing a process of transition from centrally planned to market economies, accession to the WTO offers these countries – in addition to the usual trade benefits – a way of underpinning their domestic reform processes.

WTO membership is open to any State or customs territory having full autonomy in the conduct of its trade policies. Accession negotiations concern all aspects of the applicant's trade policies and practices, such as market access concessions and commitments on goods and services, legislation to enforce intellectual property rights, and all other measures which form a government's commercial policies. Applications for WTO membership are the subject of individual Working Parties. Terms and conditions related to market access (such as tariff levels and commercial presence for foreign service suppliers) are the subject of bilateral negotiations. The following is a list of the 29 governments for which a WTO Working Party was established by 31 July 1997:

Albania, Algeria, Armenia, Azerbaijan, Belarus, Cambodia, China, Croatia, Estonia, Georgia, Jordan, Kazakhstan, Republic of Kyrgyz, Latvia, Lithuania, Former Yugoslav Republic of Macedonia, Moldova, Nepal, Oman, Russian Federation, Saudi Arabia, Seychelles, Sudan, Chinese Taipei, Tonga, Ukraine, Uzbekistan, Vanuatu and Vietnam.

# II. Work of the General Council

## Main areas of the General Council's work

The General Council is the WTO body entrusted with carrying out the functions of the WTO, and taking action necessary to this effect, in the intervals between meetings of the Ministerial Conference, in addition to carrying out the specific tasks assigned to it by the WTO Agreement. As part of its task of overseeing the operation and implementation of the multilateral trading system embodied in the WTO Agreement, the General Council addressed the following matters during the period under review.

**Preparations for the 1996 Ministerial Conference**

An important aspect of the work of the General Council during the second half of 1996 was the completion of preparatory work for the first Ministerial Conference in December 1996. As part of a process begun formally in April 1996, when the basic structure of the Conference was agreed, the General Council continued to give further consideration to the following matters: structure and organization of the Conference; modalities for the attendance of non-governmental organizations; attendance of governments and international intergovernmental organizations as observers; election of officers of the Ministerial Conference; progress of preparatory work in the various WTO bodies concerning their respective reports to the Ministerial Conference together with their conclusions and recommendations and progress in the consultation process under the auspices of the Director-General concerning other issues.

While decisions on several of these aspects were taken at meetings held in October, the process as a whole culminated at the meeting of the General Council on 7, 8 and 13 November. At that meeting the General Council noted and agreed to forward to the Ministerial Conference the reports of some 30 WTO bodies. These reports summarized the activities of the WTO with respect to the implementation of the various agreements, and several contained conclusions and recommendations for action by Ministers. In a report to the General Council, the Director-General said that he had detected a strong desire from Members to treat the Singapore Conference as part of a continuum in WTO's work, in other words, not as a single "defining moment" but with a forward-looking and balanced agenda. He said there was also a recognition that the main focus of the Conference should be to assess the implementation of the Uruguay Round results and to take decisions that would be required in this regard. The Director-General said delegations had made many proposals regarding the future work programme of the WTO. Of these, proposals on four subjects – competition, investment, government procurement and labour standards – had been retained, with the others referred to the relevant WTO bodies for consideration. The Director-General said that following his consultations, he was able to circulate a draft text of a Ministerial Declaration for consideration by Ministers in Singapore. In completing its preparations for the Ministerial Conference at this meeting, the General Council also agreed on a plan for the conduct of business at the Conference, and elected the officers of the Conference.

**WTO logo**

At its meeting on 24 April 1997, the General Council accepted with deep appreciation an offer by the Government of Singapore to transfer to the WTO for its use the logo used at the 1996 Ministerial Conference, along with the copyright thereon, free of charge.

Table V.1

**Waivers under Article IX of the WTO Agreement**

During the period under review, the General Council granted the following waivers from obligations under the WTO Agreement.

| Government | Type | Decision of | Expiry | Document |
|---|---|---|---|---|
| Argentina, Australia, Brazil, Brunei Darussalam, Canada, Colombia, Costa Rica, Cuba, Czech Republic, Egypt, El Salvador, European Communities, Honduras, Hungary, Iceland, India, Indonesia, Israel, Korea, Malaysia, Mexico, Norway, Paraguay, Philippines, Poland, Singapore, Slovak Republic, Slovenia, South Africa, Switzerland, Thailand, Tunisia, Turkey, United States, Uruguay, Venezuela, Zimbabwe | Introduction of Harmonized System changes into WTO Schedules of Tariff Concessions on 1 January 1996 – Extension of Time-Limit | 24 April 1997 | 31 October 1997 | WT/L/216 |
| Bangladesh | Implementation of the Harmonized Commodity Description and Coding System – Extension of Time-Limit | 24 April 1997 | 31 October 1997 | WT/L/209 |
| Bolivia | Implementation of the Harmonized Commodity Description and Coding System – Extension of Time-Limit | 24 April 1997 | 31 October 1997 | WT/L/212 |
| Canada | CARIBCAN – Renewal of waiver | 14 October 1996 | 31 December 2006 | WT/L/185 |
| Cuba | Article XV:6 – Extension of waiver | 14 October 1996 | 31 December 2001 | WT/L/182 |
| EC | Fourth ACP-EC Convention of Lomé – Extension of waiver | 14 October 1996 | 29 February 2000 | WT/L/186 |
| France | Trading Arrangements with Morocco – Extension of waiver | 14 October 1996 | 31 December 1997 | WT/L/187 |
| Nicaragua | Implementation of the Harmonized Commodity Description and Coding System – Extension of Time-Limit | 24 April 1997 | 31 October 1997 | WT/L/211 |
| South Africa | Paragraph 4 of Article I of GATT 1994 – Renewal of waiver | 14 October 1996 | 31 December 1997 | WT/L/188 |
| Sri Lanka | Implementation of the Harmonized Commodity Description and Coding System – Extension of Time-Limit | 16 July 1997 | 31 October 1997 | WT/L/224 |
| United States | ANDEAN Trade Preference Act - Renewal of waiver | 14 October 1996 | 4 December 2001 | WT/L/184 |
| United States | Former Trust Territory of the Pacific Islands – Extension of waiver | 14 October 1996 | 31 December 2006 | WT/L/183 |
| United States | Imports of automotive products | 7, 8 and 13 November 1996 | 1 January 1998 | WT/L/198 |
| Zambia | Renegotiation of Schedule – Extension of Time-Limit | 24 April 1997 | 31 October 1997 | WT/L/213 |
| Zimbabwe | Paragraph 4 of Article I of GATT 1994 – Renewal of waiver | 14 October 1996 | 31 December 1997 | WT/L/189 |

**Box V.1**

**Singapore Ministerial Declaration**

**Purpose**

1. We, the Ministers, have met in Singapore from 9 to 13 December 1996 for the first regular biennial meeting of the WTO at Ministerial level, as called for in Article IV of the Agreement Establishing the World Trade Organization, to further strengthen the WTO as a forum for negotiation, the continuing liberalization of trade within a rule-based system, and the multilateral review and assessment of trade policies, and in particular to:

- assess the implementation of our commitments under the WTO Agreements and decisions;
- review the ongoing negotiations and Work Programme;
- examine developments in world trade; and
- address the challenges of an evolving world economy.

**Trade and Economic Growth**

2. For nearly 50 years Members have sought to fulfil, first in the GATT and now in the WTO, the objectives reflected in the preamble to the WTO Agreement of conducting our trade relations with a view to raising standards of living worldwide. The rise in global trade facilitated by trade liberalization within the rules-based system has created more and better-paid jobs in many countries. The achievements of the WTO during its first two years bear witness to our desire to work together to make the most of the possibilities that the multilateral system provides to promote sustainable growth and development while contributing to a more stable and secure climate in international relations.

**Integration of Economies; Opportunities and Challenges**

3. We believe that the scope and pace of change in the international economy, including the growth in trade in services and direct investment, and the increasing integration of economies offer unprecedented opportunities for improved growth, job creation, and development. These developments require adjustment by economies and societies. They also pose challenges to the trading system. We commit ourselves to address these challenges.

**Core Labour Standards**

4. 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.

**Marginalization**

5. We commit ourselves to address the problem of marginalization for least-developed countries, and the risk of it for certain developing countries. We will also continue to work for greater coherence in international economic policy-making and for improved coordination between the WTO and other agencies in providing technical assistance.

**Role of WTO**

6. In pursuit of the goal of sustainable growth and development for the common good, we envisage a world where trade flows freely. To this end we renew our commitment to:

- a fair, equitable and more open rule-based system;
- progressive liberalization and elimination of tariff and non-tariff barriers to trade in goods;
- progressive liberalization of trade in services;
- rejection of all forms of protectionism;
- elimination of discriminatory treatment in international trade relations;
- integration of developing and least-developed countries and economies in transition into the multilateral system; and
- the maximum possible level of transparency.

**Regional Agreements**

7. We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least-developed countries. The expansion and extent of regional trade agreements make it important to analyze whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements. We shall continue to work through progressive liberalization in the WTO as we are committed in the WTO Agreement and Decisions adopted at Marrakesh, and in so doing facilitate mutually supportive processes of global and regional trade liberalization.

**Accessions**

8. It is important that the 28 applicants now negotiating accession contribute to completing the accession process by accepting the WTO rules and by offering meaningful market access commitments. We will work to bring these applicants expeditiously into the WTO system.

**Dispute Settlement**

9. The Dispute Settlement Understanding (DSU) offers a means for the settlement of disputes among Members that is unique in international agreements. We consider its impartial and transparent operation to be of fundamental importance in assuring the resolution of trade disputes, and in fostering the implementation and application of the WTO agreements. The Understanding, with its predictable procedures, including the possibility of appeal of panel decisions to an Appellate Body and provisions on implementation of recommendations, has improved Members' means of resolving their differences. We believe that the DSU has worked effectively during its first two years. We also note the role that several WTO bodies have played in helping to avoid disputes. We renew our determination to abide by the rules and procedures of the DSU and other WTO agreements in the conduct of our trade relations and the settlement of disputes. We are confident that longer experience with the DSU, including the implementation of panel and appellate recommendations, will further enhance the effectiveness and credibility of the dispute settlement system.

**Implementation**

10. We attach high priority to full and effective implementation of the WTO Agreement in a manner consistent with the goal of trade liberalization. Implementation thus far has been generally satisfactory, although some Members have expressed dissatisfaction with certain aspects. It is clear that further effort in this area is required, as indicated by the relevant WTO bodies in their reports. Implementation of the specific commitments scheduled by Members with respect to market access in industrial goods and trade in services appears to be proceeding smoothly. With respect to industrial market access, monitoring of implementation would be enhanced by the timely availability of trade and tariff data. Progress has been made also in advancing the WTO reform programme in agriculture, including in implementation of agreed market access concessions and domestic subsidy and export subsidy commitments.

**Notifications and Legislation**

11. Compliance with notification requirements has not been fully satisfactory. Because the WTO system relies on mutual monitoring as a means to assess implementation, those Members which have not submitted notifications in a timely manner, or whose notifications are not complete, should renew their efforts. At the same time, the relevant bodies should take appropriate steps to promote full compliance while considering practical proposals for simplifying the notification process.

12. Where legislation is needed to implement WTO rules, Members are mindful of their obligations to complete their domestic legislative process without further delay. Those Members entitled to transition periods are urged to take steps as they deem necessary to ensure timely implementation of obligations as they come into effect. Each Member should carefully review all its existing or proposed legislation, programmes and measures to ensure their full compatibility with the WTO obligations, and should carefully consider points made during review in the relevant WTO bodies regarding the WTO consistency of legislation, programmes and measures, and make appropriate changes where necessary.

**Developing Countries**

13. The integration of developing countries in the multilateral trading system is important for their economic development and for global trade expansion. In this connection, we recall that the WTO Agreement embodies provisions conferring differential and more favourable treatment for developing countries, including special attention to the particular situation of least-developed countries. We acknowledge the fact that developing country Members have undertaken significant new commitments, both substantive and procedural, and we recognize the range and complexity of the efforts that they are making to comply with them. In order to assist them in these efforts, including those with respect to notification and legislative requirements, we will improve the availability of technical assistance under the agreed guidelines. We have also agreed to recommendations relative to the decision we took at Marrakesh concerning the possible negative effects of the agricultural reform programme on least-developed and net food-importing developing countries.

**Least-Developed Countries**

14. We remain concerned by the problems of the least-developed countries and have agreed to:
- a Plan of Action, including provision for taking positive measures, for example duty-free access, on an autonomous basis, aimed at improving their overall capacity to respond to the opportunities offered by the trading system;
- seek to give operational content to the Plan of Action, for example, by enhancing conditions for investment and providing predictable and favourable market access conditions for LLDCs' products, to foster the expansion and diversification of their exports to the markets of all developed countries; and in the case of relevant developing countries in the context of the Global System of Trade Preferences; and
- organize a meeting with UNCTAD and the International Trade Centre as soon as possible in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries to foster an integrated approach to assisting these countries in enhancing their trading opportunities.

**Textiles and Clothing**

15. We confirm our commitment to full and faithful implementation of the provisions of the Agreement on Textiles and Clothing (ATC). We stress the importance of the integration of textile products, as provided for in the ATC, into GATT 1994 under its strengthened rules and disciplines because of its systemic significance for the rule-based, non-discriminatory trading system and its contribution to the increase in export earnings of developing countries. We attach importance to the implementation of this Agreement so as to ensure an effective transition to GATT 1994 by way of integration which is progressive in character. The use of safeguard measures in accordance with ATC provisions should be as sparing as possible. We note concerns regarding the use of other trade distortive measures and circumvention. We reiterate the importance of fully implementing the provisions of the ATC relating to small suppliers, new entrants and least-developed country Members, as well as those relating to cotton-producing exporting Members. We recognize the importance of wool products for some developing country Members. We reaffirm that as part of the integration process and with reference to the specific commitments undertaken by the Members as a result of the UruguayRound, all Members shall take such action as may be

necessary to abide by GATT 1994 rules and disciplines so as to achieve improved market access for textiles and clothing products. We agree that, keeping in view its quasi-judicial nature, the Textiles Monitoring Body (TMB) should achieve transparency in providing rationale for its findings and recommendations. We expect that the TMB shall make findings and recommendations whenever called upon to do so under the Agreement. We emphasize the responsibility of the Goods Council in overseeing, in accordance with Article IV:5 of the WTO Agreement and Article 8 of the ATC, the functioning of the ATC, whose implementation is being supervised by the TMB.

**Trade and Environment**

16. The Committee on Trade and Environment has made an important contribution towards fulfilling its Work Programme. The Committee has been examining and will continue to examine, *inter alia*, the scope of the complementarities between trade liberalization, economic development and environmental protection. Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development. The work of the Committee has underlined the importance of policy coordination at the national level in the area of trade and environment. In this connection, the work of the Committee has been enriched by the participation of environmental as well as trade experts from Member governments and the further participation of such experts in the Committee's deliberations would be welcomed. The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.

**Services Negotiations**

17. The fulfilment of the objectives agreed at Marrakesh for negotiations on the improvement of market access in services – in financial services, movement of natural persons, maritime transport services and basic telecommunications – has proved to be difficult. The results have been below expectations. In three areas, it has been necessary to prolong negotiations beyond the original deadlines. We are determined to obtain a progressively higher level of liberalization in services on a mutually advantageous basis with appropriate flexibility for individual developing country Members, as envisaged in the Agreement, in the continuing negotiations and those scheduled to begin no later than 1 January 2000. In this context, we look forward to full MFN agreements based on improved market access commitments and national treatment. Accordingly, we will:

- achieve a successful conclusion to the negotiations on basic telecommunications in February 1997; and
- resume financial services negotiations in April 1997 with the aim of achieving significantly improved market access commitments with a broader level of participation in the agreed time frame.

With the same broad objectives in mind, we also look forward to a successful conclusion of the negotiations on Maritime Transport Services in the next round of negotiations on services liberalization.

In professional services, we shall aim at completing the work on the accountancy sector by the end of 1997, and will continue to develop multilateral disciplines and guidelines. In this connection, we encourage the successful completion of international standards in the accountancy sector by IFAC, IASC, and IOSCO. With respect to GATS rules, we shall undertake the necessary work with a view to completing the negotiations on safeguards by the end of 1997. We also note that more analytical work will be needed on emergency safeguards measures, government procurement in services and subsidies.

**ITA and Pharmaceuticals**

18. Taking note that a number of Members have agreed on a Declaration on Trade in Information Technology Products, we welcome the initiative taken by a number of WTO Members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis as well as the addition by a number of Members of over 400 products to their lists of tariff-free products in pharmaceuticals.

**Work Programme and Built-in Agenda**

19. Bearing in mind that an important aspect of WTO activities is a continuous overseeing of the implementation of various agreements, a periodic examination and updating of the WTO Work Programme is a key to enable the WTO to fulfil its objectives. In this context, we endorse the reports of the various WTO bodies. A major share of the Work Programme stems from the WTO Agreement and decisions adopted at Marrakesh. As part of these Agreements and decisions we agreed to a number of provisions calling for future negotiations on Agriculture, Services and aspects of TRIPS, or reviews and other work on Anti-Dumping, Customs Valuation, Dispute Settlement Understanding, Import Licensing, Preshipment Inspection, Rules of Origin, Sanitary and Phyto-Sanitary Measures, Safeguards, Subsidies and Countervailing Measures, Technical Barriers to Trade, Textiles and Clothing, Trade Policy Review Mechanism, Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures. We agree to a process of analysis and exchange of information, where provided for in the conclusions and recommendations of the relevant WTO bodies, on the Built-in Agenda issues, to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews. We agree that:

- the time frames established in the Agreements will be respected in each case;
- the work undertaken shall not prejudge the scope of future negotiations where such negotiations are called for; and
- the work undertaken shall not prejudice the nature of the activity agreed upon (i.e. negotiation or review).

**Investment and Competition**

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:

- establish a working group to examine the relationship between trade and investment; and
- establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

**Transparency in Government Procurement**
**Trade Facilitation**

21. We further agree to:
    - establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement; and
    - direct the Council for Trade in Goods to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.

22. In the organization of the work referred to in paragraphs 20 and 21, careful attention will be given to minimizing the burdens on delegations, especially those with more limited resources, and to coordinating meetings with those of relevant UNCTAD bodies. The technical cooperation programme of the Secretariat will be available to developing and, in particular, least-developed country Members to facilitate their participation in this work.

23. Noting that the 50th anniversary of the multilateral trading system will occur early in 1998, we instruct the General Council to consider how this historic event can best be commemorated.

* * * * *

Finally, we express our warmest thanks to the Chairman of the Ministerial Conference, Mr.Yeo Cheow Tong, for his personal contribution to the success of this Ministerial Conference. We also want to express our sincere gratitude to Prime Minister Goh Chok Tong, his colleagues in the Government of Singapore and the people of Singapore for their warm hospitality and the excellent organization they have provided. The fact that this first Ministerial Conference of the WTO has been held at Singapore is an additional manifestation of Singapore's commitment to an open world trading system.

At the 1996 Ministerial Conference in Singapore, Ministers agreed that the next Ministerial Conference would be held in Geneva, and invited the General Council to determine its date and duration. Ministers had instructed the General Council to consider how the 50th Anniversary of the multilateral trading system could best be commemorated.

At a first discussion on the 50th Anniversary commemoration, held in February 1997, Canada suggested a short meeting at Ministerial level to commemorate this Anniversary, and that this be held back-to-back with a stocktaking Ministerial Conference. Canada said its suggested format would not entail the same sort of preparations as were required for the Singapore Ministerial Conference and would yet serve important objectives of the institution. The Director-General, in welcoming Canada's proposals, said that Canada's ideas corresponded with those that had come up in his informal discussions with delegations on this matter.

At its meeting on 30 June-1 July 1997, the General Council agreed that the 1998 Ministerial Conference and the 50th Anniversary commemoration meeting be held in the period 18-20 May 1998. The General Council will hold further discussions at a later date on the agenda and format of the Conference and the planned celebration of the 50th Anniversary.

### Arrangements for effective cooperation with other international intergovernmental organizations

In November 1997, the General Council, in pursuance of Article V:1 of the WTO Agreement, approved Agreements on cooperation with the International Monetary Fund and the World Bank (see below).

### Conditions of service of WTO staff

An Agreement on the transfer of assets, liabilities, records, staff and functions from the Interim Commission for the International Trade Organization and the GATT to the WTO, approved by the General Council in January 1995, provides that the WTO Director-General, acting in accordance with the provisions of Articles VI:3 and XVI:2 of the WTO Agreement, shall appoint the members of the staff of the WTO Secretariat provided that the General Council adopts regulations governing the duties and conditions of service of the members of the Secretariat staff, including regulations on contract of employment policy, salaries and pensions.

Pursuant to this decision, the General Council considered the matter of salaries and pensions of WTO staff on several occasions during the period under review, and also established a Working Group on conditions of service to assist it in its task. At its meeting on 30 June-1July, the General Council agreed that it would consider this matter further not later than October 1997 and decide then upon the appropriate action to be taken.

**WTO Secretariat and senior management structure**

At its meeting in April 1997, the General Council requested the Director-General to submit by October a report on how to enhance the efficiency of the Secretariat, including through a rationalization of the senior management structure in the light of the Members' intention to reduce significantly the number of Deputy Directors-General. At its meeting in April 1997, the General Council took note that the Director-General, in accordance with current procedures, had decided to extend the contracts of the current Deputy Directors-General (Mr. A. Hoda, Dr. C. Kim, Mr. W. Lavorel and Mr. J. Seade) until 30 April 1999, which coincided with the end of his own tenure. The Director-General said that the four deputies formed a good team and underlined that his decision allowed governments full flexibility in reviewing the senior management structure of the WTO.

## III. Trade in goods

The work of the Council for Trade in Goods (CTG) is, to a large extent, linked to the activities of its subsidiary bodies. As overseer of the multilateral trade agreements and ministerial decisions covering the goods sector, the Council takes action, where necessary, on issues raised by the various committees which report to it. During the period under review, the Council for Trade in Goods convened more than 10 times to discuss matters ranging from "Observer Status of International Intergovernmental Organizations" to "Trade Facilitation". However, during the latter part of 1996 much of the focus was on the Singapore Ministerial Conference and the report and recommendations to be submitted by the Council in that context. One of the main substantive subject matters addressed by the Council, in that connection, included the implementation of the Agreement on Textiles and Clothing and related matters where extensive discussion took place on issues such as the integration programmes, the use of transitional safeguards, bilaterally agreed arrangements, functioning of the Textiles Monitoring Body, treatment of small suppliers and least-developed countries, particularly interests of cotton-producing countries, rules of origin, relationship between restrictions and regionalism, market access, rules and disciplines and circumvention. Some preliminary debate also took place on a proposal for "Further Industrial Tariff Negotiations".

Action was taken by the Council on several important matters including the adoption of recommendations forwarded by the Working Group on Notification Obligations and Procedures at the end of 1996. This Group had been established by the Council in 1995 pursuant to a Uruguay Round Ministerial Decision on Notification Procedures. It had a two year mandate in which to "conduct a review of the existing notifications with a view to simplifying, standardizing and consolidating these obligations to the greatest extent practicable". One of the Group's recommendations includes the updating of the status of notifications under the provisions of the Agreements found in Annex 1A of the WTO Agreement on a semi-annual basis in order to determine the level of compliance of Members with notification requirements, which will further improve transparency. Another issue addressed was the review to be conducted of the provisions, implementation and operation of the Agreement on Preshipment Inspection (PSI) pursuant to Article 6 of that Agreement. The Council recommended that the General Council, on behalf of the Ministerial Conference, set up a Working Party under the Goods Council. In November 1996, the General Council established this Working Party "to conduct the review....and to report to the General Council through the Council, in December 1997". Article 6 of the PSI Agreement also foresees the possibility for the Ministerial Conference to amend the provisions of that Agreement as a result of the review. An important item emerging from the Singapore Ministerial Conference, was a definite mandate to the Council to "undertake exploratory and analytical work, drawing on the work of other international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area". This subject commonly referred to as "Trade Facilitation" has been examined during the first six months of 1997 and discussions are expected to continue.

In April 1997, the Council took note of a communication on the implementation of the Ministerial Declaration on Trade in Information Technology Products (ITA) which had been submitted by the participants (see below). Although only certain Members and acceding states or separate customs territories had chosen to participate in the agreement, the

benefits of the ITA were to accrue to all WTO Members as they would be granted on an most-favoured-nation (MFN) basis. Participants in the ITA represented more than 92 per cent of world trade in information technology products valued at some 580 billion US dollars.

Routine matters have not gone unattended during the period under review. The Council adopted terms of reference under which a number of free-trade agreements are to be examined by the Committee on Regional Trade Agreements; it examined a number of requests for extensions or renewals of waivers from, for example, Article I.1 of the GATT 1994, in the case of the Andean Trade Preference Act or from Article II of the GATT 1994 as a result of the implementation of the Harmonized System nomenclature. The Council also provided an opportunity for Members to voice any concerns they may have regarding trading practices of their trading partners. Issues that have been raised included "Tariff Measures by Ecuador against certain suppliers", "Korea's Frugality Campaign", "Brazil's Import Financing Restrictions", "Request for Consultations concerning Restrictive Business Practices in the Japanese Photographic Film and Paper Market", the "Price Range or Range of System applied in Argentina".

## Market access

The activities of the Committee on Market Access cover market-access issues related to tariffs and non-tariff measures not covered by any other WTO body, as well as matters related to the Integrated Data Base. During the period under review, the Market Access Committee held four formal meetings.

**Tariffs**

The implementation of Uruguay Round tariff cuts has proceeded according to schedule. To date, no complaint has been received by the Market Access Committee regarding the failure of any Member to fulfil its tariff-reduction commitments.

In the context of the preparation for the Singapore Ministerial Conference, two market access proposals were tabled in the Committee, a proposal for the acceleration of Uruguay Round tariff cuts and for increased participation in sectoral initiatives, including new sectoral zero-for-zero or harmonization initiatives; and a proposal for new industrial tariff negotiations to begin in the year 2000. While some Members expressed support in varying degrees for these proposals, other Members expressed opposition because in their view the WTO's immediate focus should be on implementation of Uruguay Round commitments.

Two other initiatives concerned the elimination of tariffs on information technology products (e.g. computers, telecommunications, semi-conductors, etc.) by 43 WTO Members, and States or separate customs territories in the process of accession, representing about 93 per cent of trade in these products, and the extension of duty-free treatment to an additional 465 pharmaceutical products. These two initiatives were successfully concluded; one in March 1997 when the 43 Members concerned agreed to implement the Ministerial Declaration on ITA products, the other with the addition of 465 pharmaceutical products in April 1997. These initiatives were welcomed by Members as they made a positive contribution to trade liberalization and their results are granted on an MFN basis.

The Market Access Committee oversaw the introduction of the Harmonized System changes (HS96), implemented by Members on 1 January 1996, and examined the consequences of those changes to Members' schedules of tariff concessions. A waiver was granted to a large number of Members allowing them to introduce changes and, if necessary, to renegotiate affected bound items under Article XXVIII. The waiver has been extended until 31 October 1997 for those Members that requested it. In view of objections lodged with regard to the documentation submitted by the Members concerned, these changes had not been formally certified by 31 July 1997.

**Non-tariff measures**

A Decision on the format for the notification of quantitative restrictions has been adopted by the Committee at its meeting of 24 June 1997. In the future, this format will help to simplify compliance with this notification requirement by Members.

**Trade facilitation**

The Singapore Ministerial Declaration directed the Council for Trade in Goods to "undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area." The Secretariat prepared a document showing the work undertaken in this area. Discussions took place on this matter at the meeting of the Council for Trade in Goods in June and July 1997.

**Integrated data base**

In 1997, the Committee undertook numerous informal consultations on the operation of the Integrated Data Base (IDB) in order to facilitate the information gathering and dissemination of tariff and import data, thus improving the analytical tools at the disposal of Members. As a result of these discussions, Members decided to move the IDB from its existing mainframe environment to a PC-based system, to simplify the data elements, and thereby facilitate data collection by the acceptance of a variety of electronic formats. In addition to these changes, the Committee also put forth a Decision on the supply of information to the IDB, adopted by the General Council on 16 July 1997, which requires Members to make annual tariff and import submissions to the IDB.

## Textiles and clothing – the Textiles Monitoring Body

The Agreement on Textiles and Clothing (ATC), which entered into force on 1 January 1995, is within the WTO legal structure, a 10-year transitional agreement with a four-stage programme to gradually integrate textile and clothing products into GATT rules and disciplines by 2005. It replaces the MultifibreArrangement (MFA) which began in 1974 and provided the basis on which certain industrial countries, through bilateral agreements or unilateral actions, established quotas on imports of textiles and clothing from several developing countries. The MFA expired when the ATC entered into force and its quotas were carried over into the ATC.

The Agreement on Textiles and Clothing is built on the following main elements:

(i) the product coverage, which comprises an extensive list of man-made fibres, yarns, fabrics, made-up textile products and clothing;

(ii) the procedures for the four-stage integration of these products into GATT 1994 rules, on 1 January 1995, 1998, 2002 and 2005. When products are integrated by a Member, they are removed from the Agreement with respect to that Member's imports and are freed of any quotas to which they may have been subjected; any new protection for these integrated products must be based on the relevant provisions of the GATT 1994;

(iii) a quota liberalization process during the 10-year transition period which automatically increases at each stage the annual growth rates in the quotas inherited from the MFA;

(iv) a transitional safeguard mechanism to deal with cases of serious damage, or actual threat of serious damage, to domestic industries which may arise during the transition period. It permits quotas to be either bilaterally agreed or unilaterally imposed under strict criteria for limited time periods;

(v) other provisions, which include clauses on circumvention of restrictions, quota administration, quantitative restrictions other than those inherited from the MFA, actions as may be necessary to abide by GATT 1994 rules and disciplines, and special treatment for certain categories of exporters; and

(vi) the Textiles Monitoring Body (TMB), which is mandated to supervise the implementation of the ATC and to report thereon to the CTG at each stage.

The TMB consists of a Chairman and 10 members who act in their personal capacity. It is a standing body and meets as necessary to carry out its functions, relying essentially on notifications and information supplied by Members under the relevant provisions of the ATC.

On 31 January 1995, the General Council decided on the TMB's composition for the first three years (1995-1997), including the naming of the Chairman, Ambassador András Szepesi of Hungary. The decision also included the allocation of the 10 seats to WTO Members or to groupings of Members (i.e.constituencies). Each of these select a WTO Member which, in turn, appoints an individual person to be the TMB member and to act on an *ad personam* basis in the TMB.

In 1997 the following constituencies were in place: the ASEAN Member countries; Canada and Norway; Pakistan and Macau; the European Community; Hong Kong and Korea; India and Egypt/Morocco/Tunisia; Japan; LatinAmerican and Caribbean Members; Turkey, Switzerland and Czech Republic/Hungary/Poland/Romania/Slovak Republic; and the United States. Most of the constituencies operate on a basis of rotation. The TMB Members appoint their own alternates. The TMB composition also provides for two "second alternates" and two "non-participating observers".

The TMB takes all of its decisions by consensus; however, according to the ATC, consensus within the TMB does not require the assent or the concurrence of those members appointed by WTO Members who are involved in an unresolved issue under review by the TMB. The ATC also has its own working procedures, adopted in mid-July 1995, which include precise terms on how members discharge their functions.

In the year ending 31 July 1997, the TMB spent 55 days in 19 formal sessions carrying out its functions. It examined a large number of notifications in respect of actions taken under provisions of the ATC, including the first and second integration stages, administrative arrangements, actions taken under the transitional safeguard, and a number of issues among Members in respect of these obligations.

More specifically, during the period of this report, the TMB continued its examination of the lists of products notified by Members as their integration programmes in the first stage of the transition. During this period, the TMB also received notifications and undertook the examination of the lists of products for the second integration stage (1998-2001) from 40 Members. In many cases, additional information in respect of the integration programmes in both phases was sought from the Members concerned to ensure that full information on these programmes was made available to WTO Members.

Also in the context of the integration process, the TMB examined a notification made by Colombia on behalf of a number of Members that were also members of the International Textiles and Clothing Bureau, alleging certain discrepancies in the first integration programme of the EC. It was claimed that in respect of a number of specific products from the Annex to the Agreement, representing portions of 6-digit HS lines, the EC included in its list the import level for the full 6-digit HS line. The TMB found that certain elements of the claim were correct, however, due to a lack of reliable statistics, the TMB was not in a position to pronounce itself upon the magnitude of the discrepancy. The TMB recommended that the EC re-examine its first stage integration programme and report on its findings.

The Body received a total of 72 notifications from Canada, the European Community and the UnitedStates, of arrangements they had concluded with exporting Members for the administration of the quotas in place under Article 2.1 of the ATC. The Body examined these arrangements in detail and took note of them.

With reference to the transitional safeguard mechanism, the TMB examined actions taken by Brazil against one textile and one clothing category exported from Hong Kong. As consultations between these two Members had not resulted in a mutually acceptable solution, both parties requested the TMB to conduct a review. The TMB examined the factual data provided and heard arguments by delegations from both sides in respect of the textile product. It found that serious damage was present, attributable in part to imports from Hong Kong. It recommended that, in view of the industry restructuring already taking place in Brazil, the restraint should be terminated by 31 December 1997, i.e. within a period less than the maximum time-frame envisaged by the ATC. In the case of the clothing product, the TMB concluded that Brazil had not demonstrated that its industry had experienced serious damage and recommended that the measure be rescinded. Subsequently, Brazil notified the TMB that it would endeavour to accept the recommendation in full. Hong Kong conveyed its inability to conform with the TMB's recommendation and requested the TMB to review the matter. Accordingly, the TMB conducted such a re-examination. It found that it would not be appropriate to revise its earlier findings but recalled to the parties concerned its earlier observations and recommendations.

In another case, Korea had requested the TMB to examine safeguard measures introduced by Ecuador, referring to the provisions of the Agreement on Textiles and Clothing, on imports of several textile and clothing products from Korea and Hong Kong. In its review the TMB, among other things, noted that such measures had been in force for some five months and would remain applicable until 9 February 1997 with possible effects on trade between the Members concerned. The TMB expected that Ecuador would take the necessary steps to disinvoke Article 6 of the ATC with respect to these measures, and comply with the legal and procedural requirements under the WTO. Subsequently, Ecuador informed the TMB that the measures had expired on 9 February 1997.

The TMB also examined restraint measures between Brazil and Korea on five fabric categories agreed through bilateral consultations under the provisions of the transitional safeguard and a safeguard measure agreed between the UnitedStates and El salvador on one clothing category. It found that the elements of the agreements were in conformity with the provisions of the ATC and concluded that the restraints were justified in accordance with the ATC. Also with respect to the application of the safeguard, the TMB was requested by Honduras to consider the appropriateness of the US continuing to maintain a quota on one clothing category. After examination of this request, the TMB called upon the US to reassess the situation in the light of the current circumstances. This was done and the US advised that the quota would be rescinded not later than 31 October 1997. The US has communicated to the TMB its decision to rescind the restraint on 30 September 1997.

The TMB prepared a detailed report for the Council for Trade in Goods (CTG) in 1996 on the work it had carried out, in preparation for the Singapore Ministerial meeting. A further comprehensive report was submitted to the CTG in July 1997, as required by the ATC and in preparation for the major review of the operation of the Agreement.

## Committee on Agriculture

The WTO Agreement on Agriculture was negotiated during the Uruguay Round and is made up of several elements which seek to reform trade in this sector. Although the original GATT applied to trade in agricultural products, various exceptions to the disciplines on the use of non-tariff measures and subsidies meant that it did so ineffectively, particularly as regards export subsidies. One of the main aims of the Agreement is to improve predictability and security for importing and exporting countries alike. Implementation of the commitments related to agriculture involves action by WTO Members in two closely related areas of obligation. The first concerns the implementation of generally applicable rule-based commitments, such as the new rules prohibiting the use of border measures other than ordinary customs duties and export subsidies on products not subject to reduction commitments. These rule-based commitments entered into effect on 1 January 1995. The second area of obligations concerns the implementation of the specific market access, domestic support and export subsidy commitments that are indicated in each WTO Member's Schedule of concessions and commitments.

The implementation process of these commitments is subject to regular multilateral review in the WTO Committee on Agriculture. According to the mandate assigned to it by the WTO General Council, "The Committee shall oversee the implementation of the Agreement on Agriculture. The Committee shall afford Members the opportunity of consulting on any matter relating to the implementation of the provisions of the Agreement". To date, the Committee on Agriculture has held 10 regular meetings as well as numerous informal consultations, plus a special meeting to approve its reports for the December 1996 WTO Ministerial Conference.

At each of its regular meetings, the Committee has reviewed progress in the implementation of the Uruguay Round commitments. This review process is undertaken on the basis of specific questions relating to the implementation of commitments under Article 18:6 of the Agreement on Agriculture and on the basis of questions raised in relation to notifications submitted by WTO Members in the areas of market access, domestic support and export subsidies, as well as under the provisions of the Agreement relating to export prohibitions and restrictions. By June 1997, a total of about 400 notifications had been reviewed by the Committee on Agriculture.

The work of the Committee on Agriculture in the area of market access continues to focus on how WTO Members administer the market-access opportunities under their respective tariff and other quota commitments and on actual imports under these commitments. In total, 35 WTO Members have commitments in this area. WTO Members are required to provide information on any allocation of quotas to supplying countries (e.g. global quota or allocation to country x and y); the allocation of licences or of importers' access to quotas; and any other details relevant to the implementation of commitments. Members are also required to notify any subsequent changes to the existing administrative arrangements of tariff and other quota commitments, as well as imports on an annual basis under these commitments. Given the substantial value of these concessions, the examination of these notifications has been conducted rigorously and in considerable technical detail.

The Committee also addressed a range of more general matters concerning tariff quota administration. Some of the principal items included the various methods of allocating tariff and other quota licences, such as the auctioning of tariff quota licences, the treatment of preferential imports under MFN market access commitments, domestic purchasing requirements, the use of state trading, or allocation to processor or producer organizations. In addition, the Committee reviewed market-access notifications in the context of the special agricultural safeguard.

From mid-1996 onwards, the scope of the Committee's review process has broadened considerably as notifications on domestic support and export subsidy commitments started to come fully on stream. In the area of domestic support, particular attention has been given to the measures which Members have categorized as being exempt from reduction commitments and to the conformity of these measures with the relevant non-trade distortion and other criteria under the Agreement on Agriculture. The "full picture" export subsidy notifications, which cover not only subsidized quantities and related budgetary outlays but also food-aid transactions and total exports, have also received close attention and systematic scrutiny in the Committee. In several instances questions have been raised regarding the status, from the anti-circumvention point of view, of newly introduced or modified arrangements affecting exports of certain agricultural products.

The Committee also dealt with a wide range of issues relevant to the implementation of commitments that were raised independently of notifications under the provisions of Article 18:6 of the Agreement on Agriculture, which states: "The review process shall provide an opportunity for Members to raise any matter relevant to the implementation of commitments under the reform programme…". Implementation issues concerning market

access, domestic support and circumvention of export subsidy commitments were clarified as a result of these Article 18:6 procedures. In some instances, the matters raised were subsequently pursued under the formal WTO dispute settlement procedures.

As provided for in the report of the Committee on Agriculture for the December 1996 WTO Ministerial Conference, Ministers agreed to a process of analysis and information exchange on the built-in agenda issues (the "AIE Process") to allow Members to better understand the issues involved and identify their interests before undertaking the agreed negotiations and reviews. The arrangements for the agricultural AIE Process were agreed at the March 1997 meeting of the Committee on Agriculture. The AIE Process is being undertaken in informal meetings of the Committee on Agriculture.

When Ministers signed the Final Act in Marrakesh in April 1994, they adopted a Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries. Ministers recognized that the progressive implementation of the results of the Uruguay Round as a whole will generate increasing opportunities for trade expansion and economic growth to the benefit of all participants. However, they also recognized that during the reform programme leading to greater liberalization of trade in agriculture, least-developed and net food-importing developing countries may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs. In the context of this Decision, the Committee on Agriculture established notification requirements under which donor Members are to provide data on food aid donations (quantity and concessionality) as well as information on technical and financial assistance and other relevant information on actions taken within the framework of the Decision.

As part of a series of steps taken to make the Decision operational, the Committee established a WTO list of net food-importing developing countries.[1] On the basis of a report submitted by the Committee on Agriculture, the December 1996 WTO Ministerial Conference approved a number of recommendations concerning the implementation of the Decision. These included a recommendation relating to the level of international food aid commitments and concessionality guidelines which is now under action in the context of the 1995 Food Aid Convention.

## Committee on Sanitary and Phytosanitary Measures

The Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") sets out the rights and obligations of Members when taking measures to ensure food safety, to protect human health from plant- or animal-spread diseases, or to protect plant and animal health from pests and diseases. Such measures should not create undue obstacles to international trade. Governments must ensure that their food safety and animal or plant health requirements are necessary for health protection, based on scientific evidence, and that they are transparent. The use of internationally-developed standards is encouraged, and exceptions must be justifiable through an assessment of the health risks involved. Advance notice must be given of proposed new regulations or modifications to requirements whenever these differ from the relevant international standards.

The Committee on Sanitary and Phytosanitary Measures oversees the implementation of the SPS Agreement. It holds three regular meetings each year. In 1995 it developed and recommended procedures and formats for the notification of proposed measures and of emergency actions. In addition, the Committee established lists of National Enquiry Points, offices designated to respond to all requests for information on sanitary and phytosanitary measures, as well as of National Notification Authorities. These lists are regularly updated. Modifications were agreed to the notification procedures in 1996, and notifications as well as the list of Enquiry Points were derestricted to allow public access to this information.

As of mid-1997, almost 600 notifications had been received with regard to the provisions of the SPS Agreement. Eighty-eight Members have established and identified National Enquiry Points to respond to requests for information regarding sanitary and phytosanitary measures, whereas 70 have identified their national authority responsible for notifications. Developing country Members were required to implement the transparency provisions of the SPS Agreement as of 1 January 1995 and have been required to implement its other provisions since 1997. The SPS Agreement provides a delay until 2000 for the least-developed country Members to implement and adhere to all provisions of the Agreement, including those with respect to notifications, Enquiry Points and National Notification Authorities.

Since 1995, the Committee has undertaken efforts to develop guidelines to help Members achieve consistency in their decisions regarding acceptable levels of health protection. The Committee is also developing a procedure to monitor the use of international standards, guidelines and recommendations.

[1]This list currently includes the least-developed countries and 18 developing country Members of the WTO (Barbados, Botswana, Côte d'Ivoire, Dominican Republic, Egypt, Honduras, Jamaica, Kenya, Mauritius, Morocco, Pakistan, Peru, Senegal, Saint Lucia, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela).

A number of other issues regarding the implementation of the Agreement have been considered by the Committee. Specific trade concerns, involving measures either proposed or taken by certain Members and which other Members allege violate the provisions of the Agreement, are considered by the Committee at each of its regular meetings. Trade restrictions related to BSE ("mad cow" disease), for example, have been the subject of considerable discussion by the Committee. Korean "shelf-life" provisions for UHT milk, and restrictions on poultry due to salmonella are other examples of the kinds of matters brought before the Committee.

A number of trade disputes alleging violations of the SPS Agreement were brought to the Dispute Settlement Body. These include: a complaint by the United States against Korean shelf-life requirements and a separate US complaint against Korean inspection procedures; complaints by Canada and the United States against Australian restrictions related to fish diseases; a Canadian complaint against Korean regulations on bottled water; complaints by the United States and Canada against the European Community's ban on imports of hormone-treated meats; and a US complaint against Japanese restrictions on apple varieties. Dispute settlement panels have been established to consider the two complaints on hormone-treated meats, and the Canadian complaint against Australian restrictions on salmon (see below).

The effective implementation of this Agreement requires cooperation from several international standard-setting organizations, and in particular the Office International des epizooties (OIE), the FAO/WHO Joint Codex Alimentarius Commission (Codex), and the FAO's Secretariat for the International Plant Protection Convention (IPPC). Close working relationships have been established with these bodies. They are frequently involved with the work of the Committee.

The Committee has regularly considered the need for technical assistance and the WTO Secretariat has organized a series of regional seminars in Africa, Asia, Central and Eastern Europe and Latin America focusing on the implementation of the SPS Agreement. Participants from the OIE, Codex Alimentarius and the IPPC secretariats have been involved in these seminars. National seminars and assistance in response to numerous specific requests were also provided by the WTO Secretariat.

## Safeguards

WTO Members may take "safeguard" actions with respect to a product if increased imports of that product are causing, or threatening to cause, serious injury to the domestic industry that produces like or directly competitive products. Safeguard measures were available under the Article XIX of GATT 1947, but were infrequently used, because some governments preferred to secure protection for their domestic industries by using "grey area" measures. These measures usually took the form of voluntary export restraint agreements between exporting and importing countries.

The WTO Agreement on Safeguards, which entered into force on 1 January 1995, broke new ground in establishing a prohibition against "grey area" measures, and in setting a "sunset clause" on all safeguard actions. The Agreement stipulates that Members shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures. Such measures have to conform with the Agreement, or be phased out by the end of 1998.

During the period under review, the Committee established under the Agreement completed its review of national safeguards legislation which had been notified to the Committee as of mid-March 1997. To date, 70 Members have notified the Committee of their domestic safeguard legislations or made communications in this respect. Forty-six Members have not, as yet, made notifications as required by Article 12.6 of the Agreement.[2]

The Agreement requires Members maintaining "grey area" measures to notify such measures, as well as timetables for their phase-out, to the Committee. The notifications of timetables received from Cyprus, the European Community, the Republic of Korea, Slovenia, and South Africa were reviewed by the Committee, in the context of its monitoring activities and annual reporting to the Council for Trade in Goods required under the Agreement. The Agreement also requires notification and termination of any pre-existing measures imposed under Article XIX of GATT 1947. The notifications of such measures, which were received from the European Community and the Republic of Korea, also were reviewed in this context.

Members are required to notify the Committee immediately upon taking any action related to safeguard measures. Notifications of the initiation of investigations regarding serious injury or threat thereof and the reasons for it were received from Argentina and Korea during the period covered by this report. Also during this period, one notification of the application of a provisional measure was received from Argentina. Notifications of findings of serious injury due to increased imports were received from Brazil and Korea.

[2]The total of 116 Members used here reflects the fact that for this obligation, the EC submits a single notification that covers all 15 member States. The official total membership of the WTO (131) includes the EC Commission and the 15 individual member States.

Notifications of termination of investigations with no safeguard measures imposed were received from Korea and the United States. Notifications related to decisions to apply safeguard measures, and related to the exclusion from application of safeguard measures of those developing countries whose shares of imports are below the thresholds set forth in Article 9.1 of the Agreement, were received from Brazil, Korea and the United States. In addition, notifications regarding the results of consultations held pursuant to Article 12 of the Agreement (related to definitive measures proposed or provisional measures applied) were received from Brazil, Korea and the United States. All of these notifications were reviewed by the Committee.

## Subsidies and countervailing measures

The Agreement on Subsidies and Countervailing Measures, which entered into force on 1 January 1995, regulates the provision of subsidies and the imposition of countervailing measures by Members. The Agreement applies to subsidies that are specific to an enterprise or industry or group of enterprises or industries within the territory of a Member. Specific subsidies are divided into three categories: prohibited subsidies under Part II of the Agreement, actionable subsidies under Part III of the Agreement, and non-actionable subsidies under Part IV of the Agreement. Part V of the Agreement contains detailed rules regarding the conduct by Members of countervailing duty investigations. Parts VIII and IX of the Agreement provide special and differential treatment for developing country Members and Members in transformation into a market economy, respectively.

### Notification and review of subsidies

Transparency is essential for the effective operation of the Agreement. To this end, Article 25 of the Agreement requires that Members make a new and full notification of subsidies every third year, with the first such notification due on 30 June 1995, and that on 30 June of the intervening years Members submit an updating notification. As of 31 July 1997, 76 Members had submitted a new and full notification regarding specific subsidies, of which 22 notified they provided no specific subsidies; 48 Members had submitted 1996 updating notifications; and 9 Members had submitted 1997 updating notifications. The 1995 new and full notifications were reviewed in detail at meetings of the Committee on Subsidies and Countervailing Measures ("the Committee") in July and October 1996 and in May 1997. The Committee also began its review of 1996 updating notifications; however, the late submission or non-submission of these notifications by numerous Members has delayed the review process. The Committee further reviewed notifications under Article 29.3 by Members in transformation to a market economy of subsidies falling within the scope of Article 3, and a notification under Article 27.13 by a developing country of a subsidy linked to a privatization programme.

Table V.2

**Summary of countervailing duty actions, 1996**[1]

| | Initiation | Provisional measures | Definitive duties | Price undertakings | Measures in force on 31 Dec. 1996[2] |
|---|---|---|---|---|---|
| Argentina | 1 | 0 | 1 | 0 | 1 |
| Australia | 1 | 0 | 0 | 0 | 13 |
| Brazil | 0 | 0 | 0 | 0 | 7 |
| Canada | 0 | 1 | 0 | 0 | 5 |
| EC | 1 | 0 | 0 | 0 | 2 |
| Mexico | 0 | 0 | 0 | 0 | 11 |
| New Zealand | 4 | 1 | 0 | 0 | 2 |
| United States | 2 | 1 | 2 | 0 | 67 |
| Venezuela | 0 | 0 | 0 | 0 | 3 |
| Total | 9 | 3 | 3 | 0 | 111 |

1. The reporting period covers 1 January-31 December 1996. The table is based on information from Members that have submitted semi-annual reports and is incomplete due to a significant number of missing notifications.

2. Includes definitive duties and price undertakings.

### Notification and review of countervailing legislation

Pursuant to Article 32.6 of the Agreement and a decision of the Committee, Members were required to notify their countervailing duty legislation and/or regulations (or the lack thereof) to the Committee by 15 March 1995. As of 31 July 1997, 71 Members (counting the

EC as a single Member) had submitted such a notification. Of these, 17 Members notified new legislation designed to implement the Marrakesh Agreements, 34 Members notified pre-existing legislation and 21 Members notified that they had no countervailing duty legislation. Forty-five Members had not submitted a notification. During the period 1 August 1996 through 31 July 1997, the Committee continued the task of reviewing notifications of legislation, which had been begun in four special meetings held jointly with the Committee on Anti-Dumping Practices, during the course of its regular meetings. Both new notifications of legislation, and notifications that had previously been the subject of review, were reviewed in detail at the Committee's regular meetings in October 1996 and May 1997.

**Non-actionable subsidies**

Article 8 of the Agreement provides that subsidy programmes for which non-actionable status are invoked shall be notified to the Committee in advance of implementation. The notified programmes shall be reviewed by the Committee upon the request of a Member with a view to determining whether the criteria for non-actionability have not been met. Thereafter, upon request of a Member, the determination of the Committee, or lack thereof, shall be submitted to binding arbitration. The Committee in 1995 approved a format for the notification of non-actionable subsidies. Further, an informal group on procedures for binding arbitration pursuant to Article 8 began work before the entry into force of the Marrakesh Agreements. However, the Committee has not yet been able to adopt arbitration procedures. In addition, the Working Party on Subsidy Notifications continues to work on the development of a format for non-actionable subsidies updating notifications. To date, no notifications of non-actionable subsidies pursuant to Article 8 have been made.

**Permanent Group of Experts**

The Agreement provides for the establishment of a Permanent Group of Experts ("PGE"), composed of five independent persons highly qualified in the fields of subsidies and trade relations. The role of the PGE involves the provision of assistance to panels with respect to whether a subsidy is prohibited, as well as the provision of advisory opinions at the request of the Committee on Subsidies and Countervailing Measures or a Member. On 2 May 1997, the Committee elected Mr. A.V. Ganesan to replace Mr. Friederich Klein as a member of the PGE[3]. Although the PGE has drafted Rules of Procedure and submitted them to the Committee for its approval, the draft Rules have not yet been approved by the Committee.

**Informal Group of Experts**

Under Article 6.1(a) of the Agreement, *ad valorem* subsidization of a product in excess of 5 per cent gives rise to a presumption of serious prejudice to the interests of another Member. Annex IV to the Agreement sets forth certain methodological approaches for determining whether the 5 per cent level has been met, but states that an understanding among Members should be developed as necessary on matters regarding this calculation which are not specified in the Annex or require clarification. In 1995, the Committee created an Informal Group of Experts whose terms of reference are to examine any such matters and to report to the Committee such recommendations as could assist the Committee in the development of such an understanding. The Group has met repeatedly over the past two years, and informed the Committee in May 1997 that it expected to submit a report to the Committee in the near future. The report was circulated to Members in late July 1997.

Table V.3

**Exporters subject to initiations of countervailing investigations, 1996[1]**

| | Total | | Total |
|---|---|---|---|
| Argentina | 1 | Norway | 1 |
| Canada | 1 | South Africa | 3 |
| European Community[2] | 3 | | |
| | | *Total* | *9* |

1. The reporting period covers 1 January-31 December 1996. The table is based on information from Members that have submitted semi-annual reports and is incomplete due to a significant number of missing notifications.
2. Initiations concerning exporters of the European Community and its member States.

**Countervailing actions**

Countervailing actions taken during the period 1 January-31 December 1996 are summarized in Tables V.2 and V.3. The tables are incomplete because certain Members have not submitted one or both of their semi-annual reports on countervailing actions or have not provided all the information required by the format adopted by the Committee. The data available indicate that nine new countervailing duty investigations were initiated in 1996. As of 31 December 1996, Members reported 111 countervailing measures (including undertakings) in force.

## Anti-dumping practices

The Agreement on Implementation of Article VI of GATT 1994 ("the Agreement"), which entered into force on 1 January 1995, builds on the Tokyo Round Agreement on Implementation of Article VI ("Tokyo Round Agreement"). Article VI of GATT 1994 allows

[3]The new membership of the PGE is as follows: Mr. Seung-Wha Chang, lecturer in international trade law at Seoul National University; Mr. A.V. Ganesan, former Commerce Secretary and chief Uruguay Round negotiator for India; Mr. Gary Horlick, private attorney in the trade law area; Mr. Akiro Kotera, Professor of International Relations at Tokyo University; and Mr. Robert Martin, former Secretary of the Canadian International Trade Tribunal and former Canadian GATT negotiator.

Members to apply anti-dumping measures on imports of a product with an export price below its "normal value" (usually the comparable price of the product in the domestic market of the exporting country) if such imports cause material injury to a domestic industry. Detailed rules governing the application of such measures – which take the form of either duties or undertakings on pricing by the exporter – were negotiated during the Tokyo Round. That Agreement was substantially revised during the Uruguay Round.

The new Agreement provides for greater clarity and more detailed rules in relation to the method of determining whether a product is dumped, including the calculation of a "constructed" normal value where no direct comparison with prices on the domestic market of the exporting country is possible. It sets out procedures to be followed in initiating and conducting anti-dumping investigations, as well as additional criteria to be taken into account in determining whether dumped imports cause or threaten material injury to a domestic industry. It also clarifies the role of dispute settlement panels in disputes concerning anti-dumping actions taken by WTO Members.

**Notification and review of anti-dumping legislation**

Pursuant to Article 18.5 of the Agreement and a decision of the Committee on Anti-Dumping Practices, Members were required to notify their anti-dumping legislation and/or regulations (or the lack thereof) to the Committee by 15 March 1995. As of 30 June 1997, 76 Members (counting the EC as a single Member) had submitted such a notification. Of these, 19 Members notified new legislation designed to implement the Agreement, 35 Members notified pre-existing legislation, and 22 Members notified that they had no anti-dumping legislation or regulations. Forty Members have not submitted a notification. During the period 1 August 1996 through 31 July 1997, the Committee continued the task of reviewing notifications of legislation, which had been conducted during four special meetings held jointly with the Committee on Subsidies and Countervailing Measures, during the course of its regular meetings. Both new notifications of legislation, and notifications that had previously been the subject of review, were the subject of written questions and answers and discussion, at the Committee's regular meetings in October 1996 and April 1997.

**Other actions**

At its regular meeting in October 1996, the Committee decided on a group of topics that it referred to the Ad Hoc Group on Implementation for discussion and consideration of possible recommendations to the Committee. The Ad Hoc Group held its first meeting to discuss those topics, based on papers submitted by Members, in April 1997. While no recommendations were adopted, Members agreed that the discussion had been useful, and that, following the submission of further papers and some specific information on Members' individual practices, the discussions would continue in October 1997.

The Committee continued the informal consultations it had undertaken pursuant to the Ministerial Decision on Anti-Circumvention, and Members agreed on a framework for continuing discussions, of which the Committee took note at its April 1997 regular meeting. Also at that meeting, the Committee decided to establish an Informal Group on Anti-Circumvention, which would undertake the task of continuing discussions on this matter, pursuant to the framework agreed to in the informal consultations.

In its annual report to the Council for Trade in Goods in October 1996, the Committee observed that in general, good progress had been made in implementing the Agreement during the first two years of the WTO's existence, but that much remained to be done, and that additional efforts from Members were required in order to achieve full implementation of the Agreement.

**Anti-dumping actions**

Anti-dumping actions taken during the period 1 January-31 December 1996 are summarized in Tables V.4 and V.5. The tables are incomplete because certain Members have not submitted one or both of the required semi-annual reports of anti-dumping actions or have not provided all the information required by the format adopted by the Committee. The data available indicate that 206 investigations were initiated in 1996. The most active Members during the year, in terms of initiations of anti-dumping investigations, were South Africa (30), Argentina and the EC (23 each), followed by the United States (21), India (20), Australia and Brazil (17 each), and Korea (13). As of 31 December 1996, Members reported 900 anti-dumping measures (including undertakings) in force. Of these, 35 per cent were maintained by the United States, 17 per cent by the European Community, and 11 per cent each by Canada and Mexico. Products exported from China were the subject of the most anti-dumping investigations initiated during the year (39), followed by products exported from the EC or its member States (35), the United States (21), and Brazil and India (10 each).

Table V.4

**Summary of anti-dumping actions, 1996**[1]

| | Initiation | Provisional measures | Definitive duties | Price under-takings | Measures in force on 31 Dec. 1996[2] |
|---|---|---|---|---|---|
| Argentina | 23 | 4 | 18 | 2 | 30 |
| Australia | 17 | 5 | 0 | 1 | 47 |
| Brazil | 17 | 1 | 6 | 0 | 24 |
| Canada | 5 | 8 | 0 | 0 | 96 |
| Chile | 3 | 2 | 0 | 0 | 0 |
| Colombia | 1 | 1 | 1 | 0 | 7 |
| EC | 23 | 11 | 26 | 6 | 153 |
| Guatemala | 1 | 0 | 0 | 0 | n.a.[3] |
| India | 20 | 5 | 0 | 0 | 15 |
| Indonesia | 8 | 0 | 0 | 0 | n.a.[3] |
| Israel | 6 | 1 | 0 | 0 | n.a.[3] |
| Japan | 0 | 0 | 0 | 0 | 3 |
| Korea | 13 | 9 | 5 | 1 | 14 |
| Malaysia | 2 | 2 | 2 | 0 | n.a.[3] |
| Mexico | 3 | 3 | 5 | 0 | 95 |
| New Zealand | 4 | 2 | 4 | 0 | 27 |
| Peru | 5 | 3 | 1 | 0 | 4 |
| Singapore | 0 | 0 | 0 | 0 | 2 |
| South Africa | 30 | 9 | 8 | 0 | 31 |
| Thailand | 1 | 1 | 0 | 0 | 1 |
| Turkey | 0 | 0 | 0 | 0 | 37 |
| United States | 21 | 14 | 12 | 1 | 311 |
| Venezuela | 3 | 2 | 0 | 0 | 3 |
| *Total* | *206* | *83* | *88* | *11* | *900* |

n.a. = not available

1. The reporting period covers 1 January 1996-31 December 1996. The table is based on information from Members that have submitted semi-annual reports and is incomplete due to a significant number of missing notifications.
2. Includes definitive price undertakings
3. Did not submit a separate list of measures in force.

Table V.5

**Exporters subject to two* or more initiations of anti-dumping investigations, 1996**[1]

| | Total | | Total |
|---|---|---|---|
| China | 39 | Bulgaria | 3 |
| European Community or member States[2] | 35 | Malaysia | 3 |
| United States | 21 | Mexico | 3 |
| Brazil | 10 | Poland | 3 |
| India | 10 | Ukraine | 3 |
| Korea, Rep. of | 8 | Chile | 2 |
| Thailand | 8 | Egypt | 2 |
| Chinese Taipei | 8 | Hong Kong | 2 |
| Indonesia | 7 | Pakistan | 2 |
| Japan | 7 | Romania | 2 |
| Russian Federation | 6 | Switzerland | 2 |
| South Africa | 6 | Turkey | 2 |
| | | *Total* | *194*[3] |

1. The reporting period covers 1 January 1996-31 December 1996. The table is based on information from Members that have submitted semi-annual reports and is incomplete due to a significant number of missing notifications.

2. Initiations concerning the European Community and its member States.

3. Does not include exporters subject to only one initiation (see below). The total number of initiations was 206.

* Countries subject to only one initiation of an anti-dumping investigation are Canada, Cuba, Czech Republic, Iran, Israel, Kazakhstan, Norway, Peru, Saudi Arabia, Slovak Republic, Venezuela, and Yugoslavia.

## Technical barriers to trade

The Agreement on Technical Barriers to Trade is aimed at ensuring that activities relating to mandatory technical regulations, voluntary standards and their conformity assessment procedures do not create unnecessary obstacles to trade. For the purpose of transparency, WTO Members are required to fulfil notification obligations and establish national enquiry points.

During the period from 1 August 1996 to 31 July 1997, the Committee held four meetings where statements were made on the implementation and administration of the Agreement. At its sixth and seventh meetings held on 16 and 22 October 1996, the Committee discussed and finalized its Report to the Singapore Ministerial Conference. It conducted a periodic examination of the special and differential treatment granted to developing country Members under Article 12.10. It also agreed to set up a Technical Working Group on ISO/IEC (International Standards Organization/the International Electro-technical Commission) Guides Relating to Articles 5 and 6 of the Agreement, aiming at assisting the Committee to consider whether it was necessary to adopt recommendations regarding relevant ISO/IEC Guides on conformity assessment procedures. During the period under review, the Technical Working Group held two meetings.

At its eighth meeting held on 14 February 1997, the Committee carried out its second Annual Review of the Administration and Implementation of the Agreement under Article 15.3, and its second Annual Review of the Code of Good Practice for the Preparation, Adoption and Application of

Standards under the Ministerial Decision. It also started to prepare for its First Triennial Review of the Operation and Implementation of the Agreement under Article 15.4 which will be carried out in November 1997. At its ninth meeting on 20 June 1997, the Committee held discussions on the proposals put forward by Members with respect to the Review. These included issues concerning notification procedures, Code of Good Practice (Annex 3 of the Agreement), international standards, technical regulations, standards, conformity assessment procedures, technical assistance, special and differential treatment of developing country Members, and terms and definitions for the purpose of the Agreement. There was a general feeling that the priority objective of the Triennial Review should be to focus on better implementation of the existing Agreement before considering any amendment to its text.

## State trading enterprises

The Working Party on State Trading Enterprises was established in accordance with paragraph5 of the Understanding on the Interpretation of Article XVII of the GATT 1994, and held its first meeting in April 1995. Since the 1996 Annual Report, the Working Party has held three formal meetings: in September 1996, in October 1996 and in February 1997.

The Working Party's main task is to review the notifications and counter-notifications submitted by Members on their state trading activities. The Working Party also is charged with two other tasks: (1) to examine, with a view to revising, the questionnaire on state trading adopted in November 1960 and in use since then; and (2) to develop an illustrative list of the kinds of relationships between governments and state trading enterprises and the kinds of activities engaged in by these enterprises. The Working Party has held numerous informal meetings, open to any Member wishing to participate, on these two issues. Elements of the questionnaire include why a state trading enterprise was established and is maintained, what its legal basis is, a description of its functions and recent statistics on its operations. The illustrative list is intended to be a tool to help Members determine whether they maintain entities which should be notified as state trading enterprises.

New and full notifications on state trading enterprises were required of all Members by a deadline of 30 June 1995 and will be required in every subsequent third year. An updating notification must be submitted in each of the intervening two years; thus, two separate updating notifications were due by 30 June 1996 and by 30 June 1997. All such notifications must be made, regardless of whether the Member maintains any state trading enterprises and irrespective of whether an existing state trading enterprise has conducted any trade during the period under review.

At its meeting in September 1996, the Working Party conducted a review of the 14 notifications it had received. The notifications of the following countries were discussed: Australia, Barbados, Brazil, Canada, Malta, New Zealand, Norway, Switzerland and the UnitedStates. There was no discussion of the remaining five notifications. The Working Party agreed that a draft revised questionnaire that had been circulated under the Chairman's responsibility would be the basis for further work on this issue. It also considered proposals from New Zealand and the UnitedStates on the illustrative list of relationships and activities of state trading enterprises. The Working Party agreed to continue its examination of the 1960 questionnaire and the illustrative list in informal consultations under the guidance of the Chairman. The Working Party discussed, but was not able to adopt, its 1996 Report to the Council for Trade in Goods. The Report was discussed and finalized at the Working Party's October 1996 meeting held especially for that purpose.

At its February 1997 meeting, the Working Party had before it 16 new notifications. The notifications of the following countries were discussed: Côte d'Ivoire, El Salvador, Iceland, Israel, Jamaica, Slovenia, Tunisia, Venezuela, Colombia, Indonesia, Japan, Slovak Republic, South Africa and Thailand. There was no discussion of the remaining two notifications. The Chairman noted in his progress report that work on the questionnaire was advancing and that a revised text would be circulated shortly to all Members. He said there had been a useful exchange of views on the two submissions regarding the illustrative list, but that work on this issue was proceeding more slowly.

## Agreement on Import Licensing Procedures

The Agreement on Import Licensing Procedures entered into force on 1 January 1995. It recognizes that import licensing procedures can have acceptable uses, but also that their inappropriate use may impede the flow of international trade. The Agreement establishes disciplines on the users of import licensing systems with the principal objective of ensuring that the procedures applied for granting both "automatic" and "non-automatic" import licences do not in themselves restrict trade. The Agreement contains provisions to ensure that

automatic import licensing procedures are not used in such a manner as to restrict trade; and that automatic import licensing procedures (licensing for the purposes of implementation of quantitative or other restrictions) do not act as additional restrictions on imports over and above those which the licensing system administers. Nor should they be more administratively burdensome than absolutely necessary to administer the relevant measures. By becoming Members of the WTO, and therefore automatically also of the Agreement on Import Licensing Procedures, governments commit themselves to simplifying and bringing transparency to their import licensing procedures and to administering them in a neutral and non-discriminatory manner.

The obligations contained in the Agreement include publication of import licensing procedures, notification, fair and equitable application and administration, simplification of procedures and the provision of foreign exchange to pay for licensed imports. The Agreement sets up time-limits for the publication of information concerning licensing procedures, notification to the Committee and processing of licence applications. Developing country Members which were not signatories to the Tokyo Round Agreement on Import Licensing Procedures have the possibility of delaying the application of certain provisions linked to automatic import licensing for a period up to two years from the date of WTO Membership.

During the period from 1 August 1996 to 31 July 1997, 29 Members (counting the EC as a single Member) have notified to the Committee on Import Licensing their laws and regulations pursuant to Articles 1.4(a) and 8.2(b) of the Agreement; 26 have submitted replies to the Questionnaire on Import Licensing Procedures pursuant to Article 7.3; and five (counting the EC as a single Member) have submitted notifications relating to the institution of import licensing procedures or changes in those procedures pursuant to Article 5.

The Committee held two meetings during the period under review. It reached an understanding on procedures for the review of notifications submitted under the Agreement; conducted the first biennial review of the implementation and operation of the Agreement under Article 7.1 on the basis of a factual report by the Secretariat; and reviewed notifications submitted by Members under various provisions of the Agreement.

## Rules of origin

The aim of the Agreement on Rules of Origin, which entered into force on 1 January 1995, is to harmonize non-preferential rules of origin and to ensure that such rules do not themselves create unnecessary obstacles to trade. The Agreement sets out a 3-year work programme for the harmonization of rules of origin in conjunction with the World Customs Organizations's Technical Committee on Rules of Origin. In July 1995, the Committee on Rules of Origin decided to launch the Harmonization Work Programme, which is to be completed by July 1998. The Harmonization Work Programme is divided into four phases:

(i) Definitions of Goods Wholly Obtained, and Minimal Operations or Processes;
(ii) Substantial Transformation – Change in Tariff Classification;
(iii) Substantial Transformation – Supplementary Criteria (ad valorem percentage and/or manufacturing or processing operations); and
(iv) Final fine-tuning of the results of the work in terms of their overall coherence.

Until the completion of the Harmonization Work Programme, Members are expected to ensure that their rules of origin are transparent; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard, i.e. that they are based on what does confer origin rather than what does not.

Members were required to notify, within 9 days after joining the WTO, their rules of origin, and all judicial decisions and administrative rulings of general application which relate to rules of origin and which were in effect at that time.

The Agreement on Rules of Origin contains an Annex II (Common Declaration with regard to preferential rules of origin) by which the general principles and requirements applied to non-preferential rules of origin as contained in the Agreement apply also to preferential rules of origin. These requirements include notification procedures. There is no work programme for the harmonization of preferential rules of origin.

During the period under review, the Committee on Rules of Origin and the Technical Committee on Rules of Origin held four meetings each.

The Committee granted observer status to the ACP, EFTA, IDB, ITCB, IMF, OECD, UNCTAD, WCO and the World Bank.

In May 1997, the Committee reviewed the Seventh Report of the Technical Committee and welcomed adoption of the Management Plan for 1997 by the Technical Committee which is aimed at ensuring the timely completion of the technical work in connection with the Harmonization Work Programme.

## Customs valuation

The Agreement on Implementation of Article VII of the GATT 1994, known as the Customs Valuation Agreement, entered into force on 1 January 1995. The Customs Valuation Agreement was a result of the Tokyo Round negotiations. The Tokyo Round Code sought to replace the many different national valuation systems in existence at the time with a set of straightforward rules which provide a fair, uniform and neutral system and preclude the use of arbitrary or fictitious values. The Agreement gave greater precision to the provisions on customs valuation already found in Article VII of the GATT and has led to the harmonization of valuation systems and greater predictability in duties payable by traders.

The WTO Customs Valuation Agreement and the Tokyo Round Customs Valuation Agreement do not differ in a substantive manner.

Members are to ensure that their laws, regulations and administrative procedures conform with the provisions of the Agreement, and are required to inform the Committee on Customs Valuation of any changes in this regard. Such notifications are subject to examination in the Committee. Developing-country Members are allowed to delay the application of the provisions of the Agreement for five years from the date of their accession to the WTO.

During 1996, the Committee held two meetings. At its meeting in April 1996, the Committee concluded its examination of the modifications to national legislations of Canada and the European Community. The Committee continued its examination of the national legislations of Mexico, India and Slovenia. It also examined notifications made by Hong Kong, Japan, Norway, the Slovak Republic and the United States that notifications of legislation made previously under the Tokyo Round Customs Valuation Agreement remain valid under the WTO Agreement.

At its meeting in October 1996, the Committee concluded examinations of the legislations of Slovenia, the Czech Republic, Macau and South Africa and continued examination of the legislations of Mexico and India. The Committee also examined the notification by Brazil that its legislation made under the Tokyo Round Customs Valuation Agreement remains valid under the WTO Agreement. The Committee adopted its report to the Council for Trade in Goods and its Second Annual Review of the Implementation and Operation of the Customs Valuation Agreement. It also agreed to include discussion of technical assistance pursuant to Article 20.3 of the Agreement on the agenda of the next meeting.

Article 18 of the Agreement established a WTO Technical Committee, under the auspices of the World Customs Organization (WCO), to promote at the technical level uniformity in interpretation and application of the Agreement. The Technical Committee presented reports on its Second (4-8 March 1997) and Third Session (30 September-4 October 1997).

## Preshipment inspection

This Agreement concerns the practice of employing specialized private companies to check shipment details - essentially price, quantity and quality - of goods, ordered overseas. The Agreement on Preshipment Inspection came into force in January 1995 for all WTO Members. The Agreement applies to all preshipment inspection activities carried out on the territory of WTO Members, whether such activities are contracted or mandated by the government, or any government body, of a Member. Approximately 35 governments employ PSI companies, which are contracted to examine and report on the quantity, quality and unit prices of export goods prior to shipment. Generally the inspection activity is carried out in the country of export by company officials hired by the country of import. Contracts vary as to product coverage and emphasis but are generally intended to control, or aid in the control of, any or all of the following practices: i) over-invoicing of imports; ii) under-invoicing of imports; iii) misclassification of imports; iv) under-collection of taxes due on imports; and v) misappropriation of donor funds provided for import support. Additional services may include verification of origin, monitoring of compliance with national regulations, monitoring and control of tariff exemptions, assistance in the establishment of customs valuation data, trade facilitation, and some consumer protection.

Most provisions of the Agreement contain obligations for user Members, who are expected to ensure fulfilment of the obligations through their contractual arrangements with the inspection agencies. These obligations include non-discrimination, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification and the avoidance of conflicts of interest by PSI agencies. The obligations of exporting Members towards PSI users include non-discrimination in the application of domestic laws and regulations and the provision of technical assistance where requested. Article 5 of the Agreement provides for notification of laws and regulations by which Members put the Agreement into force as well as of any

other laws and regulations relating to PSI. From July 1996 through June 1997, 19 Members notified their current laws and/or regulations, 27 Members reported that they had no laws and/or regulations relating to PSI, and one Member notified changes to its legislation.

In December 1995, the General Council adopted the Agreement Establishing the Independent Entity (IE) as foreseen in Article 4 of the Agreement, which calls for an independent review procedure to resolve disputes between an exporter and a preshipment inspection (PSI) agency. The IE is jointly constituted by the International Chamber of Commerce (ICC), the International Federation of Inspection Agencies (IFIA), and the WTO, and is to be administered by the WTO. At its meeting of December 1995, the General Council also adopted the rules of procedures for the IE and agreed that a moratorium on the acceptance of review applications would be put in place until the ICC and the IFIA confirmed that all administrative and procedural requirements necessary to make the IE operational were completed. In April confirmation was received and the IE became operational on 1 May 1996. A List of Experts to serve as panelists for the reviews was also circulated to Members, affiliates and contacts around the world. As of July 1997, no application for cases had been received.

The WTO's General Council, at its meeting of 7, 8 and 13 November 1996 agreed to the establishment of a Working Party on Preshipment Inspection with a mandate to conduct the review of the Agreement provided for under Article 6 of the Agreement. It is to report to the General Council through the Council for Trade in Goods in December 1997. The Working party held two meetings through June 1997. At the February meeting, it was agreed that Members would make submissions of their national experiences with the Agreement and that a checklist of issues would be drawn up. At the meeting in June, discussion focused on the submissions made and on a checklist of issues presented in a Chairman's text, with a view towards elaborating recommendations by the end of 1997.

## Trade-related investment measures

Article 2 of the Agreement on Trade-Related Investment Measures prohibits the use of any trade-related investment measure (TRIM) that is inconsistent with Article III (national treatment on internal taxation and regulation) or Article XI (general elimination of quantitative restrictions) of GATT 1994. An annex to the Agreement lists examples of measures inconsistent with Articles III.4 and XI.1 of GATT 1994. This prohibition is subject to the exceptions permitted under GATT 1994, including safeguard clauses allowing the developing countries to take measures to deal with balance-of-payments problems.

Article 5.1 of the Agreement requires that Members notify any measure that is incompatible with the Agreement not later than 90 days after the entry into force of the WTO Agreement. Article 5.2 gives the benefit of a transition period for the elimination of measures notified under Article 5.1 – within two years after the date of entry into force of the WTO Agreement in the case of developed country Members, five years in the case of developing country Members and seven years in the case of the least-developed country members (provided, however, that the measures had been introduced not less than 180 days before the entry into force of the WTO Agreement). A decision adopted by the WTO General Council in April 1995 on the application of Article 5.1 to governments that joined the WTO after 1 January 1995 provides that they shall have a period of 90 days after the date of their acceptance of the WTO Agreement to make the notifications foreseen in Article 5.1. The period for the elimination of measures notified under Article 5.1 continues to be governed by reference to the date of entry into force of the WTO Agreement itself.

As of 31 July 1997, notifications of measures under Article 5.1 had been received from Argentina, Barbados, Chile, Colombia, Costa Rica, Cuba, Cyprus, the Dominican Republic, Ecuador, Egypt, Indonesia, India, Mexico, Malaysia, Nigeria, Pakistan, Peru, Philippines, Poland, Romania, Thailand, Uganda, Uruguay, Venezuela and South Africa. At the meetings of the Committee held in September 1996 and March 1997, questions were raised and comments made on some of these notifications, including with respect to their timing. Several Members raised questions regarding the compatibility with the Agreement of certain measures applied in the automotive sector. Although there is no requirement to do so, a number of Members have informed the Committee that they do not apply any TRIM inconsistent with the Agreement.

Article 5.5 of the Agreement deals with the conditions under which, during the transition periods of Article 5.2, a TRIM notified under Article 5.1 may be applied to new investments. A standard format for notifications of measures under this Article had been adopted by the Committee in 1995. So far, no Member has notified such measures to the Committee.

In September 1996, the Committee adopted a procedure for the implementation of Article 6.2, which requires notification of publications in which TRIMs may be found. As of 31 July, information under this procedure had been provided by Australia, Bulgaria, Chile,

Hong Kong China, Indonesia, Liechtenstein, Nicaragua, Norway, Peru, Romania, Singapore, Switzerland, Thailand, Uganda and Venezuela.

During the period under review, proceedings under the DSU which *inter alia* involved claims based on the TRIMS Agreement were initiated regarding certain measures with respect to automobiles and agricultural products (see below).

## Working Group on the Relationship between Trade and Investment

Following the election by the General Council in April 1997 of Ambassador Krirk-Krai Jirapaet (Thailand) as Chairman of the Working Group established at the Singapore Ministerial Conference to examine the relationship between trade and investment, the Working Group held its first meeting on 2 and 3 June 1997. Members made statements on the objectives and scope of the work to be undertaken in the Working Group and on specific issues which they would like to be studied. In the light of these statements, the Chairman submitted a checklist of issues raised for study prepared by the Chairman and the Working Group noted that it could be used as a framework for the organization of its future work. The checklist comprises four categories of issues: (1) the implications of the relationship between trade and investment for development and economic growth; (2) the economic relationship between trade and investment; (3) stocktaking and analysis of existing international instruments and activities regarding trade and investment, and (4) certain issues of a more prospective nature that will be addressed on the basis of the work on these first three sets of questions. The Working Group agreed to take up the first three sets of questions at meetings in October and December 1997.

In connection with this checklist, it was widely recognized that the work programme of the Group should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all the elements set forth in the checklist should be permeated by the development dimension, that particular attention should be paid to the situation of least-developed countries and that, in pursuing this work programme, the Working Group should avoid unnecessary duplication of work done in UNCTAD and other organizations.

As stated in paragraph 20 of the Singapore Ministerial Declaration, Ministers decided to establish this Working Group "having regard to the existing WTO provisions on matters related to investment." Accordingly, at its first meeting the Working Group discussed relevant provisions of WTO agreements on the basis of a background note by the WTO Secretariat.

The Singapore Ministerial Declaration encourages the Working Group to cooperate with UNCTAD and other appropriate intergovernmental fora. In this respect, the Working Group at its first meeting heard statements by representatives of the OECD, UNCTAD and the World Bank on the activities of their organizations relevant to the Working Group and also considered a background note prepared by the WTO Secretariat on ongoing activities and initiatives in other international fora. The Working Group also requested the WTO Secretariat to seek the cooperation of other international organizations, notably UNCTAD, in the preparation of a background document containing a summary of the results of analytical work on the implications of the relationship between trade and investment for economic growth and development. The Working Group noted that the IMF and the World Bank have observer status according to the cooperation agreements concluded between the WTO and these organizations and agreed to invite UNCTAD to attend its future meetings. It decided that requests for observer status from other international organizations would be considered in accordance with the normal WTO procedures for the granting of observer status to international inter-governmental organizations.

## Working Group on the Interaction between Trade and Competition Policy

The mandate of this Working Group, established by the Singapore Ministerial Declaration, is to "study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework". At the meeting of the General Council in April 1997, Prof. Frédéric Jenny (France) was elected as Chairman of the Group.

At its first meeting on 7 and 8 July 1997, the Working Group on the Interaction Between Trade and Competition Policy heard presentations by a large number of Members regarding issues that they would like the Group to address in the course of its work, and related questions of approach and methodology. In many cases, the oral presentations by Members supplemented written submissions that had been distributed prior to the meeting. In addition, reflecting a direction set out in the Singapore Ministerial Declaration that the work

**Box V.2: Chairman's checklist of issues suggested for study**

It was widely recognized that the Working Group's work programme should be open, non-prejudicial and capable of evolution as the work proceeds. It was also emphasized that all elements should be permeated by the development dimension. Particular attention should be paid to the situation of least developed countries. In pursuing the items of its work programme, the Working Group should draw upon and avoid unnecessary duplication of the work of other WTO bodies concerned with specific trade measures as well as the work under way in UNCTAD and other organizations.

I. Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy. Their relationship to development and economic growth.

II. Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their trade application:
   - Members' competition policies, laws and instruments as they interrelate with trade;
   - existing WTO provisions;
   - bilateral, regional, plurilateral and multilateral agreements and initiatives.

III. Interaction between trade and competition policy:
   - the impact of anti-competitive practices of enterprises and associations on international trade;
   - the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
   - the relationship between the trade-related aspects of intellectual property rights and competition policy;
   - the relationship between investment and competition policy;
   - the impact of trade policy on competition.

IV. Identification of any areas that may merit further consideration in the WTO framework.

Members of the Working Group took note of the Chairman's checklist.

It has been decided to hold two additional meetings of the Working Group in 1997, one in September and another in November. These meetings will focus on the first two items in the Chairman's checklist.

of the Group be conducted in cooperation with UNCTAD and other appropriate intergovernmental fora, the Group also heard presentations by UNCTAD, the OECD, the World Bank and APEC regarding their respective activities that may have implications for the WTO Working Group. Further, the Group reviewed a note by the Secretariat on Competition-Related Provisions in Existing WTO Agreements.

Based on the written and oral contributions by Members to the meeting, the Chairman drew up a checklist of issues (see above) to facilitate the organization of the Group's work.

## Working Group on Notification Obligations and Procedures

Under the Ministerial Decision on Notification Procedures, the CTG established a Working Group on Notification Obligations and Procedures on 20 February 1995 to arrive at recommendations to the CTG on means to simplify and standardize these notifications, to improve compliance and transparency and to identify the needs of some developing countries for assistance.

The Working Group reviewed all existing notification obligations in the 12 Agreements listed in Annex 1A of the WTO Agreement, as well as the GATT 1994, including the six Understandings interpreting certain articles thereof. It focused exclusively on procedural aspects; excluding the substantive aspects of the notifications which the Group considered best served by the respective committees.

The Group's work, carried out over 11 formal meetings, comprised three phases: first, the development of an inventory of those notification obligations where Members considered that problems might exist was addressed at the three meetings in 1995. Second, a detailed examination of these possible problem areas was undertaken in the first half of 1996. Third, the preparation of recommendations was completed in September-October 1996.

The Group identified three types of notification obligations: (i) ad hoc notifications which were specifically required when certain actions are taken by a concerned Member; (ii) "one-time only" notifications, most of which were required to provide information on the situations existing at the entry into force of the WTOAgreement for a Member; and (iii) the regular or periodic notification obligations (semi-annual, annual, biennial, triennial). Of the 175 notification obligations found in Annex 1A, twenty-six were of the regular or periodic type and the Group focused particular attention on these provisions.

The Working Group examined six areas: (i) the possibility of duplication or overlapping in notification obligations; (ii) the scope for simplification of data requirements and the standardization of formats; (iii) coordination of the timing aspects of the reporting processes; (iv) the need of some developing country Members for assistance in meeting their notification obligations; (v) the status of notification obligations established pursuant to the decisions of GATT 1947 CONTRACTING PARTIES; and (vi) improving Members' compliance with notification obligations.

In October 1996, the Working Group completed its work and submitted its report to the CTG. The CTG considered the Group's observations and recommendations also in October 1996 and took the decisions described hereunder.

On the question of duplication or overlapping in notification obligations, the group specifically examined four sets of agreements and found in respect of three of them that the problems identified were either non-recurring or minor in nature and not warranting further action. In one case, involving the Agreements on Agriculture and on Subsidies and Countervailing Measures, it was recommended that the respective committees should consider modified notification formats as suggested by the Group. The CTG agreed with this recommendation.

On the question of the scope for simplification of data requirements and the standardization of formats, it was found that a number of notification questionnaires and guidelines had been developed in the Uruguay Round to facilitate the presentation of information and several committees had begun reviews of existing questionnaires adapting them to existing circumstances. Therefore the Group decided no further work on their part was necessary. Regarding the scope for coordinating the timing aspects of the reporting processes to avoid the grouping of obligations at certain points in the year, it was found that timing was not a separate issue but should be taken up as an aspect of other topics.

Regarding the need of some developing countries for assistance in meeting their notification obligations, the Group recognized the problems of the increasing workload, the limited resources in small delegations and the difficulty Members would have in responding to the complex and often technical notification requirements. In this regard the Group recognized the considerable information which had been made available through the notification seminars arranged by the Secretariat and encouraged their continuation on a regular basis. It also decided that a practical handbook on notification obligations would provide valuable assistance to many Members and supported the initiatives already taken by the Secretariat to prepare and circulate such a handbook.

The Group also examined the notification obligations created by Decisions of the GATT 1947 CONTRACTING PARTIES to determine if any of these were redundant or obsolete in the current situation. Based on its examination, the Group recommended that the CTG request the General Council to take the necessary steps to eliminate the notification obligations in the Decisions of the GATT 1947 CONTRACTING PARTIES relating to import licensing procedures. This was accepted by the CTG. The Group also recommended that the CTG refer the Decisions relating to quantitative restrictions and non-tariff measures, Marks of Origin and Liquidation of Strategic Stocks to the appropriate bodies for further consideration. The CTG, accordingly, referred the first two matters to the Market Access Committee and retained the third for future consideration, there being no body responsible for this topic.

The Group recognized that the goal of improving compliance with the notification obligations was a key responsibility of all Members to maximize transparency of trade policies and measures. Detailed monitoring of all agreements by the responsible committees could only be achieved if there was sufficient transparencythrough compliance with the notification obligations. Recognizing that difficulties existed for Members in meeting these obligations, the Group recommended, and the CTG agreed, that a comprehensive listing of notification obligations and the compliance therewith by all WTO Members should be maintained on an ongoing basis and be circulated semi-annually to all Members. It also recommended that the CTG consider the preparation of general guidelines for the bodies under its purview, providing for the regular review of questionnaires and formats and of the situation as regards compliance with notification obligations. This remains under consideration in the CTG. It also noted that benefits would be achieved if Members developed a central national coordination of notification submissions, and recommended this for consideration by individual Members.

The Group discussed suggestions that a special programme of assistance to developing country Members and particularly to the least-developed country Members should be developed providing more intensive technical assistance, possibly with the participation of other organizations, focusing on the development of systems and structures required to respond to notification obligations. It recommended the CTG give consideration to such a programme. The CTG forwarded this matter to the Committee on Trade and Development for further consideration.

As to further work in these areas, the Group was of the opinion that the review of notification obligations in each individual agreement was an ongoing responsibility of the committees overseeing the functioning of the respective agreements. However, the Group also saw benefit in conducting periodic reviews of the operation of the entire notification process from a global perspective. Accordingly, it recommended to the CTG that it request the Ministerial Conference or the GeneralCouncil to consider the establishment, at an appropriate time, of a body with a mandate to review the notification obligations and

procedures throughout the WTO Agreement. Alternatively, a body could be established to further review the notification obligations in the agreements in Annex 1A of the WTO Agreement. Future work could encompass matters relating to the Central Registry of Notifications, electronic transmission of notifications and further work on the notifications handbook. The CTG considered this recommendation and agreed to forward it to the General Council for further consideration.

## IV. Trade in services

The Council for Trade in Services has held seven meetings during the period 1 August 1996 to 31 July 1997.

### Preparation for the 1996 Ministerial Conference in Singapore

The Council had started its discussions on the preparation for the Singapore Ministerial Conference at its meeting on 30 July 1996. Discussions started on the basis of submissions by delegations which focused on recommendations that might be submitted to Ministers in Singapore, in relation to future work in services, for their consideration and adoption. On 20 September the Secretariat distributed a note by the Chairperson in which she attempted to summarize the views expressed by delegations during various formal and informal discussions and at the same time share with delegations her thoughts concerning the Services Council's report to the General Council and Ministers in Singapore. The Chairperson took the view that the work programme already called for in the GATS represented a large element of the WTO's built-in agenda, whose implementation and fulfilment should be the major concern of the Ministerial Conference. She suggested that the Council should take advantage of the Conference to take stock of the work that had been done thus far in services, to assign priorities and deadlines where necessary and to seek political impetus and guidance from Ministers.

At its meeting on 5 November, the Council adopted its Report to the General Council. It consisted of two parts: a factual part contained the work undertaken thus far by the Council and the subsidiary bodies and, a second part contained recommendations on future work.

### The implementation of the work programme approved by the Singapore Ministerial Conference

At its meeting on 5 March 1997 the Council for Trade in Services started its discussions on the implementation of its Work Programme which had been contained in its report to the General Council and subsequently endorsed by Ministers in Singapore. It contained the following three items:

(i) The information exchange programme, on which Ministers had endorsed the following recommendation:
"The Council for Trade in Services will develop an information exchange programme. The aim of this programme is to facilitate the access of all Members, in particular developing country Members, to information regarding laws, regulations, administrative guidelines and policies affecting trade in services in order to contribute to the assessment of trade in services which would assist future negotiations in the services sector. The structure should be simple and able to provide a common standard and concise multilateral basis to understand the state and evolution of the regulations governing the services sector avoiding any unnecessary burden to the Members in general and developing country Members in particular. During 1997, the Council should agree to the modalities and the timing for this programme."

(ii) The Article VI:4 work programme, on which Ministers had endorsed the following recommendation:
"The Council should examine, as appropriate, under Article VI:4 of the GATS, measures relating to qualification requirements and procedures, technical standards and licensing requirements with a view to taking the work as far as possible before the commencement of the next round of liberalization negotiations referred to above."

(iii) Guidelines for the future negotiations mandated by Article XIX of the GATS, on which Ministers had endorsed the following recommendation:
"The Council should begin the consideration of guidelines and procedures for negotiations mandated under Article XIX at an appropriate time."

In the context of its work on the first item concerning the information exchange programme, at its meeting on 25 July 1997 the Council considered a Note by the Secretariat (S/C/W/24) regarding information on services regulations and services statistics available within the WTO and with other international organizations.

## Notifications pursuant to Article V (Economic Integration)

At its meeting on 30 October 1996, the Council received notifications pursuant to paragraph 7 of Article V from Australia and New Zealand (S/C/N/7), the European Communities and their Member States and the Slovak Republic (S/C/N/23), Hungary (S/C/N/24), Poland (S/C/N/25), the Czech Republic (S/C/N/26), Romania (S/C/N/27) and from Norway, Iceland and Liechtenstein (S/C/N/28).

At the same meeting the Council decided to request the Committee on Regional Trade Agreements to examine the following agreements pursuant to paragraph 7(a) of Article V of the GATS:

- Protocol on Trade in Services to the Australia – New Zealand Closer Economic Relations Trade Agreements (S/C/N/7);
- Europe Agreement between the European Communities and their Member States and the Slovak Republic (S/C/N/23);
- Europe Agreement between the European Communities and their Member States and Hungary (S/C/N/24);
- Europe Agreement between the European Communities and their Member States and Poland (S/C/N/25).

## Notifications pursuant to Article III: 3 of the GATS

At its meetings on 30 October 1996 and 5 March 1997 the Council received and took note of the following notifications pursuant to Article III:3 of the GATS concerning modifications to services regulations in sectors where specific commitments had been undertaken:

| | | | |
|---|---|---|---|
| Canada | S/C/N/9 | Czech Republic | S/C/N/39 |
| Norway | S/C/N/10 | Liechtenstein | S/C/N/40 |
| Peru | S/C/N/11 | Liechtenstein | S/C/N/41 |
| Poland | S/C/N/12 | Liechtenstein | S/C/N/42 |
| Slovenia | S/C/N/16 | Federal Republic of Germany | S/C/N/48 |
| Peru | S/C/N/19 | Federal Republic of Germany | S/C/N/49 |
| Switzerland | S/C/N/20 | Federal Republic of Germany | S/C/N/50 |

## Notifications pursuant to Article VII: 4 of the GATS

At its meetings on 30 October 1996 and 5 March 1997 the Council received and took note of the following notifications pursuant to Article VII:4 of the GATS concerning recognition measures, agreements or arrangements:

| | | | |
|---|---|---|---|
| Chile | S/C/N/8 | Cuba | S/C/N/22 |
| Argentina | S/C/N/13 | Switzerland | S/C/N/31 |
| Norway | S/C/N/14 | Switzerland | S/C/N/32 |
| Macau | S/C/N/15 | Switzerland | S/C/N/33 |
| El Salvador | S/C/N/17 | United States | S/C/N/51 |
| Brazil | S/C/N/18 | United States | S/C/N/52 |
| Colombia | S/C/N/21 | United States | S/C/N/53 |

## Notifications pursuant to Article V (bis) of the GATS concerning Labour Market Integration Agreements

At its meeting on 5 March 1997 the Council for Trade in Services received and took note of the following notifications:

| | | | |
|---|---|---|---|
| Denmark | S/C/N/34 | Sweden | S/C/N/37 |
| Iceland | S/C/N/35 | Finland | S/C/N/38 |
| Norway | S/C/N/36 | | |

## Report of the Group on Basic Telecommunications

At its meeting on 5 March 1997 the Council received and took note of the report of the Group on Basic Telecommunications contained in document S/GBT/4 dated 15 February 1997 and its attachments: a List of Schedules of Commitments and Lists of MFN Exemptions

resulting from the negotiations on basic telecommunications and which were annexed to the Fourth Protocol to the GATS; a Note by the Chairman of the Group concerning the Scheduling of Basic Telecommunications Commitments; and another Note by the Chairman concerning Market-Access Limitations on Spectrum Availability. The report had been prepared pursuant to paragraph 4 of the Decision on Commitments in Basic Telecommunications, adopted by the Council for Trade in Services on 30 April 1996 (S/L/19).

## Verification of schedules in basic telecommunications

During the technical verification of the schedules of commitments on basic telecommunications a difficulty had arisen concerning the reference which had been contained in some of the schedules to the notes of the Chairman of the Group on Basic Telecommunications concerning Market access limitation on spectrum availability (S/GBT/W/3) and Scheduling Basic Telecommunications Services Commitments (S/GBT/W/2/Rev.1). At its meeting on 11 and 15 April 1997 an agreement was reached in the Council to delete all such references on the basis of an understanding by the Council that all the schedules would be read in the light of the notes by the Chairman of the GBT. That understanding was reflected in a statement by the Chairman of the Council and recorded in the report of the meeting (S/C/M/18). At the same meeting the Council concluded the verification of the Schedules of Commitments and MFN Exemption Lists in Basic Telecommunications and the Chairman announced that, as of 15 April 1997, the Fourth Protocol to the GATS was open for acceptance by Members who had annexed to it their Schedules of Commitments on Basic Telecommunications.

## Guidelines for mutual recognition agreements in accountancy

The Decision on Professional Services adopted by the Council on 1 March 1995 (S/L/3) calls upon the Working Party on Professional Services to make recommendations concerning, inter alia, the establishment of guidelines for the recognition of qualifications in the accountancy sector. At its meeting on 29 May 1997, the Council for Trade in Services received and approved such guidelines as recommended by the Working Party. In its recommendation to the Council, the Working Party indicated that the guidelines were non-binding, and that they were intended to offer practical guidance without precluding the use of alternative models. It also indicated that the possible relevance of these guidelines for other professional services sectors had not been specifically addressed by the Working Party.

## Negotiations on market access

**1) Financial services**

At the end of the Uruguay Round in December 1993, there was a view among some Members that the commitments in the schedules of a number of Members did not provide an adequate basis for conclusion of the negotiations. In order to avoid a breakdown of the negotiations, Ministers agreed at the Marrakesh meeting of April 1994 that negotiations on commitments in financial services should be continued after the WTO Agreement came into force. The Second Annex on Financial Services and the Ministerial Decision on Financial Services permitted Members to improve, modify, or withdraw all or part of their commitments in the financial services sector at the end of a 15-month-long negotiation, ending on 30 June 1995. Members were also required to finalize their position relating to MFN exemptions in this sector at the same time. Negotiations on the basis of the Ministerial Decision began shortly after the Marrakesh meeting.

Participants agreed from the outset that the objective of these negotiations should be to achieve a higher level of commitments on an MFN basis, and not to withdraw or scale down existing commitments. However, the point was made by a number of delegations that the outcome of these negotiations could not be seen in isolation from progress in concurrent negotiations on other subjects, in particular those on the movement of natural persons.

In all 32 Members, counting the European Community as one, revised or supplemented their scheduled commitments or MFN exemptions as a result of these negotiations. However, based on a view that the quality and extent of the total package of commitments offered was not sufficient, the United States announced in the meeting of the Committee on 29 June 1995 that it had decided not to bind open the US market nor guarantee national treatment for new entrants and new activities of foreign financial services suppliers. With the withdrawal of its best offer and the submission of a revised schedule and MFN exemption on 30 June, the United States did not assume an MFN obligation that covered new activities in banking, securities, insurance, fund management, and other financial services. However, its delegation added that the US had a long history of offering full market access to its financial markets, and this would remain its normal practice; and that the United States had no

intention of imposing new restrictions on foreign financial services firms already established in the country.

In an attempt to reach an agreement on a multilateral basis despite this situation, the delegation of the European Community proposed that all participants maintain their best offers on an MFN basis until December 1997. This was agreed and the Committee on Financial Services, on 21 July 1995, adopted the text of the "Second Protocol to the GATS" and the "Decision Adopting the Second Protocol to the GATS" and recommended to the Council for Trade in Services to adopt the "Decision on Commitments in Financial Services" and the "Second Decision on Financial Services". The Council adopted these Decisions in a meeting held on the same day.

The final revised schedules and the MFN exemptions in financial services were adopted by the Committee on 28 July. They revise or supplement the national schedules and MFN exemptions negotiated in the Uruguay Round, and should be read in conjunction with them together with the previous schedules and MFN exemptions.

Of the 32 Members which amended their commitments as a result of the negotiations, 29 accepted the Second Protocol to the GATS. Of these, 20 made improved commitments in insurance, 24 in banking, 17 in securities, and 25 in other financial services. Thirteen Members revised MFN exemptions in financial services, involving deletion, suspension or reduction in the scope of exemptions. The revised commitments and MFN exemptions annexed to the Protocol entered into force on 1 September 1996.

After 1 November 1997, Members again have a possibility until 12 December 1997 to modify or withdraw the commitments in their financial services schedules and/or to take MFN exemptions in the sector. Negotiations on financial services resumed in April 1997, with the objective of achieving significantly improved market access commitments on an MFN basis by 12 December 1997.

At the end of June 1997, 82 schedules, accounting for 96 Members, included commitments in financial services – more than in any other sector save tourism.

The Committee on Trade in Financial Services has been monitoring the progress in the negotiations as well as following recent developments in liberalization of financial services trade in Member countries. During the past year the Committee also discussed technical issues, such as the distinction between mode 1 (cross-border supply) and mode 2 (consumption abroad) and the classification of financial services, related to the Schedules of Specific Commitments in financial services.

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**2) Basic telecommunications**

Ministers at Marrakesh agreed in 1994 that negotiations should be pursued after the Uruguay Round on the liberalization of access to markets in basic telecommunications services. It had been generally agreed not to make commitments in this sector during the Round, but to provide additional time for doing so given the on-going reforms and deregulation of national telecom regimes and the rapid advances in technology affecting this service.

The negotiations began in May 1994 under the auspices of the Negotiating Group on Basic Telecommunications (NGBT) and were scheduled to conclude by 30 April 1996. Participation in the NGBT was voluntary and 53 governments elected to join as full members, while another 24 governments participated as observers. The Group conducted an exchange of information through responses to a questionnaire on definitions, market structure, extent of competition and regulatory issues. By April 1996, 37 full participants and two observers had submitted questionnaire responses. The NGBT also examined a range of technical and regulatory issues specific to telecommunications. In this context, participants discussed concerns related to establishing a regulatory environment conducive to market entry. Many participants suggested that regulatory disciplines might be inscribed as additional commitments in schedules (an approach made possible by GATS Article XVIII) as a way of safeguarding the value of the market access commitments. The NGBT succeeded in elaborating an informal document setting out jointly drafted principles on matters such as competition safeguards, interconnection guarantees, transparent licensing processes and the independence of regulators. Participants also agreed that this document, called the Reference Paper, could be used by each Member as a guide to deciding what regulatory disciplines to undertake as additional commitments. In addition to these multilateral discussions, participants held intensive bilateral negotiations on commitments, during which requests and offers were tabled and discussed. By April 1996, 48 governments had submitted commitments (contained in 34 offers) on market access for basic telecommunications.

However, it proved impossible to conclude the negotiations by the April deadline; the commitments offered were held to be insufficient by some participants and a small number of technical and regulatory issues remained unresolved. At the final meeting of the NGBT, on 3 April 1996, it was agreed to maintain the offers made so far and to attach them as draft

schedules and lists of MFN exemptions to a Fourth Protocol to the GATS. Participants also agreed to open a one-month period, from 15 January to 15 February 1997, during which the attachments to the Protocol could be supplemented or modified. On 30 April 1996, the same day of the last NGBT meeting, the Council for Trade in Services established a Group on Basic Telecommunications open to all Members (GBT) to oversee the further negotiations. The Group restarted negotiations at its first meeting, held on 19 July 1996.

The first tangible signs of renewed progress in the negotiations were registered in mid-November 1996 when the first three revisions of offers contained in the package achieved in April were submitted to the GBT. By the end of the negotiations 23 governments had submitted new offers and 32[4] had submitted revisions of their April 1996 offers. As a result, on 15 February 1997, the GBT successfully concluded the negotiations with a total of 69 governments making commitments (contained in 55 schedules[5]). All industrialized countries participated as did over 40 developing countries and six economies in transition. The markets of the participants accounted for more than 91 per cent of global telecommunications revenues in 1995. This represented a substantial improvement over the April 1996 results which produced 34 offers covering 48 governments. Moreover, in February 1997 many of the offers submitted in April 1996 were improved, both technically and substantively. The commitments are annexed to the Fourth Protocol to the General Agreement on Trade in Services and represent enhancements of the existing schedules of specific commitments on services.

Commitments have been undertaken in all sectors of basic telecommunications. 47 schedules out of a total of 55 commit to competitive supply (defined here as permitting two or more suppliers) in voice telephone services. Of these, 41 cover local services, 38 domestic long distance services and 42 international services. Commitments on resale of public voice telephony are included in 28 schedules. As regards services other than voice telephony, 49schedules include commitments on data transmission, 46 grant access for cellular/mobile telephone markets, 41 commit to competition in leased circuit services, 45 include commitments on other types of mobile services (such as personal communications services, mobile data or paging). On satellite-related communications, 37 schedules commit on some or all types of mobile satellite services or transport capacity and 36 commit on fixed satellite services or transport capacity. In addition, 8 governments scheduled some commitments on value-added telecommunications services (e.g. e-mail, on-line data processing or data base retrieval).

Sixty-three of the 69 governments submitting schedules also included commitments on regulatory disciplines. 57 of these commit to the Reference Paper in whole or with small modifications. This compared favourably with the April 1996 results, when 44 of the governments submitting offers had included regulatory commitments and only 31 of these had subscribed to the Reference Paper.

The results of the telecommunications negotiations will be extended to all WTO members on a non-discriminatory basis through MFN treatment. However, the legal basis for the negotiations made it possible for each WTO Member to decide individually whether or not to file an MFN exemption on a measure affecting trade in basic telecommunications services.[6] On 15 February, nine governments submitted MFN exemption lists to be annexed to the Protocol.[7]

The Protocol, to which the schedules and MFN exemption lists tabled in February are annexed, is open for acceptance until 30 November 1997 and is scheduled to enter into force on 1 January 1998. Once in force, the schedules on basic telecommunication services will constitute part of the GATS schedules of services commitments already in force since the Uruguay Round agreements were signed in 1994. In a number of schedules, a Member's commitments for particular services are to be "phased in". In such cases, while the schedule will formally enter into force on the date of the Protocol as a whole, the actual implementation date for the "phased in" commitments will be the date specified in the schedule.

**Professional services**

A Working Party on Professional Services (WPPS) was established in 1995 to put into effect the work programme on domestic regulation required by Article VI:4 of the GATS. The Ministerial Decision establishing the Working Party requires it as a matter of priority to make recommendations on the elaboration of multilateral disciplines in the accountancy sector, so as to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the area of professional services do not constitute unnecessary trade barriers. In addition, the mandate of the Working Party requires participants to concentrate on the use of international standards and the establishment of guidelines for the recognition of professional qualifications.

The Working Party completed its fact finding exercise on the regulation of the accountancy sector and also completed the development of "Guidelines for mutual

[4]All figures include the European Community and its member States, counted as one participant.

[5]Antigua & Barbuda, Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Colombia, Côte d'Ivoire, Czech Republic, Dominica, Dominican Republic, Ecuador, El Salvador, European Communities and its Member States, Ghana, Grenada, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Jamaica, Japan, Korea, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Senegal, Singapore, Sri Lanka, Switzerland, Slovak Republic, South Africa, Thailand, Trinidad & Tobago, Tunisia, Turkey, United States and Venezuela.

[6]Contained in the GATS Annex on the Negotiations on Basic Telecommunications.

[7]These are inscribed in separate documents dedicated to this purpose; not in the schedules of commitments.

recognition agreements or arrangements in the accountancy sector". These Guidelines are intended to be used on a voluntary basis by the relevant authorities of Members when negotiating new recognition agreements in the sector.

In the Singapore Ministerial Declaration, Ministers said: "*We encourage the successful completion of international standards in the accountancy sector by IFAC, IASC, and IOSCO*", which responds for the moment to the part of the mandate of the Working Party on international standards.

On the basis of the information collected on the regulation of the sector, work has now started on the development of disciplines on domestic regulation in the accountancy sector, with the aim of completing the negotiations on the accountancy sector by the end of 1997 as requested by the Ministerial Declaration. No decision has yet been made on how the rest of professional services will be dealt with afterwards.

## V. Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, the so-called TRIPS Agreement, is based on a recognition that increasingly the value of goods and services entering into international trade resides in the know-how and creativity incorporated into them. The TRIPS Agreement provides for minimum international standards of protection for such know-how and creativity in the areas of copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and undisclosed information. It also contains provisions aimed at the effective enforcement of such intellectual property rights, and provides for multilateral dispute settlement. It gives all WTO Members transitional periods so that they can meet their obligations under it. Developed country Members have had to comply with all of the provisions of the Agreement since 1 January 1996. For developing countries, the general transitional period is five years (i.e. until 1 January 2000), and for least-developed countries, the transitional period is eleven years (i.e. until 1 January 2006).

Developed country Members were obliged to notify their implementing legislation to the Council for TRIPS in the beginning of 1996. Given the difficulty of examining legislation relevant to many of the enforcement obligations in the Agreement, Members have undertaken, in addition to notifying legislative texts, to provide information on how they are meeting these obligations by responding to a checklist of questions. This information is being used as the basis for reviews of implementing legislation carried out by the Council. It started the reviews in July 1996 with an examination of the legislation of developed country Members in the area of copyright and related rights. It continued in November 1996 with the legislation in the areas of trademarks, geographical indications and industrial designs, and in May 1997 with the legislation in the areas of patents, layout-designs of integrated circuits, undisclosed information and the control of anti-competitive practices in contractual licences. Legislation of developed countries in the area of enforcement will be taken up in November 1997. As for 1998 and 1999, the Chair is consulting with other individual Members about the possibility of taking up for advance review their legislation without prejudice to their entitlement to transition periods so as to avoid a "bunching" of countries to be reviewed in the year 2000, when the Agreement will become fully applicable to developing countries.

The national and MFN treatment obligations of the TRIPS Agreement became applicable to all Members from 1 January 1996, including those Members that avail themselves of the transitional periods provided in the Agreement. The Council for TRIPS, recognizing that Members have a number of options for meeting their obligation to notify the corresponding laws and regulations, made arrangements to facilitate the notification of the implementation of these obligations. During the period covered by the report, the Council has continued its consideration of the notifications concerning the implementation of the so-called "mail-box" and exclusive marketing rights provisions of Articles 70.8 and 70.9, which came into effect on 1 January 1995 for countries which do not yet provide product patent protection for pharmaceuticals and/or agricultural chemicals.

Other notifications in the TRIPS area include those to invoke exceptions to the MFN treatment obligation based on advantages deriving from pre-existing agreements, and those of contact points established in administrations for the purposes of cooperating with each other with a view to eliminating international trade in infringing goods. The Council has considered the criteria that might be relevant to deciding whether a notification invoking an exception to the MFN obligation should be made, and, in this respect, took note of the existence of an informal Secretariat note, the last paragraph of which was intended as an informal guideline to assist individual Member States in making or reviewing such notifications, and agreed to revert to the issue at its meeting in September 1997 so as to

take stock of the situation at that time and in the light of any new or revised notifications that had been made.

As noted elsewhere in this report, five new issues of alleged non-compliance with the TRIPS obligations were the subject of an invocation of the dispute settlement procedure. Of the 10 disputes that have been initiated in the TRIPS area, three have been settled. They concerned the protection of existing patents, the protection of past performances and existing sound recordings, and the implementation of the "mail-box" and exclusive marketing rights provisions on pharmaceutical and agricultural chemical products. The first TRIPS panel was established in November 1996 to examine another dispute concerning the implementation of the "mailbox" and exclusive marketing rights provisions. The pending consultations concern, *inter alia*, certain measures affecting the grant of copyright and related rights, and measures affecting the enforcement of intellectual property rights.

The Council has afforded Members the opportunity of consulting on a number of other matters related to TRIPS, including revocation of patents and priority rights.

Technical cooperation has been a prominent issue in the TRIPS Council. Article 67 of the Agreement obliges each developed country Member to provide, on request and on mutually agreed terms, technical and financial cooperation in favour of developing and least-developed Member countries. In order to ensure that information on available assistance is readily accessible and to facilitate the monitoring of compliance with the obligation of Article 67, developed country Members have agreed to present descriptions of their relevant technical and financial cooperation programmes and to update this annually. For the sake of transparency, inter-governmental organizations observers to the TRIPS Council have also presented, on the invitation of the Council, information on their activities. In addition, the WTO Secretariat has provided information on its technical cooperation in the TRIPS area. In 1996, the information was updated in time for the Council's meeting in September, which had a special focus on technical cooperation. The Council agreed at its meeting in July 1997, that in 1997 the information should be updated in time for its meeting in September 1997. The regular discussion in the Council on the basis of this material provides an opportunity for developing countries to identify their needs, in particular any gaps in the assistance available. Developed country Members have also notified contact points in their administrations which can be addressed by developing countries seeking technical cooperation on TRIPS. In addition, the Secretariat organized, jointly with the International Bureau of the World Intellectual Property Organization (WIPO), two workshops on specific aspects of technical cooperation, which enabled an exchange of views on technical cooperation needs and experiences related to the implementation of the TRIPS Agreement.

The Secretariat has cooperated with a number of other intergovernmental organizations, notably with WIPO. The arrangements for the cooperation with WIPO are established in the Agreement between WIPO and the WTO, which entered into force on 1 January 1996. It provides for cooperation in three areas: first, the notification and translation of, and access to, laws and regulations; second, the implementation of the provisions of Article 6*ter* of the Paris Convention (relating to the protection of national emblems) for the purposes of the TRIPS Agreement; and, third, the provision of legal technical assistance and technical cooperation by the two secretariats.

During the period covered by the report, the Council has held further discussions on various aspects of the TRIPS Agreement's built-in agenda that concern geographical indications, and has agreed on the first steps to be taken with regard to the negotiations concerning the establishment of a multilateral system of notification and registration of geographical indications for wines called for by Article 23.4. The Council has agreed to include issues relevant to such a system for spirits in this preliminary work. It has invited Members to submit information on any such systems they operate by the end July 1997 for consideration at its meeting in September 1997. The aim is to gather information that could be useful to the preliminary work that the Council has agreed to undertake.

The Council has also considered the review of the application of the Agreement's provisions on geographical indications, in particular the arrangements for carrying out this review (Article 24.2). In the autumn of 1996, the Council took up this review after, and taking into account, the review of national implementing legislation in the area of geographical indications, and agreed to first consider the questions involved in informal consultations. Some Members have already made some proposals for discussion while some other delegations have expressed reservations regarding the proposed further work in this context. The Chair intends to hold informal consultations on this matter prior to the Council's meeting in September.

Since February 1997, the following organizations have had a regular observer status in the TRIPS Council: the Food and Agriculture Organization (FAO), the International Monetary Fund (IMF), the International Union for the Protection of New Varieties of Plants (UPOV), the Organization for Economic Cooperation and Development (OECD), the United Nations (UN), the United Nations Conference on Trade and Development (UNCTAD), the World Bank, the

World Customs Organization (WCO) and the World Intellectual Property Organization (WIPO). Requests from the European Free Trade Association (EFTA), the Latin American Economic System (SELA), the Office International de la Vigne et du Vin (OIV), the Organization of American States (OAS) and the Secretariat of the General Treaty on Central American Economic Integration (SIECA) are pending.

# VI. Resolution of trade conflicts under the WTO's Dispute Settlement Understanding

## Overview

"The dispute settlement system of the WTO is a central element in providing security and clarity in the multilateral trading system", states the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The benefits of liberalization of trade in goods and services cannot be realized unless there is certainty that trade rules and market access commitments are enforced. The new WTO dispute-settlement mechanism provides this security. Compared to the GATT 1947 system, the increased automaticity and the clearly defined time-frames have contributed to the new system's efficiency and effectiveness in settling disputes.

The General Council convenes as the Dispute Settlement Body (DSB) to deal with disputes arising from any Agreement contained in the Final Act of the Uruguay Round. The DSB has the sole authority to establish dispute settlement panels, adopt panel and appellate reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions in the event of non-implementation of recommendations.

In December 1996, the DSB adopted Rules of Conduct for panelists, experts, Appellate Body members and Secretariat staff. These Rules of Conduct are the most elaborate and sophisticated rules applicable to participants in international dispute settlement and are the result of more than two years of negotiations initiated by the Preparatory Committee for the WTO. They are concerned with the issue of the impartiality and independence of the persons involved in the dispute settlement process of the WTO as well as their obligation to maintain confidentiality and to avoid conflict of interests. The operation of the DSU will be strengthened by the Rules of Conduct designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU, thereby enhancing confidence in the new dispute settlement mechanism.

In June 1997, the DSB appointed three Members of the Appellate Body for additional four-year terms:

Professor Claus-Dieter Ehlermann of Germany
Justice Florentino Feliciano of the Philippines
Ambassador Julio Lacarte Muró of Uruguay

During the year, the DSB also maintained an indicative list of governmental and non-governmental panelists pursuant to the DSU.

In its report to the 1996 Singapore Ministerial Conference, the DSB stated:

> It may therefore be concluded that the role of the DSB in managing the settlement of disputes within the new multilateral trading system under the WTO has been positive. The DSU, under the management of the DSB, is contributing to greater security and predictability in relations amongst partners in the open multilateral trading system. Certain problems in the overall operation of the dispute settlement system have been identified and in most cases, working practices have been developed to solve these problems in a pragmatic manner. Further experience in the operation of the system is nevertheless required before it can be fully evaluated. In this respect, the Decision by Ministers to review the operation of the system within four years after its entry into force will provide an opportunity for such an evaluation and for the introduction of improvements in the system if necessary.
>
> It can finally be stated that the effective operation of the dispute settlement system during the first two years of its existence has fostered greater cooperation amongst Members, reflecting their growing trust in the multilateral system, and thus contributing towards the strengthening and the consolidation of the WTO and the open multilateral trading system.

As noted in the report, Members will review the operation of the DSU in 1998.

## Dispute settlement activity for the period 1 August 1996-31 July 1997

In the 12 months from 1 August 1996 to 31 July 1997, the DSB received 51 notifications of formal requests for consultations under the DSU. During this period, the DSB established

panels to deal with 12 new matters. It adopted Appellate Body and panel reports in 5 cases. However, in one case (see below) the DSB is still considering status reports in respect of implementation of the report.

## Adopted Appellate Body and Panel reports

This section briefly describes developments in cases where reports of the Appellate Body and panels have been adopted by the DSB.

**(1) United States – Standards for reformulated and conventional gasoline**

In January 1996, the panel examining the US regulations challenged by Venezuela and Brazil found that they were not consistent with Article III:4 of GATT and could not be justified under paragraphs (b), (d) and (g) of Article XX. The panel recommended that the DSB request the US to bring its regulations into conformity with its GATT obligations. The US appealed the panel's findings on Article XX(g). In April 1996, the Appellate Body reached the same result as had the panel, although for different reasons. The Appellate Body report and the panel report, as modified by the Appellate Body report, were adopted by the DSB in May 1996.[8]

The US subsequently agreed with Venezuela to bring its measures into conformity with its obligations within 15 months. During the period under review, the US made regular reports to the DSB on the progress of its implementation, which is due to be completed by August 1997.

**(2) Japan – Taxes on alcoholic beverages**

In September 1995, a panel was established to consider the complaints of the EC, US and Canada against the Liquor Tax Law of Japan. In July 1996, the panel found that chace and vodka were like products and that Japan violated GATT Article III:2, first sentence, by taxing vodka in excess of chace; and that chace and the rest of the liquors in dispute were "directly competitive or substitutable products" and Japan violated GATT Article III:2, second sentence, by not taxing them similarly. The panel recommended that the DSB request Japan to bring its Liquor Tax Law into conformity with its GATT obligations.[9]

In October 1996, the Appellate Body affirmed the panel's conclusion that the Japanese Liquor Tax Law is inconsistent with GATT Article III:2, but pointed out areas where the Panel had erred in its legal reasoning. The Appellate Body report and the panel report, as modified by the Appellate Body report, were adopted by the DSB on 1 November 1996. On 24 December 1996, the US, pursuant to Article 21(3)(c) of the DSU applied for binding arbitration to determine the reasonable period of time for implementation by Japan of the recommendations of the reports. On 14 February 1997, the arbitrator determined the reasonable period for implementation of the recommendations to be 15 months.

**(3) US – Restrictions on imports of cotton and man-made fibre underwear**

In March 1996, a panel was established to consider Costa Rica's claim that the United States had imposed quantitative restrictions on cotton and man-made fibre underwear from Costa Rica in a manner inconsistent with the requirements of the Agreement on Textiles and Clothing (ATC). Under the ATC, the United States was required to show "serious damage" or "actual threat of serious damage" to its industry in order to impose such restrictions. Earlier, the Textiles Monitoring Body (TMB) had concluded that the United States had not demonstrated that US industry suffered "serious damage", but could not reach consensus on whether an "actual threat of serious damage" to US industry existed.[10]

In its November 1996 report, the panel examined the evidence put forward by the US to establish serious damage to its industry and concluded that it suffered from two important weaknesses: in some cases it was inconsistent with other evidence later submitted by the United States to the TMB, and in other cases it was inadequate to demonstrate serious damage to the US industry. According to the panel, these weaknesses raised considerable doubts as to whether serious damage had been demonstrated. However, the panel refrained from making a finding on this point. Instead, the panel examined whether the United States had properly established casualty between the increased imports and serious damage to its domestic industry as required by the ATC. In the panel's view, the US had not "demonstrably" shown that serious damage was caused by increased level of imports. Thus, it concluded that the United States had failed to comply with its obligations under the ATC.

The panel also found that the United States had failed to comply with its obligations under the ATC by imposing a restriction on imports of Costa Rican underwear without making an adequate attribution of serious damage to Costa Rican imports, as distinct from other imports. Furthermore, the panel concluded that the United States violated the ATC because it applied the restriction starting from the date of the request for consultations (17 March 1995) instead of the date of the official publication regarding the request (21 April 1995).

[8] See 1996 Annual Report, pp. 132-133.

[9] 1996 Annual Report, page 134.

[10] 1996 Annual Report, page 135.

The panel concluded that the United States was in violation of its obligations under the ATC and recommended that the United States bring the measure challenged by Costa Rica into compliance with those obligations. The panel further suggested that the United States bring the measure into compliance by immediately withdrawing the restriction.

Thereafter, Costa Rica appealed the panel's conclusions relating to the permissible effective date of application of the United States' transitional safeguard measure. In February 1997, the Appellate Body allowed Costa Rica's appeal. It concluded that the ATC does not permit the retroactive application of transitional safeguard measures. Thus, the United States could not apply the restriction prior to 60 days after the date it requested consultations. Later in February, the DSB adopted the Appellate Body report and the panel report as modified by the Appellate Body report. In April 1997, the United States informed the DSB that the contested measure had expired in March 1997.

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**(4) Brazil – Measures affecting desiccated coconut**

In March 1996, a panel was established at the request of the Philippines to consider whether Brazil's imposition of countervailing duties on desiccated coconut from the Philippines complied with WTO rules. The Philippines claimed that the duties were inconsistent with Brazil's obligations under Article V of GATT 1994 because, *inter alia*, Brazil had not established the basic prerequisites for imposing such duties and in particular had not correctly calculated the degree of subsidization. Brazil objected to this claim on the ground that the Tokyo Round Subsidies Code was the only legal framework applicable to the dispute. In Brazil's view the WTO agreements did not apply to countervailing duty investigations initiated prior to the date of entry into force of the WTO Agreement. The panel was given special terms of reference mandating that it consider the Brazilian objection that the WTO agreements did not apply to the dispute.[11]

In its October 1996 report, the panel noted that the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) provides that it applies to countervailing duty investigations initiated after 1 January 1995. The investigation at issue was initiated prior to 1995. The panel concluded that Article V of GATT 1994 could not be applied independently of the SCM Agreement to a countervailing duty investigation initiated prior to 1995. In addition, the panel found that, because Article V of GATT 1994 did not apply, Articles I and II of GATT 1994 also did not apply. As a result of its findings on applicable law, the panel did not consider the merits of the Philippines' claims.

In February 1997, the Appellate Body issued its report which concluded that, unlike the previous GATT 1947 system, the WTO Agreement is an integrated system, based on a single treaty instrument, that was accepted by the WTO Members as a "single undertaking". On the basis of this reasoning, Article V of GATT 1994 could not be applied independently of the SCM Agreement to the countervailing duty measure at issue. The Appellate Body, therefore, upheld the panel's conclusion that Article V of GATT 1994 cannot be applied independently of the SCM Agreement to a countervailing duty investigation conducted pursuant to an application made prior to the entry into force of the WTO Agreement. The Appellate Body also upheld the Panel's conclusion that the inapplicability of Article V makes Articles I and II of GATT 1994 inapplicable as well.

The reports of the Appellate Body and of the panel, as upheld by the Appellate Body, were adopted by the DSB in March 1997.

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**(5) US – Measure affecting imports of woven wool shirts and blouses from India**

In April 1996, a panel was established at the request of India to consider the transitional safeguard measures imposed by the United States on imports of woven wool shirts and blouses from India in July 1995. Earlier, the TMB had examined the issue and reached a consensus that the United States had demonstrated "actual threat of serious damage"; it found the US measure to be in conformity with the ATC. India claimed that these safeguard measures were inconsistent with ATC Articles 2, 6 and 8.[12]

The panel noted that the role of panels under the DSU and the role of the TMB under the ATC were different. The TMB process, which takes account of all the subsequent development after the initial determination to impose restrictions, is distinct from the formal adjudication process by panels. The panels limit themselves to an objective assessment as to whether the importing country respected the requirements of the ATC at the time of the determination.

In assessing the conformity of the US restriction with Article 6.2 of the ATC, the panel restricted its review to an examination of a statement issued by the US investigating authorities when the United States requested consultations with India in April 1995 (the Market Statement). The panel evaluated the information contained in the Market Statement in light of the economic variables listed in Article 6.3 of the ATC. In the panel's view, an importing country that invokes Article 6 of the ATC must (i) consider at least all economic factors listed in Article 6.3 and (ii) confirm that the increase in imports is the cause of the

[11] 1996 Annual Report, pp. 134-135.

[12] 1996 Annual Report, page 135.

serious damage or actual threat thereof and that the decline in the domestic industry is not caused by such other factors as technological changes or changes in consumer preferences. After examination of these variables, the panel found that the United States did not examine eight out of the eleven factors cited above in Article 6.3 with respect to the woven wool shirts and blouses industry. For five of these factors, some information was provided only for the broader "shirt and blouse" or "woven shirt and blouse" sectors without being adequately related to the particular industry in question. Furthermore, the panel found that the United States failed to show in its Market Statement that serious damage or actual threat thereof was demonstrably caused by increased imports. The panel concluded that the US determination did not respect the requirements of Article 6 of the ATC.

In light of its findings, the panel did not consider India's request that it find that the importing country has to choose at the beginning of the process whether it will claim the existence of "serious damage" or "actual threat of serious damage" to the domestic industry because they were separate concepts, not interchangeable with each other, nor did it consider India's claim that the United States consulted with India only on the basis of "serious damage" and referred the matter to the TMB on that basis, not on the basis of "actual threat". The panel also declined to consider India's claim that the United States had improperly backdated the effective date of the restraint. However, the panel did reject India's claim that the US restraint was invalid because the TMB did not "endorse" it. In the panel's view, the recommendations of the TMB under Article 8 of the ATC were not binding.

The panel concluded that the US restraint violated the ATC and nullified and impaired benefits accruing to India under the WTO Agreement. The panel recommended that DSB make such a ruling.

In February 1997, India appealed from the panel's conclusions on several issues, including which party has the burden of proof, on the role of the TMB and on whether a panel is required to make findings on all legal claims made by the complaining party. In April 1997, the Appellate Body upheld the legal findings and conclusions of the panel on all issues. As to the burden of proof, the Appellate Body agreed with the panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination was inconsistent with the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption. On the TMB, the Appellate Body concluded that the statement in the panel report, concerning what information the TMB may take into account, was purely a descriptive comment by the panel and not "a legal finding or conclusion" which the Appellate Body "may uphold, modify or reverse". On the issue of judicial economy, the Appellate Body concluded that the panel's finding that it only needed to address those legal claims that it considered necessary for the resolution of the dispute was consistent with the DSU as well as with practice under GATT 1947 and the WTO Agreement.

In May 1997, the DSB adopted the reports of the Appellate Body and of the panel, as upheld by the Appellate Body. The United States had revoked the restraint in December 1996.

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**(6) Canada – Certain measures concerning periodicals**

In June 1996, the DSB established a panel to consider a US claim that Canadian measures prohibiting or restricting the importation into Canada of certain periodicals were in contravention of GATT Article XI. The United States also claimed that the tax treatment of so-called "split-run" periodicals and the application of favourable postage rates to certain Canadian periodicals were inconsistent with GATT Article III.[13] "Split-run" periodicals are magazines with the same or similar editorial contents as those published in foreign countries, which contain an advertisement directed to the Canadian market. Thus, if *Sports Illustrated (Canadian Edition)* shares most of its articles and graphics with *Sports Illustrated (US Edition)*, but contains advertisements for Canadian beer, sportswear, etc. that do not appear in its US edition, then it is regarded as a "split-run".

The dispute concerned three Canadian measures: Tariff Code 9958, which prohibits the importation into Canada of certain periodicals, including split-run editions; Part V.1 of the Excise Tax Act, which imposes an excise tax on split-run editions of periodicals; and the application by Canada Post Corporation ("Canada Post") of commercial "Canadian", commercial "international" and "funded" publications mail postal rates. In March 1997, the panel found Tariff Code 9958 to be in violation of Article XI:1 of GATT, which generally prohibits "prohibitions or restrictions other than duties, taxes or other charges" on goods at the border. Canada argued that the measure was justified under Article X(d) of GATT, which allows a Member to take measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [GATT]" in derogation of its obligations under the Agreement. According to Canada, Tariff Code 9958 was necessary to secure the attainment of the objectives of Section 19 of the Income Tax Act, which allows for the deduction of expenses for advertising directed to the Canadian market on condition that the advertisements appear in Canadian editions of Canadian periodicals. The panel rejected this

[13] 1996 Annual Report, page 136.

argument on the grounds that Tariff Code 9958 does not "secure compliance" with Section 19 of the Income Tax Act, since the former cannot be regarded as an enforcement measure for the latter.

The panel found Part V.1 of the Excise Tax Act to be in violation of Article III:2, first sentence, of GATT, since domestically produced non split-run periodicals and imported split-run periodicals are "like products" and the latter is taxed (even though indirectly) in excess of the former. Canada argued that GATT is not applicable with respect to this particular point because the excise tax is levied on advertising, which falls under the scope of the General Agreement on Trade in Services (GATS). The panel rejected this argument, saying "there is no reason why both GATT and GATS obligations should not apply to the Excise Tax Act" and went on to examine the compatibility of the tax with Canada's obligations under GATT. Canada claimed that imported split-run periodicals and domestic non split-run periodicals are not like products because, first, imported split-runs do not exist in the Canadian market due to the prohibition under Tariff Code 9958; and, second, even if there were an imported split-run periodical, its editorial content would be different from Canadian non split-run periodical with original Canadian content. The panel rejected this argument on the grounds that the purpose of Article III is to protect expectations of the Members as to the competitive relationship between their products and those of other Members, not to protect actual trade volumes; and that the definition of a "split-run periodical" essentially relies on factors external to the Canadian market (i.e., existence of foreign companion editions), not on whether it has "original Canadian content".

The panel found that Canada Post's application of the "commercial Canadian" and "funded" rates to Canadian periodicals, which are lower than the "international" rates applied to imported periodicals (including the availability of additional discounts only to Canadian periodicals), is inconsistent with Article III:4 of GATT, which prohibits discrimination between imported and domestic like products in respect of governmental regulations and requirements. However, the panel rejected the US claim that the "funded" rate scheme is not a domestic subsidy within the meaning of Article III:8 of GATT. The panel considered that it was the payment of subsidies exclusively to domestic producers, as was claimed by Canada to be the case.

Before concluding, the panel noted "that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case. The only task entrusted to this panel was to examine whether the treatment accorded to imported periodicals under specific measures identified in the complainant's claim is compatible with the rules of GATT ...". The panel then concluded that Canada was in violation of its obligations under GATT Articles XI:1, III:2 and III:4 and recommended that the DSB request Canada to bring its measures into compliance with its obligations under GATT.

In April 1997, Canada appealed the panel's findings regarding Part V.1 of the Excise Tax Act. The United States appealed the panel's conclusion that Canada's "funded" postal rate scheme is justified by Article III:8(b) of the GATT 1994. In June 1997, the Appellate Body upheld the panel's findings and conclusions on the applicability of GATT 1994 to Part V.1 of the Excise Tax Act. However, the Appellate Body reversed the panel's finding that imported split-run periodicals and domestic non-split-run periodicals are "like products", thereby reversing the panel's conclusions on Article III:2, first sentence. The Appellate Body concluded, however, that Part V.1 of the Excise Tax Act is inconsistent with the second sentence of Article III:2 of GATT 1994, which essentially prohibits dissimilar taxation of domestic and foreign products if they are directly competitive or substitutable. The Appellate Body reached this conclusion in finding that imported split-run and domestic non-split-run periodicals of the same type are directly competitive or substitutable, that they are not similarly taxed and that the design and structure of Part V.1 is clearly to afford protection to the production of Canadian periodicals. Finally, the Appellate Body allowed the United States' appeal and reversed the panel's conclusion that Canada's "funded" postal rate scheme is justified by Article III:8(b) of GATT 1994.

In July 1997, the Appellate Body report and the panel report, as modified by the Appellate Body, were adopted by the DSB.

## Panel report issued, not adopted

*European Communities – Regime for the importation, sale and distribution of bananas*, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (W/DS27). The complainants alleged that the EC's regime for importation, sale and distribution of bananas is inconsistent with GATT Articles I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and GATS. The panel found various aspects of the EC's banana import regime, and particularly the licensing procedures for the importation of bananas in this regime, were inconsistent with GATT and GATS rules. Belize, Cameroon, Canada, Colombia, Costa Rica,

Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, the Philippines, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Suriname, Thailand and Venezuela participated in the proceedings as third-parties. On 11 June 1997, the European Communities appealed the Panel decision to the Appellate Body. A decision is expected by September 1997.

## Panels established

(1a) *European Communities – Measures affecting meat and meat products (hormones)*, complaint by the United States (W/DS26). In a communication dated 25 April 1996, the United States requested the establishment of a panel, claiming that measures taken by the EC under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action restrict or prohibit imports of meat and meat products from the United States, and are inconsistent with GATT Articles III or XI, SPS Agreement Articles 2, 3 and 5, TBT Agreement Article 2 and the Agreement on Agriculture Article 4. A panel was established at the DSB meeting on 20 May 1996. Australia, Canada, New Zealand and Norway reserved third-party rights.

(1b) *European Communities – Measures affecting meat and meat products (hormones)*, complaint by Canada (DS48). Canada requested a panel regarding the EC ban on importation of livestock and meat from livestock that have been treated with certain substances having a hormonal action. Canada alleges violations of SPS Articles 2, 3 and 5; GATT Article III or XI; TBT Article 2; and Agriculture Article 4. The DSB established a panel on 16 October 1996 and the parties agreed on the same panelists as were serving in the US-EC dispute. Australia, New Zealand, Norway and the United States reserved third-party rights.

(2) *Japan – Measures affecting consumer photographic film and paper*, complaint by the United States (DS44). The United States requested a panel with Japan concerning Japan's laws, regulations and requirements affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper. The United States alleges that the Japanese Government treated imported film and paper less favourably through these measures, in violation of GATT Articles III and X. The United States also alleges that these measures nullify or impair benefits accruing to the United States (a non-violation claim). The DSB established a panel on 16 October 1996. The EC and Mexico reserved third-party rights.

(3) *United States – The Cuban Liberty and Democratic Solidarity Act*, complaint by the European Communities (DS38). The European Communities requested a panel with the United States concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 and other legislation enacted by the US Congress regarding trade sanctions against Cuba. The EC claims that US trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and the exclusion of non-US nationals from US territory, are inconsistent with the US obligations under the WTO Agreement. Violations of GATT Articles I, III, V, XI and XIII, and GATS Articles I, III, V, XVI and XVII are alleged. The EC also alleges that even if these measures by the United States may not be in violation of specific provisions of GATT or GATS, they nevertheless nullify or impair its expected benefits under GATT 1994 and GATS and impede the attainment of the objectives of GATT 1994. The DSB established a panel on 20 November 1996. Canada, Japan, Malaysia, Mexico and Thailand reserved third-party rights. At the request of the EC, the Panel suspended its work on 25 April 1997.

(4) *India – Patent protection for pharmaceutical and agricultural chemical products*, complaint by the United States (DS50). This dispute concerns an alleged failure of India to meet its obligations under Articles 63 and 70 of the TRIPS Agreement in respect of pharmaceutical and agricultural chemical products. The DSB established a panel on 20 November 1996. The EC reserved third-party rights.

(5) *Turkey – Taxation of foreign film revenues*, complaint by the United States (DS43). This dispute concerns Turkey's taxation of revenues generated from the showing of foreign films. Violation of GATT Article III is alleged. The DSB established a panel on 25 February 1997. Canada reserved third-party rights. In July 1997, the parties announced that the dispute had been settled, without panelists having been selected.

(6) *Argentina – Certain measures affecting imports of footwear, textiles, apparel and other items*, complaint by the United States (DS56). This dispute concerns the imposition of specific duties on these items in excess of the bound rate and other measures by Argentina. The United States contends that these measures violate Articles II, VII, VIII and X of GATT 1994, Article 2 of the TBT Agreement, Article 1 to 8 of the Agreement on the Implementation of Article VII of GATT 1994, and Article 7 of the Agreement on Textiles and Clothing. The DSB established a panel on 25 February 1997. The EC and India reserved third-party rights.

(7) *United States – Import prohibition of certain shrimp and shrimp products*, complaint by India, Malaysia, Pakistan and Thailand (DS58). This dispute concerns a joint complaint by India, Malaysia, Pakistan and Thailand against a ban on importation of shrimp and shrimp products from these countries imposed by the United States under Section 609

of US Public Law 101-62. Violations of Articles I, XI and XIII of GATT 1994 are alleged. The DSB established a panel on 25 February 1997 at the request of Malaysia, Pakistan and Thailand. The DSB subsequently established a panel on 10 April 1997 at the request of India which was consolidated with the panel established earlier. Australia, Colombia, the EC, Guatemala, Hong Kong, India, Japan, Mexico, Nigeria, Philippines, Singapore, and Sri Lanka reserved third-party rights.

(8a) *European Communities – Customs classification of certain computer equipment*, complaint by the United States (W/DS62). This dispute is in respect of the classification by the European Communities, for tariff purposes, of certain Local Area Network (LAN) equipment and personal computers with multimedia capability. The United States alleges that these measures violate Article II of GATT 1994. The DSB established a panel on 25 February 1997. India, Japan, the Republic of Korea and Singapore reserved third-party rights.

(8b) *United Kingdom – Customs classification of certain computer equipment*, complaint by the United States (DS67). This dispute is in respect of the classification by the UK for tariff purposes of certain Local Area Network (LAN) equipment and personal computers with multimedia capability. The United States alleges that these measures violate Article II of GATT 1994. A similar request concerning these measures was made by the United States in respect of the EC (DS62). On 20 March 1997, the DSB agreed to incorporate this dispute into the panel already established in respect of DS62.

(8c) *Ireland – Customs classification of certain computer equipment*, complaint by the United States (W/DS68). This dispute covers the same measures as in DS67, in respect of Ireland, except for the reference to personal computers with multimedia capability. The United States alleges a violation of Article II of GATT 1994. On 20 March 1997, the DSB agreed to incorporate this dispute into the panel already established in respect of DS62.

(9) *Guatemala – Anti-Dumping investigation regarding imports of Portland cement from Mexico*, complaint by Mexico (W/DS60). This dispute is in respect of an anti-dumping investigation commenced by Guatemala with regard to imports of portland cement from Mexico. Mexico alleges that this investigation is in violation of Guatemala's obligations under Articles 2, 3, 5 and 7.1 of the Anti-Dumping Agreement. The DSB established a panel on 20 March 1997. Canada, El Salvador, Honduras and the United States reserved third-party rights.

(10) *Australia – Measures affecting the importation of salmon*, complaint by Canada (DS18). This dispute is in respect of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation. Canada alleges that the prohibition is inconsistent with GATT Articles XI and XIII, and also inconsistent with the SPS Agreement. The DSB established a panel on 10 April 1997. The European Communities, the United States, India and Norway reserved third-party rights.

(11a) *Indonesia – Certain measures affecting the automobile industry*, complaint by the European Communities (DS54). This dispute concerns Indonesia's National Car Programme. It concerns the exemption of imports of "national vehicles" and components thereof from customs duties and luxury taxes by Indonesia, and related measures. The EC contends that these measures are in violation of Indonesia's obligations under Articles I and III of GATT 1994, Article 2 of the TRIMs Agreement and Articles 3 of the SCM Agreement. The DSB established a single panel on 12 June 1997 to hear this dispute together with DS55 and DS64. Canada, Japan, Korea and the United States reserved third-party rights.

(11b) *Indonesia – Certain measures affecting the automobile industry*, complaint by Japan (W/DS55). This dispute concerns Indonesia's National Car Programme – Japan challenges basically the same measures as listed in DS54. Japan contends that these measures are in violation of Indonesia's obligations under Articles I:1, III:2, III:4 and X:3(a) of GATT 1994, as well as Articles 2 and 5.4 of the TRIMs Agreement. The DSB established a single panel on 12 June 1997 to hear this dispute together with DS54 and DS64. Canada, the European Communities, Korea and the United States reserved third-party rights.

(11c) *Indonesia – Certain measures affecting the automobile industry*, complaint by Japan (W/DS64). This dispute concerns Indonesia's National Car Programme. Japan challenges the same measures that are the subject of complaints in DS54, 55 and 59. In its earlier request for consultations on these measures (DS55) Japan had confined itself to violations under GATT and TRIMs. In this request, Japan alleges violations of Articles 3, 6 and 28 of the SCM Agreement. The DSB established a single panel on 12 June 1997 to hear this dispute together with DS54 and DS55. The European Communities and the United States reserved third-party rights.

(11d) *Indonesia – Certain measures affecting the automobile industry*, complaint by the United States (DS59). This dispute also concerns Indonesia's National Car Programme – basically the measures complained of are those listed in DS54. The United States contends that these measures are in violation of Indonesia's obligations under Articles I and III of GATT 1994, Article 2 of the TRIMs Agreement, Articles 3, 6 and 28 of the SCM Agreement and Articles 3, 20 and 65 of the TRIPS Agreement. The DSB established a panel on 30 July

1997, and decided that this dispute be heard together with DS54, DS55 and DS64. Canada, the European Communities, Japan and Korea reserved their third-party rights.

(12) *European Communities – Measures affecting importation of certain poultry products*, complaint by Brazil (W/DS69). This dispute concerns the EC regime for the importation of certain poultry products and the implementation by the EC of a tariff rate quota for these products. Brazil contends that the EC measures are inconsistent with Articles X and XXVIII of GATT 1994 and Articles 1 and 3 of the Agreement on Import Licensing Procedures. Brazil also contends that the measures nullify or impair benefits accruing to it directly or indirectly under GATT 1994. The DSB established a panel on 30 July 1997. The US and Thailand reserved their third-party rights.

[14]Not including those where a panel was established; in order of date requested, except related cases are grouped together.

Table V.6

**Requests for consultations**[14]

| Dispute | Complainant | Date of request |
|---|---|---|
| Brazil – Certain Measures Affecting Trade and Investment in the Automotive Sector (W/DS52) | United States | 9 August 1996 |
| Brazil – Certain Measures Affecting Trade and Investment in the Automotive Sector (W/DS65) | United States | 10 January 1997 |
| Brazil – Certain Measures Affecting Trade and Investment in the Automotive Sector (W/DS81) | European Communities | 7 May 1997 |
| Mexico – Customs Valuation of Imports (W/DS53) | European Communities | 27 August 1996 |
| United States – Import Prohibition of Certain Shrimp and Shrimp Products (W/DS61) | Philippines | 25 October 1996 |
| United States – Anti-Dumping Measures of Solid Urea from former E. Germany (W/DS63) | European Communities | 28 November 1996 |
| Japan – Measures Affecting Imports of Pork (W/DS66) | European Communities | 15 January 1997 |
| Canada – Measures Affecting the Export of Civilian Aircraft (I) (W/DS70) | Brazil | 10 March 1997 |
| Canada – Measures Affecting the Export of Civilian Aircraft (II) (W/DS71) | Brazil | 10 March 1997 |
| European Communities – Measures Affecting Butter Products (W/DS72) | New Zealand | 24 March 1997 |
| Japan – Procurement of a Navigation Satellite (W/DS73) | European Communities | 26 March 1997 |
| Philippines – Measures Affecting Pork and Poultry (W/DS74) | United States | 1 April 1997 |
| Korea – Taxes on Alcoholic Beverages (W/DS75) | European Communities | 4 April 1997 |
| Japan – Measures Affecting Agricultural Products (W/DS76) | United States | 7 April 1997 |
| Argentina – Measures Affecting Textiles, Clothing and Footwear (W/DS77) | European Communities | 23 April 1997 |
| United States – Safeguard Measure Against Imports of Broom Corn Brooms (W/DS78) | Colombia | 28 April 1997 |
| India – Patent Protection for Pharmaceutical and Agricultural Products (W/DS79) | European Communities | 28 April 1997 |
| Belgium – Measures Affecting Commercial Telephone Directory Services (W/DS80) | United States | 2 May 1997 |
| Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights (W/DS82) | United States | 14 May 1997 |
| Denmark – Measures Affecting the Enforcement of Intellectual Property Rights (W/DS83) | United States | 14 May 1997 |
| Korea – Taxes on Alcoholic Beverages (W/DS84) | United States | 23 May 1997 |
| United States – Measures Affecting Textiles and Apparel Products (W/DS85) | European Communities | 22 May 1997 |
| Sweden – Measures Affecting the Enforcement of Intellectual Property Rights (W/DS86) | United States | 28 May 1997 |
| Chile – Taxes on Alcoholic Beverages (W/DS87) | European Communities | 4 June 1997 |
| United States – Measure Affecting Government Procurement (W/DS88) | European Communities | 20 June 1997 |
| United States – Imposition of Anti-Dumping Duties on Imports of Colour Television Receivers from Korea (W/DS89) | Korea | 10 July 1997 |
| India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (W/DS90) | United States | 15 July 1997 |
| India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (W/DS91) | Australia | 16 July 1997 |
| India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (W/DS92) | Canada | 16 July 1997 |
| India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (W/DS93) | New Zealand | 16 July 1997 |

Table V.7

**Notifications of mutually agreed solutions**

| Dispute | Complainant | Date settlement notified |
|---|---|---|
| Poland – Import Regime for Automobiles (W/DS19) | India | 11 September 1996 |
| Japan – Measures Concerning Sound Recordings (W/DS28) | United States | 24 January 1997 |
| Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products (W/DS36) | United States | 28 February 1997 |
| European Communities – Duties on Imports of Grains (W/DS13) | United States | 30 April 1997 |
| Venezuela – Anti-Dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods (W/DS23) | Mexico | 6 May 1997 |
| Turkey – Taxation of Foreign Film Revenues (W/DS43) | United States | 14 July 1997 |
| Hungary – Export Subsidies in Respect of Agricultural Products (W/DS35) | Argentina, Australia, Canada, New Zealand, Thailand, United States | 30 July 1997 |

## VII. Trade Policy Review Mechanism

The objectives of the Trade Policy Review Mechanism, established on a provisional basis at the Mid-term review of the Uruguay Round and confirmed in Annex 3 of the Marrakesh Agreement, are to contribute to improved adherence by all members of the WTO to the Organization's rules, disciplines and commitments, and to the smoother functioning of the multilateral trading system. The reviews aim to achieve greater transparency in and understanding of the trade policies and practices of Members. The mechanism enables the regular collective appreciation and evaluation by the Members of the full range of an individual Member's trade policies and practices (now covering all areas of the WTO Agreements) and their impact on the functioning of the multilateral trading system. Reviews take place against the background of wider economic development needs, the policies and objectives of the Members concerned, as well as the external trading environment.

Reviews are conducted in the General Council, meeting as the Trade Policy Review Body (TPRB). During 1996 the TPRB was chaired by Ambassador Anne Anderson (Ireland), followed by Ambassador M. Akram (Pakistan) in early 1997.

The TPRM lays down a rhythm of reviews, under which the four largest entities in world trade (the European Communities, the United States, Japan and Canada – the "Quad") are reviewed every two years; the next 16 every four years; and the remaining Members of the WTO every six years, with a longer interval envisaged for least-developed countries. It has been agreed that these intervals might, if necessary, be applied with a flexibility of six months' extension and that every second review of the "Quad" should be an interim review, while remaining comprehensive in scope.

By mid-1997, a total of 83 reviews had been conducted, covering 60 WTO Members (counting the EC as one). Forty-two developing countries have been reviewed, of which seven twice. In 1996, 15 Members were reviewed; Brazil (second review), Canada (fourth review), Colombia (second review), the Czech Republic, the Dominican Republic, El Salvador, Korea, Rep. of (second review), Morocco (second review), New Zealand (second review), Norway (second review), Singapore (second review), Switzerland (second review), the United States (fourth review),Venezuela and Zambia. In January-July 1997, the TPRB carried out reviews of Cyprus, Fiji and Paraguay. The Chairperson's summings-up of these reviews can be found in Annex II. The Chair's concluding remarks on previous reviews can be found in GATT Activities 1990, 1991, 1992, 1993, 1994-95 and the WTO Annual Report 1996.

In the period September-December 1997, the TPRB was scheduled to carry out reviews of Benin, Chile (second review), South Africa/SACU (second review), Mexico (second review), the European Communities (fourth review), Japan (fourth review) and Malaysia (second review).

## VIII. Committee on Balance-of-Payments Restrictions

Under GATT Articles XII and XVIII:B, Members whose balance-of-payments difficulties have led them to restrict imports in order to conserve foreign exchange are required to consult regularly in the Committee on Balance-of-Payments Restrictions, during the period when the restrictions are in place. Members applying the provisions of Article XII of the General Agreement on Trade in Services are also expected to consult with the Committee.

The "Understanding on the Balance-of-Payments Provisions of the GATT 1994" draws upon and clarifies the provisions of Article XII, XVIII: B and the 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes. In order to avoid incidental protective effects, measures taken for balance-of-payments purposes should be temporary, price-based, control the general level of imports and be administered in a transparent manner. Members are required to notify to the General Council the introduction of, or any changes to, restrictive import measures introduced for balance-of-payments purposes, no later than 30 days after their announcement; consultations are expected to follow within four months of the notification. As long as restrictions for balance-of-payments purposes are maintained, developing countries consult every two years under Article XVIII:B; other countries are reviewed annually under Article XII. In the course of consultations, the Committee assesses the nature of the balance of payments difficulties, alternative corrective measures and the possible effect of restrictions on other economies. Members are expected to announce time-schedules for the removal of restrictions which may be modified in accordance with the balance-of payments situation. In accordance with Article XV of the GATT, the IMF is invited to participate in the consultations and Members are expected to accept the determination of the Fund, *inter alia*, as to what constitutes a serious decline in the level of monetary reserves.

## 1996-1997

Between September 1996 and 31 July 1997, the Committee on Balance-of-Payments Restrictions consulted with a number of Members maintaining restrictions for balance-of payments purposes: India, Nigeria, Tunisia, Hungary, Pakistan, and Bangladesh. The consultations with India, Nigeria, and Tunisia represented the continuation of consultations which had previously been suspended. In addition to ongoing consultations, certain Members partially or fully removed their balance-of-payments restrictions. Sri Lanka notified the WTO in September 1996 that it had removed import restrictions on four tariff lines (potatoes, red onions, "B"onions and peppers); restrictions remain on four products. On 1 January 1997, Turkey, Poland and Slovakia removed the restrictions they had maintained for balance-of-payments purposes.

During Article XII consultations with *Hungary* in September 1996, the Committee considered that present conditions showed no balance-of-payments reasons why Hungary should not continue its progressive phase-out and eliminate the surcharge more rapidly. Hungary confirmed its firm intention to eliminate the surcharge and disinvoke balance-of-payments provisions by 1 July 1997, at the latest; a notification confirming the abolition of the surcharge was submitted in July 1997.

The Committee met twice with *Nigeria*, once in September 1996 and again in March 1997. In September 1996, the Committee recalled Nigeria's previous commitments to make all restrictive trade measures price-based and to eliminate them by disinvoking Article XVIII:B. Technical and legislative processes had been initiated with a view to eliminating the import prohibitions based on balance-of-payments grounds as of 1 January 1997. Restrictions on textiles and clothing and furniture were removed, leaving in place import prohibitions on six products or product groups. The Committee met again with Nigeria in March 1997: some Members urged immediate elimination, others felt that a phase-out could be justified. The Committee rejected Nigeria's proposal of a phase-out by 2005 and requested Nigeria to draw up a reasonable time-schedule for the elimination of these WTO-incompatible measures. The fourth stage of these continued consultations was scheduled for July 1997. Meanwhile, Members reserved their rights under GATT 1994.

The full consultations with *Pakistan*, originally scheduled for November 1996, were postponed to April 1997 due to the change in Government. Committee Members recognized that Pakistan was facing a serious balance-of-payments problem and agreed that it was justified in resorting to measures in accordance with Article XVIII:B of GATT 1994. While Members appreciated the reduction of items on the Negative List from 214 to 68 since 1989, when the last full consultations had been held, some pointed out that many of the items listed should more appropriately be justified under other WTO provisions, e.g. on grounds of health, safety, public morals or security. The Committee agreed to meet again in October 1997, with a view to concluding, requesting that Pakistan produce a clearer notification regarding which items were specifically being justified under Article XVIII:B, an explanation as to why quantitative restrictions were preferred to price-based measures, and either a time-table for phase-out or justification as to why that would not be possible.

Consultations were held with *Bangladesh* under simplified procedures in May 1997. Noting that full consultations had never been held with Bangladesh, the Committee determined that full consultations would be desirable, as a means of clarifying the balance-of-payments situation and promoting greater transparency. The Committee invited the Government of Bangladesh to consider holding such full consultations in the autumn of 1998, or, in any case, before May 1999.

In June 1997, consultations resumed with *Tunisia*. While there were differences of view as to whether the balance of payments was stable or still fragile, Tunisia presented a plan for eliminating its quantitative restrictions on motor vehicles which, it was agreed, would take place over three years, with imports to be liberalized annually in three stages from 1 July 1997 terminating on 1 July 2000.

The consultations with *India*, suspended since December 1995, resumed in January and again in June 1997. In January 1997, the IMF stated that India's current monetary reserves were not inadequate and that there was no threat of a serious decline in India's monetary reserves. India cautioned that its balance of payments needed close monitoring and that precipitous removal of the quantitative restrictions notified under Article XVIII:B could have the effect of undermining the stability of the Indian economy and the reform process. The Committee reconvened on 10 June to consider India's plan to eliminate the measures notified under Article XVIII:B. Some Members expressed the view that nine years was too long a period for phasing out the remaining restrictions, given that the balance-of-payments situation did not justify their maintenance. Other Members highlighted the commitment to liberalization contained in the presentation of the phase-out plan. They believed that, in light of the impact of the removal of quantitative restrictions on the domestic economy, the necessary structural adjustment and in recognition of India's development needs, the time

period for the plan was acceptable. Given that a gap remained in the different views, the Chairman adjourned the consultation for a "period of reflection" and the consultation continued on 30 June. While India offered to lower the time span of its phase-out plan from nine to seven years, agreement on the length of phase-out could not be achieved nor could the Committee reach a consensus on the balance-of-payments position; the Committee thus ended its consultations on 1 July 1997 without adopting any conclusions.

In July 1997, the Committee consulted with the *Czech Republic* and *Bulgaria* under Article XII. The Czech Republic had introduced, on 21 April 1997, an import deposit requirement; imports of most consumer goods and foodstuffs are subject to a six-month non-interest bearing import deposit equivalent to 20 per cent of the invoiced price of the goods to be imported. Consultations with the Czech Republic were suspended until September on the basis that a review by the authorities of the scheme would allow for the communication of a time-table for elimination of the measure, judged questionable as to its consistency with Article XII by many Committee Members.

*Bulgaria*, which became a WTO Member on 1 December 1996, introduced an import surcharge of 5 per cent with effect from 4 June 1996. The surcharge applies to all imports except for some essential goods. Bulgaria has presented a time-table for the progressive reduction of the surcharge: from 1 July 1997, it will be reduced to 4 per cent, on 1 July 1998, it will be reduced to 2 per cent, from 1 July 1999 to 1 per cent and eliminated on 1 July 2000. The Committee recognized that Bulgaria's balance-of-payments situation was still delicate and the import surcharge broad-based and transparent, deciding to recommend to the General Council that Bulgaria be deemed in compliance with its WTO obligations. Bulgaria was encouraged to consider early elimination of the surcharge as conditions improved.

# IX. Committee on Regional Trade Agreements

## Introduction

In February 1996 WTO Members created the Committee on Regional Trade Agreements (CRTA) and mandated it to perform the following tasks:

1. To "examine" RTAs notified to the WTO – i.e., to increase understanding of their provisions and operation, and assess their consistency vis-a-vis relevant WTO rules;
2. To formulate procedures to improve the examination process;
3. To define the scope of the existing obligation for RTAs to report on their activities, and to establish practical arrangements for implementing this obligation; and
4. To consider the systemic implications of the regionalism/multilateralism relationship.

In the Singapore Ministerial Declaration of December 1996, Ministers gave added impetus to the Committee's work, agreeing that:

> "...the expansion and extent of regional trade agreements make it important to analyze whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements."

## Activities of the CRTA: 1996-1997

In its first annual report to the General Council, the CRTA indicated progress made in fulfilling its mandate. In addition, Members set out an ambitious work programme, which covers all the areas of work contained in the terms of reference of the Committee.

**Work Programme**

- The Committee should continue the examination of regional trade agreement as one of its priority tasks for the years ahead. The Committee should make every effort to work to remove the backlog and ensure that such a backlog does not recur.
- The Committee should work towards early agreement on procedures for the effective implementation of biennial reporting on the operation of agreements, in an efficient manner, taking into account other relevant WTO procedures.
- On procedures to facilitate and improve the examination exercise, the Committee should continue the work already initiated. This should include, *inter alia*, the development of a voluntary Standard Format for Information on Services Agreements, the development of

guidelines for the examination of regional trade agreements, and the consideration of the nature and content of reports.

- The Committee should explore measures that could help in increasing the effectiveness of notifications – with respect to their timing as well as to their contents – and examine the options available for ensuring that all regional trade and economic integration agreements involving WTO Members are notified to the appropriate WTO bodies.

- On systemic matters, the Committee should continue its consideration building on written submissions and interventions by Members; on the evolving checklist of systemic issues identified in the context of the examination of regional trade agreements; and on horizontal comparative studies on selected elements of regional agreements and initiatives. As part of this work, the Committee should analyze, in a non-prejudicial manner, whether the system of WTO rights and obligations, as it relates to regional trade agreements, needs to be further clarified with a view to making appropriate recommendations to the General Council, in accordance with the mandate of the Committee.

From July 1996 to July 1997, the Committee has held 10 sessions (typically lasting 2-3 days each), and three more sessions are scheduled for the fall of 1997.

**Examination of RTAs**

Much time during Committee sessions has been devoted to RTA examinations, as the number of agreements designated for examination has expanded from an initial 32 to a current 49. As of July 1997, the Committee has reached the final stage of preparing the reports for 27 of these examinations; one other examination is underway, and another 21 examinations will be started in autumn. (*See* table V.8 "WTO-Notified RTAs Currently Undergoing Examinations".)

**Improvement of examination procedures**

To facilitate and standardize the provision of initial information on RTAs undergoing examinations, the Committee has discussed a standard format for parties to use in submitting information on agreements. As a result, two documents of a non-binding, voluntary nature have been developed: the "Standard Format for Information on Regional Trade Agreements", which is geared towards goods aspects of agreements, and the "Standard Format for Information on Economic Integration Agreements on Trade in Services". These documents have contributed greatly to improving the procedures for examining RTAs, since they encourage the timely and accurate submission of information and substitute for a lengthy question and reply process. Having received initial information in these Standard Formats, Members can ask RTA parties to clear up additional questions during examinations.

A third non-binding document, entitled "Guidelines on Procedures to Facilitate and Improve the Examination Process", has also been drafted. The Guidelines stress the importance of an early and continued flow of information on RTAs to the Committee and set out a number of useful yardsticks to guide the process. Also, the document spells out a new approach to examination reports, whereby reports will consist of both a "factual record", based on summary records of comments and views expressed by delegations in the course of an examination, as well as "conclusions", containing the Committee's assessment of an RTA's conformity with WTO rules.

As "Chairman's Notes", the Standard Formats and Guidelines were taken note of by the Committee. Preliminary use shows them to be effective in structuring and streamlining the process of examinations.

**Reporting on RTAs' activities**

The Understanding on the Interpretation of Article XXIV of GATT 1994 includes a reaffirmation by Members of their commitment to report biennially on customs unions or free-trade areas to which they are party. The CRTA recently began focusing on the matter, drawing on a checklist of issues prepared by the Secretariat and proposals by Members. Questions currently facing the Committee include what purpose the reports should serve (i.e. pure transparency or a basis for monitoring consistency with WTO rules); what agreements should be subject to the reporting requirement; and what information should be supplied in the reports, and in what form.

**Systemic matters**

One of the benefits of having a single committee handle this subject is that synergies arise as the CRTA examines RTAs and considers the systemic implications of the regionalism/multilateralism relationship. The examination of a particular RTA may point to an issue that seems to be of a general or systemic nature; rather than discussing the issue solely within the bounds of the examination, the Committee can flag the issue for consideration during its systemic debate, when it can be treated in a more generic way and when

comparisons among RTAs can be drawn. Then, after discussing an issue, the Committee can apply its increased understanding to further examinations. To keep track of systemic issues arising in the course of examinations, the Committee has asked the Secretariat to maintain a running checklist.

When it appeared in the Eighth Session that the CRTA had sufficient information to begin more in-depth analysis, Members came forth with proposals on how to proceed. One idea was to have the Secretariat annotate the checklist of systemic issues, so as to include the context in which issues had been raised in previous meetings. A suggestion building on the first proposal was to use such an annotated checklist to identify priority areas, on which the Secretariat might prepare background papers. Another idea was for the Committee to delve into a broader, policy-oriented discussion, going beyond WTO rights and obligations to look at concepts such as open regionalism. An annotated checklist was prepared for the Committee's Eleventh Session, with delegations emphasizing the need to maintain it as an evolving document to help channel future discussions.

An additional suggestion has been to pursue horizontal analyses of RTA provisions. In this vein, last fall the Secretariat produced two pilot studies which display side by side provisions on technical barriers to trade and sanitary and phytosanitary measures from a number of RTAs. It has been suggested that the Committee use these horizontal studies to analyze how RTAs are linked into the multilateral trading system.

## Conclusion

In all, the Committee has made clear progress in carrying out its work programme. The bulk of its time has been spent engaged in the detailed examination of the provisions of individual RTAs. In that regard, the new approaches to the presentation of information for RTA examinations, along with the implementation of the Guidelines to Improve and Facilitate the Examination Process, have led to a more efficient use of time and resources, as evidenced in a streamlined examination process. This has permitted the Committee to devote an increasing amount of its time to considering other issues contained in its terms of reference, in particular the systemic implications of regionalism.

Table V.8

**WTO-notified RTA's currently undergoing examination**

(*as of the CRTA's twelfth session*)

*Examinations in final stages*:
Canada-Israel *(Goods)*
EC-Bulgaria *(Goods)*
EC-Czech Republic *(Goods)*
EC Enlargement *(Goods)*
EC Enlargement *(Services)*
EC-Estonia *(Goods)*
EC-Hungary *(Goods)*
EC-Latvia *(Goods)*
EC-Lithuania *(Goods)*
EC-Poland *(Goods)*
EC-Romania *(Goods])*
EC-Slovak Republic *(Goods)*
EFTA-Bulgaria *(Goods)*
EFTA-Estonia *(Goods)*
*Examination underway:*
EC-Turkey *(Goods)*
*Examinations planned for Autumn 1997:*
ANZCERTA *(Services)*
Bulgaria-Slovenia *(Goods)*
CEFTA *(Goods)*
Czech Republic-Bulgaria *(Goods)*
Czech Republic-Romania *(Goods)*
Czech Republic-Slovenia *(Goods)*
EC-Faroe Islands *(Goods)*
EC-Hungary *(Services)*
EC-Palestine *(Goods)*
EC-Poland *(Services)*
EC-Slovak Republic *(Services)*
EFTA-Hungary *(Goods)*
EFTA-Israel *(Goods)*
EFTA-Latvia *(Goods)*
EFTA-Lithuania *(Goods)*
EFTA-Poland *(Goods)*
EFTA-Romania *(Goods)*
EFTA-Slovenia *(Goods)*
Iceland-Faroe Islands *(Goods])*
MERCOSUR *(Goods)*
NAFTA *(Goods)*
NAFTA *(Services)*
Norway-Faroe Islands *(Goods)*
Switzerland-Faroe Islands *(Goods)*
EC-Slovenia *(Goods)*
Estonia-Slovenia *(Goods)*
European Union *(Services)*
Hungary-Slovenia *(Goods)*
Latvia-Slovenia *(Goods)*
Lithuania-Slovenia *(Goods)*
Macedonia-Slovenia *(Goods)*
Slovak Republic-Bulgaria *(Goods)*
Slovak Republic-Romania *(Goods)*
Slovak Republic-Slovenia *(Goods)*

# X. Committee on Trade and Development

The Committee on Trade and Development is one of the principal standing committees of the WTO and is responsible for reviewing and discussing trade issues of interest to developing countries. Its main functions are: keeping under review the participation of developing country Members in the multilateral trading system; considering measures and initiatives to assist developing country Members, in particular the least-developed country Members, in the expansion of their trade and investment opportunities; conducting periodic reviews of the application of special provisions in favour of developing country Members (including the Enabling Clause, which is one of the agreements resulting from the Tokyo Round (1973-1979) and which provides for differential and more favourable treatment of developing countries in various areas of trade policy) and defining the guidelines for the technical cooperation activities of the WTO.

Broad international consensus exists on two elements relating to trade and development: (i) in today's world, trade is an engine of growth and the development of a country depends to a large extent on the size and content of its exports; and (ii) priority should be given to improving the situation of the least-developed countries. It has been widely recognized that the WTO, as an organization which is driven by member governments, has a responsibility to ensure the integration of developing and least-developed countries into the multilateral trading system, both from a quantitative (market shares) and a qualitative (rights and obligations applicable to developing country Members) point of view. The work of the WTO Committee on Trade and Development has evolved since its inception in 1995 on the basis of a perception of shared responsibility: developed country Members should continue their efforts to open their markets to exports of developing countries, while the latter should endeavour to create a domestic environment conducive to trade expansion.

## Activities of the Committee on Trade and Development

During the period under review, the Committee on Trade and Development held eight sessions; on 12 and on 23 September, 4 October, 15 October (continued on 31 October) and 25 November 1996; on 17 February, 21 March and 20 May 1997. The increased frequency of meetings in this period shows an increased desire by Members to take a constructive approach to trade and development. This constructive approach was also reflected in the Singapore Ministerial Declaration. In the preparatory process for the Singapore Ministerial, the Committee on Trade and Development had identified one horizontal issue - the position of the least-developed countries - and three vertical issues as priorities for Ministerial action: implementation of provisions in favour of developing countries, including the impact of the Uruguay Round on developing countries; participation of developing countries in the multilateral trading system; and guidelines for technical cooperation.

## Highlights in the period under review

The Work of the Committee during the period under review addressed each of these priority areas. It accordingly reviewed the implementation of provisions in favour of developing country Members on the basis of contributions from Members and from the WTO Bodies responsible for monitoring the implementation of the Uruguay Round commitments. The Committee recognized that although the implementation of such provisions had been in general moving ahead in the first two years of existence of the WTO, available information pointed to a relatively low use of those provisions. It also noted that, due to the fact that the WTO was newly established, the implementation process was still at an early stage and further work was required for the Committee. In the area of technical assistance, the Committee adopted a set of Guidelines for WTO's Technical Cooperation and, based on these, started discussions on the establishment of implementation modalities of technical assistance. In accordance with the Guidelines, the Committee reviewed WTO's Three-Year Plan for Technical Cooperation, 1997-1999. The Committee furthermore requested the Secretariat to prepare a Manual on Technical Cooperation. The Committee engaged in a comprehensive discussion on the participation of developing country Members in the multilateral trading system on the basis of a study prepared by the Secretariat. Given the complexity of the topics addressed, sometimes divergent comments were made in those discussions and different conclusions reached by Members. In particular, various views were expressed on the importance of appropriate domestic policies and of market access possibilities for the economic development of developing countries.

The Committee was actively engaged in pursuing the objective of closer institutional cooperation by inviting the Secretary-General of UNCTAD, the Executive-Director of the

International Trade Centre, the Chairman of both WTO's General Council and UNCTAD's Trade and Development Board and the Chairman of the Joint International Monetary Fund and the World Bank Development Committee to address the Committee.

### Work specifically related to the least-developed countries: the Sub-Committee on Least-Developed Countries

Under each of the priority areas, particular attention was devoted to the difficulties of the least-developed countries. The WTO body which deals in particular with issues relating to least-developed countries is the Committee on Trade and Development's Sub-Committee on Least-Developed Countries. The Sub-Committee met on 13 and 23 September 1996, as well as on 28 February, 18 April and 26 June 1997.

The Sub-Committee identified two main contributions that the WTO could make to better integrate least-developed countries into the multilateral trading system: first, to ensure that technical cooperation provided to least-developed country Members would aim at institutional and human capacity-building; and second, the preparation of the Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries, which was adopted by Ministers at the Singapore Ministerial Conference.

The Action Plan for Least-developed Countries aims to enhance LDCs' trading opportunities and their integration into the multilateral trading system. It envisages to do so through a comprehensive approach, bringing together national efforts and those of the international community, required to achieve active growth in least-developed countries through appropriate macro-economic policies, supply-side measures and improved market access. It includes measures in the areas of capacity-building and market-access, from a WTO perspective. It also envisages a closer cooperation between the WTO and other multilateral agencies assisting LDCs.

Pursuant to the Plan of Action, Ministers agreed to organize a meeting with UNCTAD and the International Trade Centre as soon as possible in 1997, with the participation of aid agencies, multilateral financial institutions and least-developed countries to foster an integrated approach to assisting these countries in enhancing their trading opportunities.

Accordingly, at its meeting on 18 April 1997, the Sub-Committee on Least-developed Countries agreed that a High Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development (HLM) would take place on 27-28 October 1997, in Geneva. The WTO is organizing this meeting with the International Trade Centre (ITC) and UNCTAD as well as with the IMF, UNDP and the World Bank. All 48 least-developed countries, recognized as such by the United Nations will be invited to participate, regardless of their WTO Membership. At its meeting on 26 June 1997, the Sub-Committee agreed the draft agenda and format for the Meeting, which will have as its two main components: market access and trade-related technical assistance, training and capacity building. The High Level Meeting would provide an opportunity for WTO Members, on an autonomous basis, to enhance their market access for imports from least-developed countries. In terms of technical assistance, it is envisaged that the HLM will endorse an integrated framework for technical assistance among the six international organizations most directly involved in the preparations of the Meeting, for supporting trade-related activities of the least-developed countries, including efforts to enhance the supply response of these countries. An important element of the Meeting will be the comprehensive assessments prepared by the least-developed countries of their needs for trade-related technical cooperation, to which the integrated framework would be applied.

## XI. Committee on Trade and Environment

The WTO Committee on Trade and Environment's mandate and terms of reference are set out in the Marrakesh Ministerial Decision on Trade and Environment of April 1994. The CTE has a two-fold mandate "to identify the relationship between trade measures and environmental measures in order to promote sustainable development" and "to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system".

This broad-based mandate covers goods, services, and intellectual property rights and builds on progress already achieved in the GATT Group on Environmental Measures and International Trade. With the aim of making international trade and environmental policies mutually supportive, the CTE's work programme was initially set out in the following ten items:

- the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
- the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
- the relationship between the provisions of the multilateral trading system and: (a) charges and taxes for environmental purposes; and (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling;
- the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
- the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
- the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
- the issue of exports of domestically prohibited goods;
- the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- the work programme envisaged in the Decision on Trade in Services and the Environment;
- input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organizations referred to in Article V of the WTO.

A start on the work programme was made soon after the Marrakesh Ministerial meeting, under the authority of the WTO Preparatory Committee, and from 1 January 1995, with the coming into force of the WTO Agreement, the CTE was formally established to continue work in this area.

The CTE has initiated work on all items of its work programme and has brought environmental and sustainable development issues into the mainstream of WTO work. The CTE met regularly throughout 1996 (16 February, 6 April, 21 June, 12 September, 26-27 October, and 14 December). The main focus of the CTE's work in 1996 was the preparation of its Report to the 1996 Ministerial Conference. This process was assisted by background documents prepared by the Secretariat and documents, proposals and non-papers submitted by Members and the many statements made in the CTE meetings since 1995. As directed by the Ministerial Decision, the CTE submitted a report on progress on all items of its work programme to the 1996 Ministerial Conference.

In adopting the CTE's Report, Ministers agreed that the CTE will continue to work, reporting to the General Council, with the mandate and terms of reference contained in the Ministerial Decision on Trade and Environment. The WTO is interested in building a constructive relationship between trade and environmental concerns. Trade and environment are both important areas of policy making and they should be mutually supportive in order to promote sustainable development. The multilateral trading system has the capacity to further integrate environmental considerations and enhance its contribution to the promotion of sustainable development without undermining its open, equitable and non-discriminatory character.

All items of the work programme are on the CTE's agenda in 1997 in line with the recommendations contained in the Report to the 1996 Ministerial Conference. In order to advance the discussions in 1997, a thematic approach will be followed so as to allow all items on the work programme to be addressed in a systematic manner. During 1997, the CTE will: (a) broaden and deepen the analysis of all Items on the work programme; (b) widen participation in support of this analysis; and (c) produce a brief factual report to be submitted to the General Council in December. CTE meetings in 1997 will focus on items of the work programme related to market access on 21-22 May (Items 2, 3, 4 and 6); to the linkages between the multilateral environment and trade agendas on 22-24 September (Items 1, 5, 7 and 8); and to Items 9 and 10 and the CTE's report to the General Council on 24-26 November.

Further information on CTE meetings is contained in the WTO *Trade and Environment Bulletin*. A comprehensive discussion of the work programme and the conclusions and recommendations to Ministers are contained in the CTE's Report to the 1996 Ministerial Conference. This Report, dated 12 November 1996, is available from the WTO Secretariat and can be accessed at: http:\\www.wto.org.

# XII. Plurilateral agreements

## Agreement on Government Procurement

The Agreement on Government Procurement entered into force on 1 January 1996. The following WTO Members are Parties to the Agreement: Canada; the European Communities and its fifteen member States; Hong Kong, China; Israel; Japan; Korea; Liechtenstein; Netherlands with respect to Aruba; Norway; Singapore; Switzerland and the United States. Nine WTO Members have observer status in the Committee on Government Procurement: Argentina; Australia; Bulgaria; Chile; Colombia; Iceland; Panama; Poland and Turkey. Two non-WTO Members, Chinese Taipei and Latvia, and two inter-governmental organizations, the IMF and the OECD, also have observer status.

The Agreement is estimated to open up to international competition several hundred billion US dollars of procurement each year. It covers procurement of services as well as goods and procurement by central government entities, sub-central entities and by certain public utilities. The Agreement authorizes Parties to modify the mutually agreed coverage of schedules of individual Parties, subject to the procedures for rectification and modification specified in Article XXIV:6. Since its signature in April 1994, the Agreement's scope has been expanded through the incorporation in it of the results of a series of bilateral agreements between individual Parties. Rectifications of a more technical nature have also been made to the schedules of Parties. A loose-leaf system for Appendices to the Agreement, designed to reflect the up-to-date status of the Appendices as such changes occur, is being established.

Hong Kong, China acceded to the Agreement on 20 May 1997. Under the terms of the relevant Committee Decisions, Liechtenstein may accede to the Agreement by 26 August 1997 and Singapore by 20 September 1997. Chinese Taipei and Panama are currently conducting bilateral consultations with Parties with a view to their accession to the Agreement.

Article XXIV:7(b) and (c) of the Agreement calls on the Parties, not later than the end of the third year from the date of its entry into force, to undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties and eliminating any remaining discriminatory measures and practices. As stated in its Report to the Ministerial Conference of December 1996, the Committee agreed to undertake an early review, starting in 1997 with an examination of modalities. The review will, in particular, cover the following elements: simplification and improvement of the Agreement, including, where appropriate, adaptation to advances in the area of information technology; expansion of the coverage of the Agreement; elimination of discriminatory measures and practices which distort open procurement. An objective of the review is the expansion of the membership of the Agreement by making it more accessible to non-Parties. In this connection, a communication was sent by the Chairman of the Committee to the WTO Members, drawing their attention, as well as the attention of governments which are in the process of acceding to the WTO, to the review and inviting them to participate as observers in the meetings of the Committee (W/L/206). The work was initiated in February and May 1997 in informal consultations and on the basis of proposals by various Parties.

In 1997, Parties had recourse to dispute settlement procedures on two matters. In March 1997, the European Community requested consultations with Japan regarding the Japanese Ministry of Transport procurement of satellite navigation systems. The United States also joined these consultations.[15] In June 1997, the European Communities requested consultations with the United States regarding a sub-federal legislation regulating State contracts with companies doing business with or in Myanmar. Japan also requested to join these consultations. In July 1997, Japan requested consultations with the United states on the same matter.

In the period under review, the Committee on Government Procurement adopted a number of decisions on procedural matters relating to participation of observers in the Committee, accession to the Agreement, modalities for notifying threshold figures in national currencies, notification of national implementing legislation and the checklist of issues and circulation and derestriction of documents.

## Working Group on Transparency in Government Procurement

Following the election by the General Council in April 1997 of Ambassador Werner CorralesLeal (Venezuela) as Chairman of the Working Group on Transparency in Government Procurement established at the Singapore Ministerial Conference, the Working Group held two meetings, in May and July 1997. The Working Group's mandate has two stages. First, "to conduct a study on transparency in government procurement practices, taking into

[15]In July 1997, the European Communities notified the DSB that the European Communities had found a mutually agreed solution.

account national policies" and then, "based on this study, to develop elements for inclusion in an appropriate agreement". At its meetings so far it has initiated work on the first, study, component. At its first meeting on 23 May 1997, the Working Group heard presentations by the representatives of the UNCITRAL and the World Bank on the relevant instruments and activities relating to government procurement in their organizations. At its second meeting on 21 July 1997, the Working Group continued to take stock of existing instruments and activities on the basis of a paper by the Secretariat presenting factual information on the provisions related to transparency in international instruments on government procurement procedures (UNCITRAL Model Law on Procurement of Goods, Construction and Services; World Bank Procurement Guidelines; and the Plurilateral WTO Agreement on Government Procurement) and in WTO Agreements. At these meetings, Members made oral statements on the objectives and scope of the Working Group's mandate, and identified certain aspects of transparency that the Working Group would need to address in the study phase of its work. Some Members also made written submissions supporting their oral statements or describing their national procedures and practices in this area. At its next meeting to be held on 3-4 November 1997, the Working Group will proceed with its work on information gathering and analysis relating to the elements that constitute transparency in government procurement on the basis of a note by the Secretariat synthesizing the factual information on national procedures and practices that is available to the Working Group in various sources, notably in the responses to the questionnaire on Government Procurement of Services submitted to the Working Party on GATS Rules and in the information received from the APEC Government Procurement Experts Group on the national surveys conducted in that context, together with the information on existing international instruments.

The IMF and the World Bank have observer status in the Working Group pursuant to the cooperation agreements concluded between the WTO and these organizations. The Working Group decided that requests for observer status from other international organizations would be considered in accordance with normal WTO procedures for the granting of observer status to international intergovernmental organizations.

## Agreement on Trade in Civil Aircraft

This Agreement entered into force on 1 January 1980. It has 23 Signatories: Bulgaria, Canada, the European Communities, Austria, Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the UnitedKingdom, Egypt, Japan, Macau, Norway, Romania, Switzerland and the UnitedStates. In addition, Greece has signed the Agreement subject to ratification. The Agreement has 27 observers: Argentina, Australia, Bangladesh, Brazil, Cameroon, China, Chinese Taipei, the CzechRepublic, Finland, Gabon, Ghana, the IMF, India, Indonesia, Israel, Malta, Mauritius, Nigeria, Poland, the Russian Federation, Singapore, the Slovak Republic, Sri Lanka, Trinidad and Tobago, Tunisia, Turkey and UNCTAD.

The Agreement eliminates all customs duties and other charges on imports of civil aircraft products and repairs, binds them at zero level, and requires the adoption or adaptation of end-use customs administration. The Agreement prohibits Signatories from requiring purchasers or exerting pressure on purchasers to procure civil aircraft from a particular source, and provides that purchasers of civil aircraft products should be free to select suppliers on the basis of commercial and technical factors only. The Agreement regulates Signatories' participation in, or support for, civil aircraft programmes, and prohibits Signatories from requiring or encouraging sub-national entities or non-governmental bodies to take actions inconsistent with its provisions.

Although the Agreement is part of the WTO Agreement, it remains outside the WTO framework. Attempts to adapt the provisions of the Agreement to the WTO framework remain unsuccessful. Most recently, two proposals were under review. One was a proposal from the Chairman, the other a counter-proposal from one of the Signatories. At the meeting of the Committee on Trade in Civil Aircraft on 8 November 1996, the Chairman concluded that neither proposal was acceptable to all Signatories. Recalling that the deadlock raised systemic issues for the WTO that called for urgent action, the Chairman undertook to engage in informal consultations with Signatories to resolve the matter. As of the meeting of the Committee on 16 June 1997, no concrete progress has been achieved.

## International Dairy Agreement

The International Dairy Agreement (IDA), the successor to the International Dairy Arrangement, is a plurilateral agreement that has been signed by 10 parties – Argentina, Bulgaria, Chad, the EC (15), Japan, New Zealand, Norway, Romania, Switzerland, and Uruguay.

Prior to the establishment of the WTO, the former International Dairy Arrangement had 16 Members, including all major dairy traders except for the United States. Some purely

formal amendments aside, the text of the IDA is identical with that of the former Arrangement. The objectives of the IDA date back to concerns relevant at the time of its negotiation:

"The objectives of the Agreement shall be, in accordance with the principles and objectives agreed upon in the Tokyo Round Declaration of Ministers dated 14 September 1973,

- to achieve the expansion and ever greater liberalization of world trade in dairy products under market conditions as stable as possible, on the basis of mutual benefit to exporting and importing countries;

- to further the economic and social development of developing countries" (Article 1).

The Agreement covers all dairy products and lays down minimum export prices for international trade in certain milk powders, milk fat (including butter) and certain cheeses.

Under the old Arrangement, these minimum price provisions were applied to specific pilot products (skimmed milk powder, whole milk powder, butter milk powder, anhydrous milk fat, butter and cheese). The signatories were bound to ensure that export prices for these products would not be less than the minimum prices established in the Arrangement. With the collapse of dairy production in Russia at the beginning of the 1990s and in the face of a prolonged period of excess world supplies of butter and anhydrous milk fat, a derogation from the minimum export price for butter destined to Russia was agreed in June 1993. Less than a year later, the International Dairy Products Council decided to suspend minimum export prices for butter to all destinations. In October 1995, the new Council extended the suspension of minimum prices to *all* pilot products. This also led to the suspension of the activities of the Committee on Certain Milk Products established under the Council because its main function was the monitoring of the minimum price provisions. This decision was a result of the limited membership in the Agreement and the non-participation of some major dairy-exporting countries, which had made the operation of the minimum price provisions untenable. The suspension will be valid until end-December 1997.

At its meetings in 1995, 1996 and 1997, the International Dairy Council focused on assessing trends in, and factors affecting, the world market for dairy products. The Council bases its deliberations on information covering market data, trade and domestic policies submitted by IDA signatories in response to questionnaires (as well as such information submitted voluntarily by observers). The information is compiled by the Secretariat in a summary report which is made available to parties prior to the meetings of the Council. The results of these discussions in the Council are reflected in the annual publication by the WTO Secretariat *The World Markets for Dairy Products*[16].

In 1996, in view of a number of factors, including the limited membership of the IDA and the fact that Parties wishing to discuss dairy trade related aspects are able to do so in other fora of the WTO, several Parties expressed doubts about the continued usefulness of the Agreement. The Council invited the Chairperson to undertake informal consultations on the future of the Agreement. These consultations are currently continuing.

## International Bovine Meat Agreement

While the WTO Agreement and the multilateral trade agreements (e.g. the Agreement on Agriculture) create rights and obligations for all WTO Members, the International Bovine Meat Agreement binds only its signatories. As of July 1997, 17 Parties have joined the Agreement.[17] The Agreement replaces the Arrangement Regarding Bovine Meat which was negotiated in the Tokyo Round and had operated since 1980. Upon entry into force of the International Bovine Meat Agreement on 1 January 1995 the old Agreement was terminated.

The functions of the Agreement are carried out by the International Meat Council which also provides a regular forum for discussion of current developments in the meat markets. The Parties consider the exchange of information to be the primary rationale of the Agreement and have, therefore, agreed to exchange biannually detailed livestock and meat statistics. This information covers the herd structure, slaughter rates, production, stocks, consumption, prices and trade in the beef sector and is supplemented by statistics for pigmeat, poultry meat and sheepmeat. Parties to the Agreement are also required to furnish, periodically, information on domestic policies and trade measures affecting the bovine meat sector. In addition, the WTO Secretariat provides a market report and statistical summary to assist the Council's assessment of market issues and trends.

In 1996, the Council examined the functions of the Agreement based on the recognition that WTO Members have new priorities as the result of the Uruguay Round negotiations, such as the work of the Committee on Agriculture and the Committee on Sanitary and Phytosanitary Measures. In was also noted that, as regards market information, numerous other sources of information, including information prepared by other national and intergovernmental bodies, regularly evaluating meat market developments are available

[16]The report is available for sale from the WTO Secretariat, as well as the GATT publication *Summary of the Results of the Uruguay Round in the Dairy Sector*, November 1994, which provides the details of the new market access conditions (bound rates of duty and tariff rate quotas) and export subsidies reduction commitments for dairy products for a broad range of countries.

[17]Argentina, Australia, Brazil, Bulgaria, Canada, Chad, Colombia, European Community (15), Japan, New Zealand, Norway, Paraguay, Romania, South Africa, Switzerland, United States and Uruguay.

today. In response, the Council decided to reduce its regular review of market developments from two annual meetings to one annual meeting.

In view of these factors, the Council has started, in April 1997, informal consultations regarding the future of the Agreement.

# Part II

## I. The WTO budget and Secretariat staffing

The WTO's budget for 1998 as approved by the General Council, acting on behalf of WTO Members, amounts to CHF 116 million. Overall the budget covers the costs of holding meetings, maintenance costs for the Secretariat headquarters in Geneva, technical cooperation missions and other official visits overseas. The budget is also used for technical assistance and for trade policy courses as well as for the salaries and related costs of the Secretariat staff of slightly over 500. A sum of money totalling CHF 2.5 million was also set aside in the 1998 budget to cover the variable costs of the Appellate Body. The WTO also finances, jointly with UNCTAD, the operations of the International Trade Centre.

## II. Technical cooperation and training

The establishment of the WTO and the new multilateral trading system that emerged from the Uruguay Round negotiations, have certain implications for the technical cooperation that is provided to developing countries and to economies in transition, in terms of both requirements and the way in which assistance is delivered.

The present activities already largely take account of the changing trading environment and emerging new requirements. The WTO exercises flexibility to best tailor the technical cooperation activities to the needs and priorities of individual countries, groups of countries or regions, taking into account their level of development. This flexibility can be exercised through a variety of instruments that the WTO has at its disposal for delivering such assistance, including seminars, workshops, technical missions, briefing sessions, and training through trade policy courses. The intention is to respond specifically to the requirements of Members both on the contents and on the format. Each type of activity differs in nature and in duration, and is determined on a case-by-case basis. While some activities, by their very nature, are carried out in the country or region concerned, others take place at the WTO headquarters. The financial resources involved are directly related to the duration and the geographical location of the activity.

Technical cooperation in the WTO Secretariat is guided by the fundamental objective of assisting recipient countries in their understanding and implementation of agreed international trade rules, achieving their fuller participation in the multilateral trading system and ensuring a lasting, structural impact on the recipient country. The form is on directing all instruments towards human resource development and institutional capacity building. A follow-up of technical cooperation is increasingly part of the programmes so as to ensure long-lasting relations with beneficiary countries.

Concerted efforts are being undertaken to better coordinate WTO activities with other agencies, in particular in mapping out joint technical assistance programmes with ITC and UNCTAD. Contacts are established at the operational level between the agencies, both in Geneva and during missions, to ensure that the best use is made of available expertise and limited human and financial resources. Also, more attention in the technical cooperation activities is given to the role of the private sector in the development process. Efforts are undertaken to increase the number of participants representing the private sector in the seminars and workshops.

The funds provided by the regular WTO budget for technical cooperation and training activities have been supplemented by additional funds provided by some Members for specific activities and programmes. Japan has made special contributions to finance two regional seminars in Asia; Norway has provided funds for the establishment of a WTO Trust Fund for the Least-Developed Countries to be used over the next three years; the European Community is funding a series of regional seminars on the Uruguay Round for ACP countries; and New Zealand has committed funds to be used for activities with the Forum

Island Member Countries over the next two years. Since the creation and entry into force of the World Trade Organization, a total of 250 technical cooperation activities have been organized. Major efforts have been directed towards assisting African countries, while activities for countries in other regions have been maintained. Africa continues to be covered in large measure under specific programmes. The Integrated Technical Assistance Programme in Selected Least-Developed and other African Countries was undertaken initially in eight African countries: four least developed countries, (Benin, Burkina Faso, Tanzania and Uganda) and four developing countries (Côte d'Ivoire, Ghana, Kenya and Tunisia). In the light of experience in the conduct of this programme, its further development and extension to other African and least-developed countries is envisaged for execution in the short – and medium-term. The objective is to enhance the development prospects and competitiveness of African and least-developed countries through increased participation in international trade.

The programme is based on two fundamental themes: (1) close coordination at the design stage and particularly in the conduct of the programme among the three participating international organizations, i.e. WTO, UNCTAD and ITC, alongside the strengthening of relationships on these matters with the World Bank and UNDP, as well as other organizations; and (2) a combination of technical assistance activities directed towards human development and institutional capacity building, particularly through the use, as collaborators and not only as beneficiaries, of local institutions and local trainers, with a view to reaching a significant, durable impact. Specific country report have been prepared and the implementation of programmes started.

Separately, preparation for a High-Level Meeting for Least-Developed Countries' Trade and Development, scheduled for 27-28 October 1997 were begun in the first half of 1997. The Sub-Committee on Least-Developed Countries has held various preparatory meetings an reported to the Committee on Trade and Development.

At the Singapore Ministerial Conference, the Netherlands Government announced a contribution to the WTO Trust Fund for the benefit of developing countries, including least-developed countries, economies in transition and countries involved in the process of accession to the WTO. The technical cooperation activities financed from the Dutch contribution will be aimed at the implementation by beneficiary countries of their rights and obligations in the WTO multilateral trading system. It would enhance the human development and/or the institutional capacity of the beneficiaries in this respect.

In 1996 and during the first half of 1997, specific technical assistance activities included:

- national, regional and sub-regional seminars/workshops on the WTO multilateral trading system;
- two training courses on dispute settlement procedures and practice;
- briefing sessions on a regular course for Geneva-based delegations and visiting officials of least-developed countries, developing countries, economies in transition and countries in the process of accession;
- technical missions on notification requirements;
- technical missions to assist countries in the accession process to the WTO and other countries that are contemplating accession;
- technical assistance in the preparation of the trade policy reviews of developing countries and least-developed countries;
- the provision of technical information on individual products (data on trade flows, tariffs and non-tariff measures) and the provision of comprehensive studied on the outcome of the Uruguay Round for requesting individual countries or groups of countries, as well as background notes on specific issues in different areas of the negotiations;
- fact-finding missions and needs assessment under the WTO/UNCTAD/ITC Integrated Programme for African and other Least-Developed Countries.

## Trade policy courses

In the period under review, the WTO Secretariat organized two Regular and two Special Trade Policy Courses. The two Regular Courses in English and French respectively, were held for government officials from developing countries involved in the formulation and implementation of trade policy. Each Regular Course lasted 14 weeks and took place at WTO Headquarters in Geneva. Twenty-four WTO fellowships covering participants' expenses were available for each Course. The objective of the Courses is to widen the participating officials' understanding of the multilateral trading system and international trade law, and of the activities, scope and structure of the WTO, in order to allow them to improve the effectiveness of their work in their own administrations and to promote a more active participation of their countries in the work of the WTO.

In addition, in the first half of 1997, the WTO Secretariat organized two shorter Special Trade Policy Courses for 24 officials from economies in transition: one eight-week course for officials from Eastern and Central European and Central Asian Countries financed by the

Swiss Government (since 1991) and one four-week course for 24 officials from Georgia, Russian Federation and Ukraine funded by the United States Government (since 1994).

The programme of the Special Courses is similar in many respects to the Regular Trade Policy Courses in that they are designed to familiarize participants with the functioning of the multilateral trading system with special emphasis on issues relating to accession of relevance to economies in transition.

## III. Cooperation with other international organizations

Since its establishment, the WTO has had extensive contact with other inter-governmental organizations interested in its activities. Relations have been established with relevant organizations in the United Nations system, the Bretton Woods organizations, or various regional bodies to ensure that the resources and expertise of the international community remain focused, coordinated and, most important, relevant to the most pressing global needs.

Many of the organizations have observer status in one or more of the various WTO Committees, Councils or working groups. Some of them are also represented in the negotiating groups for trade in certain services sectors. A list of all organizations with observer status is provided below.

Table V.9

**International intergovernmental organizations**

*a. Observer status in the WTO*

| | | GC | TPRB | CTG | CTS | TRIPS | ADP | SCM | SG | AG | SPS | BOPS | CRTA | CTD | CTE | MA | LIC | RO | TBT | TRIMS | VAL | GATT CPS | GATT CNCL | GATT CTD |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **UN bodies and specialized agencies:** | | | | | | | | | | | | | | | | | | | | | | | | |
| UN | United Nations | X | | X | X | X | | | | | | | | X | X | | | | | X | | X | X | X |
| Codex | Codex Alimentarius Commission | | | | | | | | | | X | | | | | | | | X | | | | | |
| CSD | Commission for Sustainable Development | | | | | | | | | | | | | | X | | | | | | | | | |
| CBD | Convention on Biological Diversity | | | | | | | | | | | | | | X | | | | | | | | | |
| CITES | Convention on International Trade in Endangered Species | | | | | | | | | | | | | | X | | | | | | | | | |
| ECA | Economic Commission for Africa | | | | | | | | | | | | | X | | | | | | | | X | X | X |
| ECE | Economic Commission for Europe | | | P | | | | | | | | | | X | | | | | X | | | X | X | X |
| ECLAC | Economic Commission for Latin America & the Caribbean | | | | | | | | | | | | | X | | | | | | | | X | X | X |
| ESCAP | Economic & Social Commission for Asia & the Pacific | | | | | | | | | | | | | X | | | | | | | | X | X | X |
| FAO | Food & Agriculture Organization | X | X | X | | X | | X | | X | X | | X | X | X | | | | X | | | X | X | X |
| ITU | International Telecommunication Union | P | | | P | | | | | | | | | | | | | | | | | | | |
| UNCTAD | United Nations Conference on Trade & Development | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| UNDP | United Nations Development Programme | | | | | | | | | | | | | | X | | | | | | | | | |
| UNEP | United Nations Environment Programme | P | | | | | | | | | | | | | X | | | | | | | | | |
| UNIDO | United Nations Industrial Development Organization | P | | | | | | | | | | | | X | X | | | | | | | X | | |
| WFC | World Food Council | | | | | | | | | | | | | X | | | | | | | | | | X |
| WFP | World Food Programme | | | | | | | | | X | | | | | | | | | | | | | | |
| WHO | World Health Organization | P | | | | | | | | | X | | | | | | | | X | | | | | |
| WIPO | World Intellectual Property Organization | X | | | | X | | | | | | | | | | | | | | | | X | X | |

Table V.9 *(continued)*

**International intergovernmental organizations**

*a. Observer status in the WTO*

| | | GC | TPRB | CTG | CTS | TRIPS | ADP | SCM | SG | AG | SPS | BOPS | CRTA | CTD | CTE | MA | LIC | RO | TBT | TRIMS | VAL | GATT CPS | GATT CNCL | GATT CTD |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Other organizations:** | | | | | | | | | | | | | | | | | | | | | | | | |
| ACP | African, Caribbean & Pacific Group of States | P | | P | P | | P | P | P | P | P | X | | X | X | X | P | X | P | P | X | X | X | |
| ARIPO | African Regional Industrial Property Organization | | | | | P | | | | | | | | | | | | | | | | | | |
| | ANDEAN Group | | | | | | | | | | | | | X | | | | | | | | X | X | X |
| | Arab Maghreb Union | P | | P | P | | | | | | | | P | P | | | | | | | | | | |
| | Arab Monetary Fund | P | | P | P | | | | | | | | | | | | | | | | | X | X | |
| CARICOM | Caribbean Community Secretariat | | | | | | | | | | | | | X | | | | | | | | X | X | X |
| UDEAC | Central African Customs & Economic Union | | | | | | | | | | | | | X | | | | | | | | X | | X |
| | Commonwealth Secretariat | | | | | | | | | | | | | X | | | | | | | | X | | X |
| GCC | Cooperation Council for the Arab States of the Gulf | | | | | | | | | | | | | X | | | | | | | | X | X | X |
| EBRD | European Bank for Reconstruction & Development | P | X | P | P | | | | | | | X | P | | | | | | | | | X | X | |
| EFTA | European Free Trade Association | P | X | P | P | P | | | | | P | X | X | X | X | | | X | P | | | X | X | X |
| IDB | Inter-American Development Bank | | P | | | | | | | P | | | P | X | | X | | X | | P | X | X | X | X |
| ICGFI | International Consultative Group on Food Irradiation | | | | | | | | | | P | | | | | | | | | | | | | |
| IEC | International Electrotechnical Commission | | | | | | | | | | | | | | | | | | X | | | | | |
| IGC | International Grains Council | | | P | | | | | | X | | | | X | | | | | | | | | | X |
| OIE | International Office of Epizootics | | | | | | | | | | X | | | | | | | | X | | | | | |
| ISO | International Organization for Standardization | | | | | | | | | | X | | | | X | | | | X | | | | | |
| ITCB | International Textiles and Clothing Bureau | P | | X | | | | | | | | | | | | X | | X | | | | | | |
| ITC[1] | International Trade Centre UNCTAD/WTO | P | | | P | | | | | | X | | | X | X | | | | X | | | | | |
| UPOV | International Union for the Protection of New Varieties of Plants | | | | | X | | | | | | | | | | | | | | | | | | |
| | Islamic Development Bank | | | | | | | | | | | | | P | | | | | | P | | | | |
| SELA | Latin American Economic System | P | | P | P | P | | | | P | P | | P | X | P | P | | | | P | | X | X | X |
| ALADI | Latin American Integration Association | | | | | | | | | | | | P | X | | | | | | P | | X | X | X |
| OIV | Office International de la Vigne et du Vin | | | | | P | | | | | P | | | | | | | P | | | | | | |
| OAU | Organization of African Unity | P | | P | | | | | | | | | P | P | | | | | | | | | | |
| OAS | Organization of American States | P | | P | P | P | | | | | | | X | X | | | | | | | | X | X | X |
| OECD | Organization for Economic Cooperation & Development | X | X | X | P | X | [2] | [2] | [2] | X | P | X | P | X | X | | | X | X | X | | X | X | X |
| | Organization of the Islamic Conference | P | | P | | | | | | | | | P | P | | | | | | | | X | | |
| RIOPPAH | Regional International Organization for Plant Protection and Animal Health | | | | | | | | | | P | | | | | | | | | | | | | |
| IPPC | Secretariat of the International Plant Protection Convention | | | | | | | | | | X | | | | | | | | | | | | | |

Table V.9 *(continued)*

**International intergovernmental organizations - Observer status in the WTO**

*a. Observer status in the WTO*

| | | GC | TPRB | CTG | CTS | TRIPS | ADP | SCM | SG | AG | SPS | BOPS | CRTA | CTD | CTE | MA | LIC | RO | TBT | TRIMS | VAL | GATT CPS | GATT CNCL | GATT CTD |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| SIECA | Secretariat of the General Treaty on Central American Economic Integration | P | | P | P | P | | | | | | | | X | | | | | | | | X | X | X |
| SADC | Southern African Development Community | | | P | P | | | | | | | | P | X | | | | | | | | X | | |
| WCO | World Customs Organization | | | X | | X | | | | | | | | | X | X | | X | X | | X | X | | |

[1] The ITC is a joint subsidiary organ of the WTO and the UN, the latter acting through the UNCTAD.

[2] The Committee has deferred action on the OECD's request, and agreed that in the interim the OECD will be invited to attend on an ad hoc basis.

Table V.9

**International intergovernmental organizations**

*b. Observer status in certain other bodies (as referred to in Explanatory note 3)*

| | | Financial Services | GATS Rules | Professional Services | Specific Commitments | Working Group on Government Procurement | Working Group on Investment | Working Group on Competition Policy |
|---|---|---|---|---|---|---|---|---|
| **UN bodies and specialized agencies:** | | | | | | | | |
| UN | United Nations | X | X | | X | | | |
| UNCTAD | United Nations Conference on Trade and Development | X | X | X | X | | X | |
| **Other organizations:** | | | | | | | | |
| ACP | African, Caribbean & Specific Group of States | X | | X | | | | |
| SELA | Latin American Economic System | | | | | P | P | P |
| OAU | Organization of African Unity | | | | | | P | |
| OECD | Organization for Economic Cooperation and Development | X | | X | X | P | P | P |

*Explanatory notes to table V.9:*

1. An "X" indicates observer status; a "P" indicates that consideration of the request for observer status is pending.

2. The bodies listed in the table are, respectively, the General Council (GC); Trade Policy Review Body (TPRB); Council for Trade in Goods (CTG); Council for Trade in Services (CTS); Council for TRIPS (TRIPS); the Committees on Anti-Dumping Practices (ADP); Subsidies and Countervailing Measures (SCM); Safeguards (SG); Agriculture (AG); Sanitary and Phytosanitary Measures (SPS); Balance-of-Payments Restrictions (BOPS); Regional Trade Agreements (CRTA); Trade and Development (CTD); Trade and Environment (CTE); Market Access (MA); Import Licensing (LIC); Rules of Origin (RO); Technical Barriers to Trade (TBT); Trade Related Investment Measures (TRIMS); Customs Valuation (VAL). Additional information concerning the observer status of the listed organizations in the GATT CONTRACTING PARTIES (GATTCPS), Council of Representatives (GATT CNCL) and Committee on Trade and Development (GATT CTD) is provided in the last three columns.

3. Since the guidelines on observer status for international organizations (WT/L/161, Annex 3) provide that requests for observer status from organizations shall not be considered for meetings of the Budget Committee or the Dispute Settlement Body, these bodies are not listed in the table. Also not listed are the Textiles Monitoring Body, which has no observers, the committees and councils under the Plurilateral Trade Agreements and working parties on accession. As for the four bodies under the Council for Trade in Services, namely the Committees on Financial Services and on Specific Commitments, and the working parties on GATS Rules, and Professional Services, as well as the three working groups on Investment, Competition Policy and Government Procurement, information is provided in a separate table (see above).

4. The IMF and World Bank have observer status in WTO bodies as provided for in their respective Agreements with the WTO (WT/L/195), and are not listed in this table.

## International Monetary Fund (IMF)

Collaboration and cooperation between the WTO and the IMF was strengthened last December when the heads of the two organizations signed an agreement in Singapore during the WTO's Ministerial Conference. Signed by the WTO's Director-General, Mr. Renato Ruggiero, and the IMF's Managing Director, Mr. Michel Camdessus, the Agreement focuses on three main elements. First, it lays the basis for carrying forward the WTO's Ministerial mandate to achieve greater coherence in global economic policy by cooperating with the IMF and the World Bank. Second, reflecting the synergies in the work and responsibilities of the IMF and the WTO, the Agreement provides channels of communication to ensure that the rights and obligations of Members are integral to the thinking of each organization. Third, in keeping with enhanced cooperation, the Agreement accords observer status to the IMF and

WTO in certain of each other's decision-making bodies. Thus, it grants the WTO observer status at the Fund's Annual meetings and at the Interim Committee, as well as at the appropriate meetings of the IMF's Executive Board, when it considers trade issues, and in turn grants observer status to the IMF on most WTO bodies. In April, August and September 1997, representatives of the WTO secretariat participated at the IMF's Executive Board meetings on the World Economics Outlook and on a possible amendment of the IMF's Articles of Agreement with respect to capital movements.

The Agreement between the IMF and the WTO has other benefits, including better access for both organizations to each other's information and data. Such access is vital to avoiding unnecessary duplication. The IMF's macroeconomic information is of great use to the WTO Secretariat, especially in the preparation of the in-depth and regular Trade Policy Reviews of each WTO Member. In turn, the IMF has access to a wide range of WTO information, including its Integrated Data Base, which contains trade statistics and information on WTO Members' tariff rates, and to Members' schedules of concessions in goods and services; this helps the Fund in its surveillance and lending activities.

While the Agreement establishes new mechanisms by which the institutions can address each other, it also reflects and builds on a long-standing successful relationship. Thus, the institutions emphasize the need for their day-to-day dialogue to develop in a natural way, creating a more fruitful, two-way relationship between the organizations. Now that the institutional footing has been put in place by the Agreement, work has started to address issues related to achieving better coherence in global economic policy making, an area where the WTO, the IMF and the World Bank each have distinctive rôles. During the first half of 1997, work also began on the preparations for a High-Level Meeting on Least-Developed Countries. The WTO is organizing this meeting with the International Trade Centre (ITC) and UNCTAD and the IMF is an active participant.

Under the GATT 1948, the formal relationship between the GATT and the IMF derived primarily from the provisions on balance-of-payments restrictions. In this regard, a close and long-standing institutional relationship existed between the two organizations, whereby the IMF provided information on and an assessment of the situation of the balance of payments of the contracting party engaged in consultations under Articles XII or XVIII:B of the GATT. In accordance with Article XV of the GATT, contracting parties who were not at the same time members of the IMF have, in the past, either signed a special exchange agreement with the CONTRACTING PARTIES or have been granted a waiver of indefinite duration. In addition, Article XV also provided for the IMF and the GATT CONTRACTING PARTIES to seek cooperation with regard to exchange questions within the jurisdiction of the IMF and to questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES, and for the latter to consult fully with the former on problems concerning monetary reserves, balance-of-payments and foreign exchange arrangements.

In contrast to the previous situation, formal relations between the WTO, the IMF and the World Bank now encompass a larger range of issues. The IMF's role within the WTO system through GATT Article XV now also covers the corresponding Article of the GATS (Article XI). Similarly, the IMF's balance-of-payments role is maintained but now enlarged to cover services (Article XII of the GATS).

## The World Bank

In April 1997 the World Bank and the WTO signed an agreement to strengthen their cooperation and collaboration. Signed by Mr. Renato Ruggiero, Director-General of the WTO, and Mr. James Wolfensohn, President of the World Bank, at the World Bank's headquarters in Washington, D.C., the agreement focuses on three main elements. First, it provides the basis for carrying forward the WTO's Ministerial mandate to achieve greater coherence in global economic policy making by cooperating with the World Bank and the International Monetary Fund (IMF). The WTO Secretariat and the World Bank are expected to consult and exchange views on all matters of common interest. Second, the Agreement calls for improved communication between the two institutions through the exchange and sharing of information, thus ensuring that interests of Members are integral to the thinking of each organization. The WTO and the World Bank will share access to their respective databases, undertake joint research and technical cooperation activities and exchange reports and other documents. Third, the Agreement accords observer status to the World Bank and the WTO to attend meetings of each other's decision-making bodies. Thus, the WTO attends the Annual Meetings of the World Bank's Board of Governors, the Development Committee and sessions of the Bank's Executive Board as appropriate, while the World Bank may attend the WTO's Ministerial Conference, the General Council and other relevant committee meetings. In July 1997, a member of the WTO Secretariat participated at the Bank's Executive Board discussions of Global Economic Prospects and Developing Countries.

The Agreement provides the WTO Secretariat with access to World Bank information, including the Bank's Economic and Social Database (BESD) and the World Debt Tables, the World Bank Atlas and World Development Indicators, its Trends in Developing Economies and its African Development Indicators. This information is essential to the work of the WTO's Trade Policy Review Body, the Committee on Trade and Development and the Sub-committee on Least Developed Countries. In turn, the World Bank has access to the Integrated Database of the WTO and to WTO Members' schedules of market access commitments and concessions in goods and services.

In 1997, the WTO and the World Bank's Economic Development Institute began collaboration on a project that uses information technologies to help government officials, academics, journalists and business leaders access information related to trade and development. Part of the project includes a joint WTO-World Bank Trade and Development Internet site. Funding for the joint collaboration comes from a trust fund made possible by financial contributions received from the governments of the Netherlands and Norway.

During the first half of 1997, work began on the preparations for a High-Level Meeting on Least-Developed Countries. The WTO is organizing this meeting with the International Trade Centre (ITC) and UNCTAD and the World Bank is an active participant.

## United Nations Conference on Trade and Development

There has always been a significant working relationship between the World Trade Organization (WTO) and the United Nations Conference and Trade and Development (UNCTAD) reflecting a shared interest in advancing the cause of global trade liberalization within the framework of the multilateral system. In addition to biennial meetings of the two executive heads, the working relationship at all levels of both organizations has been improved in areas such as research, trade and investment, trade and competition, trade and environment, trade and development and, in particular, technical cooperation activities.

The overall objective has been to improve coordination across the board and to make better use of collective resources. But within this broader framework of cooperation, the major focus of these joint efforts has been to assist least-developed countries, and African countries in particular, in integrating more fully and effectively into the world trading system.

The two organizations and the International Trade Centre (see below) have also collaborated in the establishment of an unprecedented Technical Assistance Programme, designed to target specific African countries and help them expand and diversify their trade, and ease their integration into the multilateral trading system. The drive for greater coordination between WTO and UNCTAD underscores the broader need to integrate the developing world – and especially the least-developed countries – more fully into the global economy. The WTO and UNCTAD will continue to work together towards this goal, especially in the latter half of 1997 when a High-Level Meeting for Least-Developed Countries will take place. The object of the meeting is to assess the areas where trade-related technical assistance could be provided to help LDCs realize more of their trade export capacity.

## The International Trade Centre UNCTAD/WTO

Established by GATT in 1964, the International Trade Centre UNCTAD/WTO (ITC) is a joint subsidiary organ of the WTO and the United Nations, the latter acting through the UN Conference on Trade and Development (UNCTAD). The WTO General Council and the UNCTAD Trade and Development Board determine the broad policy guidelines of ITC's programme and the two contribute equally to ITC's regular budget, which in 1996 totalled US$22 million. ITC has also been designated by the UN Economic and Social Council as the focal point for technical cooperation with developing countries in trade promotion.

Cooperation among ITC, WTO and UNCTAD was given a new impetus in 1996. ITC proposed a general framework for the technical cooperation activities of the three organizations, which was agreed upon by the three Executive Heads after UNCTAD IX. This common understanding has found a number of practical applications in both the strengthening of coordination in specific programme areas and the development of joint projects. Furthermore, a framework agreement was concluded among ITC, WTO and UNCTAD to promote complementarity and to avoid duplication of technical cooperation activities in Africa. A joint ITC/UNCTAD/WTO "Integrated Technical Assistance Programme in Selected Least – Developed and other African Countries" was launched in 1996. The programme aims at assisting selected African countries to strengthen their participation in the multilateral trading system resulting from the conclusion of the Uruguay Round.

ITC continued to undertake technical cooperation activities as a follow-up to the Uruguay Round agreements, in cooperation with WTO and UNCTAD. These activities included dissemination of information through seminars and workshops based on its Business Guide to the Uruguay Round; the identification of priority areas for further action to expand the

business community's participation in the new trading environment; and strengthening of local capacities to provide information and advice on the Uruguay Round Agreements.

Throughout the first half of 1997, the ITC worked closely with WTO and UNCTAD to prepare for the High-Level Meeting on Integrated Initiatives for Least Developed Countries' Trade Development in October 1997. The meeting was agreed upon at the WTO Ministerial Conference in Singapore. ITC's contributions to this joint effort included a survey among the business community in developing countries on priorities for trade development and related technical cooperation needs, as well as initiatives to include the participation of a small group of eminent business persons in an advisory capacity in the meeting.

At ITC's Joint Advisory Group (JAG) meeting in April 1997, representatives from 94 WTO and UNCTAD Member governments and 12 international organizations expressed strong support for ITC's recent reform and revitalization measures, including its refocused programme and its restructuring. They endorsed ITC's efforts to reinforce the complementaries and synergies among ITC, WTO and UNCTAD, and a number of governments announced voluntary contributions to ITC's technical cooperation programme. At the meeting, WTO and UNCTAD announced the extension of the term of appointment of ITC's Executive Director, Mr. J. Denis Bélisle, for another three-year period, as confirmed by the UN Secretary General upon the recommendation of the Executive Heads of WTO and UNCTAD.

## Annex I – New publications

**Opening markets in financial services and the role of the GATS**

This first edition in our new series of special studies explores some of the issues surrounding the financial service negotiations, analyzes what is at stake, and assesses what WTO Members have already achieved in previous negotiations. This study contains detailed tables, charts and boxes to help the reader understand some of the characteristics of the financial services sector and appreciate the full benefits of its trade liberalization.
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The GATT's own article-by-article handbook on the General Agreement. It provides an account of the drafting history, interpretation and application of GATT rules, based on the documentary records of GATT. The new edition of the Guide to GATT Law and Practice 1947-1994 gives the most complete and up-to-date presentation of GATT law from 1945 to 31 December 1994, when the World Trade Organization was established. It incorporates decisions by GATT bodies, the many interpretations of GATT law made by dispute settlement panels and a new chapter on institutional and procedural matters. Each researched chapter analyses precedents and practice, and presents the relevant material in the original text, with full documentary references.
Available in English only.
ISBN 92-870-1181-8. Price Sfr 200.-

**The world market for dairy products 1996**

The most important developments in global production, consumption, trade and prices of milk products are provided in this annual report. The report provides an up-to-date analysis of the dairy situation and recent developments in the dairy policies of major producing countries. It contains a comprehensive statistical annex with tables and charts.
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ISBN 92-870-1192-3. 73 pages. Price Sfr 15.-

**The international markets for meat 1997**

This annual report examines trends in the production, consumption and trade of bovine animals and meat and describes major trade policy developments in this area. The report provides a comprehensive statistical analysis and contains detailed tables and charts by product category. (Summary reports are also provided on the developments in the international markets for pig, poultry and sheepmeat.)
Available in English, French and Spanish.
ISBN 92-870-1190-7. 111 pages. Price Sfr 15.-

**Reshaping the world trading system – a history of the Uruguay Round**

Take 120 governments and territories, each bent on vigorously seeking its own self-interest. Give them a mandate to reach agreement on new rules for more open markets –

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Second updated edition forthcoming end 1997 in English only.
ISBN 92-870-1149-4. 391 pages. Price Sfr 40.-

**Guide to the Uruguay Round Agreements**

A companion volume to Reshaping the world trading system, this new book takes the non-specialist reader through the legal texts that were the results of the Uruguay Round. It includes an economic analysis of the impact of the agreements and a number of other features such as "how to read GATS schedules".
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# Annex II – Trade Policy Review Body – Concluding remarks by the Chair of the Trade Policy Review Body

## Brazil – 30-31 October 1996

The Trade Policy Review Body has now completed the second review of Brazil's trade policies and practices – the first under WTO provisions. These remarks, made on my own responsibility, summarize the main points of the discussion. They are not intended to substitute for the collective evaluation and appreciation of Brazil's trade policies and practices. Details of the discussion will be reflected in the minutes of the meeting.

The discussion developed under three main themes: (i) macroeconomic environment and trade relations; (ii) general measures affecting trade; and (iii) sectoral aspects.

**Macroeconomic environment and trade relations**
**Achievements of the Plano Real and future developments**

Members recognised that the significant economic reforms carried out since 1992, in particular through the Plano Real, had resulted in economic stabilization and resumption of GDP growth. They commended the continuing reforms, which included trade liberalization, privatization, deregulation of state monopolies, and opening of foreign investment. As a result, Brazil's participation in the global trading system had expanded; this was reflected in a higher ratio of total trade to GDP. Members noted that imports of goods and services had grown more rapidly than exports and asked, firstly, how Brazil planned to maintain equilibrium in the balance of payments and secondly, to comment on the possibility that its exchange rate may have been overvalued. They also noted that economic stabilization had yet to be reflected in comparable growth in employment.

Members welcomed the adaptation of domestic laws to WTO rules, including in such areas as anti-dumping, countervailing, safeguards, and intellectual property. In respect of investment provisions, they welcomed the elimination of the concept of "Brazilian company of national capital". They also sought information on progress in the elaboration of a single foreign trade law, and on the prospects for tax reform, given the complexities of the domestic tax system. Details were also requested on future privatization schemes, as well as on plans to reduce certain restrictions on remittances of investment profits and the high value added tax on some remittances.

In response, the representative of Brazil said that the latest indicators would show a further decline in the rate of inflation to around zero in September, while recovery was expected to strengthen in the next two years. Productivity, employment and real income had

both increased since the introduction of the *Plano Real*; estimates also indicated growth in consumption by lower income groups. He gave details of plans to increase the domestic savings rate, as well as for broad-ranging fiscal, administrative and social security reforms. He noted that Brazil had traditionally financed a capital account deficit with merchandise trade surpluses; when the Plano Real was introduced reserves were reasonably high, and had increased as a result of high interest rates and growing confidence in the economy. Since the initial real exchange rate appreciation, depreciation had consistently exceeded the rate of inflation for tradeable goods.

The representative gave details of the tax reform and its objectives, including related constitutional measures to facilitate further tax changes. The recent elimination of the state value added tax (ICMS) for primary and semi-manufactured goods should increase the competitiveness of Brazilian exports. Details were also provided on recent investment measures benefiting foreign capital and the elimination of state monopolies in telecommunications, oil and re-insurance. He provided information on the objectives and progress of the privatization programme; in 1996 this had extended into infrastructure, transport, electricity and telecommunications. The elaboration of a single trade law was still being discussed by the Government.

**Multilateralism and regionalism**

Members took note of the rapid growth of intra-MERCOSUL trade, and expressed concern about possible trade diversion. They expressed their hope that regional integration would take place in the spirit of open regionalism, complement multilateral trade liberalization and be consistent with WTO principles. The ongoing efforts to establish a free trade zone between MERCOSUL and the Andean Pact countries were noted.

Although Brazil's adoption of MERCOSUL's common external tariff had led to a number of WTO bindings being broken, members expressed satisfaction that Brazil had offered to enter into negotiations with affected parties. In this regard, Brazil was asked whether the import data required to conduct such negotiations were available. Noting Brazil's numerous national exceptions to MERCOSUL's common external tariff, Brazil was asked whether such exemptions allowed the application of tariff levels below, as well as above, the common rate.

In response, the representative of Brazil said that Brazil had pursued the deepening of economic integration at the regional and sub-regional levels, but this was not a departure from Brazil's traditional multilateral approach to trade. He said that MERCOSUL's external relations confirmed the concept of open regionalism, and illustrated this with recently concluded FTAs, ongoing negotiations for the FTAA and other agreements and dialogues outside the region. He provided detailed statistics showing the growth of trade with partners outside the region as well as within. He noted that the actual tariff rate under the MERCOSUL CET was lower than the pre-existing tariff averages. Tariff items where WTO bindings been exceeded had been notified and the MERCOSUL members stood ready to engage in consultations with interested Members. He also provided details of Brazilian exemptions to the CET, and noted that convergence was to take place no later than 1 January 2001; Brazil was accelerating the pace of its convergence.

**General measures affecting trade**

Members welcomed Brazil's successful completion of its autonomous liberalization programme, including the elimination of import prohibitions, reductions in the average tariff and removal of non-tariff barriers. This confirmed Brazil's commitment to free trade. However, some applied tariff rates were still seen as relatively high. Moreover, bound rates were considerably higher than applied tariffs, and frequent ad hoc changes had been undertaken since 1992 to protect particular products. Those two factors reduced predictability for Brazil's trading partners and reduced the transparency of its trade policy régime.

While import licensing procedures had been streamlined, concerns were raised about the level of licensing fees and reduction of the validity of licences. Concerns were also expressed about the practice of considering payments terms as a factor in granting licences. Members believed that Brazil's licensing system could benefit from greater transparency and efficiency in implementation.

Members called attention to the significant increase in anti-dumping and countervailing activity during 1992-96, although with a decline towards the end of the period. Although understanding was expressed for the difficulties faced by the Brazilian textile industry, some members believed that the safeguard measures on textile products were not compatible with WTO provisions; Brazil was encouraged to find other ways to assist the industry. Members were also concerned about the increased tariffs on toys taken as a safeguard measure and the precedent that such increases might cause.

Members noted that Brazil encouraged exports through a number of schemes, including internal tax concessions, assistance to the aircraft industry, the Export Finance Programme

(PROEX) and the fiscal benefits of the Special Export Programmes (BEFIEX). Brazil was asked whether it intended to phase out those subsidies.

Brazil was also asked why it did not consider joining the Agreement on Government Procurement and whether it would participate in an initiative aimed at establishing a multilateral transparency agreement in that area.

Expressing concerns about standards creating unnecessary trade barriers, members questioned Brazil on the principles governing its use of technical regulations and how the principle of "priority use of Brazilian norms" was implemented.

In response, the representative of Brazil noted that, as a result of the Uruguay Round, Brazil had bound its entire tariff, ensuring greater predictability as the maximum rate was known to all members. Ceiling bindings were a widely used technique in tariff negotiations, providing both predictability and some needed flexibility within WTO commitments. Brazil had been applying tariffs below bindings to ensure the supply of goods, enhance its own competitiveness and afford improved market access to its partners. The occasional increase in applied rates within bound levels was to cope with sectoral difficulties and provided flexibility for macroeconomic management. He noted that import licensing applied basically for statistical purposes with prior import licensing affecting arms, nuclear substances, or for environmental reasons, consistent with the WTO. From January 1997, import licences would be issued before goods passed through Customs, accelerating the procedures. Limits on foreign financing periods for certain imports were intended to provide equal conditions to those available in Brazilian financial markets.

The representative noted that safeguard measures on imports of certain textiles had been taken only after an investigation had revealed serious damage to domestic industry. The measures were transitional safeguard measures under the Agreement on Textiles and Clothing. He provided information about consultations and noted that, in any case, the measures would not be applied beyond 31 May 1999. A provisional safeguard measure on toys involved a tariff increase within bound rates and was introduced in accordance with Article 12 of the WTO Agreement on Safeguards. The investigation was not yet completed.

The representative also provided information on the export finance programme (PROEX), concerning direct financing and interest rate equalization. However, he noted that there was no subsidy in the programme. He also explained Brazilian government procurement procedures at the federal, state and municipal levels; the "Law of Similars" was applied under very strict conditions. Brazil was closely following discussions on government procurement at the regional and multilateral levels. Concerning standards, Brazil had already adopted the WTO Code of Good Practice. Brazil was committed to transparency in elaborating its standards, thus guaranteeing that Brazilian norms could not be used as trade barriers.

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**Sectoral aspects**

Members acknowledged Brazil's important steps towards greater economic openness and the legal changes undertaken to attract foreign investment in sectors such as energy, telecommunications and mining. Liberalization had exposed a number of sectors to strong import competition; thus, requests for assistance had increased. Members were of the opinion that macroeconomic adjustments to restore competitiveness were more effective than such sectoral assistance.

Members recognized that Brazil was a competitive, major producer and exporter of agricultural products. Nevertheless, agriculture received considerable financial support through minimum price supports and rural credits, while large subsidies were given to the National Alcohol Programme (PROALCOOL). Brazil was asked to clarify the economic rationale of these subsidies and future plans for the programme.

Noting that the Brazilian Coffee Institute had been abolished, members asked Brazil for information on the recent creation of a Deliberative Coffee Council. Information was also requested on the justification under WTO rules for the phytosanitary measures affecting certain banana imports.

Brazil's automotive régime, containing high tariff as well as TRIMs measures such as local content and export performance requirements, was of great concern to members. They pointed out that the régime afforded high effective protection to the industry and appeared inconsistent with WTO rules. Members sought information on the tariff quota system for vehicles recently introduced by Brazil.

Members welcomed the privatization and liberalization programmes in various service industries which, however, had yet to reach some sectors. The constitutional changes to open partially activities such as telecommunications and maritime transport were also appreciated but concerns were raised on remaining constraints to foreign investment, particularly in banking and insurance. Members requested information on plans for greater liberalization in those areas.

The representative of Brazil, explaining the sectoral distribution of tariffs, stressed that the application of contingency measures was intended to remedy unfair trade practices and respond to structural problems in the context of a more open environment. Brazil's use of such measures thus reflected its strong commitment to WTO rules and principles.

The representative noted that state involvement in the agricultural sector through minimum prices and rural credit had decreased sharply during the 1990s. Simultaneously, both private involvement and the use of market-based programmes had grown. He emphasised that, despite reduced government assistance, agricultural production and productivity had increased significantly.

On the Deliberative Coffee Council, the representative said that the council, with government and private sector representation, had been recently created to define technical, research and financial policies and programmes for the coffee industry. On phytosanitary measures affecting banana imports, he stated that Brazil was prepared to allow banana imports as soon as there was scientific proof that they did not represent a risk. The Brazilian authorities were already engaged in discussions with the WTO member concerned.

The representative pointed out that PROALCOOL had two components: a residual programme aimed to supplying existing alcohol-powered vehicles, and one for the production of gasoline additives for environmental reasons. He also indicated that the programme was financed, with decreasing costs, from other energy sources.

The representative of Brazil recalled the importance of the vehicle sector and the reasons that had led to the adoption of Brazil's automotive regime. In Brazil's view, such a regime was required to harmonise investment conditions and avoid distortions within MERCOSUL during the transition period allowed by the TRIMs Agreement. The regime, including changes introduced in December 1995, was leading to the industry's modernization, increased competition, lower production and investment costs and a higher import content of vehicles. As a result, effective protection for vehicles was being reduced. The representative added that following talks with concerned trading partners, Brazil had unilaterally introduced a tariff quota system which, in his opinion, should greatly enhance access to the Brazilian market.

The representative of Brazil discussed Brazil's active participation in the Uruguay Round services negotiations and the ongoing discussions under GATS. He outlined the legal framework for the banking and insurance industries. New constitutional amendments and enabling laws were still under discussion. Given the complexity of the issues involved, it was not possible to provide a date for changes to the framework. In the meantime, access to the local market by foreign firms in both sectors was considered on a case by case basis. The representative noted the recent promulgation of a constitutional amendment ending the monopoly on reinsurance and opening it to private participation, as well as his Government's interest in promoting foreign participation in health insurance. On telecommunications, he noted that a new law had been approved allowing foreign participation, rising to 100 per cent from July 1999, in cellular, satellite and cable services; new contracts were expected to be awarded from early 1997.

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**Miscellaneous**

Miscellaneous questions were raised on the implementation of the 1993 decision to privatize the harbours and the expected date for introduction of regulations to eliminate restrictions in maritime navigation. The shipping freight tax and lighthouse duties were also seen as discriminatory. It was also noted that unexpected changes to the import regime for the free trade zone of Manaus had affected traders; in this context, details were requested on the current regime.

The representative of Brazil noted that a 1995 constitutional amendment had opened coastal and inland shipping to foreign participation. In an effort to reduced the so called "Brazil cost", a recent government decision had allowed the privatization of federally-supervised harbour services, although certain infrastructure would remain under government control. Private ownership of certain specialized terminals and some other harbours was already possible.

The representative of Brazil commented that the shipping freight tax served to improve the merchant fleet, and was thus helping the sector's adaptation to a more open environment. The freight tax had been reduced since 1990, while the Additional Port Tariff had been eliminated. Lighthouse duties were navigation security-related charges levied on vessels from countries with which Brazil had no bilateral agreements on maritime transport. These duties were currently under assessment by his authorities.

The representative indicated that the incentives in the free trade zone of Manaus were part of a regional development programme. Import quotas – only applied to finished goods – had not been filled and thus had no trade effects. Imports from the free trade zone into Brazil were subject to the common external tariff.

Members noted the impressive progress achieved over the past few years towards macro-economic stabilization, trade liberalization and a more open investment regime. They welcomed Brazil's emphasis on the irreversibility of the liberalization process, as well as its strong statement of commitment to the multilateral process and "open regionalism".

Despite this generally positive assessment, members voiced a number of concerns including the gaps between tariff bindings and applied rates, the relatively frequent resort to anti-dumping actions, recent safeguards measures, and continuing restrictions in the services sector. The high level of protection in the automotive sector was particularly commented on.

Members were conscious of the adjustment difficulties associated with radical economic restructuring and acknowledged the recent concerns in Brazil arising from trade imbalances. However, they strongly encouraged perseverance with the macroeconomic reform programme, resistance to protectionist pressures and strict adherence to WTO rules and procedures. Given Brazil's evident importance to the region and to the world economy, success in these areas – leading to long-term stability and openness of the Brazilian economy – will have repercussions going far beyond the domestic environment.

## Canada – 18-19 November 1996

Over the past two days, the Trade Policy Review Body has conducted the fourth review – the first under WTO provisions – of Canada's trade policies and practices. These remarks, made on my own responsibility, are intended to summarize the salient points of the discussion; they do not substitute for the Body's collective evaluation and appreciation, which will be reflected in the minutes of the meeting.

The discussion developed under four main themes: (i) the general economic situation and the process of deregulation and liberalization; (ii) regional and multilateral trade relations; (iii) trade and investment policies; and (iv) sectoral issues.

In addition to the discussion, participants raised a large number of questions in writing. The representative of Canada provided comprehensive written replies in the context of the meeting and undertook to provide further details as necessary.

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**General economic situation and the process of deregulation and liberalization**

Members noted the improvement in Canada's macro-economic performance in the past two years. Economic growth had essentially been driven by exports, inflation was kept low, and fiscal policy aimed at bringing the federal budget into medium-term balance. Unemployment remained high, despite some recent improvement; Members asked whether this might lead to protectionist pressures.

Members noted that the strength of exports benefited both from strong demand in the United States and from the structural effects of trade liberalization under the WTO and the NAFTA. Reflecting strong economic expansion in the United States, economic integration deepened, with the U.S. share of Canada's trade rising to four-fifths of merchandise exports and two-thirds of imports. While acknowledging that this reflected Canadian firms' ability to operate in a highly competitive market, several Members stressed the cyclical vulnerability inherent in such dependence on one destination. Some Members asked whether Canada's participation in regional and bilateral trade initiatives, comprising the FTAA, APEC and free-trade agreements with Israel and Chile, could be seen as a response to this trend.

Members recognized that Canada's efforts towards trade liberalization, complemented by domestic reforms, had created a stronger basis for long-term economic expansion. Most sectors of the economy and a wide range of policy areas had been affected.

Members noted a continuing duality in Canada's trade policy between the federal competence for the negotiation of international agreements and the provinces' responsibility for the implementation of such agreements in certain areas. In this connection, Members stressed the need for closer co-ordination between the federal Government and provinces and expressed concerns about remaining provincial restrictions in areas such as government procurement, investment, local content requirements and subsidies. The simultaneous entry into force of the NAFTA, the WTO Agreements and the Agreement on Internal Trade (AIT) showed the possibilities of synergy among the different levels of government action; Members thus encouraged Canada to complete and implement the AIT in order to address such restrictions.

The representative of Canada replied that his country was greatly dependent on international trade and investment flows; further trade liberalization and internal deregulation, complemented by prudent and balanced fiscal policies, were seen as the path to maximizing economic growth. There were no signs of protectionist pressures resulting from the employment situation.

Challenges inherent in Canada's federal system were being met by constant and close co-operation between federal and provincial authorities. Under the AIT, work was in progress

to streamline and harmonize regulations in many areas of goods, services and factor movements; negotiations were underway to extend its scope and coverage, including in areas such as labour mobility, procurement and energy. He cited instances where provincial practices had been brought into line with Canada's international obligations.

The representative did not believe that the softwood lumber agreement with the United States would lead to challenges by trading partners in the WTO.

**Regional and multilateral trade relations**

Members recognized Canada's strong support for the multilateral trading system and its contribution to preparations for the WTO Ministerial Conference in Singapore. They noted Canada's progress in implementing and consolidating WTO Agreements, which had contributed to a more liberal trade régime in several areas. While showing appreciation for Canada's propensity to use WTO procedures to solve bilateral disputes with the United States, some Members sought clarification on the basis for choosing between WTO and NAFTA procedures.

Members generally saw Canada's participation in regional initiatives through APEC, the FTAA and the newly concluded free-trade agreement with Chile as complementing its actions at the multilateral level. They also viewed Canada's parallel implementation of the NAFTA and WTO agreement as complementary in general. However, some Members expressed concerns about possible trade diversion stemming from bilateral or regional preferences; in this connection, they linked the expansion of bilateral trade in textiles and clothing and in motor vehicles to the strengthening of NAFTA rules of origin and the growing gap between NAFTA and MFN tariffs.

The representative of Canada responded that the GATT, and now the WTO, was the "bedrock" of his country's trade policy, and the framework for Canada's other bilateral or regional initiatives. Although Canada was obliged to place emphasis on managing its relationship with its largest trade partner, and implement the NAFTA, it continued to work for the complementarity of regional and multilateral rules. In this connection, he clarified the distinctions between WTO and NAFTA dispute settlement provisions, which had differing objectives and procedures.

**Trade and investment policies**

Members welcomed the continued reductions in tariffs under the NAFTA and WTO agreements and the further autonomous cuts being made in MFN and preferential rates. Average MFN tariffs on manufactures were low; however, there were still significant peaks in textiles and clothing. By contrast, out-of-quota tariffs in agriculture were often prohibitive. Some Members called attention to the "graduation" proposals for Canada's GPT.

Members recognized that new anti-dumping initiations by Canada had declined in the last two years, continuing a trend established in the mid-1980s, and sought information regarding the current review of Canada's Special Import Measures Act. However, they noted that high duties had been imposed in certain cases and that some measures had persisted over long periods of time in areas where few imports had occurred.

Several Members asked when Canada intended to include sub-federal entities in its coverage under the Government Procurement Agreement. Questions were also raised about buy-Canada provisions at the sub-federal level, and on set-aside programmes.

Members noted that conditions for foreign investors were steadily improving through the removal of ownership restrictions in financial services at the federal level, and the application of lower investment review thresholds for WTO Members, in parallel to those applied under NAFTA. While access for investment in manufacturing was recognized as generally free, concern was expressed about remaining restrictions in some services sectors at the federal and provincial levels.

Some Members called for stricter application by Canada of intellectual property rights, particularly in the fields of copyright protection and geographical indications for wines and spirits.

Several Members asked for clarification of Canada's export promotion initiatives, in particular the Export Development Corporation, Canada's new International Business Strategy, and provincial incentives.

In return, the representative of Canada stressed that Canada's performance in the tariff area was better than indicated in the TPR Report; across all imports, the trade-weighted applied tariff averaged only 1.6 per cent. Referring to the gap between MFN and preferential rates, he noted that movement towards global free trade would reduce such gaps; Canada remained ready to support further multilateral tariff liberalization. The ongoing three-year tariff review was intended to make the tariff system simpler, more transparent and predictable, and to reduce regulatory costs. Consultations with the business sector were underway with a view to introducing a new customs tariff on 1 January 1998. Canada was also reducing its tariff on textile and clothing items; unilateral cuts made prior to the

conclusion of the Uruguay Round were covered by the Uruguay Round reduction commitments and would narrow the gap vis-à-vis NAFTA rates. There were no plans to introduce a "graduation" element into Canada's GPT scheme.

The recent decline in anti-dumping initiations was attributable to more favourable economic conditions and strengthened competitiveness. Canada's view was that in a free-trade environment domestic competition laws could replace anti-dumping provisions; anti-dumping procedures had therefore been eliminated under the bilateral agreement with Chile, and Canada continued to push for their abolition in the NAFTA context. The representative stressed that under Canada's prospective duty enforcement system, goods priced above their normal values did not incur anti-dumping duties. Canada had long had a "sunset" clause providing for regular reviews of measures in force.

In the procurement area, Canada had undertaken in 1994 to provide a final list of provincial entities to be included in the WTO Agreement, on the basis of commitments obtained from provincial governments. In October 1995, referring to access limitations to important markets, primarily the United States, Canada had made this inclusion subject to reciprocal offers on sectors of priority interest as well as to the introduction of limits on the use of small business and other set-asides so as to provide an acceptable security of access. Should circumstances change, the Canadian provinces were prepared to proceed with offers. Additional information would be given in reply to questions.

The representative stressed the openness of the Canadian investment scheme. Companies might incorporate at the federal, provincial or territorial levels or they might operate by registering in the province of operation as foreign corporations. The question of "sensitive" sectors needed further multilateral consideration.

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**Sectoral issues**

Members recognized that Canada had taken several initiatives aimed at revitalizing the economy by reducing State involvement. Public expenditure on agriculture had been reduced by 20 per cent, due essentially to the elimination of grain transport subsidies. However, supply management regimes for dairy, poultry and egg products retained various restrictions on foreign access. Members expressed concerns about high import barriers on these products, now in the form of restrictive tariff quotas, and questioned the system of quota allocation, which relied on traditional importers and left limited scope for improvement in market access. Concerns regarding specific products such as cheese or wheat were raised. Members sought clarification from Canada on future steps towards liberalization in agriculture.

Members recognized the rapid growth of the energy sector in recent years, but highlighted the contrast between the performance of the largely deregulated oil and gas industry and the electricity sector which remained impeded by the persistence of interprovincial barriers to trade.

Members recognized that the recent strong performance of manufacturing exports had benefited from greater economic integration with the United States. Several Members questioned Canada's high MFN tariffs in textiles and clothing; while recognizing that Canada was one of the few importing countries that had integrated under the WTO Agreement on Textiles and Clothing (ATC) any items previously subject to quantitative restrictions, they noted the limited impact of such an initiative. They hoped that more items will be integrated under the second and third phase of the Agreement. Some Members expressed concern about possible trade diversion in this sector resulting from stricter rules of origin under the NAFTA and the widening tariff gap vis-à-vis MFN rates, despite certain compensatory quotas for non-originating products. In the motor vehicles industry, Members stressed Canada's attractiveness as an assembly and part production location. Some Members appreciated the elimination of MFN tariffs on auto part imports, but noted significant differences between Auto-Pact and non Auto-Pact Members for tariffs on assembled cars. They regretted that the Canada-U.S. Free-Trade Agreement did not allow companies from non-member States to join the Auto-Pact.

Members also noted that, due to the rapid expansion of Canada's modern, technology-based industries, the structure of production and trade had gradually shifted from resource-based to "knowledge-based" industries. With a few exceptions, advanced-technology activities were concentrated in Canadian subsidiaries of multinational enterprises, surrounded by a network of smaller, innovative domestic firms. However, some Members noted that, overall, research and development spending in Canada remained low by OECD standards.

Finally, Members showed their appreciation for recent deregulation in some of the largest, and previously most protected, services sectors of the Canadian economy. They noted that competition had been introduced into large segments of the financial services, telecommunication and air transport industry and that, since reforms had been accompanied by new international commitments, foreign suppliers had generally benefited. However, several Members pointed to remaining restrictions on foreign investment in areas such as

telecommunications and transport and encouraged Canada to remove these in the context of GATS negotiations. Some Members felt that market access in banking was still severely restricted by the impossibility to branch directly into Canada from the home country. Other Members questioned "routing" obligations applying to international telecommunications services.

The representative of Canada responded that Canada's current tariff quota system reflected its Uruguay Round concessions on agriculture. With regard to further WTO discussions on agriculture, he said that Canada fully supported a programme of analysis and information exchange within the WTO on agricultural trade-policy matters, not limited to market-access questions, with a view to preparing for the eventual resumption of negotiations foreseen in the Agreement on Agriculture.

The representative stated that Canada had fully implemented its commitments in the first phase of integration under the Agreement on Textiles and Clothing and, despite a difficult adjustment process, was the only WTO Member to include a restrained product in its list. The Government of Canada had been consulting with stakeholders concerning Canada's notification of products to be integrated in the second phase of the ATC, which would be notified to the WTO by the end of 1996.

The representative of Canada recalled that Canada had long pursued liberalization in financial services, transportation and telecommunication services. He mentioned in particular Canada's commitments to remove the 10/25 investment limit in federally incorporated financial institutions under the GATS, except for schedule I banks for which the 10 per cent limit remained. The Government of Canada had no plans to revise this latter provision. He said that the Government was carefully considering the implications of two recent Parliamentary Committees' recommendations to allow direct branching from abroad. Canada had also offered to bind its current policies regarding foreign investment and traffic routing in the ongoing WTO negotiations, but was reviewing its approach to such negotiations to help achieve an acceptable mutual agreement by the deadline of February 1997.

Members fully acknowledged the export-driven growth in the Canadian economy over the past two years, the liberalization in certain sectors and the various initiatives to review and update trade policy mechanisms. However, a number of concerns that had been expressed at earlier reviews remain. These include continuing high levels of protection in the agricultural sector, the large number of anti-dumping measures still in force, and the problems of ensuring that policies shaped at federal level were fully carried through at sub-federal level. Other issues that received emphasis were remaining restrictions in the services sector and the manner of implementation of the Agreement on Textiles and Clothing.

Developments in relation to NAFTA were of particular interest to Members, both in the wider context of interaction between regional and multilateral arrangements and also in terms of Canada's heavy dependence on the U.S. market. Members thus encouraged Canada to maintain its strong commitment to multilateralism and to continue to give close attention to ensuring complementarity between regional and multilateral initiatives.

## Colombia – 25-26 September 1996

Over the past two days, the Trade Policy Review Body has conducted the first review of Colombia's trade policies and practices under the WTO framework. These remarks, intended to summarize the salient points, are made on my own responsibility and do not substitute for the Body's collective evaluation and appreciation. Details of the discussion will be reflected in the minutes of the meeting.

The discussion developed under four main themes: (i) general issues concerning reforms; (ii) regional and multilateral issues; (iii) general trade issues; and (iv) sectoral issues.

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**General issues concerning reforms**

Members commended Colombia on the positive macroeconomic developments since the previous review in 1990 as well as the legislative, policy and institutional reforms, including the liberalization of the foreign trade, exchange and investment régimes. These had been reflected in solid economic growth, a decline in the rate of inflation, strong capital inflows and improved public finances. Concern was expressed that recently, there appeared to have been some economic slowdown and slight increase in inflation. Questions were posed with respect to: the frequency of tax changes; the impact of the anti-inflationary Social Pact; possible increases in public expenditure arising from social spending under the Development Plan; fiscal and structural implications of the privatization programmes; the compatibility between constitutional provisions on expropriation and new laws guaranteeing investors' rights; the possible impact of oil revenues and oil-related investment on the economy, including the operation of the Oil Stabilization Fund; and the social costs of the adjustment programme. Questions were also posed on the stage of implementation of various legislative reforms.

The representative of Colombia began his response by indicating that the trade policy changes, begun in the 1990s, had taken place in the context of much wider changes in the Constitution and the rôle of the State, which were still continuing. He outlined changes in the management of trade policy and in macro-economic management, as well as the latest trends in economic indicators. He gave details of the Colombian Government's expectations for the period ahead, with a continued reduction in inflation and the fiscal deficit, non-traditional and petroleum exports were expected to continue growing while the growth of imports would slow down. The privatization programme was continuing, with electricity supply and CARBOCOL currently on the agenda.

The representative went on to provide details of the most recent changes in the investment régime, continuing the trend to greater openness; there were few incentives for investment other than a recent tax premium provision. He clarified that expropriation without compensation provisions contained in the 1991 Constitution had never been applied; a constitutional amendment had achieved first approval by Congress and would continue the process in the next legislature. Further legislative changes allowing for foreign investment in sectors such as legal and insurance services were under consideration. Land speculation and money laundering was the main target of restrictions on real estate purchases.

The representative emphasized that the Colombian Government was conscious of the need to maintain the stability of the real exchange rate and had taken steps to avoid any disruptive effects of large capital inflows. Measures had been taken to generate sufficient savings to ensure BOP stability and maintain a high rate of public and private investment. The new petroleum sources were expected to bring in new earnings for 10-20 years: the Petroleum Savings and Stabilization Fund, which was to invest abroad, was intended to promote prudent use of these earnings and avoid inflationary and other macroeconomic pressures. The "war tax" was intended to support anti-guerilla activity; it had been eliminated for investments made after 1995 and would be completely eliminated in 2001.

**Regional and multilateral issues**

Members took note of the importance attached by Colombia to increased participation in regional trade agreements, including those with the Andean Group, the Group of Three and Chile, as well as its active involvement in the plans for the establishment of a Free Trade Area of the Americas. Colombia's interest in strengthening economic links with the Asia-Pacific region countries through PECC and APEC was also noted. Members sought Colombia's views on the prospects for open, outward-oriented and trade-creating regionalism as well as on the further development of relations with MERCOSUR in trade and investment. Some participants recalled that Colombia had yet to meet fully its WTO notification obligations relating to regional agreements.

Members welcomed the expansion of Colombia's multilateral commitments, particularly with respect to tariff bindings, and noted the erosion of preferential treatment as a result of the Uruguay Round. They asked for up-to-date information on Colombia's implementation of the WTO Agreements, particularly those with longer periods for implementation by developing countries. Some participants inquired about the prospects for Colombia's becoming a member of certain Plurilateral Agreements.

The representative of Colombia indicated that economic integration was a pillar of Colombia's model of outward-oriented economic development; it was seen as strongly complementary to unilateral liberalization. Closer relations with other Latin American countries – including the recent Andean-Mercosur framework agreement and an agreement with Chile, were seen by Colombia as steps on the way to the Free-Trade Area of the Americas and to further multilateral liberalization; in this context, he recalled that the Uruguay Round commitments were part of the overall framework that all countries now applied. The Cartagena Agreement had been notified to GATT under the provisions of the Enabling Clause; the agreement with Chile had similar status. The common external tariff (CET) applied since January 1995 was consistent with more open regionalism, obliging industry to become more competitive. While intra-regional growth had been strong, this was not at the expense of other trading partners. National exceptions to the Andean CET were being progressively eliminated and should disappear by the year 2000. The exclusion of agricultural products in the G3 Agreement was related to the sensitivity of these products, but the coverage was very low; this Agreement was concluded within the LAIA framework and had been notified to the WTO Committee on Trade and Development.

**General trade issues**

Members expressed their appreciation for Colombia's trade liberalization through tariff reductions and the elimination of virtually all quantitative or licensing measures. Information was sought on the current list of Colombia's exceptions to the Andean Group's Common External Tariff. Members sought clarification on many aspects of the pre-shipment inspection

régime and procedures, the consistency of the customs valuation system with the WTO Agreement, standards, the differential rates of VAT and the consumption tax applicable to domestically produced and imported goods, safeguard and anti-dumping/countervailing measures, government procurement and SPS procedures.

Members noted that non-traditional exports had grown, partly because of support from export assistance schemes such as CERT and SIEX and inquired about any plans for their phase-out by 2003 in respect of manufactured items.

Several members appreciated the introduction of new and improved legislation on intellectual property; they also asked for details on its enforcement.

The representative of Colombia took note of the recognition by members of the progress Colombia had made in its unilateral trade reforms. He gave details of the operation of the PSI system, which was designed to facilitate trade and essentially targeted at goods most susceptible to under-invoicing; a new decree rectifying some procedures would be notified. Customs valuation was now consistent with WTO procedures, under Andean Group legislation. The Government was studying how to eliminate the differential VAT on small, imported vehicles. Details were given on the operation of the consumption tax on spirits and beer. Information was also given on conditions for acceptance of certificates of origin; the operation of the anti-dumping mechanism on spare parts and equipment; restrictions on the importation of second-hand goods, including vehicles and parts which, the representative said, had no commercial significance and were based on the relevant Andean Group Resolution. He noted that other restrictions were founded on Article XX of GATT 1994 and that the new, national information system on standards was based on international rules including those of the WTO. Gaps in Colombia's safeguards legislation had already been filled under the new Law 170. the representative provided details on new rules on government procurement; open tendering with national treatment on a reciprocal basis, was the general rule. Mining and telecommunications were also covered by the reciprocity principle, which applied to the treatment given by trading partners. Colombia was an observer in the Agreement on Government Procurement; however, no decision had yet been taken on its possible future membership.

The representative also provided further information on Colombia's export régime, including export-linked tax exemptions on imported materials and concessions on capital goods available to all enterprises under the Plan Vallejo, which had been duly notified to the WTO Committee on Subsidies. Colombia was working to bring its CERT rates into line with WTO provisions. There were no export licences except under CITES and goods subject to import restrictions in overseas markets.

The representative of Colombia said that his Government applied Andean Group decisions on intellectual property rights, on an MFN basis. Administrative and penal provisions existed to enforce these rules. Colombia was availing itself of the transitional provisions of the TRIPS Agreement to bring its legislation and practices fully into line.

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**Sectoral issues**

Questions were raised on the compatibility with the Uruguay Round Agreement on Agriculture of measures currently in force in the agricultural sector, including marketing arrangements, reference prices, import licensing under the domestic absorption régime. Members also questioned whether the variable levies under the Andean Price Band System were legitimate, or could lead to violation of tariff bindings. Colombia was also asked when a procedure for implementation of tariff quotas would be implemented. More information was sought on the rôle of the Sectoral Competitiveness Agreements in agriculture.

Members asked questions about several aspects of Colombia's automotive policy, including local content and export performance requirements and restrictions on imports of used motor vehicles. It was recognized that the removal of past restrictions had led to substantial growth in trade in vehicles. Questions were raised on plans relating to the phase-out of existing measures under the provisions of the TRIMS agreement.

Clarification was requested on the régime affecting long-distance telecommunication services, including the area reserved for nationals, and for Colombia's active participation to the negotiation on basic telecoms was encouraged. Similar inquiries were made about recent deregulation in the financial sector and restrictions applied in professional, insurance and audiovisual.

The representative of Colombia gave extensive details of his country's agricultural policies: domestic absorption policies were designed to guarantee the acquisition of local production, not for self-sufficiency goals. These were less restrictive than increasing tariffs to ceiling bindings. Colombia believed that these measures were permitted under provisions of the TRIMS Agreement, including exceptions for developing countries, and that the procedures applied were compatible with the Agreements on Agriculture and on Import Licensing Procedures.

The representative stated that Colombia had fully met its market access commitments. Applied tariffs were normally below bound levels, including in quota levels. Of those products referred to by one Member, only butter and beans were subject to minimum access commitments but these were not covered by domestic absorption or import licensing provisions. For other products, domestic absorption requirements were not the reason for the lack of growth of imports, but also depended on supply and demand for particular products. In some cases imports substantially exceeded Colombia's access commitments. Both MFN and preferential imports were counted against access commitments.

The representative gave details on the operation of the Andean Price Band System, which was designed to stabilize import costs despite fluctuations in international prices. In Colombia's view, the system was compatible with the WTO Agreement on Agriculture; it had resulted in applied tariff rates well below bound levels. The minimum reference prices for customs valuation purposes were covered by Colombia's reservation under Article 20 and Annex III of the Customs Valuation Agreement. The price band mechanism had helped to maintain incomes in poor sectors.

The representative of Colombia explained that SPS provisions were based on international standards and only applied after due notification to the WTO. Restrictions on imports of pork and ham from a European country related to the incidence of African Swine Pest in the exporting country; on evidence of the elimination of the disease, these had been lifted for all Andean countries.

Sectoral Competitiveness Agreements were designed to increase efficiency and competitiveness. These were being modified within the time-frame envisaged by the WTO Agreements. The Government had decided to reduce the rôle of the state agency, IDEMA, in purchases and stock management, leading to a greater rôle for the private sector in internal marketing.

On services, the representative stated that, while basic telecommunications was reserved to the State, the market for national long distance and international services was to be opened to two new operators from 1997: mobile telephony had also been opened up. Thus, the national monopoly for long-distance services had disappeared because of deliberate Government decision, not because of unauthorized call-back services. There were no limits on foreign participation in the establishing of companies to provide financial services; however, they were subject to the same prudential conditions as national companies. Colombia's offers in the area of financial services were linked to the offers of its major trade partners.

Members welcomed the important steps taken in recent years by Colombia towards a more open and liberal economy, through constitutional, legislative and administrative reform, tariff simplification and reduction, and privatization programmes in a number of sectors. Concerns about certain sectors emerged clearly in the discussion, including agriculture, textiles, automobiles and some services. It was also emphasized that regional arrangements should be fully consistent with multilateral liberalization and rules under the WTO. Overall, however, the thrust of the discussion was supportive of the underlying direction of Colombia's economic and trade policies during a period of sharp transition. There was strong encouragement for the Colombian authorities to consolidate and build on the achievements of the past few years.

We look forward to receiving the written replies promised by Colombia in due time.

## Cyprus – 26 June 1997

The Trade Policy Review Body has now completed the first review of the Republic of Cyprus' trade policies and practices. These remarks, made on my own responsibility, summarize the main points of the discussion. They are not intended to substitute for the collective evaluation and appreciation of the Cyprus' trade policies and measures. Details of the discussion will be reflected in the minutes of the meeting.

Prior to the start of the Review there was an exchange of views on the political aspects of the situation in Cyprus, as referred to in paragraph 8 of the Republic of Cyprus' Government Report contained in document WT/TPR/G/25, where their respective positions were expressed by the parties concerned. This exchange will be reflected in document WT/TPR/R/2.

The discussion of Cyprus' trade policies was underscored by the appreciation of Members for the considerable steps already taken by Cyprus to liberalize its import markets, reduce export restrictions, and establish a rules based, transparent trading and investment environment. The economy had clearly benefited from the reduction in distortions by developing trade in manufactures and, particularly, services; per capita income levels had grown considerably. Cyprus was urged to continue its trade liberalization and to embed it solidly within the rules and principles of the multilateral trading system, particularly by increasing its commitments in the WTO. In this context Members raised a number of issues including:

- the outlook for sustainable growth in the economy and the prospects for exports and investment in goods and services;

- fiscal discipline, partly linked to the Maastricht criteria, and its role in helping to sustain a stable macroeconomic environment. Relevant to this issue were the link of the Cyprus pound to the ecu, monetary policy considerations and associated prospects for the rate of inflation;

- the vulnerability of Cyprus' economy to the external environment, as reflected in a structural trade deficit, and measures to strengthen the production base, to lend stability to economic growth;

- economic and legislative preparations for the integration of Cyprus into the European Union. In this connection, several Members clearly expressed the view that this integration should not be at the expense of Cyprus' full participation in the multilateral system, and emphasized the need for greater geographical diversification of trade;

- investment objectives, especially equity participation limits on some FDI and the nature of the "economic interest" clause;

- the tariff structure, notably divergences between applied and bound rates; surcharges for safeguard reasons; the still significant number of specific rates; the use of excise taxes; and participation in the ITA;

- the use of standards by Cyprus that are more stringent than international standards in some areas;

- taxation and standards applied to automobiles;

- Cyprus' law and policy on anti-dumping and public procurement and its possible accession to the Government Procurement Agreement; and

- certain aspects of its competition, environment and intellectual property legislation.

Members also raised a number of questions in connection with Cyprus' sectoral policies. Thus, in agriculture, questions were posed on the use and level of subsidies, and on the MFN and preferential implementation of certain tariff quotas, including on sheepmeat. In manufacturing, the use of export subsidies related to local content was questioned. Members also raised questions on Cyprus' plans for further liberalization in financial services; its position on deregulation in telecommunications and possible WTO commitments; plans to expand the tourism sector, including by liberalizing the investment regime; and a possible relaxation of restrictions in maritime and port services. While two members recalled Paragraph 4 of the Singapore Ministerial Declaration, they posed questions relating to the observation of "core labour standards" by Cyprus.

In response, the representative of the Republic of Cyprus replied to the questions raised under three headings; macroeconomic and structural policies, trade-related policy objectives and instruments, and sectoral issues. Cyprus undertook to provide written answers to certain other questions.

Cyprus' economic growth rate had been favourable compared to other European countries; the forecast for 1997 was around 3 per cent. Clothing and footwear exports faced severe international competition, while agriculture and pharmaceuticals trade showed favourable trends. The Government's target was to maintain a fiscal deficit below 3 per cent of GDP; expenditure was to be closely monitored and tax efficiency increased, while public sector reform was a key policy. The link of the Cyprus pound to the ecu, which was partly in consequence of Cyprus' aim to join the EU, had not affected export performance adversely; the link reduced the variability in exchange rates vis-à-vis Cyprus' European partners, which were its major markets. Stability of the link was maintained through a combination of exchange controls and monetary policy, together with the overall health of the economy.

The vulnerability of the economy to external shocks and the structural trade deficit were being improved by measures to increase productivity, especially to reduce unit labour costs, and to strengthen the services sector, including by investment incentives.

Regarding Cyprus' preparations for joining the EU, the application of the EU common external tariff would result in tariffs lower than the rates bound in the WTO by Cyprus, hence in more favourable conditions. No new quotas or other trade barriers would result from the customs union; all quantitative restrictions had been lifted from 1 January 1996, with a tariff quota system introduced on various products, including textiles.

On trade related policies and objectives, the representative of Cyprus saw no conflicts between acceptance of the EU *acquis communautaire* and WTO objectives. Cyprus followed the continuous progress of EU legislation on international issues. Foreign investment had been largely liberalized and administrative procedures simplified, with 100 per cent foreign ownership allowed in most sectors; in a few areas, such as finance, applications were considered on a case-by-case basis to monitor quality.

On more specific issues, "surcharges" applied by Cyprus were increased tariffs resulting from the process of elimination of QR's; most surcharges would be removed by end-1998, and residual surcharges would be lifted by 2002/3. The "refugee levy" would be removed on all products contained in the EU Association Protocol from 1 January 1998; products

outside the Protocol would remain subject to the levy. Import duties on cars would be reduced to a MFN rate of 10 per cent by end 1997, with a zero rate for imports of cars from the EU. Excise taxation of cars was an important revenue-effective element of taxation.

The representative of Cyprus continued by noting that new anti-dumping legislation, in line with the WTO Agreement, should be completed by late 1997. On environmental matters, a draft framework law was in preparation, while interest rate concessions and other incentives were granted for pollution control. Similarly, restrictions on fishing nets were imposed for conservation reasons. With respect to public procurement, a bill on the matter had been submitted in February 1997 and was expected to pass Parliament in the autumn of this year. Detailed regulations and tender specifications would be prepared in accordance with existing policy; Cyprus' procedures would be harmonized with those of the EU and would be consistent with its obligations under the WTO.

On sectoral matters, in agriculture the system of administration for the tariff quota on sheepmeat had been introduced to ensure fair and equitable treatment. Demand for meat had fallen in 1996 as a result of BSE and reduced tourist trade, but the market was recovering in 1997. In services, 100 per cent foreign participation was allowed on freight and passenger transport, in specified circumstances. Telecommunications liberalization was under way and an offer on basic telecoms would be submitted to the WTO before the end of 1997. Conditions for tourism services would be harmonized with those of the EU.

Overall, I believe we have had a useful review of Cyprus. I know what difficulties the Cypriot delegation have laboured under in preparing their replies at such speed, and I thank them warmly for their efforts. I am sure that, as requested by some delegations, Cyprus will back up its participation in this meeting with written answers to some of the questions to which replies have been promised.

## El Salvador – 25-26 November 1996

Over the past two days, the Trade Policy Review Body has conducted the first review of El Salvador's trade policies and practices. These remarks, made on my own responsibility, are intended to summarize the salient points of the discussion; they do not substitute for the Body's collective evaluation and appreciation, which will be reflected in the minutes of the meeting.

The discussion developed under three main themes: (i) macroeconomic and structural developments, including policies relating to foreign investment; (ii) trade liberalization and its effects; and (iii) specific policy and sectoral questions.

Apart from questions raised during the meeting, four participants submitted a number of questions in writing. The representative of El Salvador provided extensive, substantive replies to the questions and also undertook in some instances to provide further details in writing.

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**Macroeconomic and structural developments, including policies relating to foreign investment**

Members commended the stabilization and structural adjustment programmes adopted by El Salvador since 1989, which had resulted in markedly increased economic growth and a fall in inflation. They also welcomed the authorities' plans to continue the longer term restructuring of the economy through increasing investment in infrastructure and human capital. Members inquired about the sustainability of macroeconomic performance, noting that inflation had increased slightly in 1995. They suggested that, if growth was to be maintained, further investment would be required in the productive sector.

In this connection, members noted that both investment and savings in El Salvador were relatively low and enquired about measures to remedy the situation. Members also asked how El Salvador aimed to generate the resources required for its planned investments in infrastructure and human capital.

Members noted the importance of remittances in financing the current account deficit and pointed out the risks of relying on external resources as a source of financing. In addition, the difficulty of managing an economy in these conditions was emphasized: the monetary inflow resulting from remittances could increase inflationary pressures and push up the real exchange rate, with harmful effects on competitiveness.

Members welcomed the tax reform and privatization programmes undertaken by El Salvador; these had both helped to reduce the fiscal deficit and contributed to economic restructuring. Members noted that, with the simplification of the tax system, only a few taxes of general application remained in place; these changes had increased tax yield and gone some way to reducing evasion. Nevertheless, members asked how El Salvador would deal with the problem of tax evasion, given the importance of the informal sector.

Members welcomed the liberalization of El Salvador's investment régime. However, some concern was expressed about the possibility of discrimination remaining in registration

procedures; for instance, free convertibility of capital was not reflected in the Foreign Investment and Promotion Law. Questions were also raised on plans to establish a one-stop window for foreign investment, whether there was any discrimination against the operation of foreign insurance companies in El Salvador, and whether there was a specific incentive programme to promote foreign investment.

In response, the representative of El Salvador said that average real growth in the period 1992-95 was 6.7 per cent, but only $3^1/_2$ to 4 per cent in 1996. Inflation was expected to fall to 9 per cent, lower than the level in 1995; with the deepening of the reforms and a fall in the cost of credit, it was hoped that growth would recover to 5 per cent in 1997. The challenge of macroeconomic management was to ensure stability and maintain the confidence of foreign and domestic investors. Foreign remittances, which had a number of benefits, also complicated economic management, generating inflationary pressures and an appreciation of the exchange rate. In the short term, measures had to be taken to sterilize the effect of inflows on the money supply, but the representative also gave details of a number of structural measures aimed at neutralizing negative effects in the longer term and re-orienting flows towards investment.

The representative outlined El Salvador's privatization programme, covering telecommunications, electricity, water, ports and airports, highways and pensions, and gave considerable detail on the planned liberalization of the telecommunications sector. His Government was conscious that domestic savings were insufficient to finance essential social and economic investment in human capital and physical infrastructure. The Government was re-directing resources to the social sector, with the aim of reaching 50 per cent of public expenditure by 1999, and had received loans from the World Bank and IDB for education and infrastructure development. Receipts from privatization and the reform of pension funds would also be used for these purposes.

The representative of El Salvador emphasized that there was no discrimination in the foreign investment régime, but the speed of liberalization sometimes had been more rapid than the evolution of the legal framework. The régime was one of the most open in the world; there were no performance requirements or exchange control restrictions, thus it was, in practice, open in all sectors. The only exceptions applied to small-scale investments of less than US$23,000. He said that El Salvador's economic and social development strategy was intended to attract foreign investment, and thus complement national savings and investment. A new investment law, intended for parliamentary approval in the first quarter of 1997, would ensure legal rights, including access to domestic courts and domestic or foreign arbitration, promote transparency and simplify registration procedures, including the elimination of prior authorization. In addition to existing governmental institutions, a private foundation, FUSADES, provided advisory services for new investors. He reassured Members regarding the security situation in the country. He clarified that advantages given to investment in free-zones, to which export performance requirements applied, were not linked to the general investment law. In respect of insurance, which was not bound under GATS, a new legal framework was below Parliament and details would be provided once this was adopted.

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**Trade liberalization and effects**

Members recognized that trade liberalization, together with the deregulation of domestic markets, had been a key element in El Salvador's economic growth, although the trade to GDP ratio had not yet recovered to 1980 levels. In addition, members noted the concentration of trade both in terms of partners and in goods. Members asked whether exports currently benefiting from preferential régimes would be competitive without these preferences.

Members noted El Salvador's participation in the Central American Common Market (CACM) and inquired whether regional commitments had helped or hindered the process of trade liberalization at the national level. In addition, members commended the active rôle that El Salvador was playing in negotiations on the FTAA and asked about El Salvador's views on "global free trade".

Members noted that El Salvador had substantially reduced tariffs and that all rates had been bound, albeit at ceiling levels. Questions were raised regarding the persistence of tariff escalation and peaks in some sectors, as well as the spread between applied and bound rates. Members asked if there were plans to continue reducing tariffs for final goods and to reduce the WTO bound rates.

Members commended El Salvador's efforts to bring its national trade legislation into consistency with the WTO Agreements. However, it was noted that certain aspects of some laws were still outdated and in need of reform. Some members also asked about the implementation and enforcement of laws, particularly in the area of intellectual property, while others asked when the draft Competition Law would come into force and the effects that it might have on trade conditions.

In response, the representative of El Salvador said that trade policy was based on the coordinated Central American tariff reduction programme, designed to reduce costs and contribute to the development and modernization of production. This was essential to diversify exports and markets. To complement this programme, El Salvador also had a programme to increase national competitiveness in world markets. The Government would implement these reforms in a comprehensive, progressive manner, and was studying how best to incorporate sectors such as textiles, clothing, sensitive agricultural products and leather into the reform programme. He provided information on the six-monthly tariff reductions planned through to July 1999, when the ceiling would be reduced to 15 per cent for imports of most goods produced in Central America, with duties on most other goods eliminated or reduced to very low levels. However, at present it was not considered prudent to lower bound rates, given the vulnerability of the external sector to remittances. Nevertheless, he stressed that El Salvador was also committed to further improvement in its trade policy régime in the few areas where non-tariff measures remained, including administrative and registration procedures for imports of pharmaceuticals and saccharin.

The representative emphasized that El Salvador was in favour of worldwide free trade and the strengthening of the multilateral system. It was participating actively in the FTAA as well as in other bilateral and regional trade negotiations. They attached importance to the WTO-compatibility of these agreements; however, they recognized that regional agreements could lead to trade and investment diversion, as had happened in respect of textiles and clothing in the case of NAFTA.

The representative said that El Salvador placed an extremely strong emphasis on strengthening competition, including through trade liberalization. A new competition law was being developed to prevent anti-competitive practices. His Government was actively pursuing any violation of the intellectual property law through a special unit created for this purpose; he gave details of recent cases. Work was underway to ensure that El Salvador would fully meet its TRIPS obligations before the year 2000, as required, including in respect of border measures; details of civil and penal sanctions applicable would be provided to Members.

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**Specific policy and sectoral questions**

Members noted that, despite the efforts made to liberalize the import régime, import and customs formalities were still cumbersome, lacked transparency and remained an obstacle to trade. Members asked whether there were plans to simplify these requirements and to modernize customs. There was a question on the time-frame for creating a one-stop window for import procedures.

Members commended the simplification of export procedures through the creation of the one-stop window for export formalities. One member asked about the scope for further simplification. Members commented on the programmes in place to promote exports beyond Central America, including the free zone régime and the duty drawback system. The growth of the free zones was noted and it was inquired to what extent there had been a relocation of industry to the free zones. Some Members thought that the duty drawback system could act as an export subsidy since, while tariffs were being progressively reduced, the drawback was fixed at 6 per cent of the f.o.b. value of exports.

Members noted the importance of the agricultural sector in the economy and the positive effects of the reforms on its performance. However, some members referred to the negative impact of the real appreciation of the currency on agricultural exports. In addition, one member asked whether there were plans to liberalize the sugar market. Several members inquired about the administration of tariff quotas and their notification to the WTO.

Noting that the present system of customs valuation was based on the Brussels Definition of Value (BDV), members urged that new legislation be made consistent with the WTO Agreement. Members expressed their concern about a lack of transparency in the award of Government contracts and sought clarification on such procedures.

One member commended El Salvador for having submitted its safeguards legislation for review by the Safeguards Committee; this appeared to be consistent with WTO requirements. Another sought clarification on the operation of anti-dumping duties and countervailing measures, including which laws applied in these areas and the rôle of the CACM Secretariat in this regard.

Some members considered that standards, sanitary and phytosanitary regulations could operate as barriers to trade. One member noted that El Salvador had not submitted a Statement of Implementation as required under the TBT Agreement.

In response, the representative of El Salvador said that, since 1995, the Government had accelerated the reform and simplification of customs procedures, including through the implementation of the Central American Uniform Customs Code and its regulations, which had entered into force in June 1996. These reforms would be complemented with a single window for imports and the privatization of some customs services. Work had already begun

at the Central American level to bring customs valuation procedures into line with Article VII of GATT 1994 within the required timeframe. No pre-shipment inspection mechanism applied.

The representative said that El Salvador's export support and promotion schemes did not constitute export subsidies. Total support, amounting to some US$7 million in 1995, did not apply to trade within Central America or to export of traditional products. There were six free zones in El Salvador, with 45 firms, of which 80 per cent were involved in clothing production. Four more zones were in construction; it was hoped they would attract operations with higher value added and modern technology.

The representative indicated that a draft law had been prepared to manage tariff quotas negotiated in the Uruguay Round and it was hoped this would soon be approved. It was difficult to think about unilateral liberalization of sugar imports while so many subsidy schemes distorted world markets; however, El Salvador was considering the opening of tariff quotas, with an out-of-quota rate of 55per cent.

Central American legislation did not provide for safeguards on intra-regional trade; WTO rules were applied but there had been no such cases since the early 1960s. Dumping and subsidization were covered by Central American legislation and the WTO Agreement, which was part of national law. The representative clarified certain operational aspects of the law, including the investigative rôle played by the CACM Secretariat (SIECA).

The representative explained that the National Science and Technology Council (CONACYT) was responsible for standards, the evaluation of conformity, and metrology. The elaboration of standards and regulations was coordinated with other agencies. El Salvador would shortly notify its acceptance of the WTO Code of Good Conduct in this area.

Finally, the representative noted that El Salvador was not a member of the Government Procurement Agreement. Almost all agencies had autonomy in this area, but the central Government was obliged to call for tenders when planned purchases exceeded a certain amount. It was planned to consolidate the various regulations in a single law with the objective of increasing transparency and guaranteeing equal treatment for national and foreign bids.

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**Overall**

Delegations welcomed El Salvador's wide-ranging structural reform programme of recent years, including the significant steps taken in trade liberalization, fiscal reform and privatization. They noted and encouraged El Salvador's intention to continue the process with further reductions in applied tariffs, measures to bring about greater competition, modernization of customs procedures and further steps to promote foreign investment.

A cautionary note was sounded on the need for diversification of exports, in relation to both goods and markets. It was also recognized that real exchange rate appreciation, fuelled in particular by the high level of emigrants' remittances, makes the task of export development more difficult. Overall, it was emphasized that maintenance of the current export-led growth pattern will require a continued strong commitment to trade liberalization, as well as sustained efforts to ensure a stable macroeconomic environment.

## Fiji – 9-10 April 1996

Over the past two days, the Trade Policy Review Body has conducted the first review of Fiji's trade policies and practices. These remarks, made on my own responsibility, are intended to summarize the salient points of the discussion; they do not substitute for the Body's collective evaluation and appreciation, which will be reflected in the minutes of the meeting.

The discussion developed under three main themes: (i) macroeconomic and structural questions; (ii) general trade policy questions; and (iii) other specific areas of concern.

In addition to questions raised during the meeting, several participants submitted a number of questions in writing. The representative of Fiji provided extensive replies to the questions and also undertook to provide further details in writing concerning specific issues.

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**Macroeconomic and structural questions**

Members highlighted Fiji's relatively slow economic growth in recent years and the challenge to Fiji in achieving more rapid, sustainable development. In this connection, questions were raised concerning the fiscal balance; progress in public enterprise reforms, which were welcomed, and the promotion of greater competition in the Fijian economy; the need for a transparent, stable basis for foreign direct investment; and remaining exchange and price controls. Members also raised issues concerning particular constraints on Fiji's development, such as questions relating to skill development, employment by ethnic and gender groups, and land tenure issues including changes to the Agricultural Landlord and Tenant Act.

Members referred to the high dependency of Fiji's trade structure on a small number of products exported to preferential markets and the consequent effects that the erosion of

existing preferences might have on Fiji's economy and trade. They asked how Fiji would adjust to such erosion and, in particular, on measures to increase domestic productivity and to diversify export products and markets.

In reply, the representative of Fiji stated that Fiji's economic performance in the 1990s had indeed been modest; this was nevertheless an improvement over the volatile fluctuations of the 1980s. It should be remembered that Fiji has special features including a small market, frequent natural calamities and isolation from major markets; these made it difficult to emulate the growth rates of Fiji's Asian neighbours, although Fiji was drawing appropriate lessons from the economic progress of South East Asian countries.

The Government recognized the need for fiscal consolidation and aimed to achieve a balanced budget by the year 2000, both by restraints on operating expenditures and improved revenue collection. Indirect taxes now accounted for 53 per cent of Government revenue, compared to 22 per cent from income taxes; this structure reflected a deliberate attempt to provide incentives for hard work and effort. Fiji's trade account was traditionally in deficit, reflecting in part the import of essential raw materials for the production process. The current account had however turned to surplus in 1996 and should remain so for the next three years. Fiji had also managed to keep its inflation rate low, at about 3 per cent at present.

The representative noted nevertheless that Fiji faced a daunting task in the future: in particular, economic performance was not broad-based and domestic demand, especially investment, remained subdued. Measures were being taken to promote investment, including Parliamentary consideration of an Investment Bill, progress in resolving the constitutional and land-lease issues, incentives to promote hotel construction and a relaxation of exchange controls. He stressed that Fiji met the Article XIII requirements of the IMF, with no restrictions on current payments.

The representative added that Fiji would continue to offer incentives to attract foreign investment and would also focus on improving the infrastructure such as roads and communications. A number of specific questions in the areas of foreign direct investment would require a more detailed response, which would be provided at a later date. He emphasized that there were no barriers to foreign investment in sugar-milling. He went on to note that the Public Enterprise Act was now in place, and implementation was being elaborated; he also indicated that several measures were being taken to promote human resource development and education. He emphasized that, while the Government aimed to abolish price controls, there was strong political and labour pressure for their maintenance.

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**General trade policy questions**

Members welcomed Fiji's moves since 1989 to more outward-oriented policies, with elimination of quantitative restrictions and reductions in the average level of tariffs. Some members drew attention to the slowing pace of tariff reform and import liberalization; they encouraged Fiji to continue progress on this front and in relation to deregulation. Members also noted the escalation of tariffs through stages of processing, remaining tariff peaks on such products as processed rice and motor vehicles, and the application of duties on beverages and tobacco that exceeded bound levels; they sought information on the future direction of tariff reforms and any particular sectoral focus.

Some members asked about the importance of tariff revenue for Fiji in the light of its fiscal imbalance. In this context, some sought information on Fiji's policy regarding tariff exemptions and concessions, noting that there was substantial leakage of revenue through such measures, which could introduce additional distortions in the structure of protection.

Questions were asked about industrial promotion measures, including the use of subsidies and export credits; questions were also posed regarding conditions of operation of Export Processing Zones, Tax-Free Zones and Tax-Free Factories.

Members noted that although Fiji had as yet no legislation regarding trade remedies (anti-dumping, countervailing and safeguards), the Fair Trading Decree was to be modified to include anti-dumping measures. Some Members asked whether the Decree would also cover countervailing measures and encouraged Fiji to introduce WTO-consistent provisions; however, one Member pointed out that there was no obligation under WTO provisions to introduce such legislation.

One Member asked if Fiji could ensure MFN and national treatment for foreign suppliers in government procurement and whether Fiji intended to join the relevant WTO Agreement.

Questions were asked regarding Fiji's growing participation in regional trading arrangements, including SPARTECA and the Melanesian Spearhead Group. The question was asked whether Fiji expected such agreements to compensate for the loss of preferential access in other markets. Particular attention was also paid to the application of rules of origin under regional and preferential agreements and their effects on Fiji's trade.

One Member and a discussant raised questions regarding the application of internationally recognized core labour standards in Fiji. A number of others stressed that,

consistent with the Singapore Ministerial Declaration, such questions should properly be addressed in the ILO.

In reply, the representative of Fiji stated that in past number of years Fiji had concentrated its efforts on trade liberalisation through the removal of licences and the reduction in tariffs. Tariff reform had slowed in recent years, in recognition of the fact that trade liberalisation needed to take place in concurrence with reforms in other sectors in the economy, including in labour and capital markets and the public sector. For the present, further tariff reductions would await the outcome of the Deregulation Policy Review, which had been commissioned following recommendations of the 1994 National Economic Summit.

On more specific matters, the representative noted that the application of specific rates of duties on some commodities were an attempt to protect against revenue evasion by importers. All applied agricultural tariffs were below bound rates, with most at $22^{1}/_{2}$ per cent. The matter of reducing applied rates on alcohol and tobacco to their bound levels needed to be considered in the context of health, revenue and WTO timeframes. The high rates of duty on motor vehicles had been introduced to raise revenue, but were being reduced. Fiji intended to eliminate the disparity in the excise duty on locally manufactured cigarettes with imported tobacco and those with domestically grown tobacco. Licence control on butter was removed in 1995 and in 1997 Fiji removed concessions and import quota restrictions on powdered milk. Further questions on customs valuation matters, such as the confidential treatment on information and the importer's right to written explanations, were being addressed in the process of updating legislation.

On regional and preferential arrangements, Fiji had sought a relaxation of SPARTECA rules of origin but had been unsuccessful. A bilateral arrangement with Australia and New Zealand was now being explored and was intended to assist Fiji's companies to ultimately adjust to an open, non-preferential trading environment. Fiji's bilateral arrangements with other South Pacific island countries were part of its overall policy to harmonize and liberalize trade on a regional basis. On wider regional interests, Fiji was watching developments with a view to aligning its trade reform with APEC policies. The representative also noted that Lomé and GSP discussions were now underway and that Fiji's position would be given at a later date.

In respect of core labour standards, he emphasized that the ILO was recognized in the Singapore Ministerial Declaration as the competent body to set and deal with such standards; questions raised in this meeting should therefore be dealt with by the ILO.

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**Other specific areas of concern**

Members recognized the dependence of Fiji on a few sectors, including agriculture, garments and tourism. They saw an urgent need for diversification within the agricultural sector, in particular away from the present emphasis on sugar to encourage greater commercialization, diversification and increased efficiency of resource use. Agricultural policies should be geared to these ends.

Members asked questions concerning Fiji's sanitary and phytosanitary (SPS) regulations; while these appeared compatible with the relevant WTO Agreement, specific issues were raised concerning imports of fruit, vegetables, flower seeds, foodstuffs, and various drugs and pharmaceuticals. More generally, one Member suggested that Fiji should, under the TBT Agreement, base its standards on international standards rather than those of major trading partners such as Australia and New Zealand.

The relatively high level of tariffs on fish was noted. Questions were asked concerning Fiji's management of fishery resources and prohibitions on exports and imports under the Fisheries Act.

Members posed questions regarding measures to encourage greater competitiveness in the clothing sector, which had increased its importance in exports.

Members recognized the importance of the services sectors, particularly tourism and transport, to Fiji. The development of a new policy statement by the Fijian Government on services was welcomed and further information was sought on the scope and expected timing of the statement. It was noted that Fiji had not made an offer in the WTO Financial Services negotiations and the authorities were encouraged to participate actively in the resumed negotiations.

On intellectual property, some Members welcomed the steps taken by Fiji to implement a new Copyright Act, consistent with the TRIPS Agreement; information was sought on the passage of the Bill through Parliament.

In reply, the representative of Fiji said that a change in its SPS policy from zero to minimal risk had opened up the market for various agricultural products, including poultry, Written replies would be provided to the detailed questions on fisheries. Although structural changes in the sugar industry were being implemented, Fiji regarded the retention of trade preferences as necessary in the foreseeable future. He recalled that Fiji Sugar Corporation was not state-owned, although a majority of the shares were held by the Government; although FSC was the present sole buyer of sugar cane, there was no legal monopoly.

He noted that diversification of agriculture, which was recognized as important, had to coexist with sugar, which was Fiji's most viable crop; diversification towards manufacturing was proceeding, but agriculture remained the mainstay of the economy.

The Government was currently seeking to implement recommendations of a study on trading and skill development in respect of niche markets in the clothing sector. He continued that diversification of exports in the services sector was also important to the Government and that work towards a Services Policy was currently being undertaken.

In the area of intellectual property rights, a draft Copyright Bill was now being examined in consultation with WIPO and was expected to be submitted to Parliament at the end of the year. Fiji was currently consolidating its request for technical assistance to align domestic intellectual property legislation with the TRIPS agreement.

Overall, Members welcomed the participation by Fiji in the review process, with a strong delegation led at Ministerial level. They welcomed the steps already taken by Fiji toward greater transparency in trade policy and the authorities' stated commitment to free and open trade, and encouraged Fiji to continue along the path of liberalization and deregulations. They emphasized the importance of diversification of the economy and the need for development to be pursued on a sustainable basis. The TPRB welcomed the answers given by Fiji to questions and looked forward to written replies on outstanding issues.

## Korea – 30 September-1 October 1996

Over the past two days, the Trade Policy Review Body has conducted the second review of Korea's trade policies and practices under the WTO framework. These remarks, intended to summarize the salient points, are made on my own responsibility and do not substitute for the Body's collective evaluation and appreciation. Details of the discussion will be reflected in the minutes of the meeting.

The discussion developed under four main themes: (i) macro-economic developments and the implications of rapid economic expansion; (ii) policies related to tariff and non-tariff measures; (iii) TRIPS, TRIMs, industrial and competition policy issues; and (iv) sectoral issues.

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**Macro-economic developments and the implications of rapid economic expansion**

Korea's rapid economic growth and continued trade liberalization since its initial Trade Policy Review in 1992 were strongly commended. The positive lessons for developing countries were highlighted. Members noted, however, the export promotion efforts adopted in response to the recent rise in the current account deficit, and sought confirmation that no public or private "anti-import" campaigns or other restrictive policies would be undertaken. Korea was asked the consequences of its rapid development and its expected OECD membership for its claims of "developing country" status, its implementation of WTO agreements, and the effects on its own GSTP and development co-operation schemes. Interest was also expressed in commitments undertaken under APEC, and their expected effects on trade with WTO members.

The representative of Korea responded that trade expansion through consistent market opening, trade liberalization and deregulation was at the root of Korea's recent economic growth. The expansion of social overhead capital, manpower development, R&D assistance and increased domestic and international competition in the financial sector were fundamental to strengthening competitiveness. Inward and outward foreign direct investment were promoted; and new financial instruments had been created to increase national savings, stabilize price levels and improve the current account. He confirmed that the Korean Government would not resort to or encourage "anti-import" campaigns or import discriminating policies.

The representative emphasized that active participation in the multilateral trading system was crucial for Korea's future growth. Although Korea had participated in the Uruguay Round as a developing country in consideration of its economic and political environment, Korea was making utmost efforts to expedite the implementation process. OECD membership was seen as a springboard for further liberalization, rather than an affirmation of fully developed country status. Within APEC, Korea was strongly committed to furthering open regionalism.

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**Policies related to tariff and non-tariff measures**

Members commented favourably upon Korea's "Five-Year Plan for a New Economy", with its emphasis on the elimination of unnecessary regulations, promotion of industrial co-operation with foreign countries and increased assistance to less-developed countries. Concern was expressed over the Import Diversification Programme, including local content provisions, as well as apparent import substitution aspects of the capital goods "localization" programme. Korea was requested to clarify various aspects of subsidy programmes and to explain the criteria used for sector-specific support granted under policy-based lending, including government guarantees for shipbuilding and support for small and medium-sized enterprises.

Members welcomed the tariff reductions implemented both autonomously and in connection with WTO commitments, as well as the greatly increased level of bindings for agricultural and industrial products. However, questions were raised over the lack of binding coverage for fishery and various strategic industrial products. The possibility of additional reductions in bound levels was raised, especially in regard to high rates resulting from tariffication and the substantial gap between bound and applied rates. Members observed that recourse to adjustment tariffs introduced instability into the tariff system, and enquired about their justification.

Members commended Korea's efforts to reform customs clearance procedures, import licensing, standards and inspection procedures, and government procurement, but expressed significant concern over the pace of implementation and the adequacy of the measures adopted. Questions were also raised concerning technical requirements for imports, changes to safeguards procedures, discriminatory taxation of liquor, and justification for expanded label-of-origin requirements affecting imported agricultural and other goods.

The representative of Korea indicated that Korea was faithfully implementing the Uruguay Round Agreements and seeking to expedite this process where possible. The Import Diversification Programme, introduced in 1978 to relieve the chronic trade imbalance with Japan, was to be abolished by the end of 1999. Rules of origin would be applied following WTO recommendations; there was no intention that these rules should reinforce the Import Diversification System. The representative stated that Korea had already abandoned its policy of targeting special industries in 1985. Most import recommendation procedures would be phased out by 1997 and all by 2001. Quantity undertakings had been excluded from anti-dumping procedures from 1 July 1996. Safeguard mechanisms were being brought into WTO consistency and would be strictly enforced. The Localization Scheme for the Capital Goods Industry, introduced in May 1995, sought to promote industrial demand and attract foreign investment, improve the R&D environment, and further quality improvements. The system for imports of used goods had been revised, and further modifications were in train. There were no restrictions on auto parts. The share of policy-based lending, presented in the Secretariat Report, was over-estimated, as it included a large proportion of general loans extended by special banks; no policy based lending was extended to shipbuilding. Assistance for small and medium-sized enterprises focused on information and technology dissemination.

On tariffs, the representative emphasized that Korea had made substantial tariff concessions in the Uruguay Round, with an average reduction of 54 per cent on a trade-weighted basis and expansion of bindings to 91.2 per cent of tariff lines; further reductions would take place under "zero for zero" and harmonization initiatives. The fact that most bound rates were higher than the currently applied rates reflected the impact of autonomous tariff reductions between 1989 and 1994; there were at present no plans for further revision of general tariff rates. While Korea's Customs Act provided for ten types of flexible tariff rates, countervailing duties, retaliatory duties and seasonal duties had never been applied; the use of anti-dumping and emergency duties was based on the relevant WTO Agreements; and price stabilization duties would be eliminated from 1997. Adjustment duties could be imposed within the limits of WTO bound rates to prevent import surges from disturbing the domestic market; the six-month application period was intended to avoid such duties remaining beyond the time necessary. Lower rate tariff quotas were applied more frequently than adjustment duties. The liquor tax and education tax were applied differentially to higher-alcohol products for fiscal, distributional and health reasons, not to discriminate against imports.

The representative indicated that Korea's non-tariff policies, primarily aimed at ensuring consumer safety, public health and similar objectives, were implemented in accordance with WTO rules, and were based on recognized international standards where possible. Recent changes in customs clearance procedures had reduced storage and processing from an average of 15 to some 2 or 3 days. Import licensing would be changed from a positive to a negative system in 1997, confining non-automatic licensing to a limited number of sensitive products. Origin marking, introduced to discourage counterfeiting, would be reviewed by end-1996; Korea was pursuing a wide range of actions to facilitate food inspection, including harmonization with international testing standards; random sampling would be introduced by end-1996. Industrial standardization and labelling was essentially in the hands of private sector organizations; where standards were converted into technical regulations, these were in accordance with the TBT Agreement. Provisions on eco-labelling were still being developed; no requests had been received from foreign companies to date. For government procurement, Korea published a short or medium-term plan at the beginning of each year; open competitive tendering was promoted and Korea's limited tendering procedure was consistent with the Plurilateral Agreement.

**TRIPS, TRIMS, industrial and competition policy issues**

While expressing their appreciation for Korea's implementation of new legislative measures to expand the protection of intellectual property, Members sought information on

the time-frames for full implementation of WTO obligations in this area. Questions were raised regarding the lack of retroactive patent protection, the rôle of the patents court and current border measures for IPR enforcement. Clarification was also sought on investment performance measures, noting the lack of a TRIMs notification; current limitations on shareholding levels; and remaining difficulties in terms of inward foreign direct investment. Various competition policy issues were also raised, including the rôle of State trading organizations.

The representative of Korea stressed that his country had consistently sought to improve intellectual property protection. A series of legislative reforms was aimed at implementing the TRIPS Agreement as early as possible; on a voluntary basis, Korea did not resort to the longer implementation period provided for under the Agreement. The new Patent Law provided for a 20 year protection period from the date of application. A patents court, to be established by March 1998, would review IPR-related cases on appeal of decisions taken by the Korean Industrial Property Office. Recent changes to customs legislation had aligned provisions for border enforcement with those contained in the TRIPS Agreement. The representative recalled the main provisions of the 1996 Foreign Direct Investment Liberalization Plan, including an increase in foreign shareholding limitations to 20 per cent from October 1996; he specified liberalization to take place in 1997 and stated that these limitations were to be fully eliminated by the year 2000. Limitations on foreign companies' trading operations would be liberalized from July 1997. He recalled recent improvements in the status and rôle of the Korea Fair Trade Commission, made to strengthen competition legislation and support the economic globalization process in the post Uruguay Round era.

**Sectoral issues**

In regard to agriculture, Members again noted the high duty levels resulting from the tariffication of previous quantitative measures, as well as potential conflicts of interest in connection with Korea's practice of offering tariff-quota administration to domestic associations and other directly related entities. Additional information was requested in regard to statistics on minimum access commitments, safeguard investigations for recently liberalized "sensitive" products, inspection and quarantine procedures, and shelf-life regulations. For fisheries, Korea was asked to explain the reasons for high tariff rates, the low level of bindings and continued use of quantitative restrictions.

In connection with services, members commented on Korea's extensive use of horizontal access limitations, including restrictions on commercial presence, land purchase, foreign equity participation and the movement of natural persons. Korea was urged to consider more rapid elimination of barriers to foreign participation in transport, communications and financial services; in this connection, problems of access for telecommunications equipment were also raised. Problems were also noted in regard to the certification of foreign service professionals.

The representative of Korea recalled that his country's agricultural sector, dominated by rice production on small farms, suffered from low productivity and an underdeveloped infrastructure. However, widespread reforms were under way in the context of the WTO implementation process, including mechanization and consolidation of farms. Tariffication was applied in all areas other than rice. The operation of tariff quotas had generally been a success; some minor problems, such as unfilled quotas, were attributable to adverse market conditions rather than to problems in quota management. Safeguard investigations for specific products, such as milk powder blends, were based on WTO provisions. The possible introduction of measures would be decided by the Korean Trade Commission. In May 1995, Korea had established an ambitious plan to improve its sanitary and phyto-sanitary system. Recent reforms included expedited customs clearance for perishable products, the planned introduction of random sampling, and the gradual conversion of official shelf-life regulations into a manufacturer-determined system. Clarification was given on beef tariffication, limits on game meat, and conditions for imports of wool. In the fisheries sector, Korea did not currently envisage any tariff reductions; however, imports of close to 50 items were to be fully derestricted by the end of 1997.

On services, the representative indicated that Korea had taken important steps to facilitate commercial presence, including the increasing of ceilings for foreign portfolio investment. Korea was firmly committed to implementing the concessions offered in the negotiations on financial services in 1995. In maritime transport, Korea's envisaged reforms went beyond the commitments initially tabled under the GATS. Korea's draft schedule of commitments in telecommunications was very different from the status quo, covering international services and satellite telecommunication services. Foreign equity ownership in basic telephone services would be allowed up to 33 per cent, and no economic needs test would be imposed. Resale of basic telecommunications services would be permitted, with the exception of voice resale services which were to be liberalized from 2001. This delay was intended to allow for the establishment a nation-wide telecommunications infrastructure.

**Overall**

Members acknowledged and appreciated the steps taken by the Republic of Korea over the past few years towards economic reform and market opening, including in the areas of tariff reduction, internal deregulation and liberalization of the investment régime. They emphasized the importance of further steps to improve market access, to increase predictability, transparency and certainty in Korea's trade practices, and to ensure that Korea's regulatory and administrative régimes are consistent with the stated aims of increased liberalization and openness. The need for improved access in the agricultural sector and continued liberalization in various fields of services was particularly emphasized. Overall, Members offered strong encouragement to the Republic of Korea to continue and accelerate the reform process in all economic areas and to be ready to undertake responsibilities within the WTO fully commensurate with the strength and dynamism of its economy.

We understand that Korea will provide further written replies to detailed questions, and look forward to receiving these in due time.

## New Zealand – 21-22 October 1996

The Trade Policy Review Body has now completed the second review of New Zealand's trade policies and practices. These remarks, made on my own responsibility, summarize the main points of the discussion. They are not intended to substitute for the collective evaluation and appreciation of New Zealand's trade policies and practices. Details of the discussion will be reflected in the minutes of the meeting.

The discussion developed under four main themes: (i) the macroeconomic and structural environment; (ii) multilateral and regional issues; (iii) specific trade-related issues; and (iv) sectoral questions.

**The macroeconomic and structural environment**

Participants praised New Zealand for its bold economic transformation, which had largely been undertaken unilaterally and had made the economy among the most open in the world. Microeconomic reforms combined with macro stability had underpinned New Zealand's strong economic performance of recent years and provided a basis for sustained higher economic growth in the future. Trade policy reforms were recognized as central to the overall liberalization effort, but privatization and corporatization, along with financial policy, tax policy, foreign investment policy, and other areas were also seen as important.

The role of labour market reform in raising productivity was of interest to Members. Productivity growth was allowing New Zealand exporters to maintain export volumes in the face of an appreciating currency. Investment, including foreign direct investment, had risen rapidly and, despite substantial government surpluses, was outstripping savings, with this imbalance reflected in a current account deficit. Recognition of this relationship gave rise to questions regarding the timing of tax cuts and efforts to promote savings. Participants, noting that the success of the reforms had reinforced pressure for trade liberalization, asked in which sectors this pressure was strongest. New Zealand was asked to comment on the expected evolution of policy in the few areas where sectoral restrictions on foreign direct investment remained.

Members asked whether the benefits of reform had been studied *ex ante* and whether such studies had a role in prompting the economic reform, and asked for observations on the impact or expected impact of Uruguay Round reforms on the prices paid to New Zealand's factors of production, such as agricultural land. Finally, participants were interested in the expected future evolution of New Zealand's economic policies.

In response, the representative of New Zealand noted that the link between New Zealand's poor economic performance before 1984 and the closed economy policies followed at the time had been clearly recognized; many studies had also shown the high costs of protection. The results of liberalization had been clearly seen in the economy in the last few years. Total factor productivity had grown more rapidly than before; following a period of cost-cutting, investments were now being made in increasing labour productivity through greater training and multi-skilling. Productivity increases could not be attributed solely to labour reforms, but these reforms had played a major role and had increased the speed of economic adjustment. He noted that the current account deficit was not now seen as a problem, given the context of high levels of private investment, export growth and diversification, and a fiscal surplus. Moreover, the simplification of New Zealand's fiscal structure, combined with price stability, was encouraging higher domestic savings.

Decisions on privatization and corporatization were made on a case by case basis. With respect to foreign direct investment, in determining applicants' financial commitments the authorities sought to ascertain whether the applicant was genuinely behind the proposed investment and whether the applicant committed its own finances. Investment restrictions on fishing referred only to the ownership of fishing quota, while those concerning optometry,

which applied equally to domestic and foreign owned businesses, restricted the ability of any company to own more than 45 per cent of any optometry business: the latter restrictions were currently under review.

**Multilateral and regional issues**

It was noted that New Zealand's trade policy operated under four tracks: multilateral, unilateral, bilateral and regional. Participants were interested in the relationship among these and whether New Zealand gave priority to the multilateral track. The New Zealand delegation was asked to comment on the role of the multilateral system in sustaining its own trade and domestic reforms.

Members noted that implementation of the WTO Agreements was expected to have a substantial, positive effect on the New Zealand economy; it was expected to be among the greatest beneficiaries of multilateral trade reform. The mechanism for implementing multilateral commitments, such as the results of a WTO dispute settlement panel, in domestic law was queried.

New Zealand's Closer Economic Relations (CER) Agreement with Australia was one of the world's most comprehensive trading arrangements. Participants were interested in New Zealand's experience with eliminating anti-dumping actions on trans-Tasman trade and the extension of domestic competition law to cover this trade; New Zealand was asked to comment on the implications of GATT Article XXIV for such an arrangement. The possibility of expanded membership in the CER was queried. Unrelated to the CER, it was asked whether any measures were envisaged with respect to an agreement between maritime labour unions of the two countries, which appeared to effectively preclude third-country competition in Trans-Tasman shipping.

A number of participants, noting New Zealand's active membership of APEC and the growing share of its trade within the region, asked about its plans in this connection.

The representative of New Zealand replied that a study commissioned by the government had estimated that the Uruguay Round would lead to gains for New Zealand equivalent to 2.3 per cent of its GDP by the year 2005, and create some 20,000 to 30,000 new jobs. Increases in agricultural product prices resulting from the Uruguay Round would tend to cause increases in rural land prices. These had increased by one third over the two years 1994-95; however, he emphasised that the Uruguay Round was only one of several factors in this respect.

While certain sectors were initially expected to be sensitive to liberalization under the CER, it had already proven possible in 1988 to move forward the date for the complete bilateral free trade in goods from 1995 to 1990. The CER had recently been expanded to cover aviation services and New Zealand hoped that remaining services sector exclusions could be eliminated in the next few years; the two parties had recently agreed to begin examination of a CER protocol for investment. The CER left open the possibility of expanded membership; all requests would be given careful consideration and applications from WTO members were welcomed. The two parties had agreed that it would be logical to align CER rules of origin to a change of tariff heading criterion, and to study the impact of such a change, in particular with regard to processed food, forest products, steel and footwear: any changes would, however, be implemented only after the WCO/WTO process had been completed. The bilateral agreement with Canada formalized tariff preferences originating from the Commonwealth preference scheme. In 1995, Canada and New Zealand had agreed to maintain preference margins, so long as these did not interfere with unilateral tariff liberalization. New Zealand continued to view complete multilateral free trade as the first best outcome, and the outcome to which all four tracks were targeted. New Zealand believed that the WTO should set an ambitious agenda in this regard.

**Specific trade-related issues**

Participants appreciated that New Zealand's remaining trade protection was in the form of import tariffs, virtually all non-tariff measures having been abolished. Tariffs had been greatly reduced over the previous decade and further reductions were to be implemented during the period 1997-2000. Participants hoped that future reductions would substantially reduce the protection that remained for certain sectors, such as textiles and clothing, and reduce tariff escalation and regional preference margins. Reductions could also reduce the impact of New Zealand's tariff concession scheme on the unevenness of tariffs. As a result of the Uruguay Round, New Zealand had greatly increased the proportion of its tariff lines bound in the WTO; however, some delegations noted that applied rates were generally well below bound levels and that substantial scope existed for bound rates to be reduced.

The interface between trade remedy and competition policies was of interest to participants. A specific question was raised about the procedure followed in anti-dumping cases and it was asked whether standards used in this field might be equated with those applied under New Zealand's competition policy. New Zealand was asked for additional

information on standards, particularly with reference to access for telecommunications, SPS measures particularly in regard to cheese imports, and on the status of mutual recognition agreements with certain other Members.

Some participants viewed certain requirements regarding local supply possibilities for government procurement as providing an advantage to domestic producers and asked New Zealand to give further consideration to joining the Plurilateral Agreement on Government Procurement. Clarification was sought on the operation of certain intellectual property provisions, including the duration of patents and the application of the Geographical Indications Act to foreign suppliers.

New Zealand believed that the level of bindings had to be seen in context. The weighted average tariff cut made in the Uruguay Round was approximately 50 per cent, far above the one-third target level; New Zealand's current bindings provided substantial security. Tariff concessions ensured that tariffs did not impose costs on businesses using inputs not produced in New Zealand. The concession scheme was transparent and well documented; concessions, once granted, were rarely withdrawn. Substantial liberalization had been undertaken with respect to textiles and clothing and New Zealand's imports had increased by nearly 30 per cent over the past five years.

The representative indicated that competition law was not seen as a general substitute for anti-dumping investigations. Specific circumstances had made it possible to eliminate anti-dumping actions in trans-Tasman trade. The authorities were considering initiating public discussion of giving greater weight to national interest in anti-dumping measures. New Zealand had made itself available for informal consultations with the European Union concerning the recent imposition of countervailing duties on canned spaghetti from Italy.

On Government Procurement, the representative stated that New Zealand's procurement regime fully accorded with the WTO principles of non discrimination, national treatment and transparency. It had moved well beyond the disciplines set out in the WTO Government Procurement Agreement, an agreement viewed as flawed because of its accommodation of bilateral and sectoral exemptions. Membership in the agreement would provide few benefits for New Zealand exporters and New Zealand would face increased regulatory costs for little or no benefit.

New Zealand viewed trade policy as closely linked with general economic policies designed to promote efficiency, including competition policy. The lowering of trade barriers complemented sector-specific deregulation and encouraged competition throughout the economy. In turn, enhanced competition in the domestic economy influenced trade policy by enabling New Zealand to support further global and regional trade liberalization.

The elimination of New Zealand's system of patent extensions from January 1995, was not seen as a step backwards. The Geographical Indications Act safeguarded foreign geographical indications in relation to any bilateral or multilateral agreement to which New Zealand may become a party. To date, no such agreements had been reached. New Zealand's Commerce Act did not prohibit particular conduct in relation to exclusive dealing, but allowed the competition authority and courts to determine whether certain behaviour was harmful to competition.

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**Sectoral issues**

New Zealand was praised for having eliminated agricultural export subsidies. However, the continuing role of marketing boards in controlling agricultural exports stood out in an otherwise open trade environment and was of concern. Participants asked about the particular effects of the Uruguay Round on New Zealand's access to agricultural markets.

Members noted that competition policy had worked together successfully with liberal trade and economic policy in many services industries and sought New Zealand's comments on this experience. New Zealand was asked whether it could consolidate its liberal policies through further GATS commitments. In addition, participants were interested in whether New Zealand would consider allowing easier or greater entry of foreign service suppliers and making GATS commitments regarding the movement of natural persons in the future.

Discussion of other sectors included textiles and clothing, where New Zealand was praised for not using import quotas and for foregoing the possible use of special safeguards; aluminium and steel; and pharmaceuticals, where some participants felt that the scheme used for the reimbursement of out-patient costs for medicines effectively restricted market access.

The representative of New Zealand maintained that the activities of the export marketing boards were fully consistent with WTO provisions, which essentially provided that they operate in accordance with commercial criteria. New Zealand's dairy output represented less than 2 per cent of international production; its share of dairy product consumption in major markets was small, and reflected the substantial market access limitations persisting in many markets. No marketing boards in New Zealand held import monopolies; the government provided no support to the Boards, but there was green box

support to the covered products. New Zealand's current AMS under the Agriculture Agreement was zero.

New Zealand's provisions regarding international telecommunications services were applied on an MFN basis, but recognized that New Zealand's competitive suppliers may be vulnerable to the actions of overseas operators who, under some conditions, could play one supplier off against another, to the detriment of New Zealand's telecommunications users. The competitive environment in New Zealand allowed for the free negotiation of local interconnection agreements, backed by competition law. New Zealand maintained five MFN exemptions in services; it had recently considered the removal of one exemption in the maritime transport negotiations and expected to again consider the issue of MFN exemptions at the scheduled review of MFN exemptions to be held by 2000. New Zealand's Uruguay Round service commitments were among the most comprehensive made in the Round and reflected New Zealand's assessment of the balance of negotiated outcomes in both services and other areas.

The representative outlined the structure and pricing policies of Pharmac, emphasizing that it did not control what prescription drugs might be sold nor, to any large extent, their price. The exemption from competition law aimed to allow regional health authorities to continue national negotiation of pharmaceutical subsidies. Further answers were given regarding steel and aluminium.

Overall, Members commented in very favourable terms on the extent of liberalisation and openness in the New Zealand economy. The mix of multilateral, regional and unilateral approaches was particularly noted. A few questions remained in specific areas: including, for example the continuing rôle of Marketing Boards in the agricultural sector and New Zealand's position vis-à-vis the Government Procurement Agreement. Overall, however, the depth and radicalism of the reform process was positively assessed and was seen as offering useful lessons for the economies of other WTO members.

## Paraguay – 17-18 July 1997

The first Trade Policy Review of Paraguay was conducted on 17-18 July 1997. These remarks, prepared on my own responsibility, are intended to summarize the discussion and not to be a full report: this will be contained in the minutes of the meeting.

The discussion developed under four main themes:

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**Macroeconomic issues**

Members commended Paraguay's recent macroeconomic performance, which had been assisted by widespread political and economic reforms; the reduction in inflation was specifically noted. Nevertheless, it was also observed that economic growth had barely kept pace with population growth and that many challenges related to development remained to be addressed. The role of "shopping tourism" in the economy and Paraguay's dependence on export revenue from two cash crops (soybeans and cotton) and electricity was evident. Concerns were raised regarding the possibility of an inflationary increase in spending due to possible increases in public expenditure in an election year.

Questions were posed on the role and incidence of State involvement in the economy and the need to accelerate progress in privatization. Information was sought on recent improvements in transparency of the régime of Government procurement, and on provisions favouring domestic suppliers; Paraguay was encouraged by some members to open its procurement market to stimulate greater efficiency in the use of resources.

Members highlighted Paraguay's success in improving the legal framework for investment. In this connection, questions were raised on the independence of the judiciary, as well as the impact of strong capital inflows on macroeconomic management, and other investment-related issues such as business registration procedures.

In reply, the representative of Paraguay noted that his country was continuing its efforts to overcome numerous structural problems; trade liberalization was a key factor in this process. Efforts to diversify agricultural production would help in the alleviation of poverty. Increased efficiency through privatization was one of the aims of the reform of State enterprises; the representative gave details of the programme. Paraguay's notification on State-trading enterprises would be completed as soon as possible. Government procurement was part of the work programme of MERCOSUR; Paraguay thus did not intend to sign the Government Procurement Agreement in the near future, although it was seeking maximum transparency in this area. Paraguay sought to encourage foreign investment to help industrial development; integration was part of these efforts. The representative indicated that Paraguay would continue its pursuit of development through balanced and stable macroeconomic policies and deepening the structural reforms.

In reply to a supplementary question, the representative of Paraguay provided details regarding the Register of Suppliers for government procurement; this was open to all legitimate, taxpaying firms and was not a restrictive device.

**Regionalism and multilateralism**

Members praised Paraguay's increasing integration into the global economy, and its rôle in promoting a liberal trade régime for MERCOSUR coupled with a strengthened dispute settlement mechanism. However, concerns were voiced that convergence to the MERCOSUR common external tariff would lead to an increase in Paraguay's average tariff, as well as to greater tariff escalation. It was pointed out that, to the extent this process affected Paraguay's scheduled WTO commitments, these should be settled through negotiations under Article XXIV:6 as soon as possible. MERCOSUR commitments may also influence Paraguay's interest in participating in multilateral liberalization efforts, among which the Information Technology Agreement and the negotiations on financial and telecommunications services were mentioned. A question was raised regarding compliance with the provisions of Article XXIV and seeking information on Paraguay's participation in other free trade arrangements.

In reply, the representative of Paraguay, supported by a number of regional partners, noted that regional agreements were compatible with the multilateralism trading system. MERCOSUR should be seen in this context; its philosophy was based on the practice of open regionalism. Contacts had been established with many other countries and regional groups. Many of the questions on MERCOSUR were currently being considered in the Committee on Regional Trading Agreements, which was regarded as the appropriate forum for such issues; replies had already been provided in that forum. Some members emphasized that, bearing in mind the broad transparency role of the TPRM, questions on members' participation in regional trading arrangements were legitimate and had been dealt with in other cases.

**WTO and other related issues**

Members urged Paraguay to meet its outstanding WTO notification obligations without delay, particularly in areas such as import restrictions and State trading enterprises. Questions were asked about the WTO consistency and application of "other" import charges such as the consular tax and port and storage fees. Information was sought on efforts made by Paraguay to implement the WTO Customs Valuation Agreement, and on procedural aspects of the pre-shipment inspection régime. One delegation expressed concerns on costs and delays with respect to customs clearance procedures, despite the existence of the PSI régime. One member asked several questions on the compliance with internationally agreed rules of technical standards adopted at MERCOSUR level, as well as whether mutual recognition agreements concluded by the sub-regional group were open to negotiation with third countries.

Some Members questioned the consistency with WTO rules of export restrictions affecting timber, hides and skins.

Positive action taken by Paraguay to improve the legal and institutional framework for protection and enforcement of intellectual property rights was commended. Information was sought on progress in new legislation in this area, training arrangements for judiciary and others concerned with enforcement, the results of the National Campaign Against the Violation of IPRs, and specific actions taken by the National Council for the Protection of IPRs and the Customs to combat piracy.

In reply, the representative of Paraguay said that his authorities had been making a great effort to meet the notification requirements of the WTO; however, this was difficult while many MERCOSUR measures were being adopted. Technical assistance from the WTO was being sought to help Paraguay meet its obligations. Concerning the consular tax, he pointed out that the charge was a fixed amount of US$15 on which $7\frac{1}{2}$ per cent was levied (i.e. US$1.05) for the support of the Paraguayan Institute for the Indigenous People. It was not based on the c.i.f. value of the goods. The original consular charge of 5 per cent of the c.i.f. value was eliminated in 1993. Pre-shipment inspection companies provided information to the customs service to verify declared values, which were generally accepted within a 15 per cent margin; the costs were absorbed by the Government. Information was provided on the application of the VAT under the tourist regime, levied at a rate of 10 per cent on 15 per cent of the invoice value.

The representative also provided information on the work of the National Council for the Protection of Intellectual Property and efforts to train officials, judges and legislators in this area. The legal framework for trademarks, authors' and related rights and patents was also being updated in accordance with the requirements under the TRIPS Agreement, and this would also strengthen enforcement. Export restrictions on timber were intended to combat deforestation; the processing industry was also required to comply with domestic restrictive measures. There was no restriction on the export of raw hides and skins.

**Sectoral questions**

Paraguay was asked to express its views on sectoral policy prospects and the role of State intervention in this context. The low level of Government intervention in agriculture was appreciated and the recent accession of Paraguay to the Cairns Group was welcomed.

Information was sought on policies to be adopted to diversify, and raise value added in, the agricultural sector. Questions were also posed on the effectiveness of measures taken to prevent deforestation, as well as the scientific basis for banning imports of bovine semen.

Members commented on the existence of tariff escalation in processing and manufacturing industries; they raised questions concerning the impact on Paraguay of the MERCOSUR common automotive regime, to be introduced in the near future.

Note was taken of reforms in the legal framework for the financial sector in the aftermath of the 1995 banking crisis. Improvements in the regulatory framework governing telecommunication services were also welcomed; however, Members saw scope for improvement in transport infrastructure. Information was sought on Paraguay's plans for making offers in the ongoing negotiations on financial and basic telecommunications services.

While one delegation raised questions regarding the observance of core labour standards by Paraguay, many others opposed raising of such questions in any WTO body, including the TPRB. They emphasized that these questions are not trade-related and, in accordance with the Singapore Ministerial Declaration, should be dealt with in the ILO.

In reply, the representative of Paraguay noted that Paraguay had no tariff quotas or special safeguards in agriculture, and did not grant export subsidies. Paraguay was working actively and constructively in international negotiations on agriculture, hence its recent accession to the Cairns Group. Paraguay was trying to diversify its production to reduce dependency on a few items. Information was provided on Paraguay SPS facilities, and extension services. Restrictions on growth-promoting hormones was to conform with requirements of foreign markets for beef, while restrictions on bovine semen from the EU were linked to the BSE crisis. Both these matters were currently under review.

The representative stressed that trade in services was of great importance for the Paraguayan economy, and Paraguay had made progress in liberalizing the sector, especially in telecommunications. Paraguay was working to complete a framework agreement on services within MERCOSUR; therefore, in the short term, Paraguay did not intend to modify its sector-specific commitments under the GATS.

Recalling the terms of the Singapore Ministerial Declaration in relation to core labour standards, the representative of Paraguay considered that it was not appropriate to respond to questions on this matter in the TPRB or within the WTO.

Overall, Members welcomed Paraguay's participation in the review process, with a strong delegation led at Ministerial level. They welcomed the steps already taken by Paraguay toward greater transparency in trade policy and the authorities' stated commitment to free and open trade, and strongly encouraged Paraguay to continue along the path of liberalization and deregulation. They emphasized the need for MFN and regional liberalization to be complementary, the importance of diversification of the economy and the need for development to be pursued on a sustainable basis. The TPRB welcomed the answers given by Paraguay to questions and looked forward to written replies on outstanding issues.

## United States – 11-12 November 1996

This meeting of the Trade Policy Review Body has now completed the fourth review of the United States' trade policies and practices. These remarks, which are made on my own responsibility, summarize the main points of discussion. They are not intended to substitute for the collective evaluation and appreciation of U.S. trade policies and practices. Details of the discussion will be reflected in the minutes of the meeting.

The discussion developed under four main themes: (i) economic conditions and regional trading arrangements; (ii) U.S. strategies for conducting trade policies; (iii) trade policy measures; and (iv) sectoral issues.

A very large number of questions has been raised in written form; many of these cover overlapping issues. We look forward to receiving the replies from the United States.

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**Economic conditions and regional trading arrangements**

WTO members complimented the United States on its strong economic performance, characterized by high growth and low inflation. Noting the rising share of trade in U.S. GDP, they emphasized the key rôle played by securely open markets for goods, services and investment in U.S. economic development and resource allocation. Binding of market access conditions by the United States was also regarded as important to the world trading system. The United States was thus urged to exercise leadership in the WTO to bring negotiations on financial services, telecommunications and maritime transport to a successful conclusion.

During the period under review, net imports had increased and the current account had widened somewhat. It was recognized that this net import expansion was taking place during a period of slack demand in other developed markets, thus helping to stabilize world

economic conditions. Some fears were expressed that a rising current account deficit might contribute to renewed protectionist pressure in the United States.

Some members commented on the importance of services to the U.S. economy, recognizing that productivity gains in that sector were crucial to improvements in living standards. In that context, they noted the shift in the delivery of service imports from cross-border to establishment and asked if this was related to State investment incentives.

Members remarked that, in the period under review, regionalism had not been a main motor for the expansion of U.S. foreign trade; trade with Canada and Mexico had increased at a similar pace as that with other trading partners.

In response, the representative of the United States emphasized the importance of open markets in helping to assure efficient production structures. The benefit to the United States came from the connection between an open, competitive domestic environment and open borders. He added that many in the United States had endured stress in restructuring the economy; these adjustment pressures had led to the United States, over many years, urging consideration in the WTO of core labour standards.

In addressing concerns that the U.S. saving-investment imbalance, and associated trade and current account deficits, might erode public support for open trade policies, he noted that the trade deficit as a share of GDP was now less than half the level of its previous peak in 1987. Moreover, there had been considerable progress in reducing the federal budget deficit, which was the Government's most direct link with savings and therefore the trade deficit. A recent rise in the trade deficit reflected U.S. economic expansion, in which investment had played a greater rôle than in the past. In this expansion, the United States had also been a significant pole of attraction for foreign capital.

On services, the representative noted that internal deregulation in a number of sectors had raised, and would continue to raise sectoral productivity. Success in GATS negotiations would also help. He believed that the openness of the U.S. foreign investment régime, and the practical requirement for a local presence to deliver many services, underlay the shift from cross-border transactions to foreign investment, rather than State investment incentives.

On regional trade links, the representative said that the overall benefits of NAFTA might be considerably larger than originally thought. NAFTA was likely to have created more trade than any potential diversionary effect, because of the huge market and its support for wider economic reforms; specifically, the low level of the U.S. MFN tariff meant that the margin of NAFTA preference was slight, and the rapid growth of U.S. imports from most suppliers in recent years was evidence that any diversion was much less than growth.

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**Strategies for conducting trade**

Members noted the strong interaction in U.S. trade policy making between multilateralism, bilateralism and unilateralism. Evidence that WTO commitments were at the centre of U.S. trade policy making was seen in its frequent use of dispute settlement provisions; however, a general dissatisfaction with the continued unilateralism inherent in "Section 301" legislation was expressed. Members inquired when the United States planned to implement the Appellate Body ruling concerning "Standards for reformulated and conventional gasoline" which was adopted by the Dispute Settlement Body.

Questions were raised about the implementation of the WTO Agreements at the State and local level, including the notification of sub-federal subsidies by the United States.

Members noted that the United States was currently without "fast-track" authority for trade negotiations. Participants asked the U.S. delegation to comment on the impact of the absence of such authority.

The large number of bilateral agreements concluded by the United States was a matter of concern. Questions were raised whether such agreements were implemented on a MFN basis and whether all were notified to the WTO. The representative of Japan stated that the bilateral U.S.-Japan measures under the Framework Agreement involved policy changes by both the United States and Japan and were implemented on a MFN basis. The representative of Canada noted that the possibility of U.S. use of its trade remedy law had played a rôle in reaching the bilateral Softwood Lumber Agreement. Participants stressed that reciprocity clauses contained in bilateral agreements could be fundamentally at odds with the MFN provisions of the multilateral trading system.

A number of delegations expressed their objections to the unilateral use of trade policy instruments for non-trade-policy objectives. In this context, the "Helms-Burton Act" and the Iran-Libya Trade Sanctions Act were particularly mentioned and the WTO consistency of these measures was strongly questioned. The extra-territorial use of environmental standards applied to imports of tuna and shrimp was also criticized. Some members queried the non-trade conditions for application of GSP preferences.

Concerning trade in services, participants stressed the importance of an open trading environment for the development of an efficient services sector and noted with regret that

the United States had introduced a broad MFN exemption to its financial services offer in 1995.

Although members welcomed the liberalization under the new telecommunications legislation, several noted possible deviations from MFN treatment to foreign services providers, as contained in reciprocity clauses, as well as concern with the application of the "public interest" test by the Federal Communications Commission. It was also noted that COMSAT had a monopoly on key satellite links.

Participants expressed disappointment that the United States had not submitted an offer under the Maritime Transport Negotiations. They noted various restrictive measures applied to domestic and international maritime transport services. It was also stated that the United States had taken unilateral measures under domestic legislation, as well as violating its standstill commitment by lifting a ban on exports of Alaskan oil under the condition that it be shipped on U.S. flagged and manned vessels.

Concerning the movement of persons, members noted the restrictive use of immigration and residence provisions applied by the United States.

In reply, the U.S. representative emphasized that good trade agreements should involve an exchange of benefits. "Free ridership" was not helpful, and leadership required clear identification of priorities. Enforcement of trade agreements was important in ensuring adherence.

In this context, he saw Section 301 as a means for communication of exporters' concerns: he emphasized that Section 301 was integrally linked to the multilateral dispute settlement mechanism. Since the entry into force of the WTO, all Section 301 actions concerning WTO members had been pursued under the DSU.

The representative declined to comment on the extra-territorial application of U.S. legislation, as this was under consideration in Dispute Settlement procedures.

The representative noted that the U.S. aim in services negotiations was to achieve substantive commitments to market access and national treatment by a wide range of countries. The United States would thus continue its active rôle in telecommunications and financial services, through putting in good offers early. In turn, meaningful down-payments were required from other Members, providing real access to foreign service providers and reflecting fully the principles of market access, national and most-favoured-nation treatment.

He stated that the renewal of fast-track negotiating authority would require extensive consultations with the new Congress, yet to be formed; the U.S. would keep Members informed of progress in this regard.

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**Trade measures**

While welcoming the low average of U.S. tariffs, Members noted the high tariff peaks in particular sectors. It was noted that zero-for-zero initiatives would contribute to further reduction of tariff averages. Questions were raised about increases in the rate of the customs user fee, and whether the fee substituted for declines in tariff revenue.

Developments in U.S. anti-dumping and countervailing legislation and their application to specific cases were raised by many participants. While welcoming the reduction in the number of new cases, members questioned the U.S. concept of "fair" trade, the definition of "national industry", the use of *de minimis* provisions, the timeframe for application of the sunset clause, the use of anti-circumvention measures, and the relationship of AD/CVD measures to competition policy. The high cost of anti-dumping and countervailing measures to the U.S. economy and trading partners was emphasized.

Members also saw a lack of consistency between rules of origin and labelling requirements used to administer preferential treatment under various regional trade agreements. In this context, the U.S. delegation was invited to comment on the status of a U.S. Treasury proposal to unify the rules of origin.

Members commended the United States for its commitment to expanding procurement coverage under the plurilateral Government Procurement Agreement and for seeking greater transparency in this area. However, many questions were raised concerning conditions of access to U.S. government procurement. "Buy-American" and "Buy-State" provisions were criticised as being wide ranging and non transparent. Members considered that set-asides for small and minority-owned businesses were becoming more important over time and sought clarification on these areas.

Standards and technical regulations were raised by many members as an area of concern. Issues raised included the application of environmental process standards to imports of tuna, shrimp and gasoline. The question of the Corporate Average Fuel Economy (CAFE) Act was also critically noted.

In reply, the U.S. representative recalled the contribution made by the United States to overall tariff liberalization; these efforts would continue, *inter alia*, through the proposed Information Technology Agreement. Binding of tariffs on a broad basis by all Members was very important.

He welcomed the improvements in anti-dumping and countervailing provisions contained in the WTO Agreements. A revision of anti-dumping and countervailing regulations underway would increase the level of clarity of U.S. procedures. Anti-circumvention provisions were, in his view, consistent with the enforcement provisions of the relevant Agreements and Ministerial Decisions. It was not easy to say why the level of new investigations had declined, as this was largely determined by private sector actions.

The representative noted in passing that only a few Members had undertaken WTO disciplines in Government procurement. The United States was committed to liberalization in this area: the transparency negotiation to be proposed at Singapore could be a stepping stone for wider membership of the GPA. U.S. policies were predictable and transparent, even when Buy American preferences applied. Restrictions under these provisions and set-aside procedures applied to a small share of procurement covered by the successive Agreements: their importance had in some cases been exaggerated. National security exceptions were maintained in the same framework as those by other trading partners. 37 States had agreed to GPA commitments.

The United States was participating actively in WTO work on rules of origin; U.S. policies on adoption of uniform rules and application of preferential rules were consistent with WTO obligations. The representative also emphasized the linkages, both domestically and multilaterally, that the United States sought to promote between trade and environmental issues, referring particularly to recent international conventions on protection of sea turtles and dolphins.

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**Sectoral issues**

The enactment of the Federal Agricultural Improvement and Reform (FAIR) Act was welcomed. However, Members noted the high average level of tariffs applied to products for which quantitative restrictions had been tariffied under the WTO Agreement on Agriculture. Although much lower tariffs were applied to imports under tariff quota, many of these quotas remained underutilized, leading to questions concerning the allocation of quotas to trading partners. Members expressed regret that export subsidies continued to be available under the FAIR Act – and even expanded in some areas – and queried the targeting of certain export subsidy provisions on particular regions. SPS measures and proposed changes to these measures were also critically reviewed.

The U.S. implementation of its commitments under the WTO Agreement on Textiles and Clothing (ATC) was an important issue for many participants. It was noted that tariffs in this sector remained high. Some Members expressed considerable disappointment that no items previously under quota had been included in the first integration phase and that the U.S. integration of textile and clothing products over four phases, as required by the ATC, was heavily backloaded. It was considered that this violated the spirit of a gradual phasing-in of the products covered by the Agreement and could inhibit the adjustment process in the U.S. market. The change in the rules of origin applied to textiles and clothing was also criticized as being disruptive to international trade, while the use of the safeguard provisions of the ATC was considered by some members to be excessive.

In reply, the U.S. representative noted that the FAIR Act would move the U.S. agricultural sector towards a more market-oriented approach, going beyond obligations agreed in the Uruguay Round. The further influence of such measures as loan rates, subsidies and tariff quotas on prices and production was significantly reduced. On loan rates, there was no price floor or government stock accumulation; international market conditions would determine the extent to which the United States applied export subsidies, with world trade liberalization the key to eventual elimination or suspension of export subsidies.

On textiles and clothing, the representative noted that the sectors were among the most sensitive in the U.S. economy; clothing, in particular, employed many economically vulnerable American workers. The U.S. market was the world's largest, with high import penetration. The United States had made great efforts to ensure that both sectors were part of the Uruguay Round package and that the U.S. Congress implemented the Uruguay Round fully, as negotiated, with appropriate phase-in provisions. The United States had scrupulously abided by its commitments and, at a minimum, would continue to do so. Going beyond currently announced plans was not out of the question but any such consideration would depend on the willingness of other countries involved in textiles and clothing to undertake commensurate additional efforts. He added that the United States had notified a comprehensive product integration schedule for the full transition period – beyond what was required in the Agreement – so as to ensure stability in the U.S. market and for its partners.

On rules of origin for textiles and clothing, when the United States codified its rules it had provided 18 months for public comment. The system was completely transparent, and the overwhelming majority of U.S. rules were in line with those used by other major importers. The U.S. use of safeguards was in accord with the ATC and had been reviewed by the Textiles Monitoring Body and dispute settlement panels.

There were significant challenges ahead to the successful transition to an integrated, quota-free textiles and clothing sector, as required by the Agreement. First, the United States would need to be sure that its trading partners' markets were as open to U.S. exports as the U.S. market was to imports. Second, the United States would need to ensure that disciplines in the Agreement on quota circumvention were effective and adequate to remedy the significant problem.

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**Overall remarks**

Members noted various positive developments in the U.S. economy over the past two years, including a significantly increased volume and share of trade. They particularly welcomed the passage of the Uruguay Round Agreements Act, the entry into force of the plurilateral Government Procurement Agreement, the substantial reform measures in the agricultural and telecommunications sectors, and a decrease in use of anti-dumping measures.

However, continuing concerns were expressed on a number of issues. Contradictory signals were noted. Despite the stated commitment to multilateralism, and frequent invocation of WTO dispute settlement procedures, a resort to unilateral approaches is still in evidence. A continuing emphasis on strict bilateral reciprocity sits uneasily with the stated attachment to multilateralism. Criticisms of legislative provisions with extra-territorial effect were widely shared.

Among the sectoral issues raised, a strong concern about the United States textile régime was registered by textile-exporting countries. In the services sector, it was hoped that the United States would demonstrate a strengthened commitment to completing the unfinished business of the Uruguay Round.

Members are conscious of the weight which the United States carries within the world trading system and the leverage which it consequently exercises. They seek reassurance that the relative restraint in resort to trade remedies which characterizes periods of economic buoyancy will prove durable. Most importantly, they are concerned to ensure that the United States is a consistent and reliable proponent of multilateralism, with a long term commitment which will be strong enough to withstand pressures that may arise.

## Zambia – 9-10 September 1996

The Trade Policy Review Body has now completed its first review of Zambia's trade policies and practices. These remarks, made on my own responsibility, summarize the main points of the discussion. They are not intended to substitute for the collective evaluation and appreciation of Zambia's trade policies and practices. Details of the discussion will be reflected in the minutes of the meeting.

The discussion developed under three main themes: (i) the external and regional setting for Zambia's trade policies; (ii) Zambia's economic situation; and (iii) specific questions on trade measures.

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**External and regional setting for Zambia's trade policies**

Members commended Zambia on its unilateral liberalization efforts and its determination to base its economic and trade policies on the principles of the multilateral trading system. The point was emphasised that open markets were necessary to support Zambia's economic restructuring. Within this context, Members asked about the access granted to Zambia by its neighbours in regional trade agreements, such as SADC and COMESA, to which it is a party; that available under the Lomé Convention; and the effects of such access on Zambia's own liberalization process. Questions were also posed concerning broader regional co-operation, including under the Abuja Treaty. Some members noted the desirability of regional approaches on tourism, with regard to resources shared by Zambia and its neighbours. Participants commented that Zambia's regional agreements should be fully consistent with the WTO Agreements.

The representative of Zambia began his response by indicating that he would provide written answers to some of the questions upon his return to Zambia. Areas he proposed to cover in this way included: the impact of SADC in the short – and medium-term; the macroeconomic environment; and Zambia's commitments under the GATS.

The representative of Zambia went on to emphasise that his country had embarked on an unparalled and bold growth programme in both the political and economic spheres; Zambia was committed to this programme and sought the support of the international community to ensure the success of the programme. He indicated that his country sought to enter into a range of bilateral trade arrangements and was currently negotiating agreements with Zimbabwe and SACU member States. On regional arrangements, it was his Government's view that COMESA and SADC could co-exist in a constructive manner. He noted that there would be a joint COMESA/SADC meeting in November of this year that would deal with any

duplication of activities by the two. COMESA had been notified to the WTO in line with the Uruguay Round Agreements, and that Zambia would encourage all COMESA members to ensure that the regional arrangement complied fully with the WTO.

With respect to the suggestions on regional approaches to tourism, he indicated that joint packages had been initiated with South Africa and Namibia and that consultations had been initiated with Kenya. On the Lomé Convention, he noted that as the preferences would end by the year 2000, Zambia had already begun to sensitize its business community to the stiffer competition that would result.

**Zambia's economic situation**

Members appreciated Zambia's significant economic reforms introduced since 1991. They noted that results had been slow in coming, partly because of the recurrence of drought; however, there had recently been an encouraging expansion of non-traditional exports. Both savings and investment levels remained low: Members asked about the effects of measures taken to increase savings and attract foreign direct investment, after the recent removal of specific incentives. Some participants inquired about levels of interest rates and their effects on competitiveness of Zambian goods and services; the structure and viability of the external current account; and the volatility of international reserves. Acknowledging that economic reforms can often be politically sensitive, Members asked questions regarding the short-term impact, and longer-term effects, of Zambia's structural adjustment measures, including the privatization programme. Questions were posed regarding domestic structural constraints on export diversification and the further development of non-traditional products.

Participants sought clarification on limitations maintained by Zambia on foreign investment in services. They noted that the prospects for FDI could be improved by Zambia's participation in future WTO services negotiations and by increasing its GATS commitments.

The representative of Zambia replied that in the short term structural adjustment had had adverse effects on the welfare of Zambia's people. This had not brought any political instability as Zambians strongly believed that the adjustment programme was the only way to revitalize the economy. In this context, Zambia had embarked on a comprehensive privatization programme, under which 138 companies had already been sold. Zambia was committed to privatizing ZCCM, the Copper Company, and ZAMTEL, the telecommunications company; the former had already been advertised for sale and the deadline for tenders was end-February 1997. He noted that a number of measures had been taken to attract foreign direct investment, including the removal of customs duty on imports of machinery in certain sectors, infrastructural improvements and 100 per cent profit repatriation by foreign investors. He noted that the Investment Centre did not have the capacity to process investment licences in the highly complex mining and financial services sectors; therefore these were the responsibility of the respective Ministries. New legislation had also been introduced for the creation of private pension schemes, which might improve savings. The representative emphasised that there were, indeed, a number of constraints facing Zambian exports, however, Zambia had a comparative advantage in areas such as horticultural products, precious and semi-precious stones, agriculture, textiles, engineering, wood and wood products, leather and tourism.

**Specific questions**

Expressing full appreciation for the considerable progress made by Zambia in liberalizing its trade régime, Members sought clarification on the consultative process for trade policy with the private sector. While noting that the tariff structure had been significantly simplified, participants expressed concerns both about the low level of Zambia's WTO bindings on non-agricultural products, and about the disparity between bound and applied rates. Participants noted the heavy dependence of Zambia's government revenue on border taxes and asked if this might slow its further pursuit of tariff liberalization.

Specific questions were also raised on the compatibility of the Import Declaration Fee with WTO rules and timetable for its abolition; as well as the incorporation of WTO disciplines into domestic trade legislation including on customs valuation, pre-shipment inspection, and anti-dumping and countervailing measures. The existence of a long-standing anti-dumping measure, applied on an MFN basis, was particularly emphasised by some members. Members also asked about prospects for further liberalization of services sectors, particularly telecommunications, and the implementation of the trucking activities licence.

The representative of Zambia responded that some 25 per cent of government revenue came from border duties; the dependence was therefore less serious than had been suggested. Government officials held quarterly meetings with the private sector to discuss a number of policy issues, including those relating to trade; the private sector was also involved in trade negotiations and in the preparation for Singapore. On the disparity between bound and applied tariffs, he reassured Members that Zambia had no intention of increasing tariffs, but rather was committed to future liberalization. He indicated that the

Import Declaration Fee would be eliminated this year; a number of measures, including a broadening of the tax base and improved performance by the Zambia Revenue Authority would fill the subsequent financial gap. Zambia was fully committed to implementing the WTO Agreement on Customs Valuation, but needed technical assistance for this purpose; inter-Ministerial consultations were underway to this effect. He noted that the company making the product on which there was a long-standing anti-dumping duty was in the process of privatization and hence the duty could be expected to lapse. He added that there was no discrimination between local and foreign truckers in granting the trucking activities licence, whose issuance was intended to arrest smuggling.

In summary, the overall thrust of the discussion was encouraging and supportive of the underlying direction of Zambia's economic and trade policy. At the same time, many of the questions posed reflected members' concern that the economic reform process in Zambia should be sustained and deepened, accompanied by full compliance with all of Zambia's WTO obligations.

Members welcomed the significant steps taken by the Zambian authorities towards a more open and deregulated economic and trade régime; they also welcomed steps being taken by Zambia to overcome infrastructural and other supply constraints. They recognized the difficulties of such major adaptation, particularly given the inevitable time-lag before the steps taken translate into practical benefits for the Zambian economy. They were conscious that, if the policies pursued domestically are to achieve the desired results, it is important that they receive support at the regional level and within the multilateral trading system.