# UNIT - I

## History of International Trade

In olden days, the concept of international trade was not prevalent. Instead, international trade was referred to as trading activities conducted overseas or over long distances. History of international trade shows us how trade used to take place between various nations in olden days. It gives us an insight into the evolution of the concept of international trade. Given below is a rough outline of the history of international trade.

## History of international trade in ancient times-Important happenings:

The important trading activities, which took place in the ancient period, can be summarized as under: According to Periplus Maris Erythraei, which is a Greek travel manuscript, written in the 1st century CE, there used to be extensive trade between Romans and the Indians. The Arabian nomads carried out long distance trading activities with the help of camels. They traded silk fand spices in Far East. The Tyrian fleet of ships known as "Ships of Tar shish" sailed back with ivory, silver, gold and precious stones from the east. The Egyptians carried out extensive trading activities in the Red Sea. They imported spices from Arabia and from the "Land of Punt". Ptolemaic dynasty, which is a Greek dynasty, was the first to carry out trade with India, long before the Romans did. People belonging to the Kingdom of Qataban, cultivated and traded aromatics as well as spices. The Kingdom's economy was dependent on this trade. Spices and aromatics were exported to Abyssinia, Mediterranean and Arabia. Berencie and Myos Hormos became important trading ports during the 1st century BCE. There was an increased demand in aromatics with Indian culture being introduced in Java and Borneo. These places assume importance as reputed trading points. These were to cater to the Arab as well as Chinese markets, in the years to come. Pre Islamic Meccans benefited from demand of Romans for luxury articles. For this, the Pre Islamic Meccans used the Incense Route. Myos Hormos, Arsinoe and Berenice were three main Roman ports, where goods brought in from East Africa were set ashore. In the above paragraphs, we also get to see some of the important trading ports during the ancient times. These trading ports served as corridors to other nations.

**History of international trade in the middle ages- Important events**

The Song Dynasty created the first paper printed money. Aden, Siraf, Damietta and Alexandria were used as ports through, which the Abassids entered China and India. Industrial manufacturing, processing and distribution of wine, tea, salt were nationalized by Wang Anshi of China. Market rights as well as trading privileges were secured by Hanseatic League in England for goods in the year 1157. Brocade workshops as well as silk mills were supported by the Song Dynasty in Kafeing and eastern province

**History of international trade in later modern era:**

During the reign of Napoleon III, the Free Trade Agreement (year-1860) was struck between France and Britain. In the year 1815, first nutmeg shipment sailed back from Europe. In 1868, Japanese Meiji Restoration opened its doors for industrialization by means of free trade. In the year 1946, the Bretton Woods System was introduced. This international economic model was introduced to stop wars and depressions. In 1947, as many as 23 nations give their consent to the implementation of GATT (General Agreement on Tariffs and Trade). Formation of Zangger Committee takes place in 1971. It was set up with a view of interpreting nuclear goods in perspective of international trade. International trade of nuclear goods was moderated by Nuclear Suppliers Group or NSG, which was established in the year 1974. NAFTA was formed on 1st January, 1994. On 1st January, 1995, the World Trade Organization or the WTO came into being to promote free trade between various nations. The journey from the "Land of Punt" to the WTO has been a long one and in each step, people have responded to situations depending on the needs of the time.

**THEORIES OF PRIVATE INTERNATIONAL LAW**

In the last post, we discussed the theory of Mercantilism. In response to Mercantilism, Adam Smith offered his own theory of Absolute Advantage. This theory believed that a nation should specialize in producing those goods that it can produce at a cheaper cost than that of other nations. These goods should be exchanged with other goods that are being cheaply produced by the other nations.

According to him, there are following advantages of this theory.

**1. Absolute Cost Advantage -**

a. Absolute Cost Advantage will exist because of specialization of labor that would in turn lead to higher productivity and less cost of labor.

b. Economies of Scale will also exist as one country would produce one type of goods at a large scale. This will significantly reduce the cost of the goods.

**2. Natural Advantage –**

A country would produce those goods that are naturally favoring its climatic conditions. The type of goods produced would also depend upon the availability of natural resources. Presence of plenty of natural resources would significantly provide advantage to such a country while producing the goods.

3. **Acquired Advantage –**

This would include advantage in technology and level of skill development.

**Criticisms of this theory**

This theory assumed that only bilateral trade could take place between the nations and only in two commodities that are to be exchanged. This assumption was significantly challenged when the trade as well as needs of a nation started increasing. Thus this theory did not take into account the multi-lateral trade that could take place between the countries.

This theory also assumed that free trade exists between the nations. It did not take into account that protectionist measures that are adopted by the nations. These protectionist measures were in many forms and included quantitative restrictions, technical barriers to trade, and restrictions on trade on account of environment protection or public policy.

Another criticism of this theory is that it considered labor as the only cost of production in manufacturing goods. It neglected other significant elements like transportation costs, technological costs etc. Also, it became hard for countries to have absolute advantage for many products. In the next post, we shall discuss the theory of comparative advantage

Theories of International Trade are simply the theories that explain the concept of exchanging goods and services between two people or entities in different countries. There are different

theories of International Trade. The older ones are termed as the Traditional Theories whereas the new ones are called as the Modern theories. Let us start with the traditional theories first. The first theory in this respect is that of 'Mercantilism.

**Mercantilism**

This theory was developed in the sixteenth century and is considered to be the oldest theory of International Trade. According to this theory, a country's wealth could be determined by the amount of its gold and silver holdings. This group of theorists believed that every country should increase its gold and silver holdings by increasing its exports and reducing imports. During that point of time, gold and silver had the status of currency. The countries should focus on having a 'trade surplus' i.e. value of exports should be greater than the value of imports. 'Trade deficit' is to be avoided.

It was Adam Smith who coined the term 'Mercantile System'. Under such a system, the economies try to enrich the wealth of the nation by restraining imports and encouraging exports. Adam Smith was also the one who heavily criticized this theory. He argued that free trade benefits both the parties i.e. the exporter and the importer. He also argued that 'Mercantile System' proved harmful to the population in general as the consumers received the goods at a higher price.

This theory flourished during the 17$^{th}$ and the 18$^{th}$ century as imperialism was being promoted by colonial empires. The countries used raw materials to manufacture goods and sell them, thereby promoting exports. However, advocates of 'free trade' believe that mercantilism promoted protectionism. Import restrictions were imposed by countries that ultimately led to higher prices and severely affected the consumers. The biggest promoters of this theory were British, Dutch and Spanish Empires. Even today this theory is being followed to some extent by export economies like Germany, Japan, and Singapore etc. Some have dubbed the policy of these countries to be a kind of neo-mercantilism.

In the last post, we discussed the theory of Absolute Advantage advanced by Adam Smith. It was observed that the theory of Absolute Advantage was not able to answer all the problems of International Trade. As trade started increasing between the nations, it became more complex too. Also, there were countries that did not have Absolute Advantage in any kind of goods. Absolute Advantage was no solution for them. In 1817, famous Economist, David Ricardo introduced his theory of Comparative Advantage. As per this theory if a country

had absolute advantage in two or more products or in no product, specialization and trade could still occur between the countries. As per this theory, Comparative Advantage exists when a country is able to produce a commodity better and more efficiently than it does other commodities. This theory focuses on the relative productivity difference, whereas Absolute Advantage theory focused only on absolute productivity.

A simple example could be that of a farmer who could produce either wheat or rice on his 1 hectare of farmland. Wheat gives him $100 per hectare and Rice gives him $150 hectare. It turns out that this farmer is able to yield better and more efficiently than other farmers in his area in both wheat and rice. We see that even though the farmer has absolute advantage in both the crops, should he produce both the crops? The answer is in negative as for every hectare of wheat produced in his farmland, he would be giving up $50 ($150 - $100) in income. The productivity of his farmland will be highest if he specializes only in producing rice. In a similar manner, a country will specialize in doing what it does relatively better. There could be other factors but this is what the crux of the theory of comparative advantage is.

**Merits of this Theory**

1. This theory demonstrates that trade between two countries is possible even when a country is able to produce all its goods at a cheaper cost than other countries. This is possible when the cost advantage is comparatively more in some goods than in the others. The country is compensated more by focusing its skill and knowledge on producing those goods in which it has a better cost advantage.

2. This theory also has the potential to incorporate costs other than labor. Thus it can take more complex situations into account than the absolute advantage theory.

3. It also takes into account the Opportunity Cost of producing the goods. A lower opportunity cost than another country would signify comparative advantage available to a particular country.

**Demerits and criticisms of Comparative Advantage Theory**

1. This theory assumes that the internal economies of countries are competitive. However, this is not true. Most of the countries have industries that are monopolistic in nature.

2. This theory also assumes the existence of constant returns. This is quite utopian as change in availability of resources and other such dimensions directly affect the economic structure of a country.

3. This theory like Absolute Advantage again assumes existence of free trade between the countries. It fails to take into account factors like quantitative restrictions, public policy, protectionist measures, export subsidies etc.

4. Another important criticism is that comparative advantage though relative in nature measures only static advantage and fails to take into dynamic advantage. It does not provide answers as to how a country could gain comparative advantage by making the necessary investments.

## FOREIGN DIRECT INVESTMENT

**Definition:** Foreign direct investment is when an individual or business owns 10 percent or more of a foreign company's capital. All later financial transactions are extra direct investments, according to the International Monetary Fund. If an investor owns less than 10 percent, it's considered an addition to his or her stock portfolio.

A 10 percent ownership doesn't give the investor a controlling interest. It does allow influence over the company's management, operations and policies. For this reason, most governments want to track who invests in their country's businesses.

### Importance of FDI

Foreign direct investment is critical for developing and emerging market countries. Their companies need the sophisticated investors' funding and expertise to expand their international

sales. In 2015, they received 43 percent of total global FDI. Developing Asia attracted more foreign investment than either the European Union or the United States. The developed world also needs cross-border investment, but for different reasons. Most of these countries' investment is via mergers and acquisitions between mature companies. These global corporations' investments were for either restructuring or refocusing on core businesses. In 2015, world FDI rose 38 percent to $1.76 trillion. There was a surge in cross-border mergers and acquisitions. Once the merger and acquisition activity was subtracted from the calculations, FDI only gained 15 percent. (Source: "Annual 2016 FDI Report," UNCTAD, June 24, 2016.) In 2014, FDI declined 16 percent to $1.2 trillion. That unusual drop-off was investment in the developed world declined 28 percent. Most of it was a single massive U.S. divestment. In 2013, FDI was up 9 percent to $1.45 trillion. (Source: "Annual 2015 FDI Report," UNCTAD, June 24, 2015.)

**Advantages of Foreign Direct Investment**

1. Foreign direct investment benefits the global economy, as well as investors and recipients. Capital goes to the businesses with the best growth prospects, anywhere in the world. That's because investors seek the best return with the least risk. This profit motive is color-blind and doesn't care about religion or politics.
2. That gives well-run businesses, regardless of race, color or creed, a competitive advantage. It reduces the effects of politics, cronyism and bribery. As a result, the smartest money rewards the best businesses all over the world. Their goods and services go to market faster than without unrestricted FDI.
3. Individual investors receive the extra benefits of lowered risk. FDI diversifies their holdings outside of a specific country, industry or political system. Diversification always increases return without increasing risk.
4. Recipient businesses receive "best practices" management, accounting or legal guidance from their investors.
5. They can incorporate the latest technology, operational practices and financing tools. By adopting these practices, they enhance their employees' lifestyles. That raises the standard of living for more people in the recipient country. FDI rewards the best companies in any country. It reduces the influence of local governments over them.

6. Recipient countries see their standard of living rise. As the recipient company benefits from the investment, it can pay higher taxes. Unfortunately, some countries offset this benefit by offering tax incentives to attract FDI.
7. Another advantage of FDI is that it offsets the volatility created by "hot money." That's when short-term lenders and currency traders create an asset bubble. They invest lots of money all at once, and then sell their investments just as fast.

That can create a boom-bust cycle that ruins economies and ends political regimes. Foreign direct investment takes longer to set up and has a more permanent footprint in a country. For more, see LTCM Fund crisis.

**Disadvantages of Foreign Direct Investment**

1. Countries should not allow too much foreign ownership of companies in strategically important industries. That could lower the comparative advantage of the country.
2. Second, sophisticated foreign investors might strip the business of its value without adding any. They can sell off unprofitable portions of the company to local, less sophisticated investors. They can use the company's collateral to get low-cost local loans. Instead of reinvesting it, they lend the funds back to the parent company. (Source: "How Beneficial Is Foreign Direct Investment for Developing Countries?" Finance and Development Magazine, International Monetary Fund, June 2001.)

**Free Trade Agreements and FDI**

Trade agreements are a powerful way for countries to encourage more FDI. A great example of this is NAFTA, the world's largest free trade agreement. It increased FDI between the United States, Canada and Mexico to $452 billion by 2012. For more, see NAFTA Advantages.

**Foreign Direct Investment Statistics**

Who keeps track of FDI statistics? Just about everyone. Here's a guide to the most important agency reports.

The United Nations Conference on Trade and Development - UNCTAD publishes the Global Investment Trends Monitor. It summarizes FDI trends around the world. For example, UNCTAD reported that FDI set a record in 2012 of $1.5 trillion. It surpassed that record in 2015.

- Organization for Economic Cooperation and Development - These FDI statistics are released quarterly for the developed countries within the OECD. It reports on both inflows and outflows. The only statistics it doesn't capture are those between the emerging markets themselves.
- IMF - In 2010, the IMF published its first Worldwide Survey of Foreign Direct Investment Positions. This annual worldwide survey is available as an online database. It covers investment positions from 2009 on for 72 countries. The IMF assembled this information with the help of the European Central Bank, Eurostat, OECD and UNCTAD.
- Bureau of Economic Analysis - This agency reports on the FDI activities of foreign affiliates of U.S. companies. It provides the financial and operating data of these affiliates. It says which U.S. companies were acquired or created by foreign ones. It also describes how much U.S. companies have invested overseas.

## INTERNATIONAL SALE OF GOODS

### Introduction

In 1980, the final version of the Convention of Contracts for the International Sale of Goods (CISG), also called Vienna Convention, was agreed by United Nations of General Assembly to present a uniform law for international sale of goods. This convention, which was an accumulation of more than fifty years of work, has been in force since 1989 in several major trading countries throughout the world. Nonetheless, the United Kingdom, which is one of the most important markets, has not yet ratified the Convention. One reason can be stated that the UK has had a legislation which has applied to both England and Scotland. It has been generally accepted that passing of risk rules have an important role in international sale transactions as they are helpful for determining the allocation of risk of damage or loss under a sale process. It can be said that the most problematic area occurs when multiple sales are in question; however, as Grewal states that the Convention fails to confer a clear solution to this matter. The controversial area is still that the countries which have ratified the Convention, have been

suffering from a lack of experiences as deep as British law scholars have had. As a result of this, the English Sale of Goods Act (SGA) and its interpretations are still important for some dark areas of the CISG.

Unification of the rules for international sale of goods was the aim of the CISG. Thus, the Convention can be regarded as a kind of guide for merchant. Therefore, it should be stated that in case the CISG rules conflict with a contract details, the provisions of the contract will overcome. Further to that even the parties of the contract may eliminate the application of the Convention. In that respect, it is said that the Convention has brought regulatory provisions to commercial law to clarify some areas of international sale of goods, which are still in doubt. One of those areas is the time of "passing of risk" from the seller to the buyer because of the odd nature of risk, which may have adverse consequences. Therefore, not only in almost all legislations there some rules to regulate the issue of risk but also parties generally put some particular provisions into their contracts to reduce the impact of risk which will probably occur in the future.

This paper compares Vienna Convention and English Sale of Goods Act in terms of the issue of passing of risk by giving special interest to similarities and differences between these two bodies of law. The first section of this essay will confer a brief definition of risk and a few different theories on the issue of passing of risk. In the second part the passage of risk rules under the CISG will be analyzed. In third and last section the English Sale of Goods act and its approaches to the transfer of risk and an overall comparison will be given. Finally, the conclusion will cover a total evaluation of the Convention and English Sale of Act rules with regard to their applicability and effectiveness in the area of international transactions.

**The Definition Of Risk And Different Approaches To Passage Of Risk**

It has always been possible that goods can be damaged by variety of factors. As already mentioned for international sales the problematic here is not what the causes of risk are, the question, at stake, has been when this risk passes to the buyer. As Cruz stated that it is a common question for all legal systems and it has resulted in creating different theories to find a proper solution for both sides of the contract. Indeed, it is true that either with national legislation or with international conventions, law scholars have produced different approaches for the time of passing of risk. Before explaining theories for transferring the risk, it seems to be essential to define the term of risk even if many of law systems do not give a place to the definition of this

term in their legislations. Although there are a lot of meanings of "risk" one can be given from Roth's point of view, according to this author, variety of situations can be the reason of risk in a sale contract such as physical damage or deterioration however these reasons should be done by accidently. As also Professor Bridge explains that damages or loss must be "an act of God". It should be noted that the damage or loss must be accidently; otherwise, incidents caused by governments' or one of the parties' acts are not considered as the real risk which can be evaluated in the scope of this essay. Furthermore, economic risk, "which shows the value of goods in the market", is also far away the risk that is regulated under the CISG and SGA.

It is true that there have been different theories and approaches on the issue of passing of risk; however, three of those are generally regarded as the most remarkable ones. According to the first theory, the risk passes to the buyer with the time of conclusion of the contact. Cruz argues that this theory does not bring a practical solution because goods will be still under the control of the seller at the time of conclusion of the contract. It can be said that although this theory removes the confusion of finding the exact time of transfer of risk, it to some extent which strengthens the buyer's hand by giving the opportunity of claiming that the seller did not show the necessary precision after any damage had happened. The second theory, which is the approach of SGA, presupposes that the risk passes to the buyer with property. One criticism to this theory comes from..... The last theory, which reflects the CISG's approaches, points out that the time of delivery by the seller is also the time of passing of risk to the buyer. Even if there are some deficient parts of the theory, it is argued that it is likely to be the most reasonably and fair theory.

**Passage Of Risk Under The Convention On Contract For The International Sale Of Goods**

During the process of transfer it is quite possible that goods might be affected by a range of damage or loss as a result of unexpected incidents. Therefore, rules which are dealing with passing of risk are principally important in an international sale transaction; particularly, when the goods are shipped for long distances. Passages of risk's rules are regulated in Chapter IV of Part III under the CISG. As earlier mentioned, the Convention confers optional provisions; consequently, parties are free to choose the law that they wish to apply to their international sale contract. However, for interpretation of sale contracts, the Convention is still useful to know when the risk passes from the seller to buyer.

It is the fact that the time of passing of risk bears some consequences for parties of a contract. On the one hand, if the risk is still at the seller and goods are perished or destructed, the seller can be kept as responsible for the damage. On the other hand, after the risk passes to the buyer, he has to fulfill his obligations such as payment, even if the goods are damaged. The Convention's approach to the matter of passage of risk varies according to a few different conditions such as the type of sale and current situation of the goods. However, the CISG does not offer a redelivery opportunity to the buyer under its Articles of 66-70. As Violotti states that "the passing of risk of non-performance is regulated in Articles 31-36".

**Risk of Loss under Article 66- 70 Of The CISG**

In case of accidental damage or loss after risk has passed, the most beneficial remedy for a buyer to whom the risk has been transferred is likely to be exceptions under the Articles 66-70 of the CISG since other remedies regulated under the Convention are not applicable for casual damages or loss. According to Bridge, a buyer might not have the rights compelled by the CISG because risk is not pointed out in other provisions of the CISG and the inherent nature and function of risk that it makes ineffective normal rules. As a result of this, to better understand the approaches of the Convention to the doctrine of risk the Articles 66- 70 of the CISG should be carefully analyzed.

Article 66 of the Convention briefly mentions the implications of the risk on the parties of a contract by saying that damage or loss of goods does not give the right to the buyer not to fulfill his obligations of payment. In other words, the buyer to whom risk has passed is still obliged to accept damage goods and make the payment for them. As above mentioned as long as the loss or damage is accidental the buyer has to fulfill his obligations without having the right to claim that it is seller's non-performance. It seems to be helpful to see reflection of this Article to case law. An Italian wine manufacturer (plaintiff) sued the German buyer (defendant) for payment of the price of bottles of wine since the defendant avoided paying for them. The German buyer claimed that the goods were not suitable for use because of deterioration during the shipment. The goods were subject to "ex factory" delivery. The Regional Court held that the buyer had declared its refusal to pay on contract; therefore, the plaintiff was not entitled to ask for payment. Upon the appeal of the seller, the Higher Regional Court affirmed the decision of Court of First Instance by stating that it was non-performance of the seller in accordance with the Article 35(2) (d) CISG. Indeed, although the risk passed to the buyer, the Court considered that

the seller was still responsible for the damage due to lack of preserving under Article 36(2) and 66 CISG.

The above case should be interpreted in a way with regard to the seller obligations under the CISG, which are providing the goods, preserving them and properly bringing them to the point of delivery. In this respect, it can be said that Article 66(2) of the CISG brings an exception to obligations of the buyer which is indeed that if the damage or loss occurs as a result of the seller's mistake, omission or act, he will remain responsible for this loss or damage until successfully handing over the goods. Consequently, the buyer obligation to pay for the goods will be delayed when this exception applies. There are different approaches to explain the phrase of "act or omission of the seller". According to one of those, it is a breach of seller's obligations under the CISG or their contract. Proponents of another approach argue that it could be any behavior of the seller which caused the damage or loss; therefore, it is difficult to say that such acts of the seller should be regarded as a breach of the CISG. Schlechtriem and Honnold, as supporters of this second view, state that any behaviours of the seller which resulted in the loss or damage should not be interpreted as a breach of obligations of the seller, it also might be unlawful behaviours under the tort law.

**Passing Of Risk In Sales Involving Carriage Of The Goods**

"If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for Transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk."The CISG regulates the passing of risk rules in sales which involve carriage of goods under the article 67. Since most of international sale transactions involve carriage, the importance of this Article comes into question. Mainly interpretation of this Article gives us two distinctive points that have to be taken into consideration. First, as seen above, the decisive factor of the whole Article is the place where the risk passes to the buyer. If no any particular place is determined, the seller transfers the risk to the buyer by handing the goods over to the first carrier. If there is a particular place and a particular carrier form which the seller should dispatch the goods, the risk remains at the seller's responsibility.

Although the basic rule is obvious, interpretation of this article arises some doubtful areas which should be briefly examined. One of those areas is that the status of the carrier should be independent and self-employed. According to Bianca and Bonell, the carrier should be a third party organization, since transmission made by parties is beyond the sphere of article 67(1) CISG. Another argument on this article is whether a forwarding agent should be considered as a carrier. Schlechtriem states that it should be regarded as a first carrier, as long as the forwarding agent is an independent entity.

**The Goods Sold During the Transit Article 68 CISG**

The Convention has followed a different approach from the basic rule to determine the time of passing of risk in the goods which have already been under the control of an independent carrier. According to the first sentence of the article 68 CISG, the risk passes to buyer at time of conclusion of the contract. The convention aimed to give dynamics to the trade life although there have been some practical problems due to the difficulty to find out the exact time in which the damage happened. After showing the main rule, it is worth saying that article 68 confers an exception once again:

"However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage."

The first sentence of the Article 67 of the Convention, which can be regarded as a general provision for passing of risk, states that:

"If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale".

With regard to this article of the convention it can be interpreted that delivery is, to a certain extent, important to determine the time of the passing of risk. Unless otherwise agreed, the risk passes to the buyer when the seller dispatches the goods at any places. Moreover, in the second sentence of the Article 67 of the Convention states that if it is agreed that the seller has to hand over the good at a particular place and with a particular carrier; therefore, the risk will pass to the buyer when the goods are delivered to the carrier at that place.

## International Taxation

There is a revolution underway in the world of international taxation. The current essential treaty and substantive taxation rules were developed shortly after the end of World War I using England and India—denominated "imperial" and "colony" countries, respectively—as a model. The purpose of these treaty and substantive rules was to repatriate income from the colony country to the imperial country to facilitate repayment of war debts. As a result, the model treaties that formed the basis of the current Organization for Economic Co-operation and Development (OECD) and United Nations models essentially allowed source countries to tax only a limited share of the overall (combined) income, and allocated the residual income to the "residence" country (England, or the imperial country).The central flaw in this approach was the treatment of interim holding companies as "residence" countries. The assumption was that all countries would ultimately adopt the same taxation regimes and rates. Needless to say, this never happened. A related flaw was the framework of the transfer pricing rules promulgated under the model treaties. In this context, "transfer pricing" refers to the mechanisms for allocating income between affiliates located in different jurisdictions. In order to allocate residual income to the residence country, the primary transfer pricing methods were so-called "one-sided" methods, which tested the source country entity. A combined or "two-sided" approach (profit split) was typically the lowest priority method.

These two critical issues have undergirded multinational enterprise (MNE) global income tax planning for generations. In mid-2013, the G-8 and G-20 countries expressed concern about the perception that MNEs do not pay their fair share of tax in their respective countries, and directed the OECD to study the matter.

## OECD BEPS Project

On July 17, 2013, the OECD released its contemplated Base Erosion and Profit Shifting (BEPS) Action Plan. The Action Plan identified 15 subjects to be addressed, which for present purposes can be categorized as follows (with parenthetical references to the Action number assigned by the OECD):

**Transfer Pricing Matters**

a. Intangibles transfer (Action 8)

b. Risks and capital (Action 9)

c. Non-third-party arrangements (Action 10)

With respect to this action item, the details suggest a need to "(ii) [c]larify application of transfer pricing methods, in particular profit splits, in the context of global value chains; and (iii) provide protection against common types of base eroding payments, such as management fees and head office expenses." In other words, the OECD is concerned about the mechanics of base erosion.

d. Re-examination of documentation (Action 13)

**Treaty Matters**

a. Treaty abuse—commissionaire-type arrangements (Action 6)

b. Permanent establishment definition (Action 7)

c. More effective dispute resolution (Action 14)

d. Development of a multinational instrument to amend treaties (Action 15)

**Backstop Matters**

a. Digital economy (Action 1)

b. Hybrid mismatches (Action 2)

c. Country foreign corporation rules (Action 3)

d. Interest and financial payment deductions (Action 4)

e. Substance for preferential regimes (Action 5)

Information Exchange and Documentation

a. Disclosure of rulings on preferential regimes (Action 5)

b. Disclosure of aggressive tax planning arrangements (Action 12)

c. Collection and evaluation of data about BEPS (Action 11)

The critical issues for most MNEs are the transfer pricing and treaty-related matters (items 1 and 2 above).

**Challenges of the BEPS Project**

There are a variety of elements that all parties must consider in evaluating the BEPS Action Plan and the way forward.

**Limits of OECD Authority**

The OECD itself has no mandate to change the law, even with the broad public endorsement of the G-8 and G-20. Accordingly, any actual change in treaty or transfer pricing policy will depend on take-up from interested sovereign states. Therein lies the fundamental problem for an initiative such as this: it relies on domestic implementation on a country-by-country basis. Because there inevitably will be variation in how states adopt the OECD proposals, there will never be a perfectly coordinated, supra-national action on BEPS. In practical terms, the process envisioned by the Action Plan will be a starting point to address perceived shortcomings of the current principles of international taxation.

The difficulties of sovereign country action is perhaps best illustrated by the United Kingdom's newly introduced "patent box," which from one perspective could be interpreted as a base-eroding tactic in favor of the UK fisc. The OECD cannot force the United Kingdom to abandon the patent box regime, and, given the regime's relatively recent appearance on the statute books, it seems highly unlikely that the United Kingdom would remove it voluntarily. In addition, the regime almost certainly was enacted with due consideration of the OECD's public and prominent work in the BEPS space, in which the United Kingdom is a leader. On the other hand, there has been recent governmental cooperation across a broad spectrum of domestic systems and points-

of-view in other areas of international tax compliance. For example, there has been broad international cooperation with the U.S. initiative addressing investment income reporting, framed by the U.S. Foreign Account Tax Compliance Act.

**Prior OECD Initiatives**

A related practical reality is that the BEPS Action Plan is not the first time that the OECD has undertaken broad-based efforts to address perceived tax base erosion matters. In May 1996, OECD ministers called upon the OECD to "develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases . . . ." The heads of state of the then-current G-7 countries endorsed this request, urging the OECD "to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries would operate individually and collectively to limit the extent of these practices." While the project started off in a similar manner as the BEPS Action Plan, the net result after several years of what became the Harmful Tax Competition initiative was a broad-based expansion of information exchange agreements. The takeaway for the BEPS process is that the study may or may not result in concrete proposals that would materially affect the effective tax rate (ETR) planning of many MNEs.

**Posture of BRICS and Non-Member Source Countries**

A third practical element relates to the posture of Brazil, Russia, India, China and South Africa (BRICS) and other non-OECD-Member countries. The BRICS in particular have been outspoken critics of the OECD model treaty and its transfer pricing guidelines for many years. Indeed, the BRICS even have suggested the possibility of developing their own model treaty. The background of this situation is an interesting element of tax policy history, as noted above. For most MNEs, the most serious current international taxation issue is the difficulty of implementing global ETR plans in the BRICS and other source countries. While the BRICS members of the G-8 and G-20 have endorsed the BEPS Action Plan process, it should be kept in mind that reaching high-level political agreement to a plan of action is a far cry from subscribing to, and implementing, the more granular proposals that may be forthcoming. Nonetheless, the apparent trend of thinking in the BRICS and source countries seems to coincide with what can be

anticipated from the BEPS Action Plan process. The issues likely to be most important to the BRICS and other non-OECD-Member countries could be along the following lines:

Preference for two-sided (versus one-sided) transfer pricing testing to ensure that source country functional activities are appropriately taken into account in allocating residual income

Permanent establishment of limitations in the current model treaties

Expansion of the definition of "intangible" assets to include a broad range of local market synergies (so-called China premium)

Backstopping of transfer pricing and domestic tax enforcement, tax base protection requiring:

Exit taxes

General anti-avoidance principles

Extra-territorial reach (so-called Vodafone issue in India)

Several of the BRICS have suggested a potential need for a new "source" country model tax treaty, at least for purposes of framing discussion in future treaty deliberations. The BEPS Action Plan clarifies that it is "not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income," which means that MNEs should expect that the BRICS countries may continue to pursue their respective agendas outside the context of the OECD's BEPS project.

**Coordination**

The European Union has undertaken its own action plan to "strengthen the fight against tax fraud and tax evasion." If both the EU and OECD action plans continue, coordination will be necessary at some point. Other OECD initiatives also are underway that could have an impact on any ultimate BEPS proposals. For example, the intangibles project involves many elements of the transfer pricing portion of the BEPS Action Plan. In addition, the first Action Plan item is

the digital economy, which the OECD tried to address in its 2010 update of the model treaty, although that update probably created more issues than resolutions.

**Transition**

Another issue that must be considered in-depth as the process evolves is how transition from the status quo will be addressed with respect to any specific action ultimately undertaken by one or more countries. Oddly enough, the Action Plan seems to discourage this reality, as it calls in several places for concerted and coordinated action. The likelihood that some states will wish to move faster and more comprehensively than others is almost inevitable. Nonetheless, if there is material change in specific treaties or transfer pricing guidelines, there will be a grandfathering process of effective dates and other items, which will provide a transitional period to adapt the ETR planning of MNEs.

These trends related to BEPS and BRICS suggest that epochal change in treaty and transfer pricing policies may be on the horizon. If there is enough political will to push through even some of the changes envisaged by the BEPS Action Plan, then, in view of the rather short proposed timeframe, MNEs should engage proactively with the principles and policies underlying the Action Plan's stated aims. MNEs also should be vigilant in keeping fully abreast of developments in this sphere and in considering potential implications of the evolving process on their global value supply chains, particularly their global ETR planning. An important element on the global tax agenda of all MNEs should be consideration of how ETR planning will be affected by any or all of the evolutions noted above. In this respect, all MNEs engaged in cross-border business should address at least two questions as the BEPS Action Plan process evolves:What does the project mean to my company? The likely outcomes of the BEPS process are as noted. These elements should be reviewed in terms of their importance to a specific MNE and its ETR plan.

In practice, modeling such matters is a relatively straightforward process. For example, it is a process that is regularly undertaken with respect to resolution of substantive tax or transfer pricing disputes, administratively or in Competent Authority, Advance Pricing Agreement or litigation contexts. In all of these contexts, likely outcomes are evaluated to develop contingency plans or business plan adaptations. As is true in any type of material evolution, legacy structures

may need to be revisited, especially where anticipated tax benefits accrue annually and the existing planning will be affected by that evolution.

A specific approach could be along the following lines. In evaluating a potential transaction, the in-house tax audit manager would prepare mock Information Document Requests (IDRs) from the relevant tax authorities. An external accounting or law firm could respond to these mock IDRs, perhaps in such a manner as to ensure attorney-client privilege. From these responses, a risk matrix can be prepared, which should list the various outcomes, quantify them using tax software and compute a risk weighted value for the respective outcomes. Once that risk matrix is evaluated, the transaction could be revised to mitigate the risk, be scrapped or tabled, or proceed.

There are a number of ways to arrive at the risk quantifications. One is the "Las Vegas bookie" approach. External advisors, not involved in the transaction, would be provided with the pertinent data and asked to place a wager, which will establish a betting line. If the final betting line is 3 to 2, meaning that one would need to wager $3 to win $2, it would translate into a 60 percent chance of prevailing on the tax position.

Another approach is "role playing," in which an external tax expert would be asked whether he or she wants to represent the taxpayer or the Internal Revenue Service (IRS) on the case, with the winner receiving a $1 million fee. This may determine the level of opinion that could be issued. Depending on this result, the process could continue with a change in the stakes—e.g., if the external adviser represented the taxpayer and would receive $1 million for a win, a fee appropriate for an IRS victory could be determined. Presumably it would be much higher.

# UNIT II

## World Trade Organization

The **World Trade Organization** (WTO) is an intergovernmental organization which regulates international trade. The World Trade Organisation officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948.As an organization it has vast powers and functions than what its predecessor GATT (General Agreement on Tariffs and Trade) had, the objectives and goals of both being broadly the same. The World Trade Organization is a Multi-lateral organization which facilitates the free flow of goods and services across the world and encourages fair trade among nations. The result is that the global income increases due to increased trade and there is supposed to be overall enhancement in the prosperity levels of the member nations.

## Features of World Trade Organization

1. It is an international organization to promote multilateral trade.
2. It has replaced GATT.
3. It promotes free trade by removing tariff and non-tariff barriers in international trade.
4. It has fixed set of rules and regulations and it has a legal status. Its rules and regulations are mutually designed and agreed upon by member nations.
5. Agreements agreed by member-countries are binding on all members of WTO and if any member does not follow such agreements, then its complaint can be lodged with the Dispute Settlement Body of WTO.
6. It includes trade in goods, trade in services, protection of intellectual property right rights, foreign investment etc.
7. Unlike International Monetary Fund (IMF) and the World Bank.WTO is not an agent of United Nations.
8. Unlike IMF and World Bank, there is no weighted voting (on the basis capital). Rather all the WTO members have equal voting rights (One Country, One Vote).
9. WTO has large Secretariat and huge organizational set up.

## Objectives of World Trade Organization

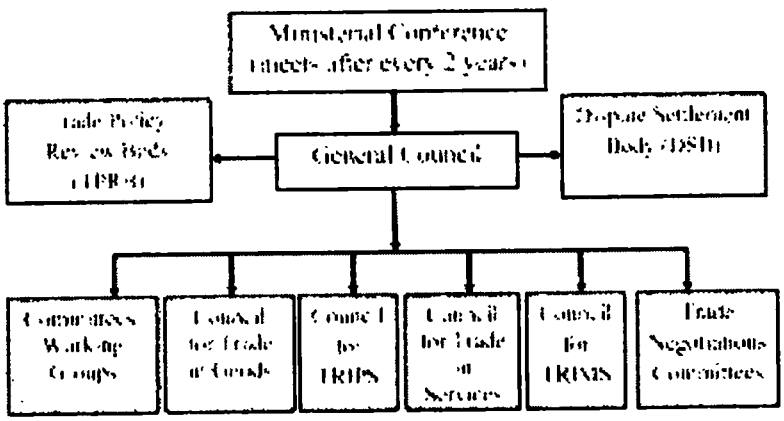
1. The primary aim of WTO is to implement the new world trade agreements.
2. To promote multilateral trade i.e. trade among many nations.
3. To promote free trade by abolishing tariff and non tariff barriers.
4. To promote world trade in a manner that benefits every member country.
5. To ensure that developing countries get a better share in the advantages resulting from the expansion of international trade corresponding to their development needs.
6. To remove all hurdles to an open world trading system and use world trade as an effective instrument to boost economic growth.
7. To enhance competitiveness among all trading partners so as to benefit consumers.
8. To expand and utilize world resources in the most optimum manner.
9. To improve the level of living for the global population and speed up economic development of the member nations.
10. To take special steps for the development of poorest nations.

## Functions of World Trade Organization

1. Laying down code of conduct aiming at reducing tariff and non-tariff barriers in international trade.
2. Implementing WTO agreements and administering the international trade.
3. Cooperating with IMF and World Bank and its associates for establishing coordination in Global Trade Policy-Making
4. Settling trade related disputes among member nations with help of its Dispute Settlement Body (DSB).
5. Reviewing trade related economic policies of member countries with the help of its Trade Policy Review Body (TPRB).
6. Providing technical assistance and guidance related to management of foreign trade and fiscal policy to its member nations.
7. Acting as form for trade liberalization.

**Organizational Structure of WTO**

World Trade Organization is a permanent trade organization having its own secretariat and huge organizational set up. The headquarters of WTO are at Geneva in Switzerland. Organizational structure of WTO is headed by Ministerial Conference which meets after every two years. General council a permanent organ of WTO works under the policy framework of Ministerial Conference. General Council is assisted by Dispute Settlement Body (DSB) and Trade Policy Review Body (TPRB). Under General Council, various Councils/Working Groups work. These are Council for Trade in Goods, Council for Trips, and council for trade in services, council for Trims, Trade Negotiations Committees and Working Groups. The organizational structure of WTO is clear from the following chart.




**IMPACT OF WTO AGREEMENTS ON INDIAN ECONOMY**

The signing of WTO agreements will have far reaching effects not only on India's foreign trade but also on its internal economy. Although the ultimate goal of WTO is to free world trade in the interest of all nations of the world, yet in reality the WTO agreements has benefitted the developed nations more as compared to developing ones. The impact of WTO on India's economy is staged as follows: –

**I. Positive Impact I Benefits I Advantages I Gains from WTO: –**

The Positive impact of WTO on India's economy can be viewed from the following points: –

**1) Increase in Export Earnings**

Estimates made by World Bank, Organization for Economic Co-operation and Development (OECD) and the GATT Secretariat, shows that the income effects of the implementation of Uruguay Round package will be an increase in traded merchandise goods. It is expected that India's share in world exports would improve.

**2) Agricultural Exports**

Reduction of trade barriers and domestic subsidies in agriculture is likely to raise international prices of agricultural products. India hopes to benefit from this in form of higher export earnings from agriculture. This seems to be possible because all major agriculture development programmes in India will be exempted from the provisions of WTO Agreement.

**3) Export of Textiles and Clothing**

With the phasing out of MFA (Multi – Fiber Arrangement), exports of textiles and clothing will increase and this will be beneficial for India. The developed countries demanded a 15 year period of phasing out of MFA, the developing countries, including India, insisted that it be done in 10 years. The Uruguay Round accepted the demand of the latter. But the phasing out Schedule favors the developed countries because a major portion of quota regime is going to be removed only in the tenth year, i.e. 2005. The removal of quotas will benefit not only India but also every other country'.

**4) Multilateral Rules and Disciplines**

The Uruguay Round Agreement has strengthened multilateral rules and disciplines. The most important of these relate to anti – dumping, subsidies and countervailing measures, safeguards and disputes settlement. This is likely to ensure greater security and predictability of the international trading system and thus create a more favorable environment for India in the New World Economic Order.

**5) Growth to Services Exports**

Under GATS agreement, member nations have liberalized service sector. India would benefit from this agreement. For e.g.- India's services exports have increased from about 5 billion US $

in 1995 to 96 billion US $ in 2009-10. Software services accounted for about 45% of service exports.

**6) Foreign Investment**

India has withdrawn a number of measures against foreign investment, as per the commitments made to WTO. As a result of this, foreign investment and FDI has increased over the years. A number of initiatives have been taken to attract FDI in India between 2000 and 2002. In 2009-10, the net FDI in India was US $ 18.8 billion.

**II. Negative Impact / Problems I Disadvantages Of WTO Agreements on Indian Economy**

**1) TRIPs**

The Agreement on TRIPs at Uruguay Round weights heavily in favor of Multinational Corporations and developed countries as they hold a very large number of patents. Agreement on TRIPs will work against India in several ways and will lead to monopoly of patent holding MNCs. As a member of WTO, India has to comply with standards of TRIPs.

The negative impact of agreement on TRIPs on Indian economy can be stated as follows:

**a) Pharmaceutical Sector**

Under the Patents Act, 1970, only process patents were granted to chemicals, drugs and medicines. This means an Indian pharmaceutical company only needed to develop and patent a process to produce and sell that drug. This proved beneficial to Indian pharmaceutical companies as they were in a position to sell quality medicines at low prices both in domestic as well as in international markets. However, under the agreement on TRIPs, product patents needs to be granted. This will benefit the MNCs and it is feared that they will increase the prices of medicines heavily, keeping them out of reach of poor. Again many Indian pharmaceutical companies may be closed down or taken over by large MNCs.

**b) Agriculture**

The Agreement on TRIPs extends to agriculture through the patenting of plant varieties. This may have serious implications for Indian agriculture. Patenting of plant varieties may

transfer all gains in the hands of MNCs who will be in a position to develop almost all new varieties with the help of their huge financial resources and expertise.

**c) Microorganisms**

The Agreement on TRIPs also extends to Microorganisms as well. Research in micro – organisms is closely linked with the development of agriculture, pharmaceuticals and industrial biotechnology. Patenting of micro – organisms will again benefit large MNCs as they already have patents in several areas and will acquire more at a much faster rate.

**2) TRIMs**

Agreement on TRIMs provide for treatment of foreign investment on par with domestic investment. This Agreement too weights in favor of developed countries. There are no provisions in Agreement to formulate international rules for controlling restrictive business practices of foreign investors. In case of developing countries like India, complying with Agreement on TRIMs would mean giving up any plan or strategy of self – reliant growth based on locally available technology and resources.

**3) GATS**

One of the main features of Uruguay Round was the inclusion of trade in services in negotiations. This too will go in favor of developed countries. Under GATS agreements, the member nations have to open up services sector for foreign companies. The developing countries including India have opened up services sector in respect of banking, insurance, communication, telecom, transport etc. to foreign firms. The domestic firms of developing countries may find it difficult to compete with giant foreign firms due to lack of resources & professional skills.

**4) Non – Tariff Barriers**

Several countries have put up trade barriers and non – tariff barriers following the formation of WTO. This has affected the exports from developing countries. The Union Commerce Ministry has identified 13 different non – tariff barriers put up by 16 countries against India. For eg. MFA (Multi – fiber arrangements) put by USA and European Union is a major barrier for Indian textile exports.

**5) Agreement on Agriculture (AOA)**

The AOA is biased in favor of developed countries. The issue of food security to developing countries is not addressed adequately in AOA. The existence of ₒ obal surpluses of food grains does not imply that the poor countries can afford to buy. The dependence on necessary item like food grains would adversely affect the Balance of Payment position.

**6) Inequality within the Structure of WTO**

There is inequality within the structure of WTO because the agreements and amendments are in favor of developed countries. The member countries have to accept all WTO agreements irrespective of their level of economic development.

**7) LDC Exports**

The 6th Ministerial Conference took place at Hong Kong in December 2005. In this Conference, it was agreed that all developed country members and all developing countries declaring themselves in a position to do so, will provide duty – free and quota – free market access on a lasting basis to all products originating from all Least Developed Countries (LDC). India has agreed to this. Now India's export will have to compete with cheap LDC exports internationally. Not only this, the cheap LDC exports will come to Indian market and compete with domestically produced goods.

India will face several problems in the process of complying with WTO agreements, but it can also reap benefits by taking advantage of changing international business environment. For this it needs to develop and concentrate on its areas of core competencies.

**SALIENT FEATURES OF URUGUAY ROUND IN WTO AGREEMENTS**

The main agreements of WTO are:

**1) Agreement on Agriculture (AOA)**

The main objective is to increase market orientation in agriculture trade. It provides for commitments in the area of market access, domestic support and export competition. The members have to transform their non-tariff barriers like quotas into equivalent tariff measures. The tariffs are to be reduced by 36% within 6 years in case of developed countries and by 24%

within 10 years in case of developed countries. The least developed countries need not make any commitment for reduction.

**2) Agreement on Trade in Textiles and Clothing (Multi – Fiber Arrangement)**

This provides for phasing out the import quotas on textiles and clothing in force under the Multi – Fiber Arrangement since 1974, over a span of 10 years i.e. by 1st January, 2005. With this agreement quota on textile and clothing has now been abolished.

**3) Agreement on Manufactured Goods**

The developed countries agreed to reduce tariffs on manufactured goods other than textiles by 40%. The tariffs would now be brought down to an average of 3.8% from earlier 6.3%.

**4) Agreement on TRIMs**

An Agreement on Trade Related Investment Measures (TRIMs) calls for introducing national treatment of foreign investments and removal of quantitative restrictions. It identifies 5 investment measures that are inconsistent with the GATT provisions on national treatment and on general elimination of qualitative restrictions.

**5) Agreement on TRIPs**

Trade Related Intellectual Property Rights (TRIPs) pertain to Patents and Copyrights. Whereas earlier on process patents were granted to food, medicines, drugs and chemical products, the TRIPs Agreement now provides for granting product patents also in all these areas. Protection will be available for 20 years for patents and 50 years for copyrights.

**6) General Agreement on Trade and Services (GATS)**

For the first time, trade in services like banking, insurance, travel, maritime transportation, mobility of labor etc. has been brought within the ambit of negotiations. The General Agreement on Trade in Services (GATS) provides a multilateral framework of principles and services that should govern trade in services under conditions of transparency and progressive liberalization.

**7) Disputes Settlement Body**

Settlement of disputes under GATT was a never ending process. The Disputes Settlement Body (DSB) set up under WTO seeks to plug the loopholes and provide security and predictability to the multilateral trading system. It has now been made mandatory to settle a dispute within 18 months. The findings of disputes settlement panels will be final and binding on all parties concerned.

In addition to the above, the Uruguay Round also reached agreements on the understanding and implications of certain articles of GATT 1947, viz pre-shipment inspection, rules of origin, import licensing, anti – dumping measures and countervailing duties, safeguards, subsidies etc.

**The Role of the General Agreement on Tariffs and Trade (GATT)**

The General Agreement on Tariffs and Trade (GATT) was a multilateral trade treaty between countries to regulate international trade and tariffs in accordance with specific rules, norms or code of conduct. GATT was set up in 1948 in Geneva to follow the objectives of free trade in order to encourage growth and development of all member countries. There are 117 member nations in GATT. The principal purpose of GATT was to ensure competition in commodity trade through the removal of or reduction in trade barriers.

GATT served as an important international forum for carrying on negotiations on tariffs. Under GATT, member nations met at regular intervals to negotiate agreements to reduce quotas, tariffs and such other restrictions on international trade. GATT became a permanent international trade institution for the multilateral expansion of trade until it was replaced by World Trade Organization (W.T.O) in 1995.

**Objectives of GATT**

1. Expansion of international trade;
2. Increase of world production by ensuring full employment in the participating nations.
3. Development and full utilization of world resources; and
4. Revising standard of living of the world community as a whole.
5. The rules adopted by GATT are based on the following fundamental principles:

6. Trade should be conducted in a non-discriminatory way;
7. The use of quantitative restrictions should be condemned; and
8. Disagreements should be resolved through consultations.

**Methods of achieving the objectives**

The GATT proposed to achieve the objectives through the following methods:

**1) Most favored Nation clause**

The clause is also known as elimination of discrimination clause. This clause is to be adopted to avoid discrimination in international trade. The clause implies that each country shall be treated as the most favored nation. Any particular trade concession offered by a member country to her trading partner should also be available to all the members of the GATT at the same time.

**2) Quantitative restrictions on Imports**

The GATT rules prohibited the use of import quota fixation. But three important exceptions were allowed to this rule:

1. Countries, which are facing balance of payments difficulties, may use the device of input quota fixation.
2. Developing countries may resort to quota fixation but only under procedure accepted by the GATT.
3. Quotas may be applied to agricultural and fishery products if domestic production is subject to equally restrictive controls.

**3) Tariff negotiations and Reduction of Tariff**

The GATT recognized that tariffs are often an important obstacle to international trade. Hence, the GATT would encourage negotiations for tariff reduction to be conducted on a

reciprocal and mutually advantageous basis, taking into consideration the varying needs of individual contracting parties.

The Uruguay Round of talks 1993 was most ambitious and complex. Apart from the traditional tariff and non-tariff measures, new areas such as Trade related Intellectual property Rights (TRIPS), Trade Related Investment Measures (TRIMS) and Trade in services were taken up for discussion. There were differences among member's countries in areas such as agriculture, textiles, TRIPS and anti-dumping. The Uruguay Round has enlarged the scope of GATT to include services and agriculture. The Uruguay Agenda wanted to remove all trade barriers.

**INTERNATIONAL MONETARY FUND**

The International Monetary Fund (IMF) is an international organization headquartered in Washington, D.C., of "189 countries working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world." Formed in 1944 at the Bretton Woods Conference primarily by the ideas of Harry Dexter White and John Maynard Keynes, it came into formal existence in 1945 with 29 member countries and the goal of reconstructing the international payment system. The IMF was established on December 27, 1945 in Washington on the recommendations of Bretton Woods Conference. But it started working on March 1, 1947. The fund has 185 member countries accounting for more than 80 per cent of total world production and 90 per cent of world trade.

It now plays a central role in the management of balance of payments difficulties and international financial crises. Countries contribute funds to a pool through a quota system from which countries experiencing balance of payments problems can borrow money. As of 2016, the fund had SDR 477 billion (about $668 billion). Through the fund, and other activities such as the gathering of statistics and analysis, surveillance of its members' economies and the demand for particular policies, the IMF works to improve the economies of its member countries. The organization's objectives stated in the Articles of Agreement are: to promote international monetary cooperation, international trade, high employment, exchange-rate stability, sustainable economic growth, and making resources available to member countries in financial difficulty.

**Functions:-**

According to the IMF itself, it works to foster global growth and economic stability by providing policy, advice and financing to members, by working with developing nations to help them achieve macroeconomic stability and reduce poverty. The rationale for this is that private international capital markets function imperfectly and many countries have limited access to financial markets. Such market imperfections, together with balance-of-payments financing, provide the justification for official financing, without which many countries could only correct large external payment imbalances through measures with adverse economic consequences. The IMF provides alternate sources of financing.

Upon the founding of the IMF, its three primary functions were: to oversee the fixed exchange rate arrangements between countries, thus helping national governments manage their exchange rates and allowing these governments to prioritize economic growth, and to provide short-term capital to aid the balance of payments. This assistance was meant to prevent the spread of international economic crises. The IMF was also intended to help mend the pieces of the international economy after the Great Depression and World War II. The IMF's role was fundamentally altered by the floating exchange rates post-1971. It shifted to examining the economic policies of countries with IMF loan agreements to determine if a shortage of capital was due to economic fluctuations or economic policy. The IMF also researched what types of government policy would ensure economic recovery. The new challenge is to promote and implement policy that reduces the frequency of crises among the emerging market countries, especially the middle-income countries that are vulnerable to massive capital outflows. Rather than maintaining a position of oversight of only exchange rates, their function became one of surveillance of the overall macroeconomic performance of member countries. Their role became a lot more active because the IMF now manages economic policy rather than just exchange rates.

In addition, the IMF negotiates conditions on lending and loans under their policy of conditionality, which was established in the 1950s. Low-income countries can borrow on concessional terms, which mean there is a period of time with no interest rates, through the Extended Credit Facility (ECF), the Standby Credit Facility (SCF) and the Rapid Credit Facility (RCF). Non concessional loans, which include interest rates, are provided mainly through Stand-By Arrangements (SBA), the Flexible Credit Line (FCL), the Precautionary and Liquidity Line

(PLL), and the Extended Fund Facility. The IMF provides emergency assistance via the Rapid Financing Instrument (RFI) to members facing urgent balance-of-payments needs. The fund of the IMF is SDRs 216.75 billion and to replenish its resources it borrows from the world financial markets and member countries. IMF's own fund is contributed by member countries .Each member country has a quota based on its economic and financial strength its national income, share in world trade and monetary gold held by it. The quota also determines the voting power of a member country and its borrowing power.

India is a founder member of the fund. India's original subscription quota was SDR (Special Drawing Rights) 400 million. The initial par value of rupee was Rs 3.30 per US dollar but, subsequently, the rupee was devalued a number of times till it stood at Rs 8.25 in 1978. At present, the external value of the rupee is not fixed but allowed to fluctuate according to market condition of demand and supply. India has been able to borrow from the fund to overcome her balance of payments difficulties. India borrowed $ 100 million from the fund during 1948-49 but paid back the amount by 1956- 57.

**History:-**

The IMF was originally laid out as a part of the Bretton Woods system exchange agreement in 1944. During the Great Depression, countries sharply raised barriers to trade in an attempt to improve their failing economies. This led to the devaluation of national currencies and a decline in world trade. The Gold Room within the Mount Washington Hotel where the Bretton Woods Conference attendees signed the agreements creating the IMF and World Bank

This breakdown in international monetary co-operation created a need for oversight. The representatives of 45 governments met at the Bretton Woods Conference in the Mount Washington Hotel in Bretton Woods, New Hampshire, in the United States, to discuss a framework for postwar international economic cooperation and how to rebuild Europe.

There were two views on the role the IMF should assume as a global economic institution. American delegate Harry Dexter White foresaw an IMF that functioned more like a bank, making sure that borrowing states could repay their debts on time. Most of White's plan was incorporated into the final acts adopted at Bretton Woods. British economist John Maynard Keynes imagined that the IMF would be a cooperative fund upon which member states could draw to maintain economic activity and employment through periodic crises. This view

suggested an IMF that helped governments and to act as the United States government had during the New Deal in response to World War II. The IMF formally came into existence on 27 December 1945, when the first 29 countries ratified its Articles of Agreement. By the end of 1946 the IMF had grown to 39 members. On 1 March 1947, the IMF began its financial operations, and on 8 May France became the first country to borrow from it.

The IMF was one of the key organizations of the international economic system; its design allowed the system to balance the rebuilding of international capitalism with the maximization of national economic sovereignty and human welfare, also known as embedded liberalism. The IMF's influence in the global economy steadily increased as it accumulated more members. The increase reflected in particular the attainment of political independence by many African countries and more recently the 1991 dissolution of the Soviet Union because most countries in the Soviet sphere of influence did not join the IMF.

The Bretton Woods system prevailed until 1971, when the United States government suspended the convertibility of the US$ (and dollar reserves held by other governments) into gold. This is known as the Nixon Shock. The changes the IMF articles of agreement reflecting these changes were ratified by the 1976 Jamaica Accords. The International Monetary Fund (IMF) is an international organization headquartered in Washington, D.C., of "189 countries working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world." Formed in 1944 at the Bretton Woods Conference primarily by the ideas of Harry Dexter White and John Maynard Keynes, it came into formal existence in 1945 with 29 member countries and the goal of reconstructing the international payment system. The IMF was established on December 27, 1945 in Washington on the recommendations of Bretton Woods Conference. But it started working on March 1, 1947. The fund has 185 member countries accounting for more than 80 per cent of total world production and 90 per cent of world trade It now plays a central role in the management of balance of payments difficulties and international financial crises. Countries contribute funds to a pool through a quota system from which countries experiencing balance of payments problems can borrow money. As of 2016, the fund had SDR 477 billion (about $668 billion).

Through the fund, and other activities such as the gathering of statistics and analysis, surveillance of its members' economies and the demand for particular policies, the IMF works to improve the economies of its member countries. The organization's objectives stated in the Articles of Agreement are: to promote international monetary cooperation, international trade, high employment, exchange-rate stability, sustainable economic growth, and making resources available to member countries in financial difficulty.

**INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT:-**
The IBRD was set up in 1945 with 8 million dollars.

**Objectives of IBRD:-**

1. It was set up to provide foreign exchange for post war reconstruction.
2. To improve the economic condition of the less developed countries.

The IBRD is actively engaged in assisting and encouraging the long term investment for the development. The IBRD has increased the private investment in abroad. IBRD also lends directly to the countries. It also participates with private investors in foreign lending. The bank also advances loans to local Govt. and commercial institutions if Govt. of that country gives surety of the repayment of capital. No doubt the IBRD has played very effective role in improving the economic conditions of the less developing countries who have requested the bank to provide them loans on low rate of interest. The conditions for credit should be also easier.

**EUROPEAN COMMON MARKET OR EUROPEAN ECONOMIC COMMUNITY:-**
European Economic Community is also called European Common Market. It was set up in 1957 by six nations of the Western Europe.

**Objectives:-**
Its main aim is to remove the restrictions on the mobilization of labor and capital among the member of countries. Now its membership has increased up to ten. In order to achieve economic integration it has made the following decisions:

1. Abolition of Tariffs: It has been decided that tariffs and import quotas should be abolished over a period of ten to 15 years among the member countries.
2. Common System: A common system of tariffs should be set up for the goods received from the rest of the world.

3. Perfect Mobility: There should be a perfect mobility of labor and capital within common market.

**4. Common Policies:** As regards the other economic affairs of joint concerns, common policies are being formulated. Economic purpose of ECM was to realize the advantages of increased specialization. The members felt that their national market was very small, so they thought that a large market will absorb by the community members that due to the improved efficiency production will be cheaper and it will increase their prosperity. Past experience shows that trade among the member countries has been increased but it has neglected the rest of the world. So these countries also hesitate to purchase the product of other countries, who are not the member of the community.

**NEW INTERNATIONAL ECONOMIC ORDER**

At the Sixth Special Session of the United Nations General Assembly in 1975, a declaration was made for the establishment of a New International Economic Order (NIEO). It is regarded as "a turning-point in the evolution of the international community."NIEO is to be based on "equity, sovereign equality, common interest and co-operation among all States, irrespective of their social and economic systems, which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations."

Though the declaration on the NIEO by the General Assembly (GA) is of recent origin, the idea is not altogether a new one. In fact, a similar resolution was adopted by the GA itself long back in 1952. Again, similar demands were raised from time to time by the UNCTAD since its inception in 1964. A.K. Das Gupta, however, says that what is spectacular about the NIEO Declaration is its timing. The NIEO aims at a development of the global economy as a whole, with the set up of interrelated policies and performance targets of the international community at large.

**Origin of NIEO:**

The movement for the establishment of the NIEO is caused by the existing deficiencies in the current international economic order and the gross failures of the GATT and the UNCTAD in fulfillment of their vowed objectives. The present international economic order is found to be a symmetrical in its working. It is biased. It is favouring the rich-advanced countries. There has been over dependence of the South on the North. Rich countries tend to have major control over vital decision making in the matter of international trade, terms of trade, international finance, aids, and technological flows. As a matter of fact, the basis for the NIEO is constituted by the U.N. Resolution in 1971, in the seventh special session on "Development and International Economic Co-operation" with various reforms in the area of international monetary system transfer of technology and foreign investment, world agriculture and cooperation among the Third World Countries.

The Resolution categorically mentions that "Concessional financial resources to developing countries need to be increased substantially and their flow made predictable, continuous and increasingly assured so as to facilitate the implementation by developing countries of long-term programmes for economic and social development." It emphasizes global interdependence. It seeks radical changes in allied social, economic, political and institutional aspects of international relations. New developing sovereign countries of the South have insisted on the NIEO. It has been further supported by the non-aligned nations which vehemently criticized the politicalisation of development and trade issues by the developed nations. The developing nations are now asserting their right to participate in the decision making processes of the international institutions like the IMF, World Bank, GATT, UNCTAD, etc. The origin of North-South dialogue for a new economic order may be traced back to over 30 years ago, at the Afro-Asian Conference at Bandung held in 1955. However, the formal idea of the NIEO was put forward in the Algiers Conference of non-aligned countries in 1973. In 1975, a declaration for the establishment of NIEO was adopted along with a programme of action in the Sixth Special Session of the UNCTAD.

**The North-South Dialogue:**

In 1977, there was a negotiation between the North and South at the Paris talks. The developed countries agreed to provide an additional U.S. 1 billion towards the Aid Fund for the

development of the poor nations. In December 1977 the Willy Brandt Commission was set up with a view to review the issues of international economic development. The WB Commission's Report (1980) stresses the need for North-South co-operation. Beside establishment of a common development fund, its recommendations include strengthening the structure of development lending a code of conduct for the multinational co-operation as well as the need for intergovernmental co-operation in monetary and fiscal areas along with the trade policies. It also proposed for the increasing participation of developing nations in the decision-making processes at international level. As Mehboob-ul-Haque observes, the demand for NIEO is to be viewed as a part of historical process rather than a set of specific proposals. It's important facets are the emergence of non-aligned movement, the politicization of the development issue and the increased assertiveness of the Third World countries.

The NIEO led to a serious thinking on the part of the developed countries (DC) to solve the problems of trade of LDCs. There has been a move towards programmed actions in two directions:

(i) Commodity Agreements, with a view to stabilize prices of exportable of LDCs; and

(ii) (ii) Compensatory Financing through IMF's liberal loans to LDCs having deficits due to fluctuations in prices.

**Objectives of the NIEO:**

In essence, the NIEO aims at social justice among the trading countries of the world. It seeks restructuring of existing institutions and forming new organizations to regulate the flow of trade, technology, capital funds in the common interest of the world's global economy and due benefits in favor of the LDCs. It has the spirit of a 'world without borders. It suggests more equitable allocation of world's resources through increased flow of aid from the rich nations to the poor countries. It seeks to overcome world mass misery and alarming disparities between the living conditions of the rich and poor in the world as large.

Its aim is to provide poor nations increased participation and have their say in the decision-making processes in international affairs. Among two other objectives, the NIEO envisages the

establishment of a new international currency the implementation of SDR aid linkage, the increased stabilisation of international floating exchange system and the use of IMF funds as interest subsidy on loans to the poorest developing countries. The crucial aim of the NIEO is to promote economic development among the poor countries through self- help and South-South co-operation. The NIEO intends to deal with the major problems of the South, such as balance of payments disequilibrium, debt crisis, exchange scarcity etc.

**Programme of Action for the NIEO:**

1. In essence, the UNCTAD resolutions provide a source of programme of action for the international economic order.

2. The NIEO is not in favor of the existing system of free market orientation. It is biased in the less developed countries through interventionist approach.

3. Its action programme narrates the need for a more rapid economic development of the poor countries and their increasing share in the world's trade at favorable terms of trade.

4. Its line of action is to adopt discriminatory approach in trade favouring the LDCs.

5. It also insists on de-politicalisation in the flow of official as well as private direct investment from the rich to the poor countries.

6. It contains that aid has to be of multi-lateral form with a view to facilitate structural adjustments in the less developed countries.

7. It also stresses the need for restructuring the international monetary system.

There has been always a great opposition from the rich countries. They have vested interests which do not allow for the healthy outcome and actions in various negotiations and their implementation. Again, the poor countries have weak bargaining power in negotiations. Further, there is very weak trade link between LDCs and the socialist blocs. So far, however, no result-oriented action programme has been undertaken. Nevertheless, the zeal for an NIEO should be continued in the interest of the global welfare.

# UNIT III

## WORLD TRADE ORGANISATION

### TRIMS-Trade Related Investment Measures

The Agreement on Trade-Related Investment Measures (**TRIMS**) are rules that apply to the domestic regulations a country applies to foreign investors, often as part of an industrial policy. The agreement was agreed upon by all members of the World Trade Organization. The agreement was concluded in 1994 and came into force in 1995. The WTO was not established at that time, it was its predecessor, the GATT (General Agreement on Trade and Tariffs. The WTO came about in 1994-1995.) Policies such as local content requirements and trade balancing rules that have traditionally been used to both promote the interests of domestic industries and combat restrictive business practices are now banned. Trade-Related Investment Measures is the name of one of the four principal legal agreements of the WTO trade treaty. TRIMs are rules that restrict preference of domestic firms and thereby enable international firms to operate more easily within foreign markets.

### Features of TRIMs

1. Abolition of restriction imposed on foreign capital.
2. Offering equal rights to the foreign investor on par with the domestic investor
3. No restrictions on any area of investment
4. No limitation or ceiling on the quantum of foreign investment.
5. Granting of permission of without restrictions to import raw material and other components
6. No force on the foreign investors to use the total products and or materials
7. Export of the part of the final product will not be mandatory
8. Restriction on repatriation of dividend interest and royalty will be removed
9. Phased manufacturing programming will be introduced to increase the domestic content of manufacturer

### India's notified TRIMs

As per the provisions of Art. 5.1 of the TRIMs Agreement India had notified three trade related investment measures as inconsistent with the provisions of the Agreement:

- Local content (mixing) requirements in the production of News Print,
- Local content requirement in the production of Rifampicin and Penicillin – G, and
- Dividend balancing requirement in the case of investment in 22 categories consumer goods.

Such notified TRIMs were due to be eliminated by 31st December, 1999. None of these measures is in force at present. Therefore, India does not have any outstanding obligations under the TRIMs agreement as far as notified TRIMs are concerned.

**Economic Implications**

Some governments view TRIMs as a way to protect and foster domestic industry. TRIMs are also mistakenly seen as an effective remedy for a deteriorating balance of payments. These perceived benefits account for their frequent use in developing countries. In the long run, however, TRIMs may well retard economic development and weaken the economies of the countries that impose them by stifling the free flow of investment. Local content requirements, for example, illustrate this distinction between short-term advantage and long-term disadvantage. Local content requirements may force a foreign affiliated producer to use locally produced parts. Although this requirement results in immediate sales for the domestic parts industry, it also means that this industry is shielded from the salutary effects of competition. In the end, this industry will fail to improve its international competitiveness. Moreover, the industry using these parts is unable to procure high-quality, low-priced parts and components from other countries, and will be less able to produce internationally competitive finished products. The best the domestic industry can hope to achieve import substitution, but the likelihood of further development is poor. The consumer in the host country also suffers as a result of TRIMs. The consumer has no choice but to spend much more on a finished product than would be necessary under a system of liberalized imports. Since consumers placed in such a position must pay a higher price, growth of domestic demand will stagnate. This lack of demand also hinders the long-term economic development of domestic industries.

**GATS**

The GATS is divided into six parts, seven annexure and a preamble. These parts comprise of 29 articles.

The Preamble to GATS wishes to promote liberalization in trade in services. However, the Preamble does not wish to force this liberalization upon the member countries. It recognizes that asymmetries exist with respect to the degree of development of services regulations in different countries and hence the countries have a right to regulate such aspects of their regulations. The preamble aims not only to strengthen the participation between the developing countries but also their domestic services capacity and its efficiency and competitiveness.

1. Part I (Article I) talks about the scope of GATS and the various definitions that need to be known for understanding the scope of GATS.

2. Part II talks about 'General Obligations and Disciplines'. This includes basic features of WTO such as MFN, Transparency etc. It also includes exceptions, economic integration, subsidies, monopolies etc.

3. Part III talks about the 'Specific Commitments'. This includes Market Access commitments, National Treatment Commitments and additional commitments.

4. Part IV talks about 'Progressive Liberalization'. Progressive Liberalization is very high on the agenda of GATS. This term is even mentioned in the Preamble to GATS.

5. Part V talks about 'Institutional Provisions' that includes provisions for Consultation, Dispute Settlement and Enforcement, Council for Trade in Services, Technical Cooperation and relationship of this agreement with other International Organizations.

6. Part VI talks about 'Final Provisions' that includes provisions relating to denial of benefits, definitions and annexes.

Finally comes the Annexes. This is on plethora of topics such as Air Transport Services, Financial Services, and Negotiations on Maritime Transport Services, Telecommunications, and Movement of Natural Persons Supplying Services under this Agreement etc.

**Scope and Ambit of GATS**

Now, before venturing any further, let us understand the scope and ambit of this agreement. Article I.1 states that GATS applies only to the measures that affect trade in services by the member countries. This makes it amply clear that GATS does not apply to those measures that do not affect 'trade in services'.

Article I.2 defines 'trade in services'. It is defined as the supply of a service:

1. Mode 1 – From the territory of one Member into the territory of any other Member;
2. Mode 2 – In the territory of one Member to the service consumer of any other Member;
3. Mode 3 – By a service supplier of one Member, through commercial presence in the territory of any other Member;
4. Mode 4 – By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Thus 'trade in services' is the 'supply of a service' using any or all of these four modes. However, in the present paper, we are only concerned with Mode 4 i.e. Supply of a Service by a service supplier, through the presence of natural persons of a member in the territory of any other member.

1. Article I.3 talks explains the meaning of 'Measures by Members' i.e. measures taken by central, regional or local governments and authorities and the NGOs exercising powers delegated by these authorities.

2. Article I.3 (b) does not define 'services'. However, it states that 'services' includes any services in any sector except services supplied in the exercise of governmental authority. Thus, supply of a service by any government is not included within the meaning of 'services'.

3. Article I.3 (c) explains the meaning of "a service supplied in the exercise of governmental authority". Such a service means 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

**MFN Treatment under GATS**

This means that each member must accord MFN treatment to services and services suppliers of other countries. However, exemptions relating to MFN treatment have been provided under one of the Annexes. Article II also states that this agreement must not be construed to prevent any member from conferring 'advantages' to adjacent countries in contiguous frontier zones of services that are local in nature.

**Economic Integration**

Article V talks about Economic Integration. It states that GATS will not prevent its members from being a party to other such agreements, provided that such an agreement has substantial sectoral coverage and it non-discriminatory within the meaning of Article V.1 (b). Also, in such agreements involving only developing countries, more favorable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

**Market Access**

Article XVI talks about Market Access that prescribes that each member shall accord MFN treatment to other members as mentioned in its schedule. Article XVI.2 states that in sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt includes *"limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test"*.

Article XVIII (f) states that service of another Member includes a service which is supplied, in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member.

Article XVIII (k) explains the meaning of 'natural person of another member. This expression means a natural person who resides in the territory of any other member of which he is a national or has the right of permanent residence in case the member does not have nationals or accords same treatment to its nationals and permanent residents in respect of measures affecting trade in services.

Article XVIII (m) talks about juridical person of another member. Juridical Person of another member includes a juridical person which is in the case of the supply of a service through commercial presence, owned or controlled by natural persons of that Member.

**UNCTAD**

The need for reducing disparities between the rich and the poor was keenly felt at the global level. Particularly developing countries in Asia, Africa and Latin America realized the importance of global efforts to be undertaken in this direction. In order to fulfill the above, the United Nations Conference on Trade and Development (UNCTAD) came to be established on 30th December, 1964.

The UN session aimed at attaining a minimum of 5 percent annual growth rate for the developing countries by the end of 1970. It sought the help of developed countries to attain the above objective. In 1960s, most of the developed countries became independent of their formal imperial masters. These nations launched programmes of rapid industrialization of their backward economies. As developing countries required enormous amount of investments for their rapid industrialization, this has necessitated large imports of capital goods. But their export earnings were not sufficient for the purpose of import of capital goods and technical know-how. Resultantly, huge balance of payments deficits prevailed in most developing countries. During 1950s, these deficits were made good with foreign loans. But the conditions attached to foreign loans were difficult to comply-with. It was also realized that the protection available from GATT was inadequate to their needs. In this context, **UNCTAD came into existence in 1964 as a permanent organization of UNO** with its own permanent secretariat. UNCTAD has its headquarters in Geneva.

**Organization of UNCTAD**

The UNCTAD was set up as the permanent organ of the UN General Assembly. It has its own structure of subsidiary bodies and a full time secretariat. It has established a Trade and Development Board to take policy decisions when the conference is not in session. It has 155 members, elected from among its members in proportion to geographical distribution. The Board meets twice a year.

There are four subsidiary committees to assist the Trade and Development Board. These include

i. the committee on commodities;
ii. the committee on manufacture;
iii. the committee on shipping and
iv. the committee on invisible items and financing related to trade.

Generally, these committees meet once a year. However, special sessions of committees can be convened to transact matters of urgent nature. All the members of the United Nations are entitled to become the member of the UNCTAD.

A special committee on preferences furnishes reports from time to time for the conference to be held.

**Basic Principles of UNCTAD**

The first conference held in 1964 laid down UNCTAD's action programme and priorities. The various recommendations are based on the following principles:

1. Every country has the supreme right to freely dispose of its natural resources for the sake of its economic development. It can freely trade with other countries.

2. Principles of sovereign equality of states, self determination of people and non-interference in the internal affairs are the principles which guide trade and economic relations between countries; and

3. There shall be no discrimination on the basis of differences in socioeconomic systems. The adoption of various trading methods and policies shall be consistent with this principle.

**Functions of UNCTAD**

UN General Assembly has laid down certain essential functions of UNCTAD. Accordingly, it shall promote accelerated development of the less developed regions of the world by dealing properly with the problem of slow expansion of exports confronting the less developed countries. The other important functions of UNCTAD are as follows:

1. To promote international trade between the developed and underdeveloped countries with a view to accelerating economic development, special emphasis should be laid upon the accelerated development of the underdeveloped countries.

2. To formulate the principles and policies on International trade.

3. To negotiate multinational trade agreements.

4. To make proposals for implementing its principles and policies.

5. To promote research and support negotiations for commodity agreements, technical elaboration of new trade activities designed to assist in the areas of trade and capital for developing countries.

6. To generally review and coordinate the activities of other institutions within the fold of United Nations relating to international trade and economic development.

7. To act as a centre for harmonious trade related policies of governments and regional economic groupings in pursuance of Article 7 of the Charter of the United Nations.

**Technical barriers to trade**

The Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. At the same time, it recognizes WTO members' right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment. The TBT Agreement strongly encourages members to base their measures on international standards as a means to facilitate trade. Through its transparency provisions, it also aims to create a predictable trading environment.

- TBT Enquiry points

**TBT Committee**

TBT Committee work involves two broad areas:

- Review of specific measures WTO members/observers use the TBT Committee to discuss specific trade concerns (STCs) — specific laws, regulations or procedures that affect their trade, usually in response to notifications. Essentially, members raise STCs to find out more about the scope and implementation of each other's regulations in light of the core TBT obligations. The discussion is mostly about measures in the pipeline, but can also be about the implementation of existing measures. To date, more than 400 "STCs" have been raised which can be accessed through the TBT Information Management System TBT IMS — the database of WTO information on TBT notifications, specific trade concerns, enquiry points, etc.

- Strengthening implementation of the TBT Agreement Members exchange experiences on the implementation of the Agreement with a view to making implementation more effective and efficient. This discussion revolves around generic, cross-cutting themes, including transparency, standards, conformity assessment and good regulatory practice.

Over the years, the Committee has developed a series of decisions and recommendations intended to facilitate implementation of the TBT Agreement.

Meetings of the TBT Committee

The Committee usually holds three formal meetings per year. Meetings are open to all WTO members and observer governments. International intergovernmental organizations — several of them standardizing bodies — also participate as observers in the Committee

The current chair of the TBT Committee is Mr. Jose Manuel CAMPOS ABAD (Chile).

**Annual reviews**

The Committee is mandated to conduct an annual review of activities relating to the implementation and operation of the TBT Agreement, including notifications, specific trade

concerns, technical assistance activities, and TBT related disputes. The latest Annual Review report was circulated in April 2017.

**Triennial reviews**

The TBT Committee is mandated to review the operation and implementation of the TBT Agreement on a triennial basis. The Seventh Triennial Review was completed in December 2015.

**TRIPS Agreement**

The Agreement on Trade related Aspects of Intellectual Property Rights of the WTO is commonly known as the TRIPS Agreement or simply TRIPS. TRIPS is one of the main agreements comprising the World Trade Organization (WTO) Agreement. This Agreement was negotiated as part of the eighth round of multilateral trade negotiations in the period 1986-94 under General Agreement on Tariffs and Trade (GATT) commonly referred to as the Uruguay Round extending from 1986 to 1994. It appears as Annex 1 C of the Marrakesh Agreement which is the name for the main WTO Agreement. The Uruguay Round introduced intellectual property rights into the multilateral trading system for the first time through a set of comprehensive disciplines. The TRIPS Agreement is part of the "single undertaking" resulting from the Uruguay Round negotiations. This implies that the TRIPS Agreement applies to all WTO members, mandatorily. It also means that the provisions of the agreement are subject to WTO dispute settlement mechanism which is contained in the Dispute Settlement Understanding (the "Understanding on Rules and Procedures Governing the Settlement of Disputes"). The TRIPS Agreement is one of the most important agreements of the WTO.

**Features**

The three important features of the Agreement are:

- Standards

In respect of each of the areas of IP covered by the Agreement, each of the member nations is obliged to provide a minimum set of standards for protecting the respective IPR. Under each of the areas of IP covered by the Agreement, the main elements of protection are defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.

- Enforcement

Each member nation is obliged to provide domestic procedures and remedies with respect to protection of IPR. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. The Agreement also lays down certain other provisions on civil and administrative procedures and remedies, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

- Dispute Settlement

Under the Agreement disputes between WTO member nations regarding the respect of the TRIPS obligations are subject to the WTO's dispute settlement procedures.

**STRUCTURE OF THE TRIPS AGREEMENT**

The three important features of the Agreement, i.e. standards, enforcement and dispute settlement are covered in seven parts i.e. the Agreement consists of seven parts. Part I deals with the general provisions and basic principles, Part II describes the standards concerning the availability, scope and use of IPR with respect to different types of IP. Part III describes the IPR enforcement obligations of member nations, and Part IV addresses the provisions for acquiring and maintaining IPR. Part V is directed specifically to dispute settlement under the Agreement. Part VI concerns transitional arrangements, and the Part VII concerns various institutional arrangements.

**TRIPS AGREEMENT AND INDIA**

India became a party to the TRIPS Agreement in April 1995. The Patent Act of 1970 was in contravention with the Article 27 of the Agreement. Hence India needed to take some measures to make its IPR laws compliant with the Agreement. The Agreement provided a three stage framework for developing countries like India which did not allow product patents in the areas of pharmaceuticals and agricultural chemicals before the Agreement came into force. These three stages included:

Introduction of Mail-Box facility from 1st January, 1995 for product patent applications in the field of pharmaceuticals and agricultural chemicals. These Mail-Box applications were not

examined till the end of 2004. But Exclusive Marketing Rights (EMR) could be granted for the Mail-Box applications for which a patent had been granted in at least one member nations and the application was not rejected in the member nation where IP pro Services (India) P. Ltd. 16 the patent protect was sought by the applicant for the reason of invention being not patentable. Compliance with the other obligations of the Agreement such as, rights of patentee, term of protection, compulsory licensing, etc. from 1st January, 2000, Full implementation of product patents in all technological domains including pharmaceuticals and agricultural chemicals with effect from 1st January, 2005. Also, all Mail-Box applications were to be taken for examination from 1st January, 2005. Thus the Agreement came into force in India from 1st January, 2005.

The Agreement changed the face of the IP regime in the world. Many developing countries, including India, which had weaker IPR systems (for example, patents) had to extensively revise their patent laws, or where there were no IPR regimes (the most important examples being plant variety protection, layout designs and geographical indications) had to put in place new IPR systems. The implications of the Agreement have their own pros and cons. On the positive side, with the revision of patent laws, a stronger patent protection system came into existence which is of international standards, because of which the foreign investors were encouraged to invest in India. It may be expected that while domestic investment may not respond to a stronger patent regime in a big way in either the short or long term, Foreign Direct Investment (FDI) might. Further, the research and development expenditures of the domestic players tremendously increased in post Agreement period as compared to the pre-agreement period. The other positive implication of a technological nature is the availability of better products which might not have been available with weaker IPR protection. However, the prices of these better and patented products may not be affordable for majority of population. Domestic private sector investment and foreign investment in the seeds sector has risen. The post Agreement environment has encouraged domestic private sector IPpro Services (India) P. Ltd. 17 and foreign firms to invest in research and development for the development of better seeds. Some of the geographical indications belonging to India which are of importance for domestic industry have got protection and have encouraged investment in these sectors, for example, Dargiling Tea. On the negative side, the most immediate impact of post Agreement may be seen on prices of drugs. The new and

required drugs will have product patent protection unlike the earlier scenario and so the prices might escalate.

**IPRs covered under TRIPS**

The IPRs covered by the TRIPS Agreement are:

- Copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations)
- Trademarks, including service marks
- Geographical indications including appellations of origin
- Industrial designs
- Patents including the protection of new varieties of plants
- Layout-designs (topographies) of integrated circuits
- Undisclosed information, including trade secrets and test data.

# UNIT IV

## Bilateral and Regional Trade.

### What is a 'Most Favored Nation Clause'

A most favored nation (MFN) clause is a level of status given to one country by another and enforced by the World Trade Organization. A country grants this clause to another nation if it is interested in increasing trade with that country. Countries achieving most favored nation status are given specific trade advantages, such as reduced tariffs on imported goods.

### BREAKING DOWN 'Most Favored Nation Clause'

In international trade, MFN treatment is understood as being synonymous with non-discriminatory trade policy, because it ensures equal rather than exclusive trading privileges between two partners. MFN status is very desirable between trading partners because it allows each country the greatest access into the other's domestic markets without the hindrances of tariffs or quotas. To avoid the confusion that MFN status signified a special or exclusive relationship, U.S. legislators began using the term "normal trade relations" (NTR) in place of "most favored nation" in 1998.

As the term "non-discriminatory" implies, the United States extends MFN, or NTR, status to all nations except those who have had their status suspended by specific legislation. The vast majority of suspensions since World War II were mandated under the Trade Agreements Extension Act of 1951. MFN status for those countries suspended under the 1951 law can be and have been restored on a temporary or permanent basis through a number of means, including following procedures laid out in the Trade Act of 1974 that apply to non-market economy (NME) countries, specific legislation or presidential order. Out of the 29 nations that have had their MFN status suspended at some point in the past, only two remain suspended: Cuba and North Korea. The status of 10 nations — Belarus, Vietnam, Turkmenistan, Azerbaijan, Kazakhstan, Moldova, Russia, Tajikistan, Ukraine and Uzbekistan — are still temporary and subject to the fulfilling of annual conditions.

Special consideration is given to countries that are classified as "developing" by the World Trade Organization.

## SAARC

**SAARC** or "South Asian Association for Regional Co-operation" was formed in December, 1985 at Dhaka. India, Pakistan Nepal, Bhutan, Bangladesh, Sri Lanka and Maldives are its founding members. Afghanistan became its 8th member in 2007.

SAARC is the first systematic organizational output of efforts at regional level among member states of South Asia. The original idea was put forth by President Zia-ur-Rahman of Bangladesh.

**Objectives of SAARC:**

The objectives of the ASSOCIATION shall be:

a) To promote the welfare of the peoples of SOUTH ASIA and to improve their quality of life.

b) To accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials.

c) To promote and strengthen collective self-reliance among the countries of SOUTH ASIA.

d) To contribute to mutual trust, understanding and appreciation of one another's problems.

e) To promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields.

f) To strengthen cooperation with other developing countries.

g) To strengthen cooperation among themselves in international forums on matters of common interests, and

h) To cooperate with international and regional organizations with similar aims and purposes.

**PRINCIPLES of SAARC**

1. Cooperation within the framework of the ASSOCIATION shall be based on respect for the principles of sovereign equality, territorial integrity, political independence, non - interference in the internal affairs of other States and mutual benefit.

2. Such cooperation shall not be a substitute for bilateral and multilateral cooperation but shall complement them.

3. Such cooperation shall not be inconsistent with bilateral and multilateral obligations.

**Constraining Factors /Hurdles in the Development of SAARC**

There are some serious constraints which are, no doubt, not allowing South Asian cooperation to develop. Some of these hurdles can be described as:

**1. Inter-state Disputes in South Asia**

One of the major hurdles in the way of cooperation among the SAARC members is the mistrust, mutual security perceptions and hostility. All the members of this organization feel in one way or another threat to their political, economic and territorial stability from the neighboring countries. They are still entrapped in the historical conflicts of colonial rule and the disputed environment after the departure of Colonial Masters i.e loss of property, lives, identities and communal violence. There are always high risks that any time the efforts for cooperation can suffer due to communal and terrorist threats.

**2. Fear of Indian Domination**

Another most important cause of SAARC failure is that there is a fear of India□s hegemonic role in the region. Indian desire to participate in the decision making process of the region as a leader has caused concerns among the neighboring countries particularly Pakistan, Sri Lanka and Bangladesh.v The political, diplomatic and security concerns felt by the member countries of SAARC in South Asia has obstructed any positive development among the member countries.

### 3. Civilizations Clash

Professor Samuel Huntington has mentioned in his book "The Clash of Civilizations" that SAARC has been a failure because according to him the countries belonging to organizations like EU etc they belong to same culture but SAARC countries are those whose cultures are different. India and Pakistan are enemies of each other, they fight on minor things. and then how can these two countries support each other in one organization. No country in the region is having any feeling of belongingness with the other state.

### 4. Unstable Financial Positions

The weak financial position of the member countries has also created an uncertain future for this organization. This weak financial position is reflected in the trade imbalances among the member countries. The SAARC members are financially and economically not very much developed. This thing is not conducive for the economic integration of South Asia. Most of the member countries export similar products and in that too, India plays a major role. This situation encourages the least developed countries to go for aid demands/arrangements and extra-regional trade which is not favorable for the regional economic interaction. The member countries of SAARC are not complementing each other but they are competing in fact. Mutual trade is very low. The lower level of intra-region trade in South Asia has made the objective of this organization a failure.

### 5. Asymmetry between India and Member Countries

There is economic, technological and demographic imbalance between India and other member countries of SAARC. India being larger in size, economy and possessing high technological infrastructure dominates other members. India accounts for more than three quarters of the regional GDP and technological infrastructure and two third of the global exports of the region. The smaller countries in South Asia feel uncomfortable about their trade relations with India because under the current tariff structure, India runs a large trade surplus with her neighbors. Also, India□s volume of informal trade with most of its neighbors is quite enormous. All south Asian countries look up to India to share its huge markets due to its size and location, where 80% of the intra-regional trade in south Asia is to or from India.

## OPEC

The successful conclusion of the bilateral deal between the EU and Saudi Arabia in September 2003 as well as news of progress in Russia's WTO accession negotiations has rekindled the hope that more and more of international trade in petroleum will come under the rules-based multilateral trading system. As more and more petroleum exporting countries join the WTO club, the question arises as to whether, and how, this development could affect the role of OPEC as the principal inter-governmental forum for the regulation of petroleum supplies and prices on the world market.

OPEC and the WTO are two of the most visible international economic organizations today. But they are often associated with two diametrically opposed players in the global economy: the WTO with the sometimes savage rules of the market and OPEC with the often demonized intergovernmental manipulation of prices. Given OPEC's pivotal role as the forum for the negotiation and regulation of petroleum supplies – and ultimately prices – and the role of the WTO as the foremost forum of negotiations and consequent regulation of trade in virtually all tradable items at large, there is ample room for a series of complex issues of international law and policy to arise, such as: does the WTO have any role to play in the petroleum sector? Can OPEC co-exist with the WTO? Can one and the same country satisfy the membership requirements of both organizations at the same time? Etc. This brief note provides some general perspectives on these issues.

## OPEC and the WTO: The Institutions

At first sight, it appears that no two institutions could be further apart from each other than OPEC and the WTO. To start with their very nature, while the WTO is a truly multilateral organization with a membership of about 148 countries (with about 30 others negotiating their accession) and free to any country that is willing to negotiate terms of accession acceptable to members, OPEC is an international organization of just 11 petroleum exporting countries and open for the accession of only net-petroleum-exporting countries with "fundamentally similar interests to those of Member Countries." From this perspective, while the WTO could well be described as a multi-sectoral organization with the potential to become truly global, OPEC is simply a uni-sectoral grouping whose potential for growth is inherently limited by its product-specific nature. Indeed, the WTO and OPEC diverge in virtually every respect: the policy

rationale underlying their existence, (free trade vs intergovernmental manipulation of prices) the goals they claim to pursue, as well as the means and enforcement mechanisms (rules-based adjudication vs collective peer pressure) they adopt to reach them.

The WTO generally promotes competition by discouraging governmental impediments to the free flow of trade across borders through, *inter alia*, the prohibition of trade-distorting governmental measures, quantitative restrictions on both imports and exports and the encouragement of reciprocal reduction/elimination of import tariffs. OPEC, on the other hand, discourages competition between its members for market share and, instead, sets (target) prices which are implemented through, *inter alia*, coordinated supply control measures. This has resulted in OPEC being taken as a byword for a hydrocarbon "cartel" – a cliché in the field of international energy policy with "pejorative connotations", which triggered several attempts, particularly in the US, to use national legal processes to force OPEC and its member countries to abandon their oil price/supply management practices. These attempts have generally taken two forms – judicial and legislative. At the judicial level, two cases have been brought so far before the US courts, one in 1978 *[International Association of Machinists and Aerospace Workers v. OPEC and Member Countries*] and another in 2000 *[Prewitt Enterprises, Inc. v. Organization of the Petroleum Exporting Countries*]. Both reached appellate levels, but were finally rejected on technical grounds related to service of process. About a year ago, a legislative effort was also launched in the US Congress by two Senators who introduced a bill seeking to enable the government "to bring action against foreign states, such as OPEC countries, for collusive practices in setting the price or production of petroleum products." Interestingly, this unilateral challenge comes from a country whose domestic petroleum resource management system in the form of the Inter-State Oil Compact served as both an inspiration as well as operational model for OPEC itself.

**OPEC and The WTO: Their Roles In The Petroleum Sector**

Petroleum is the largest primary commodity of international trade in terms of both volume and value. There is also the obvious national security element involved in it for both producing/exporting and consuming/importing countries. The political stability and economic survival of both groups of countries – and hence of the entire international community – depends

to a large extent on the availability and affordability of oil in the international marketplace. Indeed, it is widely believed that high oil prices have been responsible for several world-wide economic recessions in the past. Maintaining this delicate balance has never been easy. While petroleum importers have historically used different means, including bilateral/multilateral treaties and military and economic occupations to control their sources, exporters have combined forces under the umbrella of OPEC to protect and promote their common interests. The state of international relations over the last several decades has significantly been dictated by the balance of power between these two contending interests. Indeed there are many who believe that destruction of OPEC was an important objective of the invasion of Iraq by US and UK forces – a belief strengthened by the fact that many have later been heard advocating Iraqi withdrawal from OPEC.

The relationship between these divergent petroleum interests is complex and the role of the multilateral trading system on international trade in petroleum products has not always been clear. Due to the strategic importance of petroleum to the world economy, it has often been treated "in a largely political context" and outside the GATT system of multilateral trade rules. However, there is no GATT provision which exempts petroleum trade from its coverage. In principle, therefore, trade in petroleum products among GATT/WTO members is governed by the rules of the trading system. Yet, a combination of factors has, *de facto*, brought the virtual exclusion of international trade in petroleum products from the rules of the trading system. The most important ones in this respect include absence of petroleum export interests from GATT's origins, the consequent lack of specific trade/import liberalization commitments by GATT/WTO members, and the system's inherent market access bias. These factors will be discussed in turn.

**Absence Of Petroleum Export Interests From GATT Origins And Non-Membership Of Many Today:**

None of the major oil exporters of today was involved in the negotiations for the creation of the International Trade Organization (ITO), and its *de facto* substitute – GATT – in the 1940s. Indeed, when OPEC was founded on 14 September 1960 in Baghdad, none of its five founding members (Kuwait, Iraq, Iran, Saudi Arabia, and Venezuela) was a contracting party to the GATT. This picture has of course changed with expansion in OPEC membership, and six of the 11 OPEC countries are members of the WTO (Indonesia, Nigeria, Kuwait, Venezuela, Qatar and the UAE). This means that, of the OPEC average crude oil production of 30.18mn b/d for 2001,

over 15.9mn b/d – or about 53% – is accounted for by the five OPEC countries that are not yet members of the WTO. In terms of share of global crude oil exports, while OPEC itself accounts for about 55%, the five OPEC countries not members of the WTO account for about 60% of this OPEC share, or nearly 33% of world's total. In terms of proven reserves, while OPEC accounts for 77.8% of the world's total, the five countries account for over 61% of this OPEC share, or about 48.1% of the world's total. This, coupled with the non-membership in the WTO of Russia – the second largest oil exporting country – lead to the conclusion that a substantial majority of petroleum production and trade today takes place outside the reach of the multilateral trading system.

**Lack of Specific Commitments By GATT Contracting Parties:**

The multilateral trading system works largely through the negotiation of reciprocal tariff (and at times non-tariff) reduction commitments. The primary concern of most of the participants in the GATT process – and its driving force – was access to markets for their surplus products, which generally meant manufactures. None had such surplus in petroleum – indeed, virtually all of them were net petroleum importers even then. Coincidentally, the US turned from a net petroleum exporter into a net importer in 1948 – the year in which GATT entered into force (on 1 January 1948) on a provisional basis – and remained so until its replacement by the WTO in 1995. Indeed, although the now relatively petroleum-rich countries of Western Europe, such as Norway and the UK, were also founders of GATT, their North Sea oil wealth was discovered only after the late 1960s. GATT was thus a market opening weapon for the products of its industrialized proponents – hence almost by definition predominantly concerned with the manufacturing sector. This means that while each contracting party had a vested interest in the opening of markets for its products in other Contracting Parties, none had an interest in market access for petroleum products. Consequently, the tariff schedules of GATT Contracting Parties typically contained hardly any tariff reduction and binding commitments in the petroleum sector. Although applied tariffs on petroleum imports are generally low, many WTO member countries are thus free to raise them to any desired levels – in as long as they remained unbound (which is the case to this day for such countries as Japan and the US) – while they would not be allowed to erect quantitative import restrictions.

**GATT's Inherent Market Access Bias over Access To Supplies:**

The trading system's market access objective is clearly discernible in the balance of obligations created between import restrictions (exporters' concerns), on the one hand, and export restrictions (importers' concerns), on the other. Trade measures which would restrict the quantity of allowable imports – generally called quantitative import restrictions – are subject to a flat prohibition under GATT Article XI. This rule is rigorously applied to manufactures, while a host of exceptions has been carved out to allow countries to impose quantitative restrictions on the importation of primary – mainly agricultural – products. Moreover, this principle against the use of quantitative import restrictions has also been supplemented by the unstated obligation to enter into periodic negotiations for the reduction and consequent capping of non-quantitative restrictions, which take the form of tariff bindings.

In principle, the same rule applies in respect of quantitative restrictions against access to supplies, ie they are prohibited. But, unlike for example the symmetrical approach of the EC Treaty between import and export restrictions, GATT rules on export restrictions are different from those on import restrictions in two ways: the prohibition of quantitative export restrictions is subject to a number of important exceptions that make the obligations "meaningless;" and GATT simply lacks rules on the use of export duties as means of restricting exports. This reinforces the argument about GATT's biased approach towards market access, an approach which proved itself to be inadequate for the protection of the energy security interests of its creators, particularly since the success of OPEC in using supply restrictions as means of raising oil prices and consequent government revenue and the use of oil as a war weapon by the Arab members of OPEC during the 1973 Arab-Israeli war. The result was a concerted effort on the part of consuming nations at the national, regional and international levels to, *inter alia*, maintain and share reserves, raise energy efficiency, diversify its sources, and promote non-oil energy sources. A plethora of regional initiatives were also launched with strong energy content. For example, the 1988 Free Trade Agreement between the US and Canada and, to a certain extent, its larger successor NAFTA (including Mexico) were both partly driven by a US effort to assure more secure energy sources. The European Energy Charter of 1991 and its broader and more legalistic successor the Energy Charter Treaty (ECT) are also based on the same strategy and objective. A similar feature could also be discerned in the IEA, which was set up in 1974 in

response to the oil crisis of the time, and intended to create "a concerted program for reducing dependence on OPEC oil."

**OPEC and the WTO: Their Relations – From Where To Where?**

Historically, the relationship between these two institutions, discernible through the relations between their leading players, has been one of mutual distrust if not open hostility. Indeed, their respective proponents have been traditional opponents: OPEC was founded at a Baghdad meeting in 1960 at Iraq's invitation of Iran, Kuwait, Saudi Arabia and Venezuela, while the creation of the WTO system is essentially credited to the single- handed effort of the US administration, supported by the UK, in the immediate post-war period The relationship between these two organizations therefore appears to be the embodiment of a deep-rooted international power struggle between an oil-dependent economic giant, on the one hand, and the power of oil, on the other. This situation has led many US politicians to argue that wars fought for the protection of oil supplies should be considered as legitimate wars on the same level as wars fought defending against an aggressor. Of the 11 current members of OPEC, six (Indonesia, Kuwait, Nigeria, Qatar, the UAE and Venezuela) have already become members of the WTO, and two (Algeria and Saudi Arabia) are negotiating their terms of accession. Indeed, arguably the most important WTO Ministerial Conference since its birth in 1995, was hosted by Qatar -- a member of both OPEC and the WTO – and the new round of trade negotiations launched at Doha has been named after the Conference host city – hence the Doha Development Agenda. These developments seem to indicate that the acute divergence between these two influential inter-governmental organizations does not make it impossible for one and the same country to satisfy the membership conditions of both at one and the same time. To cap it all, OPEC itself has applied for observership at various organs of the WTO, such as the Committee on Trade and the Environment (CTE), and the Committee on Trade and Development (COMTD).

However, the relationship between these two organizations is far from cordial. To begin with, the WTO has yet to decide on OPEC's application for observership, arguably a result equivalent to a silent rejection. Secondly, three important OPEC members (Iraq, Iran and Libya) – which account for about 22.2% of the world's proven oil reserves and 10.8% of the world's production in 2000 despite all of them being under one or another form of sanctions – still remain totally outside the system. Saudi Arabia, the most influential OPEC member, could not

conclude its accession negotiations for such a long time allegedly because of its leading role in OPEC. Iran applied for accession to the WTO in 1996, but, thanks to the consensus tradition which the WTO has inherited from GATT, its application remains blocked by the US to this day. Libya also submitted its application for accession to the WTO in 2001 but only to face the same fate as Iran's. The only other OPEC country that has never applied for accession to the WTO – Iraq – is expected to take that step as soon as a new and legitimate government is in place.

But the crucial question remains to be one of compatibility of membership – ie whether or not one and the same country could satisfy the membership requirements of these two organizations at the same time. To start with a pertinent example, the WTO prohibits its members from using export restrictions, whether individually or through a concerted arrangement with others, while OPEC often demands it. OPEC-cum-WTO member countries imposing export restrictions (such as supply cuts) could be fully concordant with OPEC decisions while violating WTO rules at the same time. It is tempting to conclude from this that no country could be a member of both organizations at the same time. However, it is notable that the WTO system allows several important exceptions that could arguably accommodate OPEC and OPEC-like behavior by its members. GATT Article XX (g) on trade-restrictive measures intended for the conservation of exhaustible natural resources is the most potent force here. But, given the acute divergence between these two organizations in almost every respect, a definitive conclusion has to await 'judicial' decisions in the future.

**Conclusion**

From the discussion so far, it is tempting to conclude that economic philosophy, history, geo-politics and international relations dictate that OPEC and the WTO are too opposed to each other to build any mutually beneficial co-existence. However, that would only lead, at best, to a continuation of the *status quo* – in which both the import and export interests of oil stand to lose. Since the early 1970s, the economic and political well-being of the international community has suffered several times from the absence of cooperation between producers and consumers of oil. On many occasions, while some producers have gone as far as using their oil resources as weapons of war, oil-importing industrialized countries have also employed or considered several options, ranging from the creation of consumer country cartels to attempts at the destruction of

OPEC. Unfortunately, the prevailing state of international relations does not allow even the most optimistic to conclude that these same weapons will not be put to use again. GATT rarely figured as part of the solution throughout; but the WTO should. In one of his latest writings, Professor John Jackson recalls that, of the two main objectives of the trading system at the time of its creation, "[t]he first, and the more important at that time, sometimes overlooked, was the prevention of another war." The role of the multilateral trading system as a vital instrument of international peace and stability could be hardly complete in the absence of a large portion of perhaps the most contentious and pivotal of commodities from its coverage. If there is such a thing as a single product of international trade prone to causing yet "another war", oil could probably come on top. WTO accommodation of OPEC countries' special concerns is not only desirable and possible, but also necessary. To meet its oft-repeated role not just as a force for wealth but also for international peace, the long-established reputation of the trading system as a pragmatist has to demonstrate itself in the oil field.

But, of course, this needs a positive effort from both sides to look for some common ground, of which there is plenty. At the rhetorical level at least, both groups of countries accept this approach as the only solution. OPEC has repeatedly expressed its willingness to enter into what it calls "a fair agreement" that recognizes, on the one hand, owners' rights to a just price for their exhaustible and non-renewable resources, and, on the other, consumers' rights to a guaranteed oil supply at reasonable prices. Likewise, leading powers on the consumer end, including the US and the EU, often talk in identical terminology about their determination to strengthen trade alliances and establish dialogue with oil producers. Whatever the rhetoric, for any collaborative arrangement between these two groups of countries to succeed, their major concerns must be addressed in a mutually satisfactory manner. At the risk of oversimplification, these primary concerns may be simply stated as follows: consumers want regular and adequate supplies of oil at reasonable prices, and producers want reassurance of their sovereign right to their natural resources, secure access to export markets, and reasonable returns from those exports to support their overall development. The WTO, if allowed, has the potential to adequately address both groups of concerns. The details could be difficult; but, as they say it, if there is the will, there is always the way.

**NAFTA**

The North American Free Trade Agreement (NAFTA) is a piece of regulation implemented January 1, 1994 simultaneously in Mexico, Canada and the United States that eliminates most tariffs on trade between these nations. The essence of a free trade measure, NAFTA's purpose is to encourage economic activity between the three major economic powers of North America. Numerous tariffs (with a particular focus on those related to agriculture, textiles and automobiles) were phased out on a gradual basis, beginning with the agreement's implementation and ending on January 1, 2008.

**BREAKING DOWN "North American Free Trade Agreement – NAFTA"**

About one-fourth of all U.S. imports (especially crude oil, machinery, gold, vehicles, fresh produce, livestock and processed foods) comes from Canada and Mexico, which are the United States' second- and third-largest suppliers of imported goods. In addition, about one-third of U.S. exports, particularly machinery, vehicle parts, mineral fuel/oil and plastics are destined for Canada and Mexico.

The legislation had been developed during George H. W. Bush's presidency, as the first phase of his Enterprise for the Americas Initiative (EA). The Clinton administration, which signed it into law in 1993, believed NAFTA would create 200,000 American jobs within two years and one million within five years because exports played a major role in U.S. economic growth. They anticipated a dramatic increase in U.S. imports to Mexico under the lower tariffs.

**Additions to NAFTA**

NAFTA was supplemented by two other regulations: the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC). These side agreements were intended to prevent businesses from relocating to take advantage of lower wages, more lenient laws about worker health and safety, and looser environmental regulations.

NAFTA did not eliminate regulatory requirements on companies wishing to trade internationally, such as rule of origin regulations and paperwork requirements that determine whether certain goods can be traded under NAFTA. The free trade agreement also contains administrative, civil

and criminal penalties for businesses that violate any of the three countries' laws or customs procedures.

**North American Industry Classification System**

The three signatory countries have also developed a new collaborative system of business classification, which allows for the comparison of statistics of all business activities across North America. Companies are classified and separated into industries utilizing the same or similar processes of production.

The NAICS was established to take the place of and modernize the U.S. Standard Industrial Classification (SIC) system, allowing businesses to be classified and relatable to an ever-changing economy. The new system enables easier comparability between all countries in North America. To ensure that the NAICS continues to be relevant, plans are in place for a system review every five years.

The three parties responsible for the formation and continued maintenance of the NAICS are the Instituto Nacional de Estadistica y Geografia (INEGI) in Mexico, Statistics Canada and the United States Office of Management and Budget (OMB) through its Economic Classification Policy Committee (ECPC) and staffed by the Bureau of Economic Analysis(BEA), Bureau of Labor Statistics (BLS) and the Census Bureau. The first version of the classification system was released in 1997. A revision in 2002 made room for substantial changes occurring in the information sector. The most recent revision, in 2012, slightly reduced the number of industries in the system and made modifications to some of the system's sector classifications.

This classification system allows for more flexibility than the four-digit structure of the SIC, instead utilizing a hierarchical six-digit coding system, classifying all economic activity into 20 different industry sectors. Five of these sectors are primarily those that produce goods, with the remaining 15 sectors being strictly those that provide some type of service. Every company receives a primary NAICS code, indicating the company's main line of business. This primary code is determined by the code definition that generates the largest revenue for said company at a specified location in the past year.

The first two digits of a NAICS code indicate the largest business sector a company operates in. The third digit designates the company's subsector and the fourth digit indicates the industry group to which the company belongs. The fifth digit of the code reflects the company's particular industry of operation. The sixth and final digit designates the company's specific national industry.

**Impact of NAFTA**

A lot of debate ranges about NAFTA's meaning – that is. its impact on its three signatory countries. While the United States, Canada and Mexico have all experienced economic growth, higher wages and increased trade since NAFTA's implementation, experts disagree on how much the agreement actually contributed to these gains, if at all (*for more details on NAFTA pros and cons, see* NAFTA's Winners and Losers). The results are hard to isolate from other, arguably more important developments that have taken place on the continent and globally in the past quarter century. From the beginning, critics of NAFTA were concerned that the Agreement would result in U.S. jobs moving to Mexico (despite the supplementary NAALC). For those whose employers shifted operations, like thousands of U.S. auto workers, the deal has had an immediate, visceral impact. And for those skeptical of globalization generally, NAFTA epitomizes the wheeling and dealing of a callous, self-centered transnational elite.

**EUROPEAN UNION**

**Origins**

The EU represents one in a series of efforts to integrate Europe since World War II. At the end of the war, several western European countries sought closer economic, social. and political ties to achieve economic growth and military security and to promote a lasting reconciliation between France and Germany. To this end, in 1951 the leaders of six countries—Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany—signed the Treaty of Paris, thereby, when it took effect in 1952, founding the European Coal and Steel Community (ECSC). (The United Kingdom had been invited to join the ECSC and in 1955 sent a representative to observe discussions about its ongoing development, but the Labour government of Clement Attlee declined membership, owing perhaps to a variety of factors, including the illness of key ministers, a desire to maintain economic independence, and a failure to grasp the community's

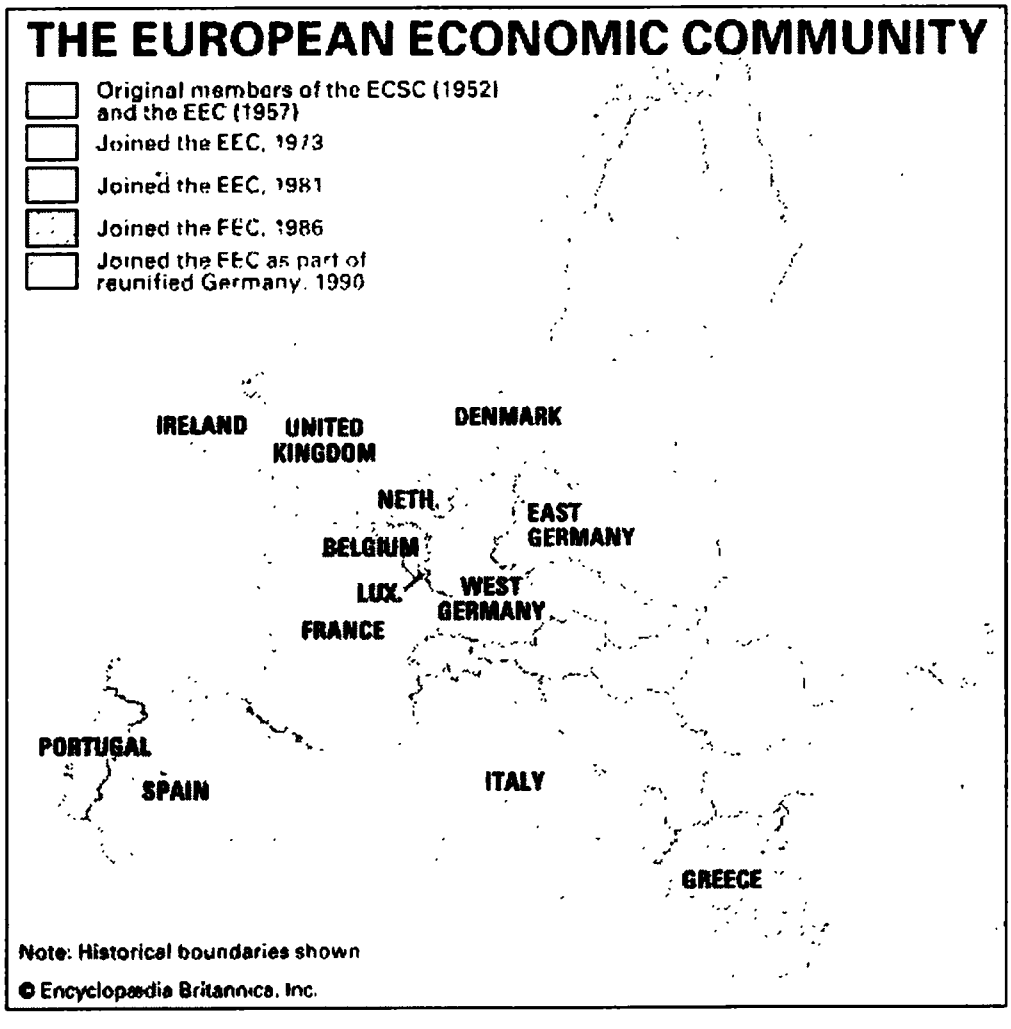
impending significance.) The ECSC created a free-trade area for several key economic and military resources: coal, coke, steel, scrap, and iron ore. To manage the ECSC, the treaty established several supranational institutions: a High Authority to administrate, a Council of Ministers to legislate, a Common Assembly to formulate policy, and a Court of Justice to interpret the treaty and to resolve related disputes. A series of further international treaties and treaty revisions based largely on this model led eventually to the creation of the EU.

**Creation of the European Economic Community**

On March 25, 1957, the six ECSC members signed the two Treaties of Rome that established the European Atomic Energy Community (Euratom)—which was designed to facilitate cooperation in atomic energy development, research, and utilization—and the European Economic Community (EEC). The EEC created a common market that featured the elimination of most barriers to the movement of goods, services, capital, and labour, the prohibition of most public policies or private agreements that inhibit market competition, a common agricultural policy (CAP), and a common external trade policy.

Signing of the Treaty of Rome, March 25, 1957.

The treaty establishing the EEC required members to eliminate or revise important national laws and regulations. In particular, it fundamentally reformed tariff and trade policy by abolishing all internal tariffs by July 1968. It also required that governments eliminate national regulations favouring domestic industries and cooperate in areas in which they traditionally had acted independently, such as international trade (i.e., trade with countries outside the EEC). The treaty called for common rules on anticompetitive and monopolistic behavior and for common inland transportation and regulatory standards. Recognizing social policy as a fundamental component of economic integration, the treaty also created the European Social Fund, which was designed to enhance job opportunities by facilitating workers' geographic and occupational mobility.




Map showing the composition of the European Economic Community (EEC) from 1957, when it was formed ...

Like the ECSC, the EEC established four major governing institutions: a commission, a ministerial council, an assembly, and a court. To advise the Commission and the Council of

Ministers on a broad range of social and economic policies, the treaty created an Economic and Social Committee. In 1965 members of the EEC signed the Brussels Treaty, which merged the commissions of the EEC and EURATOM and the High Authority of the ECSC into a single commission. It also combined the councils of the three organizations into a common Council of Ministers. The EEC, EURATOM, and the ECSC—collectively referred to as the European Communities—later became the principal institutions of the EU.

The Commission (officially known as the European Commission) consists of a permanent service directed by commissioners. It has had three primary functions: to formulate community policies, to monitor compliance with community decisions, and to oversee the execution of community law. Initially, commissioners were appointed by members to renewable four-year terms, which were later extended to five years. The Commission is headed by a president, who is selected by the heads of state or heads of government of the organization's members. In consultation with member governments, the president appoints the heads of the Directorate-Generals, which manage specific areas such as agriculture, competition, the environment, and regional policy. The Commission has shared its agenda-setting role with the European Council (not to be confused with the Council of Europe, an organization that is not an EU body), which consists of the leaders of all member countries. Established in 1974, the European Council meets at least twice a year to define the long-term agenda for European political and economic integration. The European Council is led by a president, an office that originally rotated among the heads of state or heads of government of member countries every six months. Upon the adoption of the Lisbon Treaty in 2009, the presidency was made permanent, with the officeholder being selected by European Council members. The president of the European Council serves a term of two and a half years—renewable once—and functions as the "face" of the EU in policy matters. The first "president of the EU," as the office came to be known, was former Belgian Prime Minister Herman Van Rompuy. The main decision-making institution of the EEC and the European Community (as the EEC was renamed in 1993) and the EU has been the Council of the European Union (originally the Council of Ministers), which consists of ministerial representatives. The composition of the council changes frequently, as governments send different representatives depending on the policy area under discussion. All community legislation requires the approval of the council. The president of the council, whose office rotates among council members every six months, manages the legislative agenda. Council

meetings are chaired by a minister from the country that currently holds the presidency. The exception to this rule is the Foreign Affairs Council, which, since the ratification of the Lisbon Treaty, is under the permanent supervision of the EU high representative for foreign affairs and security policy.

The Common Assembly, renamed the European Parliament in 1962, originally consisted of delegates from national parliaments. Beginning in 1979, members were elected directly to five-year terms. The size of members' delegations varies depending on population. The Parliament is organized into transnational party groups based on political ideology—e.g., the Party of European Socialists, the European People's Party, the European Federation of Green Parties, and the European Liberal, Democrat and Reform Party. Until 1987 the legislature served only as a consultative body, though in 1970 it was given joint decision-making power (with the Council of Ministers) over community expenditures.

The European Court of Justice (ECJ) interprets community law, settles conflicts between the organization's institutions, and determines whether members have fulfilled their treaty obligations. Each member selects one judge, who serves a renewable six-year term; to increase efficiency, after the accession of 10 additional countries in 2004 the ECJ was allowed to sit in a "grand chamber" of only 13 judges. Eight impartial advocates-general assist the ECJ by presenting opinions on cases before the court. In 1989 an additional court, the Court of First Instance, was established to assist with the community's increasing caseload. The ECJ has established two important legal doctrines. First, European law has "direct effect," which means that treaty provisions and legislation are directly binding on individual citizens, regardless of whether their governments have modified national laws accordingly. Second, community law has "supremacy" over national law in cases where the two conflict. The promulgation of the Lisbon Treaty signaled the acceptance of these legal doctrines by national courts, and the ECJ has acquired a supranational legal authority.

Throughout the 1970s and '80s the EEC gradually expanded both its membership and its scope. In 1973 the United Kingdom, Denmark, and Ireland were admitted, followed by Greece in 1981 and Portugal and Spain in 1986. (The United Kingdom had applied for membership in the EEC in 1963 and in 1966, but its application was vetoed by French Pres. Charles de Gaulle.) The community's common external trade policy generated pressure for common foreign and development policies, and in the early 1970s the European Political Cooperation (EPC; renamed

the Common Foreign and Security Policy by the Maastricht Treaty), consisting of regular meetings of the foreign ministers of each country, was established to coordinate foreign policy. In 1975 the European Regional Development Fund was created to address regional economic disparities and to provide additional resources to Europe's most deprived areas. In the same year, members endorsed the Lomé Convention, a development-assistance package and preferential-trade agreement with numerous African, Caribbean, and Pacific countries. Members also made several attempts to manage their exchange rates collectively, resulting in the establishment of the European Monetary System in 1979.

**Single European Act**

The Single European Act (SEA), which entered into force on July 1, 1987, significantly expanded the EEC's scope. It gave the meetings of the EPC a legal basis, and it called for more intensive coordination of foreign policy among members, though foreign policy decisions were made outside community institutions. The agreement brought the European Regional Development Fund formally into the community's treaties as part of a new section on economic and social cohesion that aimed to encourage the development of economically depressed areas. As a result of the act, there was a substantial increase in funding for social and regional programs. The SEA also required the community's economic policies to incorporate provisions for the protection of the environment, and it provided for a common research and technological-development policy, which was aimed primarily at funding transnational research efforts. More generally, the SEA set out a timetable for the completion of a common market. A variety of legal, technical, fiscal, and physical barriers continued to limit the free movement of goods, labor, capital, and services. For example, differences in national health and safety standards for consumer goods were a potential impediment to trade. To facilitate the completion of the common market by 1992, the community's legislative process was modified. Originally, the Commission proposed legislation, the Parliament was consulted, and the Council of Ministers made a final decision. The council's decisions generally needed unanimity, a requirement that gave each member a veto over all legislation. The SEA introduced qualified majority voting for all legislation related to the completion of the common market. Under this system, each member was given multiple votes, the number of which depended on national population, and approval of legislation required roughly two-thirds of the votes of all members. The new procedure also increased the role of the European Parliament. Specifically, legislative proposals that were

rejected by the Parliament could be adopted by the Council of Ministers only by a unanimous vote.

**The Maastricht Treaty**

The Maastricht Treaty (formally known as the Treaty on European Union), which was signed on February 7, 1992, created the European Union. The treaty met with substantial resistance in some countries. In Denmark, for example, voters who were worried about infringements upon their country's sovereignty defeated a referendum on the original treaty in June 1992, though a revised treaty was approved the following May. Voters in France narrowly approved the treaty in September, and in July 1993 British Prime Minister John Major was forced to call a vote of confidence in order to secure its passage. An amended version of the treaty officially took effect on November 1, 1993.

The treaty consisted of three main pillars: the European Communities, a common foreign and security policy, and enhanced cooperation in home (domestic) affairs and justice. The treaty changed the name of the European Economic Community to the European Community (EC), which became the primary component of the new European Union. The agreement gave the EC broader authority, including formal control of community policies on development, education, public health, and consumer protection and an increased role in environmental protection, social and economic cohesion, and technological research. It also established EU citizenship, which entailed the right of EU citizens to vote and to run for office in local and European Parliament elections in their country of residence, regardless of national citizenship.

The Maastricht Treaty specified an agenda for incorporating monetary policy into the EC and formalized planning that had begun in the late 1980s to replace national currencies with a common currency managed by common monetary institutions. The treaty defined a set of "convergence criteria" that specified the conditions under which a member would qualify for participation in the common currency. Countries were required to have annual budget deficits not exceeding 3 percent of gross domestic product (GDP), public debt under 60 percent of GDP, inflation rates within 1.5 percent of the three lowest inflation rates in the EU, and exchange-rate stability. The members that qualified were to decide whether to proceed to the final stage—the adoption of a single currency. The decision required the establishment of permanent exchange rates and, after a transition period, the replacement of national currencies with the common

currency, called the euro. Although several countries failed to meet the convergence criteria (e.g., in Italy and Belgium public debt exceeded 120 percent of GDP), the Commission qualified nearly all members for monetary union, and on January 1, 1999, 11 countries—Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain—adopted the currency and relinquished control over their exchange rates. Greece failed to qualify, and Denmark, Sweden, and the United Kingdom chose not to apply for membership. Greece was admitted to the euro beginning in 2001 Initially used only by financial markets and businesses, the euro was introduced for use by the general public on January 1, 2002.

The Maastricht Treaty significantly modified the EEC's institutions and decision-making processes. The Commission was reformed to increase its accountability to the Parliament. Beginning in 1995, the term of office for commissioners, who now had to be approved by the Parliament, was lengthened to five years to correspond to the terms served by members of the Parliament. The ECJ was granted the authority to impose fines on members for noncompliance. Several new institutions were created, including the European Central Bank, the European System of Central Banks, and the European Monetary Institute. The treaty also created a regional committee, which served as an advisory body for commissioners and the Council of Ministers on issues relevant to subnational, regional, or local constituencies.

One of the most radical changes was the reform of the legislative process. The range of policies subject to qualified majority voting in the Council of Ministers was broadened. The treaty also endowed the Parliament with a limited right of rejection over legislation in most of the areas subject to qualified majority voting, and in a few areas, including citizenship, it was given veto power. The treaty formally incorporated the Court of Auditors, which was created in the 1970s to monitor revenue and expenditures, into the EC.

As part of the treaty's second pillar, members undertook to define and implement common foreign and security policies. Members agreed that, where possible, they would adopt common defense policies, which would be implemented through the Western European Union, a security organization that includes many EU members. Joint actions—which were not subject to monitoring or enforcement by the Commission or the ECJ—required unanimity.

The EU's third pillar included several areas of common concern related to the free movement of people within the EU's borders. The elimination of border controls conflicted with some national

immigration, asylum, and residency policies and made it difficult to combat crime and to apply national civil codes uniformly, thus creating the need for new Europe-wide policies. For example, national asylum policies that treated third-country nationals differently could not, in practice, endure once people were allowed to move freely across national borders.

A second treaty, the Treaty of Nice, was signed in 2001 and entered into force on February 1, 2003. Negotiated in preparation for the admission of new members from eastern Europe, it contained major reforms. The maximum number of seats on the Commission was set at 27, the number of commissioners appointed by members was made the same at one each, and the president of the Commission was given greater independence from national governments. Qualified majority voting in the Council of Ministers was extended to several new areas. Approval of legislation by qualified voting required the support of members representing at least 62 percent of the EU population and either the support of a majority of members or a supermajority of votes cast. Although national vetoes remained in areas such as taxation and social policy, countries choosing to pursue further integration in limited areas were not precluded from doing so.

After the end of Cold War, many of the former communist countries of eastern and central Europe applied for EU membership. However, their relative lack of economic development threatened to hinder their full integration into EU institutions. To address this problem, the EU considered a stratified system under which subsets of countries would participate in some components of economic integration (e.g., a free trade area) but not in others (e.g., the single currency). Turkey, at the periphery of Europe, also applied for membership, though its application was controversial because it was a predominantly Islamic country, because it was widely accused of human rights violations, and because it had historically tense relations with Greece (especially over Cyprus). Despite opposition from those who feared that expansion of the EU would stifle consensus and inhibit the development of Europe-wide foreign and security policies, the EU in 2004 admitted 10 countries (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia), all but two of which (Cyprus and Malta) were former communist states; Bulgaria and Romania joined in 2007. Negotiations on Turkey's membership application began in 2005 but faced numerous difficulties.

Building on the limited economic and political goals of the ECSC, the countries of western Europe have achieved an unprecedented level of integration and cooperation. The degree of legal integration, supranational political authority, and economic integration in the EU greatly surpasses that of other international organizations. Indeed, although the EU has not replaced the nation-state, its institutions have increasingly resembled a parliamentary democratic political system at the supranational level.

In 2002 the Convention on the Future of Europe, chaired by former French president Valéry Giscard d'Estaing, was established to draft a constitution for the enlarged EU. Among the most difficult problems confronting the framers of the document was how to distribute power within the EU between large and small members and how to adapt the organization's institutions to accommodate a membership that would be more than four times larger than that of the original EEC. The framers also needed to balance the ideal of deeper integration against the goal of protecting members' national traditions. The drafting process evoked considerable controversy, particularly over the question of whether the constitution should mention God and the Christian heritage of much of European society (the final version did not). The proposed constitution was signed in 2004 but required ratification by all EU members to take effect; voters in France and the Netherlands rejected it in 2005, thereby scuttling the constitution at least in the short term. It would have created a full-time president, a European foreign minister, a public prosecutor, and a charter of fundamental rights. Under the constitution the powers of the European Parliament would have been greatly expanded and the EU given a "legal personality" that entailed the sole right to negotiate most treaties on its members' behalf.

Under the leadership of Germany, work began in early 2007 on a reform treaty intended to replace the failed constitution. The resulting Lisbon Treaty, signed in December 2007, required approval by all 27 EU member countries in order to take effect. The treaty, which retained portions of the draft constitution, would establish an EU presidency, consolidate foreign policy representation for the EU, and devolve additional powers to the European Commission, the European Court of Justice, and the European Parliament. Unlike the draft constitution, the Lisbon Treaty would amend rather than replace existing treaties. The treaty failed, at least in the short term, in June 2008 after it was rejected by voters in a national referendum in Ireland. However, in a second referendum, in October 2009, Irish voters—apparently concerned that another "no" vote would imperil Ireland's ailing economy—overwhelmingly approved the

treaty. A week after the Irish vote, Poland completed its ratification of the treaty as well. At that time the treaty remained to be ratified by only one country, the Czech Republic. Although the Czech Parliament already had approved the treaty, Czech Pres. Václav Klaus expressed concern that it would threaten Czech sovereignty and refused to sign it. In early November, after the Czech Constitutional Court ruled that the treaty did not imperil the Czech constitution, Klaus reluctantly endorsed the document, completing the country's ratification process. Having been approved by all 27 member countries, the treaty entered into force on December 1, 2009.

# UNIT V

## SETTLEMEN OF DISPUTES IN INTERNATIONAL TRADE

### Dispute Settlement in WTO

The WTO's procedure is a mechanism which is used to settle trade dispute under the Dispute Settlement Understanding. A dispute arises when a member government believes that another member government is violating an agreement which has been made in the WTO. However, these agreements are consequential to dialogues between the member States and hence they are the writers of such agreement. In case any dispute arises, the ultimate duty to settle it lies in the hands of member government through Dispute Settlement Body. This system already achieved a great deal and providing some of the necessary attributes of security and predictability which trader and other market participants need and which is called for in the Dispute Settlement Understanding under Article 3.

The WTO's Dispute Settlement Understanding (DSU) advanced out of the ineffective means used under the GATT for settling disagreements among members. Under the GATT, procedures for settling disputes were ineffective and time consuming since a single nation, including the nation whose actions was the subject of complaint could effectively block or delay every stage of the dispute resolution process. It remains to be seen whether countries will comply with the new WTO dispute settlement mechanism, but thus far the process has met with relative success.

During the phase of 1980's many new interest groups were fascinated by the GATT's procedures which were held as model, and it was used by them for the purpose of accomplishing their goals. However, service sectors and intellectual property sectors who wanted to engage in multilateral agreements through GATT's Uruguay round conference were influenced due to the success dispute settlement procedures and in role in augmenting the treaty rule compliance.

The DSU was designed to deal with the difficulty of reducing and eliminating non-tariff barriers to trade. A non-tariff trade barrier can be almost any government policy or regulation that has the effect of making it more difficult or costly for foreign competitors to do business in a country. In the early years of the GATT, most of the progress in reducing trade barriers focused on trade in goods and in reducing or eliminating the tariff levels on those goods. More recently, tariffs have

been all but eliminated in a wide variety of sectors. This has meant that non-tariff trade barriers have become more important since, in the absence of tariffs, only such barriers significantly distort the overall pattern of trade-liberalization. Frequently, such non-tariff trade barriers are the inadvertent consequence of well-meaning attempts to regulate to ensure safety or protection for the environment, or other public policy goals. In other cases, countries have been suspected of deliberately creating such regulations under the guise of regulatory intent, but which have the effect of protecting domestic industries from open international competition, to the detriment of the international free-trade regime.

## BACKGROUND

From its inception in 1947, the General Agreement on Tariffs and Trade (GATT), signed by the United States and ultimately by a total of 128 countries, provided for consultations and dispute resolution, allowing a GATT Party to invoke GATT dispute settlement articles if it believes that another Party's measure, whether violative of the GATT or not, caused it trade injury. Because the GATT did not set out a dispute procedure with great specificity, GATT Parties developed a more detailed process including ad hoc panels and other practices. The procedure was perceived to have certain deficiencies, however, among them a lack of deadlines, a consensus decision-making process that allowed a GATT Party against whom a dispute was filed to block the establishment of a dispute panel and the adoption of a panel report by the GATT Parties as a whole, and laxity in surveillance and implementation of panel reports even when reports were adopted and had the status of an official GATT decision.

Congress made reform of the GATT dispute process a principal U.S. goal in the GATT Uruguay Round of Multilateral Trade Negotiations, begun in 1986 and concluded in 1994 with the signing of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The WTO Agreement requires any country that wishes to be a WTO Member to accept all of the multilateral trade agreements negotiated during the Round, including the General Agreement on Tariffs and Trade 1994, an updated version of the GATT adopted in 1947, as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes, applicable to disputes arising under virtually all WTO agreements.

The Uruguay Round package of agreements not only carries forward original GATT obligations, such as according goods of other parties non-discriminatory treatment, not placing tariffs on goods that exceed negotiated or "bound" rates, generally refraining from imposing quantitative restrictions such as quotas and embargoes on imports and exports, and avoiding injurious subsidies, but also expands on these obligations in new agreements such as the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Antidumping, and the Agreement on Subsidies and Countervailing Measures. Congress approved and implemented the WTO Agreement and the other agreements negotiated in the Uruguay Round in the Uruguay Round Agreement Act, P.L. 103-465. The agreement entered into force on January 1, 1995.[1]

## OUTLINE OF THE DISPUTE SETTLEMENT UNDERSTANDING

The Dispute Settlement Understanding (DSU) officially known on rules and procedure Governing the Settlement of Disputes, establishes rules and procedures that manage various disputes arising under the Covered Agreements of the Final Act of the Uruguay Round. There had been total 314 complaints brought by the member of WTO. All WTO member nation-states are subject to it and are the only legal entities that may bring and file cases to the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO members, which administers dispute settlement procedures.

It provides strict time frames for the dispute settlement process and establishes an appeals system to standardize the interpretation of specific clauses of the agreements. It also provides for the automatic establishment of a panel and automatic adoption of a panel report to prevent nations from stopping action by simply ignoring complaints. Strengthened rules and procedures with strict time limits for the dispute settlement process aim at providing "security and predictability to the multilateral trading system" and achieving "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements." The basic stages of dispute resolution covered in the understanding include consultation, good offices, conciliation and mediation, a panel phase, Appellate Body review, and remedies.

## STAGES IN WTO

### Consultations (Article 4)

The DSU permits a WTO Member to consult with another Member regarding "measures affecting the operation of any covered agreement taken within the territory" of the latter. If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days.

If the dispute is not resolved within 60 days, the complaining party may request a panel. The complainant may request a panel before this period ends if the other Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.

### Establishing a Dispute Panel (Articles 6, 8)

A panel request, which must be made in writing, must "identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly" (Art. 6.2). Under GATT and now WTO dispute settlement practice; a Member may challenge a measure of another Member "as such," "as applied," or both. An "as such" claim challenges the measure independent of its application in a specific situation and, as described by the WTO Appellate Body, seeks to prevent the defending Member from engaging in identified conduct before the fact.

If a panel is requested, the DSB must establish it at the second DSB meeting at which the request appears as an agenda item, unless it decides by consensus not to do so. Thus, while a defending Member may block the establishment of a panel the first time the complaining Member makes its request at a DSB meeting, the panel will be established, virtually automatically, the second time such a request is placed on the DSB's agenda. While DSB ordinarily meets once a month, the complaining Member may request that the DSB convene for the sole purpose of considering the panel request. Any such meeting must be held within 15 days after the complaining Member requests that the meeting be held.

The panel is ordinarily composed of three persons. The WTO Secretariat proposes the names of panelists to the disputing parties, who may not oppose them except for "compelling reasons"

(Art. 8.6). If there is no agreement on panelists within 20 days from the date that the panel is established, either disputing party may request the WTO Director-General to appoint the panel members.

**Good Offices, Conciliation and Mediation**

Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel," good offices, conciliation and mediation "are undertaken voluntarily if the parties to the dispute so agree." No requirements on form, time, or procedure for them exist. Any party may initiate or terminate them at any time. The complaining party may request the formation of panel," If the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute." Thus the DSU recognized that what was important was that the nations involved in a dispute come to a workable understanding on how to proceed, and that sometimes the formal WTO dispute resolution process would not be the best way to find such an accord. Still, no nation could simply ignore its obligations under international trade agreements without taking the risk that a WTO panel would take note of its behavior.

**Panel Proceedings (Articles 12, 15, Appendix 3)**

After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report. Following a review period, a final report is issued to the disputing parties and later circulated to all WTO Members. A panel must generally provide its final report to disputants within six months after the panel is composed, but may take longer if needed; extensions are usual in complex cases. The period from panel establishment to circulation of a panel report to WTO Members should not exceed nine months. In practice, panels have been found to take more than 13 months on average to publicly circulate reports.

**Appellate Body Review**

The DSB establishes a standing Appellate Body that will hear the appeals from panel cases. The Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case." Those persons serving on the Appellate Body are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the Covered Agreements generally." The Body shall consider only "issues of law covered in the panel report and legal interpretations developed by the panel." Its proceedings shall be confidential, and its reports anonymous.

This provision is important because, unlike judges in the United States, the members of the appellate panel do not serve for life. This means that if their decisions were public, they would be subject to personal retaliation by governments unhappy with decisions, thus corrupting the fairness of the process. Decisions made by the Appellate Body "may uphold, modify, or reverse the legal findings and conclusions of the panel." The DSB and the parties shall accept the report by the Appellate Body without amendments "unless the DSB decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the members."

**Adoption of Panel Reports/Appellate Review (Articles 16, 17, 20)**

Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a disputing party appeals it or the DSB decides by consensus not to adopt it. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body (AB) must issue a report that upholds, reverses, or modifies the panel report. The AB report is to be adopted by the DSB, and unconditionally accepted by the disputing parties, unless the DSB decides by consensus not to adopt it within 30 days after circulation to Members. The period of time from the date the panel is established to the date the DSB considers the panel report for adoption is not to exceed nine months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

**Implementation of Panel and Appellate Body Reports (Article 21)**

In the event that the WTO decision finds the defending Member has violated an obligation under a WTO agreement, the Member must inform the DSB of its implementation plans within 30 days after the panel report and any AB report are adopted. If it is "impracticable"

for the Member to comply immediately, the Member will have a "reasonable period of time" to do so. The Member is expected to implement the WTO decision fully by the end of this period and to act consistently with the decision after the period expires.10 Compliance may be achieved by withdrawing the WTO-inconsistent measure or, alternatively, by issuing a revised measure that modifies or replaces it.

Under the DSU, the "reasonable period of time" is: (1) that proposed by the Member and approved by the DSB; (2) absent approval, the period mutually agreed by the disputants within 45days after the report or reports are adopted by the DSB; or (3) failing agreement, the period determined by binding arbitration. Arbitration is to be completed within 90 days after adoption of the reports. To aid the arbitrator in determining the length of the compliance period, the DSU provides a non-binding guideline of 15 months from the date of adoption. Arbitrated compliance periods have ranged from six months to 15 months and one week. The DSU envisions that a maximum 18 months will elapse from the date a panel is established until the reasonable period of time is determined.

**Compliance Panels (Article 21.5)**

Where there is disagreement as to whether a Member has complied—i.e., whether a compliance measure exists, or whether a measure that has been taken is consistent with the WTO decision in the case—either disputing party may request that a compliance panel be convened under Article 21.5. A compliance panel is expected to issue its report within 90 days after the dispute is referred to it, but it may extend this time period if needed. Compliance panel reports may be appealed to the WTO Appellate Body and both reports are subject to adoption by the DSB.12 Compensation and Suspension of Concessions (Article 22)

If the defending Member fails to comply with the WTO decision within the established compliance period, the prevailing Member may request that the defending Member negotiate a compensation agreement. If such a request is made and agreement is not reached within 20 day.

**Remedies**

There are consequences for the member whose measure or trade practice is found to violate the Covered Agreements by a panel or Appellate Body. The dispute panel issues recommendations with suggestions of how a nation is to come into compliance with the trade agreements. If the member fails to do so within the determined "reasonable period of time," the complainant may request negotiations for compensation. Within twenty days after the expiration of the reasonable period of time, if satisfactory compensation is not agreed, the complaining party "may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the Covered Agreements."

Retaliation shall be first limited to the same sector(s). If the complaining party considers the retaliation insufficient, it may seek retaliation across sectors. The DSB shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable time unless the DSB decides by consensus to reject the request. The defendant may object to the level of suspension proposed. The original panel, if members are available, or an arbitrator appointed by the director-general" may conduct arbitration.

**Arbitration**

Members may seek arbitration within the WTO as an alternative means of dispute settlement "to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties." Those parties must reach mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become party to the arbitration "only upon the agreement of the parties that have agreed to have recourse to arbitration." The parties to the proceeding must agree to abide by the arbitration award. "Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto."

## WTO DISPUTE PANELS AND THE BALANCE BETWEEN TRADES

### Agreements and National Policy

Since the various agreements that constitute the WTO cover such a wide range of topics, dispute settlement panelists find that a number of subjects come under their authority. This places WTO dispute panels in a delicate position. On the one hand they must identify cases where nations are failing to comply with international trade agreements; on the other, they must be cautious when making recommendations that reverse the preferences of national governments.

Thus far, in the decisions of the panels and the Appellate Body, there has been a tendency to write decisions in a way that minimizes the burden on nations to change their regulations and laws in order to comply with their WTO trade obligations. This does not mean that dispute settlement panels have not found nations in violation of the trade agreements. When they have, however, they have left national governments with a variety of options in order to come into compliance.

Two cases in which panel reports were adopted reflect the WTO's tendency to avoid becoming overly involved in the internal regulatory affairs of nations. These cases have been selected as examples because they have received a lot of attention, but the trend described can be found in each case where a panel report has been issued. Both examples are complaints by the United States, one against the European Union (EU) regarding restrictions on import of hormone treated meat, and the other against Japan regarding the photographic film industry. In the first case the United States won the concessions it sought; in the second case the panel found no evidence of violation of the trade agreements.

### European Hormone Case

In the European Hormone Case the panel found the scientific evidence for the import restrictions on beef treated with growth hormones to be insufficient to justify the restriction on trade, but, in effect, left open a wide variety of ways for the EU to comply. The EU is conducting further studies in the hopes of justifying the ban. This was a case where the WTO panel clearly confronted the democratic will of the people, as expressed through their national legislatures and the European Parliament, since the hormone restrictions were initially adopted under intense

public pressure. The panel sided with the United States by finding that the provisions were arbitrary and had the effect of restricting trade, but left options for the EU as well by suggesting that more complete scientific evidence would justify the ban. Alternatively, the panel indicated that technical changes in the way the policy is implemented could reduce the policy's negative impact on trade. Still, the panel was firm in ruling that the current policy is inconsistent with the SPS Agreement, and the EU will have to make substantive changes to come into compliance. If it does not, the EU will be required to offer other trading concessions to compensate for losses, some $200 million per year according to the United States. The EU has until 1999 to comply.

### Japan Alcohol Case

A U.S. complaint against Japan that resulted in a dispute settlement panel decision adopted in July of 1996 will require a 40 per cent reduction of the Japanese tax on alcohol imports, which will add tens of millions of dollars in exports to U.S. producers. The panel agreed with U.S. claims that the Japanese Liquor Tax Law that provided for lower taxes on a Japanese produced liquor called shochu, versus a higher one on whiskey, cognac and wine spirits, was a violation of the GATT Article III, Section 2, national treatment provisions.

## WTO DISPUTE SETTLEMENT AND U.S. LAW

### Legal Effect of WTO Decisions

The adoption by the WTO Dispute Settlement Body of a panel or Appellate Body report finding that a U.S. law, regulation, or practice violates a WTO agreement does not give the report direct legal effect in this country. Thus, federal law is not affected until Congress or the executive branch, as the case may be, changes the law or administrative measure at issue.22 Procedures for executive branch compliance with adverse decisions are set out in §§ 123(g) and 129 of the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C. §§ 3533(g), 3538. Only the federal government may bring suit against a state or locality to declare a state or local law invalid because of inconsistency with a WTO agreement; private remedies based on WTO obligations are also precluded.23 Federal courts have held that WTO panel and Appellate Body reports are not binding on the judiciary24 and have treated determinations involving "whether, when, and how" to

Comply with a WTO decision as falling within the province of the executive rather than the judicial branch.[5]

**Section 301: Unilateral Sanctions and the Japan Auto Dispute**

The second argument that raised vis-à-vis the WTO dispute settlement mechanism and U.S. sovereignty regards the question of whether or not the United States can employ unilateral sanctions to punish trading partners who do not cooperate with U.S. wishes. In the Japan auto parts dispute, the United States insisted that the WTO does not cover the anti-competitive policy issue, therefore unilateral action was permissible. However, the language of the DSU implies that unilateral sanctions without authorization by the WTO violate WTO rules. For example, Article III and Article XXII of the DSU, which emphasize multilateral dispute settlement; and Article I of the GATT, which addresses MFN status, as well as Article II of the GATT, which deals with excessive tariffs, can all be interpreted as prohibiting unilateral punitive sanctions.(99) Other WTO member-states also opposed the United States' unilateral action, with the European Union and Canada going so far as to reserve their third party rights in the dispute because of this issue.

The DSU does not affect application of Section 301 if it is used against non-WTO members, however. The DSU does not demand any significant modification in Section 301 investigations if those investigations include alleged breaches of Uruguay Round Agreements or the impairment of U.S. benefits under the Agreements. The United States could always decide to use Section 301 trade sanctions without WTO authorization against a fellow member-state. In this case, the member-country subjected to the use of Section 301 may seek counter-retaliation against the United States by arguing that the United States has violated its obligations under the DSU. While the United States clearly retains the practical ability to apply Section 301, doing so would probably undo the delicate world trade regime that the United States has sought to promote.

Since the United States and Japan settled the auto-parts dispute before a WTO panel was formed, the issue of the legality of unilateral sanctions was not formally decided by the WTO. Both the threat of sanctions by the United States and the existence of the possibility of a binding settlement by the DSU panel brought pressure on the parties to come to a negotiated settlement. Since the issue was not formerly resolved, the United States has quietly maintained the legal

position that it could use unilateral sanctions in the future, even before a panel found that a U.S. complaint was justified. The Clinton Administration has not chosen to force the issue.

On balance, the record of the first three years suggests that the WTO's dispute settlement provisions are not a significant threat to the sovereignty of the United States. Instead, the United States maintains enough practical power to move issues out of the venue of the WTO when it sees fit, as illustrated by Helms Burton case and the Japan auto parts conflict. Since dispute settlement panels are only authorized to consider whether laws and regulations are consistent with trade agreements, there is a tendency for their decisions to place a preponderance of importance on trade issues. Ultimately, the United States may face the need to exercise its sovereignty by violating a WTO recommendation on environmental, health and safety, and/or national security grounds. The United States, or any other member-country, should carefully consider the consequences of such an action for long-term trade stability before doing so. The option to maintain the controversial regulation always remains, while compensating trading partners in another realm.

The existence of the WTO regime offers the United States a valuable opportunity to extend its global influence. Through minor adjustments in policy, the United States has demonstrated its willingness to abide by the dispute settlement process. By setting an example of compliance, the United States further promotes its vision of a stable, law-based international trading system.

**ENVIRONMENT AND TRADE**

The WTO has no specific agreement dealing with the environment. However, the WTO agreements confirm governments' right to protect the environment, provided certain conditions are met, and a number of them include provisions dealing with environmental concerns. The objectives of sustainable development and environmental protection are important enough to be stated in the preamble to the Agreement Establishing the WTO. The increased emphasis on environmental policies is relatively recent in the 60-year history of the multilateral trading system. At the end of the Uruguay Round in 1994, trade ministers from participating countries decided to begin a comprehensive work programme on trade and environment in the WTO. They created the Trade and Environment Committee. This has brought environmental and sustainable

development issues into the mainstream of WTO work. The 2001 Doha Ministerial Conference kicked off negotiations in some aspects of the subject.

**The committee: broad-based responsibility**

The committee has a broad-based responsibility covering all areas of the multilateral trading system — goods, services and intellectual property. Its duties are to study the relationship between trade and the environment, and to make recommendations about any changes that might be needed in the trade agreements.

The committee's work is based on two important principles:

1. The WTO is only competent to deal with trade. In other words, in environmental issues its only task is to study questions that arise when environmental policies have a significant impact on trade. The WTO is not an environmental agency. Its members do not want it to intervene in national or international environmental policies or to set environmental standards. Other agencies that specialize in environmental issues are better qualified to undertake those tasks.

2. If the committee does identify problems, its solutions must continue to uphold the principles.

More generally WTO members are convinced that an open, equitable and non-discriminatory multilateral trading system has a key contribution to make to national and international efforts to better protect and conserve environmental resources and promote sustainable development. This was recognized in the results of the 1992 UN Conference on Environment and Development in Rio (the "Earth Summit") and its 2002 successor, the World Summit on Sustainable Development in Johannesburg.

The committee's work programme focuses on 10 areas. Its agenda is driven by proposals from individual WTO members on issues of importance to them. The following sections outline some of the issues, and what the committee has concluded so far:

**WTO and environmental agreements: how are they related?**

How do the WTO trading system and "green" trade measures relate to each other? What is the relationship between the WTO agreements and various international environmental agreements and conventions?

There are about 200 international agreements (outside the WTO) dealing with various environmental issues currently in force. They are called multilateral environmental agreements (MEAs).

About 20 of these include provisions that can affect trade: for example they ban trade in certain products, or allow countries to restrict trade in certain circumstances. Among them are the Montreal Protocol for the protection of the ozone layer, the Basel Convention on the trade or transportation of hazardous waste across international borders, and the Convention on International Trade in Endangered Species (CITES).

Briefly, the WTO's committee says the basic WTO principles of non-discrimination and transparency do not conflict with trade measures needed to protect the environment, including actions taken under the environmental agreements. It also notes that clauses in the agreements on goods, services and intellectual property allow governments to give priority to their domestic environmental policies.

The WTO's committee says the most effective way to deal with international environmental problems is through the environmental agreements. It says this approach complements the WTO's work in seeking internationally agreed solutions for trade problems. In other words, using the provisions of an international environmental agreement is better than one country trying on its own to change other countries' environmental policies (see shrimp-turtle and dolphin-tuna case studies).

The committee notes that actions taken to protect the environment and having an impact on trade can play an important role in some environmental agreements, particularly when trade is a direct cause of the environmental problems. But it also points out that trade restrictions are not the only actions that can be taken, and they are not necessarily the most effective. Alternatives include: helping countries acquire environmentally-friendly technology, giving them financial assistance, providing training, etc.

The problem should not be exaggerated. So far, no action affecting trade and taken under an international environmental agreement has been challenged in the GATT-WTO system. There is also a widely held view that actions taken under an environmental agreement are unlikely to become a problem in the WTO if the countries concerned have signed the environmental

agreement, although the question is not settled completely. The Trade and Environment Committee is more concerned about what happens when one country invokes an environmental agreement to take action against another country that has not signed the environmental agreement.

**Disputes: where should they be handled?**

Suppose a trade dispute arises because a country has taken action on trade (for example imposed a tax or restricted imports) under an environmental agreement outside the WTO and another country objects. Should the dispute be handled under the WTO or under the other agreement? The Trade and Environment Committee says that if a dispute arises over a trade action taken under an environmental agreement, and if both sides to the dispute have signed that agreement, then they should try to use the environmental agreement to settle the dispute. But if one side in the dispute has not signed the environment agreement, then the WTO would provide the only possible forum for settling the dispute. The preference for handling disputes under the environmental agreements does not mean environmental issues would be ignored in WTO disputes. The WTO agreements allow panels examining a dispute to seek expert advice on environmental issues.

**A WTO dispute: The 'shrimp-turtle' case**

This was a case brought by India, Malaysia, Pakistan and Thailand against the US. The appellate and panel reports were adopted on 6 November 1998. The official title is "United States — Import Prohibition of Certain Shrimp and Shrimp Products", the official WTO case numbers are 58 and 61.

Seven species of sea turtles have been identified. They are distributed around the world in subtropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and nesting grounds.

Sea turtles have been adversely affected by human activity, either directly (their meat, shells and eggs have been exploited), or indirectly (incidental capture in fisheries, destroyed habitats, polluted oceans).

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products. The protection of sea turtles was at the heart of the ban.

The US Endangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their "take" within the US, in its territorial sea and the high seas. ("Take" means harassment, hunting, capture, killing or attempting to do any of these.)

Under the act, the US required US shrimp trawlers to use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles.

Section 609 of US Public Law 101-102, enacted in 1989, dealt with imports. It said, among other things, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

In practice, countries that had any of the five species of sea turtles within their jurisdiction, and harvested shrimp with mechanical means, had to impose on their fishermen requirements comparable to those borne by US shrimpers if they wanted to be certified to export shrimp products to the US. Essentially this meant the use of TEDs at all times.

**The ruling**

In its report, the Appellate Body made clear that under WTO rules, countries have the right to take trade action to protect the environment (in particular, human, animal or plant life and health) and endangered species and exhaustible resources). The WTO does not have to "allow" them this right.

It also said measures to protect sea turtles would be legitimate under GATT Article 20 which deals with various exceptions to the WTO's trade rules, provided certain criteria such as non-discrimination were met.

The US lost the case, not because it sought to protect the environment but because it discriminated between WTO members. It provided countries in the western hemisphere — mainly in the Caribbean — technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices.

It did not give the same advantages, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.

The ruling also said WTO panels may accept "amicus briefs" (friends-of-the-court submissions) from NGOs or other interested parties.

'What we have not decided ...'

This is part of what the Appellate Body said:

In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX [i.e. 20] of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States — Gasoline [adopted 20 May 1996, WT/DS2/AB/R, p. 30], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement."

**A GATT dispute: The tuna-dolphin dispute**

This case still attracts a lot of attention because of its implications for environmental disputes. It was handled under the old GATT dispute settlement procedure. Key questions are:

1. Can one country tell another what its environmental regulations should be? and
2. Do trade rules permit action to be taken against the method used to produce goods (rather than the quality of the goods themselves)?
3. What was it all about?

In eastern tropical areas of the Pacific Ocean, schools of yellow fin tuna often swim beneath schools of dolphins. When tuna is harvested with purse seine nets, dolphins are trapped in the nets. They often die unless they are released.

The US Marine Mammal Protection Act sets dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellow fin tuna in that part of the Pacific Ocean. If a country exporting tuna to the United States cannot prove to US authorities that it meets the dolphin protection standards set out in US law, the US government must embargo all imports of the fish from that country. In this dispute, Mexico was the exporting country concerned. Its exports of tuna to the US were banned. Mexico complained in 1991 under the GATT dispute settlement procedure.

The embargo also applies to "intermediary" countries handling the tuna en route from Mexico to the United States. Often the tuna is processed and canned in one of these countries. In this dispute, the "intermediary" countries facing the embargo were Costa Rica, Italy, Japan and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. Others, including Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations (ASEAN), were also named as "intermediaries".

**The panel**

Mexico asked for a panel in February 1991. A number of "intermediary" countries also expressed an interest. The panel reported to GATT members in September 1991. It concluded:

1. The US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported.) This has become known as a "product" versus "process" issue.

2. that GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country — even to protect animal health or exhaustible natural resources. The term used here is "extra-territoriality".

What was the reasoning behind this ruling? If the US arguments were accepted. then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally — and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system — to achieve predictability through trade rules.

The panel's task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct or not. It suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse.

The panel was also asked to judge the US policy of requiring tuna products to be labeled "dolphin-safe" (leaving to consumers the choice of whether or not to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.

**UNCITRAL**

The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 50 years, UNCITRAL's business is the modernization and harmonization of rules on international business. Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include:

1. Conventions, model laws and rules which are acceptable worldwide
2. Legal and legislative guides and recommendations of great practical value
3. Updated information on case law and enactments of uniform commercial law

4. Technical assistance in law reform projects
5. Regional and national seminars on uniform commercial law

**Origin**

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 ( Resolution 2205(XXI)of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.

**Mandate**

The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.

**Composition**

The Commission is composed of sixty member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

**UNCITRAL: Information for Member States**

**The Commission**

The Commission carries out its work at annual sessions, which are held in alternate years at United Nations Headquarters in New York and at the Vienna International Centre at Vienna. Each working group of the Commission typically holds one or two sessions a year, depending on the subject-matter to be covered; these sessions also alternate between New York and Vienna.

In addition to member States, all States that are not members of the Commission, as well as interested international organizations, are invited to attend sessions of the Commission and of its working groups as observers. Observers are permitted to participate in discussions at sessions of the Commission and its working groups to the same extent as members.

**Working Groups**

The Commission has established six working groups to perform the substantive preparatory work on topics within the Commission's programme of work. Each of the working groups is composed of all member States of the Commission.

The six working groups and their current topics are as follows:

- Working Group I - Micro, Small and Medium-sized Enterprises
- Working Group II - Dispute Settlement
- Working Group III - Investor-State Dispute Settlement Reform
- Working Group IV - Electronic Commerce
- Working Group V - Insolvency Law
- Working Group VI - Security Interests

**2030 Agenda for Sustainable Development: UNCITRAL's role**

UNCITRAL supports the Sustainable Development Goals. In the Addis Ababa Action Agenda, States endorsed "the efforts and initiatives of the United Nations Commission on International Trade Law, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field."

UNCITRAL's contribution to the achievement of the Sustainable Development Goals proceeds on several fronts and touches upon a number of different and interrelated areas. This page lists only the goals and targets that are most relevant to the work of UNCITRAL, along with an explanation of how UNCITRAL contributes to their achievement. Select a Goal for more information on UNCITRAL's role in promoting that Goal and selected targets.