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**THE WORLD TRADE SYSTEM BEYOND 50 – A HISTORICAL ANALYSIS & PROPOSALS
FOR REFORM: REVITALIZING CORDELL HULL’S FOUNDING VISION**

by

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**A thesis submitted to the Faculty
of graduate Studies and Research in
partial fulfillment of the requirements
for the degree of Doctor of Civil Law (D.C.L.)**

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**Dedicated in gratitude to those who
encouraged this undertaking.**

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ABSTRACT

The thesis reviews the 50 year history of the GATT/WTO trading system in order to assess how far the system has achieved the goals and objectives of its principal founders, with a view to recommending proposals for completing the same in the context of the next major round of WTO negotiations. Emphasis is laid throughout the work on actions which need to be taken to ensure that the world trade system has a set of integrated rules which address the realities of increasing international economic interdependence. The conclusion of this work incorporates various steps that can be taken towards achieving this objective.

A principal thesis of this work is that the actual achievements of the GATT/WTO system are less than those intended by Cordell Hull, the principal founder of what became the initial GATT arrangements, and, accordingly, a series of proposals are advanced to complete Hull's original vision. Most significantly, important elements of the failed *Havana Charter*, which was to establish the International Trade Organization (ITO), have yet to be incorporated into present GATT/WTO disciplines. In particular, the *Havana Charter* included provisions dealing with investment and private restraints on trade, which are now indispensable, as contemporary restrictions on the ability to truly contest international markets originate more from the internal structuring of domestic markets, rather than from border measures. This reality has been recognized in regional trading arrangements, and, accordingly, an examination of the principal non-multilateral trading systems is made in this respect, particularly the European Union, and the NAFTA.

Based on a review of the need for the same, this work proposes new WTO disciplines for investment and competition policy, as well as a series of proposals to facilitate regulatory reform in services, the area in which they are most needed. Finally, a series of proposals are made to restructure the basic WTO agreements to remove inconsistencies which have evolved in the last 50 years, and to facilitate truly effective market access, i.e. the ability to actually contest international markets. Collectively, these proposals are fundamental prerequisites to the orderly operation of the contemporary world trading system.

SOMMAIRE

Cette thèse passe en revue les cinquante ans d'histoire des accords de commerce GATT/WTO pour évaluer dans quelle mesure ces accords ont atteint les buts et les objectifs de ses principaux fondateurs; ceci en vue de présenter des propositions pour les atteindre pleinement, dans le contexte de la prochaine phase, d'importance majeure, des négociations WTO. L'auteur insiste tout au long de ce travail, sur les actions à entreprendre pour que le commerce mondial soit régi par des règles qui tiennent compte des réalités de l'interdépendance croissante de l'économie internationale. En conclusion, il propose différentes mesures qui pourraient être prises pour atteindre cet objectif.

L'une des thèses principales de l'auteur est que les résultats effectivement obtenus par les accords GATT/WTO sont inférieurs à ceux qu'attendait Cordell Hull, le principal artisan de ce qui allait devenir les premiers accords GATT et, en conséquence, il présente une série de propositions pour parachever la vision originelle de Hull. D'importance particulière, l'échec de la *Charte de La Havane*, qui devait permettre l'établissement de l'ITO (International Trade Organization) fait que des éléments importants de cette charte ne sont toujours pas incorporés dans les règlements actuels de GATT/WTO. En particulier, la *Charte de La Havane* comprenait des dispositions relatives aux investissements et aux entraves privées au commerce qui sont devenues indispensables puisqu'aujourd'hui les restrictions apportées à la libre concurrence sur les marchés internationaux proviennent plus de l'organisation interne des marchés nationaux que de mesures imposées à leurs frontières. Ce fait a du reste été reconnu et pris en compte dans des accords commerciaux régionaux; en conséquence l'auteur étudie de ce point de vue les principaux accords commerciaux non-multilatéraux, et en particulier l'Union Européenne et la NAFTA.

S'appuyant sur une analyse de la nécessité d'une telle approche, l'auteur propose de nouvelles directives WTO en ce qui concerne les politiques d'investissement et de concurrence et formule également une série de propositions tendant à faciliter une réforme des réglementations en matière de services, domaine où elle est la plus nécessaire. Enfin il fait une série de propositions de modifications structurelles à apporter aux accords WTO de

base pour supprimer des contradictions nées au cours des cinquante dernières années et pour faciliter réellement l'accès aux marchés, c'est à dire la possibilité d'effectivement entrer en compétition sur les marchés internationaux. Prises dans leur ensemble, ces propositions sont des conditions préalables fondamentales pour arriver à un fonctionnement ordonné du mécanisme contemporain régissant le commerce mondial.

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COMPLETE LIST OF ACRONYMS

ABAC	APEC Business Advisory Council
AD	anti-dumping
AEM	ASEAN Economic Ministers
AFTA	ASEAN Free Trade Agreement
AIC	ASEAN Industrial Complementation
AIJV	ASEAN Industrial Joint Venture
AIP	ASEAN Industrial Project
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
APEC	Asia Pacific Economic Cooperation
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
BBC	ASEAN Brand-to-Brand Complementation
BT	British Telecom
CAP	Community Agriculture Policy
CBERA	Caribbean Basin Economic Recovery Act
CEC	Commission on Environmental Cooperation [NAFTA]
CEPT	ASEAN Common Effective Preferential Tariff
CER	Australia-New Zealand Closer Economic Relations Agreement
CET	common external tariff
CFTA	United States - Canada Free Trade Agreement

CP	Committee on Competition Law and Policy
CTE	Committee on Trade and Environment [WTO]
CTI	Committee on Trade and Investment [APEC]
CVD	countervailing duty
DG	drafting group
DSB	Dispute Settlement Body [WTO]
DSU	Dispute Settlement Understanding
EAEC	East Asian Economic Caucus
EC	European Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EG	expert group
EMS	European Monetary System
EPA	Environmental Protection Agency [United States]
EPG	Eminent Persons Group
ERM	European Exchange-Rate Mechanism
EU	European Union
FTA	free trade agreement
GAO	US General Accounting Office
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GBT	WTO Group on Basic Telecommunications
GDP	gross domestic product

GSM	Global System for Mobile Communications	NAALC	North American Agreement on Labor Cooperation
HRD	human resources development	NADB	North American Development Bank
IAA	International Antitrust Authority	NAFTA	North American Free Trade Agreement
IAP	Individual Action Plan [APEC]	NAO	National Administrative Office [NAFTA]
IBRD	International Bank for Reconstruction and Development (“World Bank”)	NATO	North Atlantic Treaty Organization
ICPO	International Competition Policy Office	NGBT	Negotiating Group on Basic Telecommunications [WTO]
ICSID	International Center for Settlement of Investment Disputes	NTA	New Trans-Atlantic Agenda
IEM	Internal Energy Market	NTB	non-tariff barrier
IMF	International Monetary Fund	OECD	Organization for Economic Cooperation and Development
IPR	intellectual property rights	OEEC	Organization for European Economic Cooperation
ITA	Information Technology Agreement	PBF	Pacific Business Forum
ITO	International Trade Organization	PTA	preferential trading arrangement
LTSS	Land Transportation Standards Subcommittee [NAFTA]	RIA	regional integration agreement
MAI	Multilateral Agreement on Investment	RTA	regional trading agreement
MC	ministerial conference	SAA	Statement of Administrative Action [United States]
MEA	multilateral environment agreement	SMC	Singapore Ministerial Conference
MERCOSUR	Mercado Comun del Sur (Common Market of the Southern Cone)	SOM	senior officials meeting
MFN	most-favored nation	SPS	sanitary and phytosanitary standards
MOU	memorandum of understanding	TAA	NAFTA Trade Adjustment Assistance program
MRA	mutual recognition agreement	TAA	Trade Agreements Act
MTN	multilateral trade negotiation	TBT	technical barriers to trade
NAAEC	North American Agreement on Environmental Cooperation	TPRB	Trade Policy Review Board

TRIMs	Agreement on Trade-Related Aspects of Investment Measures
TRIPs	Agreement on Trade-Related Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UR	Uruguay Round
URA	Uruguay Round Agreements
URAA	Uruguay Round Agreements Act [United States]
USITC	United States International Trade Commission
USTR	United States Trade Representative
VAT	value-added tax
VER	voluntary export restraint
VRA	voluntary restraint agreement
WTO	World Trade Organization

It was therefore not without significance that the text of each trade agreement began, not with tariff reductions, but with guarantees of equality of treatment in all its forms.¹

Chapter 1. Introduction

1.1 Overview

The fiftieth anniversary of the General Agreement on Tariffs and Trade (GATT) in 1998 provides a unique opportunity to re-examine the fundamental goals of the multilateral trade agenda—to assess how far we have come and determine what has been achieved.² The anniversary also allows us to examine what remains to be finished from GATT's original goals, and to formulate what should be its future agenda now that it has evolved into the World Trade Organization (WTO). This is the objective of this work.

The thesis of this work is that the actual achievements of the WTO system are less than those intended by the founders of what became the original GATT arrangements, and accordingly a new trade agenda is proposed which is designed to reinforce and support evolving international economic realities, and reach beyond even those original goals to support the next fifty years of the international economy. The starting point in this respect is the premise that while the modalities for implementing the multilateral trade liberalization process need to be reformulated, the original rationale for the same does not. This is perhaps no better articulated than by Cordell Hull when he asserted: "I have never faltered, and I will never falter, in my belief that enduring peace and the

¹ CORDELL HULL, THE MEMOIRS OF CORDELL HULL 369 (1948).

² See General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT 1947]. GATT 1947 never actually entered into force. Instead, because its drafters thought the International Trade Organization would soon come into being, it was applied to its Contracting Parties through a Protocol of Provisional Application (PPA). The PPA was opened for signature on October 30, 1947 for the original parties to sign by November 15, 1947, and for others to sign by June 30, 1948. The PPA first took effect on January 1, 1948. The Protocol of Provisional Application to the General Agreement on Tariffs and Trade, opened for signature on Oct. 30, 1947, 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 308. Professor John Jackson argues that this provisional legal implementation of the GATT is one of the system's "birth defects" that hampered and clouded the GATT's legal effects. See JOHN H. JACKSON, WORLD TRADE LAW AND THE LAW OF GATT (1969).

welfare of nations are indissolubly connected with ... the maximum practicable degree of freedom in international trade.”³

There is no disagreement that the post-war global economy has undergone vast changes and that international trade has increased significantly as national economies have become more interrelated and dependent upon each other. Clearly, this integration has been facilitated by eight rounds of multilateral trade negotiations under the auspices of the GATT. Each successive trade round has lowered impediments to international commerce. Early rounds focused on tariffs, while later rounds focused on nontariff barriers such as quotas and voluntary restraint agreements. Other issues added to the most recent negotiations include trade in services, intellectual property protection, and trade-related investment measures.

It is now well recognized that as border measures have been reduced, domestic policies and regulations have begun to attract increasing attention. These policies and regulations include environmental regulations, foreign investment restrictions, and internal competition regimes. Obviously, one reason for this attention is the increasingly global nature of commerce—that multinational corporations are common today and many markets transcend national borders is long unexceptional. In addition, foreign direct investment is continuing to increase at a rapid pace as firms establish foreign operations. The intra-firm component of international trade also continues to grow as firms adopt international sourcing, rationalize production, and reduce costs. Joint ventures and other cooperative arrangements are increasing as firms from major industrialized countries cooperate in product development, manufacturing, and marketing. Finally, information technology continues to hasten the already rapid pace of globalization.

With border measures reduced, firms are seeking a stronger foothold in foreign markets by increasing their foreign investment activity. The Agreement on Trade-

³ HULL, *supra* note 1, at 75.

Related Aspects of Investment Measures (TRIMS) was one of the agreements that came out of the Uruguay Round negotiations.⁴ This agreement begins to address some of the concerns surrounding trade-distorting, restrictive investment measures; however, the TRIMS has major limitations and far more comprehensive disciplines need to be established in this respect. Accordingly, this work proposes a new WTO Agreement on Investment. Without such disciplines, Members can effectively prevent nationals of other Members from achieving full access to GATT/WTO benefits within the former's borders.

It is argued, however, that investment reform is a mere prerequisite to full market liberalization. Following investment liberalization, activity within domestic markets comes to the fore. This activity can be impacted from two principal directions: government regulation and private business behavior. Both of these activities can stifle foreign entrants, even though investment distortions may have been reduced or eliminated. Once firms are established in foreign markets, they will need to be able to compete on an even basis, free from restraints on competition, and inappropriate regulatory interference. Accordingly, this work proposes significant restructuring of the GATS so as to ensure that the effects of disparate national regulatory systems be eliminated, and likewise proposes the terms of a new WTO Agreement on Competition Policy to address distorting business practices.

With the inclusion of the competition code, an investment agreement, and regulatory obligations vis-a-vis services, the WTO Agreements will approach *Havana Charter* vision of a single unified constitution for the world trading system. As such, it is proposed in the final chapter that a new overarching commitment to market contestability be applied to all the substantive agreements covering goods, services and intellectual property. Accompanied by general national treatment and MFN commitments, such an obligation would apply to all the sub-agreements. The sub-agreements would remain to

⁴ Agreement on Trade-Related Aspects of Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 27 [hereinafter TRIMs].

specify certain positive obligations other than that of contestable market access and provide baseline rules for commitments to the other Members of the World Trade Organization.

1.2 Outline

Chapter 2 examines in some detail the origins of the multilateral system and the vision of U.S. Secretary of State Cordell Hull—which even today serves as a useful articulation of where we should be headed. In particular, it was quite extraordinary that Secretary Hull recognized that while reducing border measures was important, it was nondiscriminatory treatment, especially within borders, that is most important. Finally, Chapter 2 discusses the first attempted implementation of that vision in Havana.

With the *Havana Charter* unsuccessful, the world trading system continued under the temporary arrangements of the GATT until the Uruguay Round's 1994 replacement with the WTO. Accordingly, Chapter 2 reviews the GATT's early history before focusing on the WTO's multilateral approach, as well as subsequent developments in the environmental, labor and information technology fields.

Since the “Hull Vision” was not fully adopted at the first comprehensive attempt at a multilateral trading system in Havana, beginning in Europe, regional trading arrangements grew to meet the world's need for freer international trade. In order to determine how far the “Hull Vision” has been integrated into those various trading systems, Chapter 4 analyzes the major regional trade and investment liberalization approaches. Since a principal tenet of this work is that the GATT and WTO failed to adequately incorporate the three major substantive areas of investment, regulatory/services reform, and competition policy from the ITO, particular attention is given to how these non-multilateral arrangements have dealt with these particular areas, and what lessons can be learned from their treatment of them.

As this work proposes disciplines for enhanced, non-discriminatory, competition across national borders, Chapter 4 examines how far deeper economic integration has taken place in actual practice. Obviously no better example of this exists than in the case of the European Union (EU), and an in-depth analysis is given as to how far the EU has been able to establish rules and disciplines to implement its political and economic arrangement. Clearly the EU has as its organizing basis the element of sovereign integration, whereas the other economic arrangements studied clearly do not. This, however, does not invalidate the EU as a basis for analysis—it remains a very useful metaphor for examining the constraints on deeper economic integration, and allows a review of where possibilities for expanding the same exist.

Following the discussion of the EU, other major/representational regional trade agreements are evaluated in a similar fashion as the EU. These agreements include the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the North American Free Trade Agreement (NAFTA), Asia Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN), and Mercado Comun del Sur (MERCOSUR), and the Free Trade Area of the Americas (FTAA) initiative. The experience of each is instructive in informing the content of future WTO negotiations, particularly in the areas proposed by this work.

Chapter 5 commences treatment of this work's formal proposals for completing the Cordell Hull vision in the WTO framework with the proposal for a WTO Agreement on Investment. A comprehensive review is given in this chapter of prior international agreements, or negotiations for the same, including the Multilateral Agreement on Investment under negotiation at the Organization for Economic Development and Cooperation (OECD). The existing multilateral disciplines for facilitating and protecting investment by foreign enterprises are found to be wanting, and accordingly this chapter proposes terms for what an acceptable WTO Agreement on Investment must contain.

Even assuming foreign enterprises have suitable disciplines on investments, they still must confront government regulations and private business behavior as prerequisites to be able to fully contest foreign markets on an equitable basis. In this respect, Chapter 6 reviews the existing instruments dealing with disparate national regulatory schemes, and finds that the principal means of dealing with the same generally occurs in the context of the regulation of the providing of services. However, as a review of the GATS in this chapter finds that this is a particularly flawed instrument, it proposes significant reforms to the GATS which are designed to overcome the significant gaps in national coverage of existing sectors. The proposed reforms are also designed to overcome the extremely protracted nature of negotiations under the GATS, which, as demonstrated in the two case studies on Basic Telecommunications and Financial Services, are extremely complex and time-consuming.

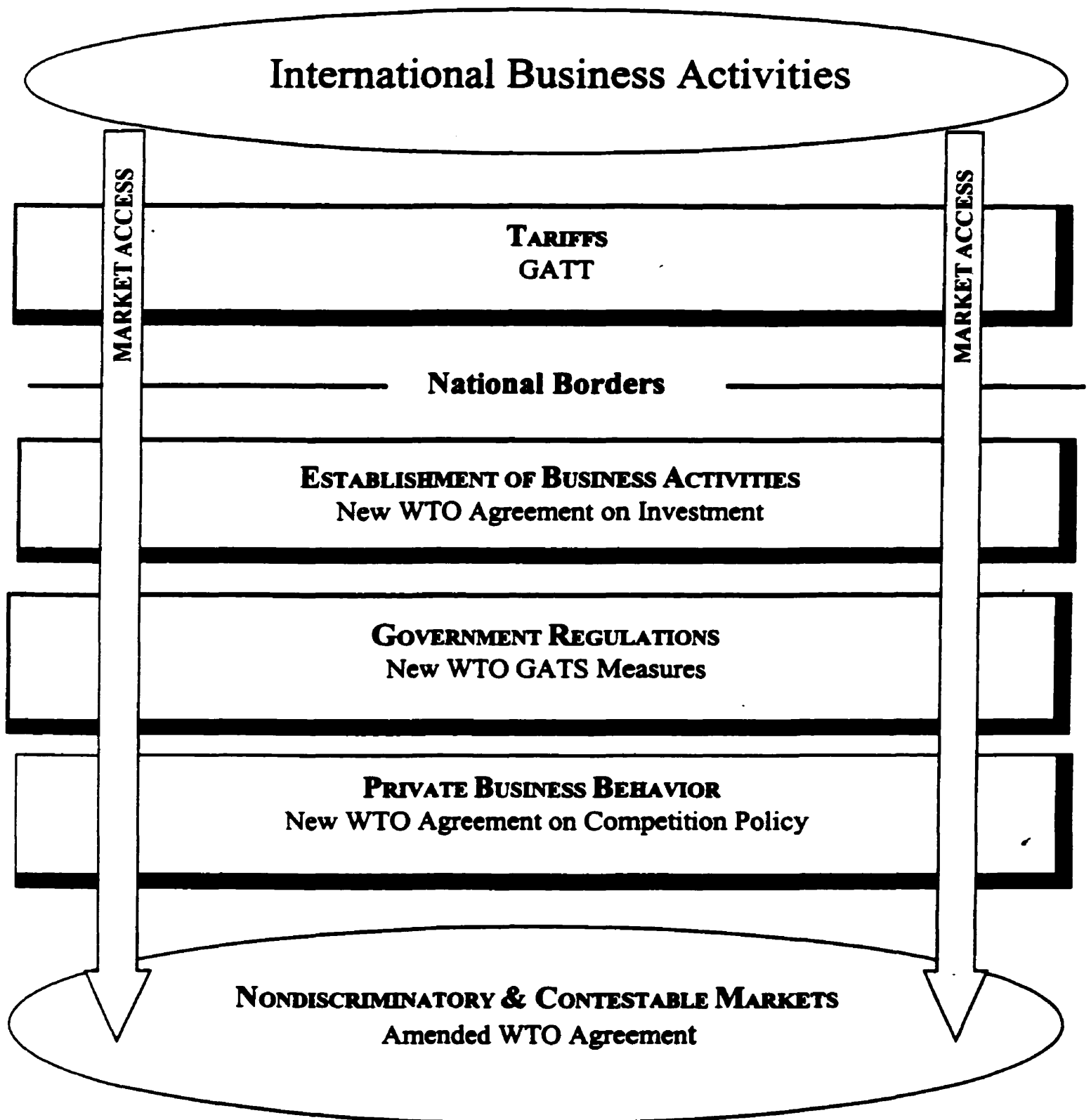
As detailed in Chapter 7, one of the principal gaps in WTO disciplines are instruments to deal with private restraints on trade within foreign economies. As this chapter shows, although such disciplines were a central part of the *Havana Charter*, they were not made a part of the GATT or the WTO, and accordingly a comprehensive review is made of those trade agreements that have adopted such disciplines to inform to what extent they could be employed in the WTO context. The chapter therefore examines the experiences of these disciplines in the EU, ANZCERTA, and MERCOSUR context, among others. Also, because the academic and policy community has generated many proposals in the area of international competition, Chapter 7 examines many of these, and concludes with a description of a proposed WTO Competition Policy Agreement, and provides an actual text of the same for consideration.

To date, the multilateral trading system is a collection of agreements and groupings that falls well short of the Hull vision for “equality of treatment in all its forms.” The proposal set forth in Chapter 8 attempts to move the multilateral trading system towards a borderless regime that allows commercial enterprises to truly contest international markets. There is still a long way to go towards unimpeded market access,

and the fundamental goal of this proposal is to achieve far deeper market access than exists today and non-discriminatory operation in international markets. Accordingly, the collective proposals advanced herein center around the need for a unified set of multilateral rules and policies to address restrictions on global market competition, as reflected in Figure 1-1.

Figure 1-1: Completing the World Trading System

COMPLETING THE WORLD TRADING SYSTEM



Chapter 2. The Vision of Cordell Hull and Early International Trade Agreements

As early as 1908, Cordell Hull, then a member of the U.S. House of Representatives, saw the costs of protection in the form of high tariffs. He saw high tariffs as an ineffectual means of raising revenue for the Federal Government, as linked to foreign strife including war, and as taken advantage of by domestic firms to engage in anticompetitive behavior in their home markets. On the floor of the House, Cordell Hull proclaimed:

[N]o fountain can be purified while a contaminated stream flows into it [therefore no] effort to curb and suppress trust violators [will] succeed unless such effort strikes at the main source of their constant creation—the protective tariff.⁵

Cordell Hull's vision lay in his ability to look beyond border measures, and see that restrictions in domestic markets gave firms market power and inequitable competitive advantages. He saw that once external protection was eliminated, the more fundamental issues of equal treatment and market access could be addressed. In fact, it was in 1908 on the floor of the U.S. House of Representatives that he correctly observed that “the trusts are intrenched behind the walls of the protective-tariff system. The flag of monopoly has always floated above the ramparts of protection.”⁶

During the First World War, Cordell Hull continued his fight to reduce tariffs and increase international trade. He believed that robust international commerce was inextricably linked to world peace. Indeed, in a speech to Congress, he proposed:

⁵ HULL, *supra* note 1, at 52.

⁶ 42 CONG. REC. 3519 (1908) (Statement of Cordell Hull). In 1912, a newly-elected President Woodrow Wilson echoed his Democratic colleague's beliefs on antitrust and high tariffs: “[high tariffs had become] a set of privileges and exemptions from competition behind which it is easy by any, even the crudest forms of combination to organize a monopoly; until at last nothing is normal, nothing is obliged to stand the tests of efficiency and economy, in our world of big business, but everything thrives by concerted arrangement.” HAROLD B. HINTON, CORDELL HULL 132 (1942).

[A]t the close of the present European war an international trade conference [should] be held in the city of Washington for the purpose of establishing a *permanent international trade congress*. The function and duty of such a congress...would be to comprise the consideration of all international trade methods, practices, and policies which in their effects are calculated to create destructive commercial controversies or bitter economic wars, and to formulate agreements with respect thereto, designed to eliminate and avoid the injurious results and dangerous possibilities of economic warfare, and to promote fair and friendly trade relations among all the nations of the world.⁷

This was the earliest call for a *permanent* international trade organization whose purpose was to facilitate increased international trade and mediate international controversies with respect to trade. Hull explained that competition among countries through the use of high tariffs was fundamentally flawed:

In my judgment the country that will prosper greatest after the war will be that country which develops the highest state of utility and efficiency in its production; that country which encourages invention and scientific and industrial education and training in the largest measure; that country in which capital and labor in a friendly spirit mutually work out a relationship just and fair to both with respect to each important industry. Antiquated machinery, worn-out methods, and inefficient management will have to be abandoned.⁸

Cordell Hull continued his quest for tariff reductions as President Franklin D. Roosevelt's Secretary of State. However, he realized that public opinion at that time would not support any meaningful multilateral undertaking. Consequently, he resorted to moving forward in a bilateral direction culminating with the Reciprocal Trade Agreements Act (TAA) of 1934.⁹ This bill authorized the President to enter into trade

⁷ HULL, *supra* note 1, at 82. Cordell Hull believed that this proposal became the foundation for point three of President Woodrow Wilson's Fourteen Points which called for the elimination of international trade barriers. *Id.*

⁸ HINTON, *supra* note 6, at 160 (quoting Cordell Hull).

⁹ Reciprocal Trade Agreements Act of 1934, Act of June 12, 1934, 48 Stat. 943, 19 U.S.C. § 1351
(continued...)

agreements with other countries without the need for Senate approval or Congressional action. The TAA had two main points in addition to the lack of need for Senate approval: 1) tariffs could be reduced by up to 50 percent, but only if the United States received corresponding concessions from other countries; and 2) reductions in tariffs applied to all countries that did not discriminate against the United States. This is the so-called unconditional most-favored-nation (MFN) clause. In his memoirs, Cordell Hull recalled the importance of unconditional treatment of other nations in trade matters, by noting that “the text of each trade agreement began, not with tariff reductions, but with guarantees of equality of treatment in all its forms.”¹⁰

By the start of the Second World War the United States had negotiated over 20 such agreements that represented approximately 60 percent of its total foreign trade. Cordell Hull was establishing a multilateral trading system, one bilateral agreement at a time. The multilateral trading system he envisioned manifested itself with the activity that occurred after the War.

2.1 Multilateral Pre-cursors to the Havana Conference

Following from President Woodrow Wilson’s (and Cordell Hull’s) call for “the removal as far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating

⁹ (...continued)
(1997). Cordell Hull may have had more pressing interests in pushing the TAA through Congress. At the time, he sought to counter the isolationist trend represented by a Congress considering an official policy of neutrality with a policy of American engagement in world affairs. The TAA proved to be an instrument which combined his interest in lowering tariffs with his political interests in building American power in the international sphere. See HINTON, *supra* note 6, at 268-269. On the contrary, Professor Sylvia Ostry views the TAA and the reduction of trade barriers through reciprocity, MFN and national treatment as the cornerstones of the “Hull Vision,” not, as we argue here, a second-best alternative to multilateral reductions of trade barriers both at the border and beyond. See SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM 57-58, 66-67 (1997).

¹⁰ HULL, *supra* note 1, at 369.

themselves for its maintenance,"¹¹ the multilateral system embarked on several attempts to develop common principles for the reduction of international barriers to trade.¹² Four major conferences, in Brussels, in Genoa and, twice, in Geneva, were called by the League of Nations to address issues of economic policy. At these conferences several basic principles arose as necessary to promote global economic welfare: unconditional, as far as possible, most-favored nation treatment, national treatment, the elimination of quantitative restrictions, the reduction of tariffs, the elimination of exchange controls, the elimination of export and import prohibitions and controls, and the elimination of non-tariff barriers to trade. Further, the concept of negotiating exceptions to the general prohibitions was introduced whereby countries could continue to violate the general principles when legislating in certain sovereign areas so long as they did not constitute disguised barriers to trade or were arbitrary means of discrimination. However, no consensus on the implementation of these ideals emerged in any binding form.

Even prior to the United States entering World War II, it began to negotiate with the United Kingdom how the post-war international economic order would be shaped. Beginning with the Atlantic Charter and the Mutual Aid Agreement, the United States and United Kingdom agreed to develop the multilateral system in accordance with the following goals:

¹¹ Address of President Woodrow Wilson delivered at a Joint Session of Congress, Jan. 8, 1918, *cited in* WILLIAM ADAMS BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 29-30 (1950).

¹² This section is generally derived from Brown's review of pre-Havana efforts at multilateral trade liberalization. *See id.* at 15-56. For other thorough reviews of the history leading up to the Havana Conference, see JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 2; ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990); SUSAN ARIEL AARONSON, *TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY* (1996); WILLIAM DIEBOLD, *THE END OF THE ITO* (Essays in Int'l Finance No. 16, Princeton U., 1952), WILCOX, *supra* note 20; Simon Reisman, *The Birth of a World Trading System: ITO and GATT*, in *THE BRETTON WOODS-GATT SYSTEM* 82 (Orin Kirshner, ed., 1996); William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335 (1994).

- (1) the expansion...of production, employment and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples;
- (2) the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers; and
- (3) the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security.¹³

These principles were eventually agreed to by a number of countries, including the Soviet Union, an early multilateral participant, in several agreements and declarations.

In response to conversations with United Kingdom officials over how to best implement these ideals, the U.S. State Department developed their *Proposals for Consideration by an International Conference on Trade and Employment*.¹⁴ While rather general in nature, these *Proposals* outlined the United States' goals for the *Havana Charter*.¹⁵ With these *Proposals* in hand, the United States urged the Economic and Social Council of the United Nations (ECOSOC) to sponsor a conference on trade and employment. ECOSOC formed a preparatory committee to begin working on a Charter. At its first meeting, this Committee issued a report that essentially bifurcated the two sets negotiations and gave birth to the GATT. In its London Conference, the Preparatory Committee provided that tariff negotiations would proceed under a separate track directly tailored to allow for U.S. participation that would otherwise be circumscribed by the Trade Agreements Act of 1934 regarding tariff reductions. This single act caused the

¹³ Points (1) and (2) are from Art. VII of the Mutual Aid Agreement and Point (3) is from the Atlantic Charter as referenced by the Mutual Aid Agreement. Cited in BROWN, *supra* note 11, at 47-48.

¹⁴ See U.S. DEP'T STATE, PUB. 2411, PROPOSALS FOR EXPANSION OF WORLD TRADE AND DEVELOPMENT (Commercial Pol'y Series 79, 1946).

¹⁵ See Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, UN Doc. No. E/PC/T/33 (1946). The U.S. *Proposals* became a draft charter attached to this report.

separate GATT negotiations and precipitated the “birth defects” in GATT identified by Professor John Jackson.¹⁶

Within the context of the proposed ITO, participants drew provisions from the ITO’s draft charter to safeguard negotiated tariff concessions for the General Agreement on Tariffs and Trade. The GATT was envisioned as a specific trade agreement within the institutional context of the ITO. The GATT was agreed to in 1947 and went into effect in 1948 (there were 23 contracting parties to the original GATT agreement).

Over the course of three more official meetings, in London, Geneva, and New York, the Preparatory Committee prepared a draft charter for the Havana Conference. Finally, in November, 1947, the delegates began meeting in Havana, Cuba to produce the final Suggested Charter for an International Trade Organization. On March 24, 1948, the participating countries finally signed the *Havana Charter*.¹⁷

2.2 The Havana Charter

The *Havana Charter*’s purpose was to facilitate the expansion of international trade on the basis of non-discrimination and multilateralism. The *Havana Charter* itself contains nine chapters and 109 articles. It covers a wide range of trade relationships including tariffs, quotas, exchange rate controls, internal taxation and regulation, restrictive customs requirements, internal preferences, and state trading subsidies. Other topics covered included intergovernmental commodity agreements, international aspects of domestic stabilization policies, economic development, and international private investment.

¹⁶ See JACKSON, *supra* note 2.

¹⁷ *Havana Charter for an International Trade Organization, in United Nations Conference on Trade and Employment, Final Act and Related Documents*, U.N. Doc. E/CONF.2/78, U.N. Sales No. 1948.II.D.4 (1948) [hereinafter *Havana Charter*].

It is extraordinary that in 1948 an agreement was reached that encompassed both the vision of Cordell Hull and sought to deal with the fundamental issue of market access for international trade in goods and services. Unfortunately, the *Havana Charter* lost support in the United States and was never ratified. The demise of the ITO left the interim General Agreement on Tariffs and Trade as the only body of rules governing trade and trade negotiations. The comprehensive multilateral trading system envisioned by Cordell Hull and culminated by the *Havana Charter* and the establishment of the ITO has still not been achieved, particularly as it applies to restrictive business practices. As described in Chapter 3, instead, the GATT survived with trade policy focusing on external (i.e., border) measures for most of the post-war period. While this proved beneficial for world economic welfare, today it falls short in global markets served by international firms.

Chapter 3. Multilateral Approaches to Trade Liberalization

This chapter provides a comprehensive review of what the post-war GATT/WTO system has, and has not, achieved. While it is quite clear that the GATT/WTO disciplines and institutions were sub-optimal in terms of what was intended in the ITO, that system has achieved a fair measure of liberalization, principally in goods, but also, in a nascent way, in services. It has achieved this through two parallel developments, progressive reduction in tariff and other border-measures, and the ongoing structural development of GATT institutions and processes. As is detailed below, these two developments culminated with the Uruguay Round establishing new disciplines in both goods and services, as well as a new organizational structure, the WTO, which serves as the body to administer one of the most important procedural developments of the system—the dispute settlement understanding. This chapter will review these developments, in turn.

As the chapter goes on to reflect, during the time that the GATT disciplines and institutions evolved into the WTO, a host of new issues (in addition to services), were sought to be added to the system. The evolution of “trade plus ...” issues such as the environment, labor and the like have come to the fore, with this chapter outlining to what extent these issues have, and have not, been grafted into and on the trade system. What is remarkable is that while those areas of the environment and labor have received a fairly unwelcome reception by the trade community in general, such a new trade-related issue as information technology got positively express handling through to adoption. This, of course, took place at the 1996 Singapore Ministerial, which also formally commenced the operation of the WTO.

After reviewing the activities of the Singapore Ministerial, the chapter goes on to examine both the unfinished elements of the Uruguay Round (the so-called “built-in agenda”), and considers possible developments in the possible next round of WTO negotiations, labeled by some as the “Millennium Round.” Throughout the chapter, what

becomes clear is that, as impressive as the GATT/WTO system developments have been, the consequences of the birth defects in the same have become more apparent as that system has had to deal with the realities of closer international economic integration.

3.1 Historical Context of the Multilateral Approach to Economic Issues

The current multilateral trade system arose largely in reaction to the chaos in world trade brought on by the 1930 worldwide economic depression that was exacerbated by high tariffs such as those in the so-called “Smoot-Hawley” Tariff Act.¹⁸ The United States sought to encourage domestic economic growth by reviving international trade through a progressive lowering of tariff levels achieved through a policy of reciprocal bilateral trade agreements authorized under the Reciprocal Trade Agreements Act of 1934.¹⁹ Once the Act was approved in June 1934, the United States, under the leadership of Secretary of State Cordell Hull, set about proposing to other governments specific concessions that were offered and requested in reciprocal bilateral trade negotiations for particular commodity imports based on the “principal supplier” rule.

Following the Second World War, the United States’ bilateral approach to trade agreements transformed into a multilateral approach, still based on reciprocal tariff concessions but no longer involving bilateral negotiations with just one other country but instead multilateral talks with many countries simultaneously. New to this multilateral approach was that reciprocal tariff concessions agreed with principal suppliers were now extended to all other countries involved in these multilateral trade negotiations (MTNs) based on the “most-favored-nation” (MFN) treatment rule.

¹⁸ Tariff Act of 1930, ch. 497, 46 Stat. 685.

¹⁹ Reciprocal Trade Agreements Act of June 12, 1934, c. 474, 48 Stat. 943 (codified at 19 U.S.C.A. § 1351).

The United States' incorporated Cordell Hull's reciprocal approach into multilateral international trade with the *Havana Charter*, and the provisionally designed General Agreement on Tariffs and Trade which survived Congressional scrutiny to govern the multilateral trading system ad hoc over the next forty-seven years.²⁰

The creation of a multilateral trade system did not take place in isolation, however, but rather in a context of establishing a multilateral approach to world political and economic issues on a much broader scale. The multilateral approach to trade was designed to be part of a multilateral approach to global economic issues, where the ITO was intended to support and be reinforced by the other Bretton-Woods multilateral economic institutions—notably the International Monetary Fund (IMF) involving international finance and the International Bank for Reconstruction and Development (IBRD or “World Bank”) involving international economic development. Moreover, the multilateral approach extended beyond global economic issues to global political issues as well, with the IMF, IBRD, and GATT, coming under the wider political and economic scope of the United Nations (UN) system.

In addition, the establishment of a multilateral system for global political and economic decision making was further extended in concept by the establishment of similar organizations with more limited but nonetheless major goals also involving political and economic aims—organizations such as the North Atlantic Treaty Organization (NATO) focused on the defense of war-torn Europe from the perceived threat of the Soviet Union, and the Organization for European Economic Cooperation

²⁰ Professor Sylvia Ostry disagrees with this interpretation of the early GATT agenda, arguing instead that “the consensus reflected in the GATT...masked significant differences on...the nature and extent of government intervention to achieve domestic objectives,” and not the development of “a free and fair trading system” in the vein of Cordell Hull’s vision. OSTRY, *supra* note 9, at 72. Indeed, she may be correct in her statement on GATT. However, this is in fact an inaccurate assessment of the true “Hull Vision” which was interested in more than a reciprocal free and fair trading system as it applies to border measures, but developing the ITO and the multilateral system as “a medium through which nations may regularly consult with one another concerning the international consequences of national policies” and the nature and extent to which they may intervene in their own economies. CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* 53 (1949).

(OEEC) aimed at disbursing economic development assistance to re-build the devastated European economies. Such organizations are not “multilateral” in the sense all governments worldwide being eligible to participate—as in the UN—but are “plurilateral” indicating a limited, more focused membership. Plurilateral organizations and agreements can group together countries based on common geographic characteristics—such as NATO's regional focus on Europe—or they can group together countries based on other common characteristics or interests—such as the Organization for Economic Cooperation and Development (OECD, successor to the OEEC) where industrialized countries meet to examine common economic issues whether raised by Canada, Japan, or Sweden. A hybrid development in this multilateral system is the multilateral development banks—the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank—which are “multilateral institutions” that address individual geographic regions.

3.2 The GATT Rounds

The original GATT negotiations were conducted on a selected product-by-product, most-favored-nation, reciprocal and mutually advantageous basis. Negotiations were multilateral and conducted between principal suppliers and primarily dealt with reducing tariffs. In fact, the binding of an already low tariff was regarded as equivalent to the substantial reduction of a high tariff. The multilateral approach adopted for the GATT was seen as beneficial to participants because they could reap the benefits of concessions granted by other participants over and above direct concessions they may have granted.

Subsequent early GATT negotiations (Anency, 1949; Torquay, 1950-51; Geneva, 1955-56; and Dillon, 1960-61) dealt primarily with further tariff reductions and the accession of more countries. During this time, the European countries began to stop

invoking the balance-of-payments exceptions under the GATT and as a result, many quantitative restrictions were dismantled. The Dillon Round followed the creation of the European Economic Community and resulted in tariff concessions, but it was recognized that future negotiations would have to deal with non-tariff barriers and the problems of trade in agricultural products.

The next round, (Kennedy 1964-67), covered approximately 75 percent of world trade. For the first time, the negotiations departed from a product-by-product approach and began using an across-the-board method of cutting tariffs for industrial goods. At this time many developing countries acceded to the GATT, separate agreements were reached on grains and chemical products, and an antidumping code was adopted. As the 1960's ended, the European Community, Japan, and the United States emerged as the major economic powers in international trade.

After the monetary developments and crises of the early 1970's, the major economic powers called for another round of trade negotiations under the auspices of the GATT. The Tokyo Round commenced in 1973 and ended in 1979. The negotiators reduced tariffs, on average, by approximately one-third and notably reached agreements ("codes") on subsidies, technical barriers to trade ("standards"), import licensing procedures, government procurement, customs valuation, and a revised antidumping code.²¹ In addition, the Round adopted four important decisions regarding the

²¹ The nine Tokyo Round agreements were: Agreement on Technical Barriers to Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 8 (1980) [Standards]; Agreement on Government Procurement, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 33 (1980); Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the GATT, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 56 (1980) [Subsidies]; Agreement on Trade in Bovine Meat, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 84 (1980); International Dairy Arrangement, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 91 (1980); Agreement on Implementation of Art. VII of the GATT, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 116 (1980) [Customs Procedures]; Agreement on Import Licensing Procedures, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 154 (1980); Agreement on Trade in Civil Aircraft, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 162 (1980); Agreement on Implementation of Article VI of the GATT, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 171 (1980) [Antidumping] [collectively hereinafter The Tokyo Round Agreements]. While the negotiators may have adopted these Codes, the GATT Contracting Parties did not uniformly accept the results—at best, therefore, these could be called "plurilateral" codes. For a measure of the rate of

(continued...)

interpretation and practice of the GATT. Taking effect in 1979, these decisions included: allowing preferential treatment to developing countries, allowing practices to safeguard external financial and balance-of-payment positions, allowing developing countries greater flexibility in using trade measures; and improving existing mechanisms in the GATT.²²

The most recent round of trade negotiations commenced in 1986 and ended in 1993. The Uruguay Round of negotiations was the most ambitious undertaken thus far and resulted in the most extensive changes to the world trading system since the *Havana Charter* failed and the GATT was established in the 1940s. The *Final Act* of the Uruguay Round is actually a collection of agreements that enhance previous GATT disciplines by further reducing tariff and nontariff barriers, strengthening discipline over domestic and export-related government subsidies for agriculture, and re-integrating textile and apparel trade into the multilateral trading system. In addition, services, intellectual property, and trade-related investment measures were brought under the multilateral trading system.

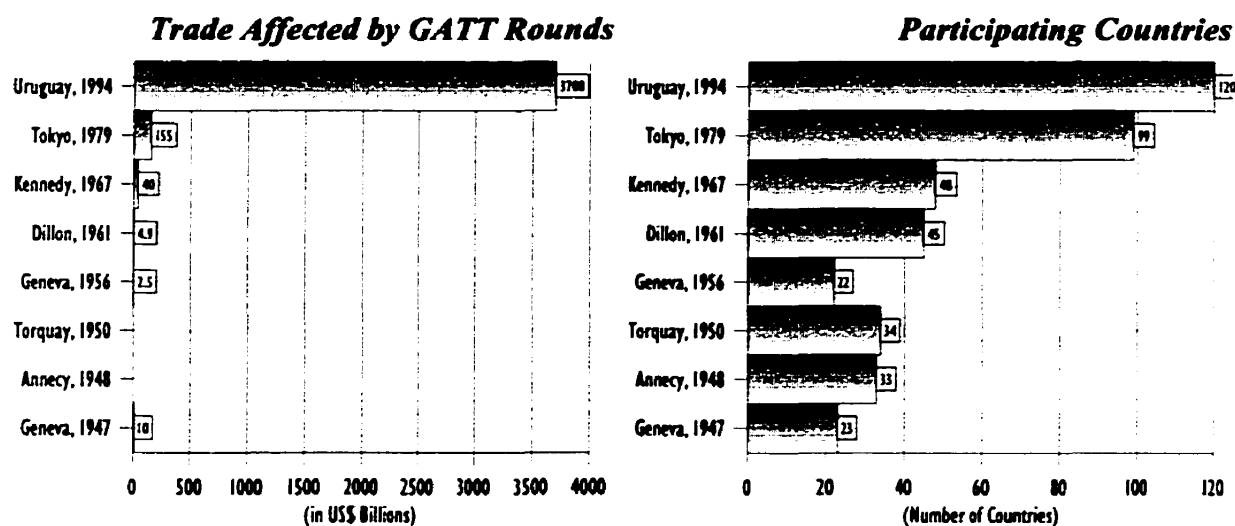
The scope of the Uruguay Round dwarfed all earlier attempts at multilateral trade negotiations. As reflected in the following charts, the amount of trade involved and the number of countries participating far surpassed that of the earlier Rounds due in part to the inclusion of trade in services and intellectual property rights.²³

²¹ (...continued)
acceptance as of 1989 and the legal uncertainty surrounding their implementation, see JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 27-29 (1990).

²² See *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT B.I.S.D. (26th Supp.) at 203 (1980); *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, GATT B.I.S.D. (26th Supp.) at 205 (1980); *Safeguard Action for Development Purposes*, GATT B.I.S.D. (26th Supp.) (1980); *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT B.I.S.D. (26th Supp.) at 210 (1980). These four "Understandings" had an even more uncertain legal status than the nine codes. See JACKSON, *RESTRUCTURING GATT*, *supra* note 74, at 27-29.

²³ Created from statistics compiled by Prof. John Jackson. Trade affected statistics are not available for the Annecy and Torquay Rounds. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 74 (1997).

Figure 1: The GATT Rounds Compared



3.3 The Uruguay Round Agreements

The Uruguay Round Agreements (URA) were formally signed at a special GATT ministerial meeting on April 15, 1994.²⁴ It is convenient to claim that this round of negotiations were completed. But in fact there were many other pressures that drove

²⁴ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 [hereinafter Final Act].

participants to essentially declare victory and go home. Chief among them was the soon-to-expire fast-track negotiating authority of the United States President.²⁵ Consequently, several negotiations did not conclude at the end of the Round and instead continued interrupted briefly by the establishment of the WTO. These included, among others, financial services, basic telecommunications, and maritime transport services.

As stated earlier, the central purpose of the GATT is to establish a framework for rules and procedures for the conduct of international trade. As noted, border restrictions in the form of tariffs and quotas have been the major historical area of concern for the GATT. However, the Tokyo Round and the Uruguay Round expanded the agenda into more subtle market access issues—subsidies and government procurement in the former round, and services and intellectual property in the latter. Despite these efforts, the GATT still does not address market access issues on a comprehensive level, and has never directly addressed market access barriers caused by private restrictive business practices.

The establishment of the World Trade Organization represents a major structural change in the multilateral trade regime.²⁶ The WTO assumes the administration of the GATT, ensures that the new rules and procedures relating to services and intellectual property rights are observed, and strengthens the GATT dispute settlement process. A significant achievement of the Uruguay Round is the fact that member countries must agree to abide by all stipulated codes of conduct, rather than just the ones they choose to

²⁵ “Fast-track” procedures allow the President to submit the treaty to a majority vote in both the House of Representatives and the Senate; unlike normal advice and consent procedures in the United States where only the Senate considers the treaty, Congress is not allowed to offer any amendments to the treaty—it must accept or decline it as it was negotiated. For a more complete description of fast-track powers, see *infra* at ch. 4 regarding the FTAA.

²⁶ See Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 [hereinafter WTO Agreement]. A review of the WTO provisions of the Uruguay Round is contained in John H. Jackson, *The World Trade Organization, Dispute Settlement, and Codes of Conduct*, in THE NEW GATT, IMPLICATIONS FOR THE UNITED STATES (Susan M. Collins & Barry P. Bosworth eds., 1994) [hereinafter THE NEW GATT].

observe.²⁷ While the new functions of the WTO are not a panacea, the WTO does provide the institutional framework for the future multilateral agenda.

Clearly, the Uruguay Round represents the most ambitious expansion of the GATT. However, the Uruguay Round Agreements still do not address, to any meaningful degree, many sources of recent worldwide trade friction such as cartel activities, restrictive business practices, and informal government-private sector arrangements.²⁸ On the other hand, the Uruguay Round did introduce institutional structures that can be used to incorporate these issues in the future. Although, the General Agreement on Trade in Services (GATS),²⁹ the Agreement on Trade-Related Intellectual Property Rights (TRIPs),³⁰ and the Agreement on Trade-Related Investment Measures (TRIMs)³¹ went into more areas than contemplated by the *Havana Charter*, as set out in Chapter 5, they only represent first steps toward removing the negative consequences of restrictive business practices and limited market access on trade liberalization. Nevertheless, these Uruguay Round Agreements—GATS, TRIPS, and TRIMS—have implications for the post-GATT order worth examining in some detail.³² This is not to ignore the important achievements of the Uruguay Round in relation to new agreements concerning the sale of goods, a summary of which immediately follows. A review of the above-mentioned “non-goods” achievements follows, in turn.

²⁷ The plurilateral codes involving civil aircraft, government procurement, dairy products and bovine meat are still optional.

²⁸ These issues and others comprise the next area of focus for trade negotiators. For a concise treatment, see GEZA FEKETEKUTY, *THE NEW TRADE AGENDA* (Group of Thirty Occasional Paper No. 40, 1992).

²⁹ See generally General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 28 [hereinafter GATS].

³⁰ See generally Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31 [hereinafter TRIPs].

³¹ See generally TRIMs.

³² Robert Baldwin refers to these agreements as the “New Negotiating Issues” since they represent areas not previously addressed by the GATT. See Robert Baldwin, *An Economic Evaluation of the Uruguay Round Agreements* (October 1994) (on file with the author).

3.3(a) Uruguay Round Trade Agreements on Goods

The multilateral trading system began initially as tariff cutting negotiations, requesting reductions in tariff rates for particular commodities from the “principal supplier” of that good and offering in exchange reductions in tariff rates on commodities of interest to that supplier. This approach has since been described as a “positive list” negotiation, where delegates negotiate what goods will be on the list of goods slated for tariff reduction. As mentioned, during the 1964-67 Kennedy Round, a new approach was tried that agreed to cut all tariffs across the board by a formula, with delegates negotiating instead what goods would *not* be on the list of goods slated for tariff reduction. This approach has come to be known as a “negative list” negotiation.

Tariff cutting negotiations succeeded over the years in reducing average tariff levels in general (although “tariff peaks” remained in certain “sensitive” industries). As lower tariff rates reduced the protection afforded to domestic industries, national governments increasingly put into effect policies that—when pressured by their industries for relief—offered protection through other means, erecting nontariff barriers (NTBs) such as quantitative restrictions or regulatory requirements such as import licensing. These NTBs were addressed first as a major trade issue during the 1973-79 Tokyo Round. Nine agreements (the so-called Tokyo Round “codes of conduct”) were concluded that were to address certain of the more egregious nontariff trade barriers.³³ During the Uruguay Round (UR), the NTBs addressed by the Tokyo Round agreements were taken up again following the lack of success experienced with their operation. The subject matter involved in a number of them (Standards, Subsidies, Antidumping, Valuation and Import Licensing) became individual multilateral agreements under the URA while the remaining four (Government Procurement, Dairy, Bovine Meat and Civil Aircraft) remained “plurilateral” agreements with limited memberships after the URA.

³³ See Tokyo Round Agreements, *supra* note 21.

The Uruguay Round negotiations combined traditional tariff cutting negotiations with the effort begun during the Tokyo Round to reduce nontariff barriers. The Round began with negotiating groups examining tariff and nontariff barriers separately but, as negotiations drew toward completion, the two areas were merged into one as market-access negotiations.³⁴ These combined market-access negotiations resulted in lower tariffs, expanded quotas, and other market-access liberalization set out in the national schedules of commitments. Where the results were not in the form of specific commitments reflected in lower tariffs or liberalized nontariff barriers, the outcome yielded stronger rules and disciplines for the multilateral trade system.

3.3(b) Uruguay Round Trade Agreements on Services, Intellectual Property and Investment

When the Uruguay Round introduced three new subjects into the multilateral trade system, it successfully expanded the horizon of past MTNs to areas that had been contemplated in the *Havana Charter*, but theretofore roundly ignored, including: trade-related investment measures (TRIMs), trade in services, and trade-related intellectual property rights (TRIPs). Whereas the TRIMs Agreement was one of the agreements on trade in goods under the URA, the negotiations on services and on intellectual property rights broke new ground and resulted in agreements that were incorporated under the URA in their own separate annexes—the first, the General Agreement on Trade in Services (GATS) and the second, the Agreement on Trade-Related Intellectual Property Rights.

The multilateral trade system continues to be heavily oriented toward trade in goods, with 13 of 15 of the URA in the goods category. However, the extension of the

³⁴ John Croome notes that the negotiations effectively merged in 1990 in anticipation of a meeting in Brussels intended to complete the efforts of the Uruguay Round; however, in Brussels, the single negotiating team was able to achieve little more than agreements on rules of origin and preshipment inspection. See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM* 194-195, 280 (1995).

multilateral trade system to subjects involving investment, services, and intellectual property rights, all point to the evolution of the multilateral trade system from the situation at the end of World War II when trade in goods was its exclusive domain. The "uncharted territory" of these new subjects also suggests that reaching and implementing agreement in these fields will not be as familiar as with the more traditional fields. Certainly, opinions can differ as to whether the agreements concerning investment, services, and intellectual property are a success for the multilateral trade system for starting to tackle fields of such importance in the world economy, or whether the agreements concluded to date are a failure because they do not yet represent final and complete disciplines covering these new subjects. What is true is that it has taken far longer in this regard to achieve the investment objectives of Article 53 of the *Havana Charter*.

The General Agreement on Trade in Services

The General Agreement on Trade in Services extends the reach of the GATT to trade in services.³⁵ For that reason alone, GATS is significant because barriers to trade in services, which accounts for a significant portion of world trade and approximately 25 percent of U.S. exports, are now recognized formally. Specifically, GATS identifies nondiscriminatory regulatory regimes as potential market access barriers rather than just explicit discriminatory policies.³⁶ Thus, GATS has the potential to address market access issues relating to trade in services and inefficient government regulation.

Unfortunately, it is unclear how much impact GATS will have on the existence and endurance of market access barriers to trade in services, given the form it eventually

³⁵ For a comprehensive discussion of the GATS provisions of the Uruguay Round, see Bernard Hoekman, *Services and Intellectual Property Rights*, in THE NEW GATT, *supra* note 26. See also U.S. INT'L TRADE COMMISSION (USITC), INV. 332-358, PUB. 2940, GENERAL AGREEMENT ON TRADE IN SERVICES: EXAMINATION OF MAJOR TRADING PARTNERS' SCHEDULES OF COMMITMENTS (1995).

³⁶ See GATS arts. VI, XVI.

assumed in the Uruguay Round. On the positive side, GATS includes specific commitments on market access and national treatment. Rather than defining market access, however, GATS merely provides a list of prohibited practices, including restraints on the number of service providers allowed, the value of transactions or assets, quantity of output, employment, and several others. As such, the approach does not focus on the effects of market barriers in services.

Another fault of GATS is that country commitments are positively identified by sector, that is, commitments only apply to sectors identified specifically by member countries. As a result, prohibited market access measures may continue to exist in non-identified sectors. Moreover, commitments are identified in GATS by mode of supply so that market access barriers may continue to exist in unlisted modes of supply even in sectors that are positively identified. These aspects of the agreement, in addition to the fact that market access prohibitions are identified as measures rather than the effects of measures, makes GATS relatively non-transparent and complex. As a result, its ultimate likely impact on trade liberalization will depend on the multitude of extended services negotiations.³⁷

Although the Uruguay Round negotiations concluded the GATS agreement in December 1993, along with a number of specific commitments concerning services embodied in national schedules, negotiations were extended for a number of service sectors where additional rules were considered necessary, including: basic telecommunications, financial services, maritime transport, movement of natural persons, professional services and air transport services.

³⁷ In contrast, under the North American Free Trade Agreement (NAFTA), market access and national treatment are general obligations and exceptions are listed by sector (i.e., negatively, rather than positively, identified). North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296, 32 I.L.M. 605 [hereinafter NAFTA]. Consequently, in this respect, NAFTA is considerably more effective than GATS.

The services negotiations, and the extended services negotiations in particular, were slow to succeed for a number of reasons. Primarily, the negotiation of the liberalization of the regulation of trade in services is a new area for the multilateral trade system and, as such, particularly difficult considering the increasing importance occupied by the field of services in a globalizing world economy. Further, in the extended services negotiations, the United States was largely been responsible for the failure or postponement of the three major sectors: financial, telecommunications, and maritime transport services.

In the first two areas, U.S. reluctance to close a deal may be attributable to the importance of these services within the world economy, sectors where the United States is a major if not the dominant competitor in these service sectors. In general, the United States sought significant commitments in the extended services agreements that would allow U.S. firms to exercise their comparative advantage and was unwilling to accept what it considered partial agreements that did not attain a “critical mass” of sufficiently high-quality offers by the major actors in each area that would allow market-access opportunities for U.S. firms. In particular, the United States criticized the lack of offers from the industrializing Asian economies commensurate with their economic growth and status. In both areas of basic telecommunications and financial services—which are treated in full in Chapter 5's proposal to reform the GATS liberalization process—U.S. obstinance proved to be successful with re-negotiations effectively garnering the United States better market access offers.

In maritime transport services, the United States criticized the lack of forthcoming offers to reduce barriers and liberalize market access to foreign markets for shipping services. However, other delegations also considered that the coincidence of a U.S. Presidential election year with the scheduled conclusion of the maritime services negotiations was unlikely to allow the United States to table an offer with any concessions that might energize negotiations.

Discussions in the Negotiating Group on Maritime Transport Services resumed in May 1994 and were scheduled to conclude by June 30, 1996.³⁸ The aim of the negotiations was to devise a model schedule for making market-access commitments that would provide MFN and national treatment in its coverage of the “three pillars” of maritime transport: international shipping; auxiliary services; and access to and use of port facilities, but excluding cabotage services. By March 1996, the United States had indicated it would not bind its maritime policy for an agreement that left current restrictive policies of other countries in place, and so would not submit either an offer or written requests to other countries. The United States, indeed, declined to submit any formal offer given the lack of other participants’ offers, leaving the United States open to charges that it let the negotiations founder. And when the United States’ refusal to submit an offer became clear, other Members withdrew their earlier offers. Nonetheless, the United States continued conducting bilateral consultations for the purpose of assessing various countries’ maritime regimes and their corresponding offers. In response to the lack of offers the negotiations stalled by their April 1996 conclusion. In June, the participants finally agreed to suspend the negotiations until the comprehensive GATS negotiations scheduled in 2000 as envisioned by GATS art. XIX.

Further negotiations on air transport services were largely foregone because of the complexity of the extensive bilateral treaties currently in effect on air traffic rights.³⁹ As a result, the GATS Annex on Air Transport Services largely exempts measures governing trade in air transport services and does not apply to measures affecting air traffic rights and other directly related services.⁴⁰ However, the Annex does apply to aircraft repair and maintenance services, selling and marketing of air transport services, and computer reservation services.

³⁸ See WTO, ANNUAL REPORT 1996, VOL. I, at 127-128 (1996); USITC, PUB. 3024, THE YEAR IN TRADE: OPERATIONS OF THE TRADE AGREEMENTS PROGRAM IN 1996, 48TH REPORT, at 39 (1997).

³⁹ There are over 5,000 individual bilateral treaties regarding air traffic rights.

⁴⁰ See GATS, Annex on Air Transport Services, para. 2.

The natural persons negotiations, although not linked with those on financial services, were extended to be concluded on the same schedule as the financial services negotiations by July 28, 1995.⁴¹ They now become part of the GATS as a service sector annex, which makes clear that commitments made regarding entry or temporary stay of foreign nationals do not affect domestic laws governing the employment market or citizenship.⁴² Further stronger commitments were negotiated by six Members, including the EC, Australia, Canada, India, Norway and Switzerland that attempt to allow certain types of experts to work in the host country on a temporary basis without being specifically linked to a commercial presence in that country.

Finally, arising out of Uruguay Round discussions on professional services, the WTO, in order to GATS Art. VI(4) requirements on domestic regulation, established in 1995 a Working Party on Professional Services to examine the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards, and licensing requirements in the field of professional services, do not constitute unnecessary barriers to trade.⁴³ Beginning with the accountancy sector, by March 1996, four countries had submitted papers concerning the group's work program. The submission from the U.S. delegation concerned guidelines for negotiating mutual recognition agreements. The first accomplishment of the Working Group was to develop voluntary guidelines for the negotiating of bilateral mutual recognition agreements. With that completed, the Group continued negotiating a substantive GATS agreement, and by December of 1997 produced a working draft with only some areas remaining such as the use of technical standards for protectionist purposes.⁴⁴ Prompt conclusion of these

⁴¹ See WTO, ANNUAL REPORT 1996, *supra* note 38, at 128.

⁴² Third Protocol to the General Agreement on Trade in Services, WTO Doc. WTO/S/L/12 (July 24, 1995).

⁴³ For a description of the Working Group's activities, see WTO, ANNUAL REPORT 1997, VOL. I, at 123-124 (1997).

⁴⁴ See Draft of WTO Professional Services Agreement, Fourth Revision, Prepared by the Secretariat for the Working Party for Professional Services, *available at* Insidetrade.com, Doc. No. iwp980589 wt (continued...)

negotiations should further the GATS liberalization goals expressed at the end of the Uruguay Round.

The Agreement on Trade-Related Intellectual Property Rights

The Agreement on Trade-Related Intellectual Property Rights (TRIPs),⁴⁵ on the other hand, does appear to represent genuine movement toward the type of progress necessary for advancement on market access and competition policy concerns.⁴⁶ TRIPs incorporates many of the provisions contained in the existing international agreements that protect intellectual property.⁴⁷ In this sense, TRIPs represents a major development of substantive law in the GATT/WTO system. While it does adopt the traditional GATT concepts of most-favored nation status, national treatment, and transparency, TRIPs proscribes minimum standards of intellectual property protection that must be maintained by WTO members and requires Member States to take positive action to ensure protection of property rights. Finally, TRIPs unlocks the WTO's powerful dispute

⁴⁴ (...continued)
(Feb. 5, 1998), <<http://www.insidetrade.com>>.

⁴⁵ See generally TRIPs.

⁴⁶ See BERNARD M. HOEKMAN & MICHAEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 144-158 (1995); Hans Ullrich, *TRIPs: Adequate Protection, Inadequate Trade, Adequate Competition Policy*, 4 PAC. RIM L. & POL'Y J. 153 (1995); Baldwin, *supra* note 34; JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 23, at 310-313.

⁴⁷ The TRIPs agreement was intended to replace and supplement the disparate, incoherent IP international regimes—including the Berne and Paris Conventions and the UN-related World Intellectual Property Organization ("WIPO")—with a single system unified by GATT/WTO dispute settlement procedures and backed up with American-style substantive intellectual property law. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 107; Berne Convention for the Protection of Industrial Property, Mar. 20, 1883, U.N.T.S. 107; Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3. This does not mean that WIPO is dead. WIPO recently opened for signature several agreements that bring WIPO copyright and recorded performances protections into line with the protections offered by TRIPs. See WIPO Press Release, No. 106 (Dec. 20, 1996), <<http://www.wipo.org/eng/diplconf/distrib/press106.html>>. Although TRIPs still has a more binding dispute settlement process under the WTO than WIPO does, this new WIPO agreement gives signatories more leverage against non-complying countries that do not belong to the WTO but do belong to WIPO.

settlement system to IPR conflicts. Compared to GATS, therefore, TRIPs represents a much more transparent and progressive approach to trade.⁴⁸

One drawback of the agreement, however, is the long transition periods for developing countries, and the deficient treatment of patents currently under development. The TRIPs agreement sets different transition periods for putting its provisions into effect.⁴⁹ Developed WTO members were required to put the TRIPs agreement into effect by January 1, 1996 (one year from the entry into force of the WTO). Developing WTO members have 5 years (by 2000) and least developed WTO members have 10 years (by 2005) to put the TRIPs agreement into effect with the exception that the agreement's MFN and national treatment provisions must be put into effect by 1996, the same date as for developed WTO members.

Using the WTO dispute settlement process has garnered the United States, in particular, considerable success in TRIPs compliance. Indeed, panels reports are not even necessary for success: one benefit of enforcing the TRIPs before the DSB is that "the 'automaticity' of the WTO system has enabled...[the US]...to reach satisfactory outcomes in a number of cases merely by entering into consultations."⁵⁰ Of course, U.S. monopolization of the DSB's enforcement of TRIPs makes a great deal of sense given the stakes involved for United States holders of patent, trademark and copyright rights.⁵¹

⁴⁸ Hoekman and Kostecki observe that the TRIPs is not unlike a European Union directive which tells the EU Member States what type of policy to adopt but leaves it up to those Member States to decide on the proper method of implementation. HOEKMAN & KOSTECKI, *supra* note 46, at 156. Several years of TRIPs dispute settlement history later, this observation could be extended with an argument that the United States has effectively acted like the EU Commission in ensuring that WTO Members properly implement their TRIPs obligations—and as this section later argues, the United States takes full advantage of TRIPs' access to the DSU procedures.

⁴⁹ See *id.* at arts. 65-67. For a comprehensive assessment of the legal issues raised by the transition provisions, see L. Peter Farkas, *Trade-Related Aspects of Intellectual Property*, in *THE WORLD TRADE ORGANIZATION* 463, 465-475 (Terence P. Stewart ed., 1996).

⁵⁰ Jeffrey M. Lang, Deputy USTR, Oral Statement before the Subcommittee on Trade of the Committee on Ways and Means, U.S. House of Representatives (Feb. 26, 1997), <http://www.ustr.gov/testimony/lang_3.html>.

⁵¹ It was estimated at the beginning of the Uruguay Round that the losses created by inadequate
(continued...)

For example, in the first request for consultations under TRIPs, the United States alleged in February 1996 that Japanese intellectual property laws were inconsistent with its TRIPs obligations because they did not protect sound recordings made prior to 1971.⁵² Generally, the United States and the EC argued that TRIPs' implementation of the Berne Convention required that Members provide copyright protection for pre-existing works for fifty years—which means that as of the date of implementation, all recordings made after January 1, 1946 must be protected.⁵³ In December 1996, the issue was resolved with the Japanese Diet's approval of legislation that extended copyright protections back fifty years from the current year.⁵⁴ Because of the Diet's extension of copyright protection, the United States, the EC, and Japan ended their disputes before the WTO DSB.⁵⁵

The second form of disputes has centered around the “mailbox” provisions relating to the transition phases allowed to developing countries. In the area of patent protection, developing countries and least-developed countries are allowed to delay

(...continued)

intellectual property protection could surpass \$24 billion annually. See USITC, PUB. 2065, FOREIGN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AND THE EFFECT ON U.S. INDUSTRY AND TRADE 4-2 (1988).

⁵² Japan—Measures Concerning Sound Recordings, Request for Consultations by the United States, WTO Doc. WT/DS28/1, IP/D/1 (Feb. 14, 1996). By May, the EC had separately requested consultations on the very same issue. Japan - Measures Concerning Sound Recordings, Request for Consultations by the European Communities, WT/DS42 (May 24, 1996).

⁵³ USTR, Press Release 97-04, USTR-Designate Barshefsky Announces Resolution of WTO Dispute with Japan on Sound Recordings (Jan. 24, 1997), <<http://www.ustr.gov/releases/1997/01/97-04.html>>.

⁵⁴ Sir Leon Brittan said, “[t]his is a good day for the Golden Oldies. It not only benefits the European recording industry, which is one of our most dynamic exporters, but also demonstrates the effectiveness of the multilateral trading system at helping Europe resolve disputes, open markets and prevent piracy”. European Commission Press Release, IP/97/16, *EU and Japan Resolve Music Copyright Dispute*, REUTER E.C. REP., Jan. 16, 1997. The European music industry estimates that this new Japanese protection could potentially net it close to 100 million ECU. *Id.* This figure amounts to approximately US\$115 million. US industry estimates are even higher with half a billion dollars being lost annually because of the lack of protection for such artists as Duke Ellington, Chuck Berry, the Beach Boys and Otis Redding. USTR, Press Release 97-04, USTR-Designate Barshefsky Announces Resolution of WTO Dispute with Japan on Sound Recordings (Jan. 24, 1997), <<http://www.ustr.gov/releases/1997/01/97-04.html>>.

⁵⁵ Japan—Measures Concerning Sound Recordings, Notification of Mutually Agreed Solution, WTO Doc. WT/DS28/4, ID/D/1/Add.1 (Feb. 5, 1997).

implementation for a period of up to ten years of new laws implementing TRIPs.⁵⁶ Nevertheless, if the Member does not provide patent protection by January 1, 1996 for pharmaceutical and agricultural chemical products, the Member must provide for a delayed application process that prioritizes pre-filed applications so that once the legislation comes into effect, current seekers of patents will have priority⁵⁷ and an exclusive licensing mechanism during this transition period for foreign holders of foreign patents.⁵⁸ The United States complained that both India and Pakistan had failed to provide this limited, so-called “mailbox” protection to United States’ patent-holders and seekers.⁵⁹

The U.S. complaint against India resulted in the first panel established under the TRIPs Agreement.⁶⁰ As such the panel carefully laid out TRIPs’ inherent relationship with any other WTO Agreement, and concluded that despite the fact that TRIPs fundamentally deals with treatment of another Member’s nationals and not goods, the interpretation of TRIPs must be consistent with the DSU.⁶¹ While the Appellate Body reversed some of the Panel’s legal reasoning, it substantively agreed with the results and found India in violation of its obligation to provide mailbox priority for certain foreign holders of pharmaceutical and agricultural patents under Art. 70(8) and exclusive

⁵⁶ TRIPs, arts. 65 and 66.

⁵⁷ TRIPs, art. 70(8).

⁵⁸ TRIPs, art. 70(9).

⁵⁹ India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Request for Consultations by the United States, WTO Doc. WT/DS50/1 (July 2, 1996); Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Request for Consultations by the United States, WTO Doc. WT/DS36/1 (Apr. 30, 1996). The claim against Pakistan was eventually settled when Pakistan agreed to amend its laws to include an exclusive marketing provision and first-to-file priority for foreign patent holders. Notice of a Mutually Agreed Upon Solution, WTO Doc. WT/DS36/4, IP/D/2/Add.1 (Mar. 7, 1997).

⁶⁰ India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Request for the Establishment of a Panel, WTO Doc. WT/DS50/4 (Nov. 8, 1996).

⁶¹ See Report of the Panel, WTO Doc. WT/DS50/R (Sept. 5, 1997).

marketing rights for those patents under Art. 70(9).⁶² And, reflecting the utter simplicity and finality of the WTO's extensive effect on global intellectual property rights, the Appellate Body recommended that India bring its laws into conformity with its TRIPs' obligations.⁶³

The Agreement on Trade-Related Investment Measures

The WTO Agreement on Trade-Related Investment Measures (TRIMs) is the third of the "new" subjects addressed in the UR, not traditionally addressed by the GATT and its multilateral trade system.⁶⁴ Developing countries resisted developed country efforts to negotiate these nontraditional subjects, the investment negotiations in particular because—unlike service or intellectual property—some developing countries did have policies in place regarding investment. The Round's negotiations in the field of investment were very narrow in scope, resulting in an agreement focused solely on trade-related investment measures (TRIMs), and falls far short of the disciplines needed in the modern interdependent global economy.

TRIMs arose out of the use of several investment measures that are sometimes employed by industrializing countries as part of their national development strategies, but which other countries generally consider trade-distorting. These measures violate GATT articles concerning national treatment (Article III) and elimination of quotas (Article XI) by either enforcing some form of local-content use or some trade-balancing requirement

⁶² Report of the Appellate Body, WTO Doc. WT/DS/50/AB/R, at ¶ 97 (Dec. 19, 1997).

⁶³ *Id.* at ¶ 98. From a legal perspective, the decision is significant because it found it necessary to analyze India's domestic legal system in order to assess India's compliance. India claimed that it had complied through an administrative rather than legislative act and that this was sufficient. The Appellate Body agreed with the Panel that, under *Indian* domestic law, the administrative act did not provide enough legal certainty that the mailbox procedures would survive a legal challenge to it as contrary to India's Patents Act, and therefore that it provided "a sound legal basis to preserve novelty of inventions and priority of applications as of the relevant filing and priority dates." *Id.* at ¶ 70; *see generally id.* at ¶¶ 59-75.

⁶⁴ TRIMs.

that makes access to imports, foreign exchange, or the like contingent on export quantity or local-content use. As a new subject for the multilateral regime, many developing countries resisted including such an investment agreement in the Uruguay Round as a violation of their sovereign rights to direct economic development as they see fit. Largely as a result, the current TRIMs Agreement is very narrow in scope and needs to be significantly enhanced.

The WTO agreement on services, GATS, is also directly concerned with investment matters through one of the 4 channels ("modes of supply") covered in the agreement that constitute trade in services: 1) cross-border supply; 2) supply to persons in the home market (e.g., tourism); 3) supply by persons in the foreign market (e.g., consultants abroad); and 4) supply by firms established in the foreign market. The establishment of a firm abroad to supply services clearly involves foreign direct investment as thus has a stake in future multilateral investment discussions.

Canada and particularly the European Union have pressed increasingly to include the subject of investment under the WTO auspices. This stance made the United States question, at the February 1996 meeting of the so-called "Quad" governments (Canada, the EU, Japan, and the United States), their resolve to complete investment negotiations in the OECD, where negotiators are attempting to work out a high-grade agreement with "state-of-the-art" provisions (as opposed to an investment agreement that more countries might join, but that has looser disciplines). All Quad members agreed that the goal at the Singapore WTO ministerial meeting was not to launch negotiations on investment at the WTO, but rather to launch a limited "educational and confidence building" exercise that would lay the groundwork for eventual negotiations later, after the 1998 WTO ministerial meeting.

Following this lead, the Singapore Ministerial Conference created a working group “to examine the relationship between trade and investment.”⁶⁵ Having just begun its work, the Working Group on Trade and Investment will study the following issues:

- Implications of trade and investment for economic and development growth;
- Economic relationship between trade and investment; and
- Existing international mechanisms regarding trade and investment.

Upon completing the first three tasks, the group will move on to prospective recommendations based upon its analysis of those issues.⁶⁶

3.3(c) Multilateral Approach as Process rather than Goal

Regional trade agreements seek prosperity for it's citizenry through some form of economic integration, the result or goal of such arrangements typically measured by the drawing together of geographically contiguous areas through a common infrastructure and common economic policies (and possibly also political, social, and legal policies). The approach to common economic issues taken by multilateral trade agreements also seeks prosperity for its constituents (“maximization of global economic welfare”) through economic integration, but with less emphasis on geographic integration and more emphasis on integration through common rules and procedures. Considered more broadly, the multilateral approach to economic integration has less the goal of common economic infrastructure than a process through which all participants operate by mutually agreed disciplines in a common forum in which to discuss differences, exceptions,

⁶⁵ Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC, at para. 20 (Dec. 18, 1996).

⁶⁶ See WTO, ANNUAL REPORT 1997, *supra* note 43, at 116; Working Group on the Relationship between Trade and Investment, *Report (1997) to the General Council*, WTO Doc. WT/WGTI/1/Rev.1 (Dec. 9, 1997).

exemptions, anomalies, or other divergences from the commonly agreed set of multilateral rules. At the same time the Uruguay Round introduced the new subjects, it also dramatically restructured the decision-making process, the dispute settlement system, and the institutions of the multilateral trading system.

Consensus Decision making

The multilateral trade system developed and carried out under GATT 1947 operated by taking decisions “by consensus.” Although provisions exist in the multilateral trade system for decisions to be taken by voting (essentially institutional considerations such as amendments of articles or waivers from obligations), they have virtually never been used during the operation of the GATT/WTO. The uncertain status of the GATT from its outset, where the rules and disciplines under the GATT were in force but the ITO institutional structure to enforce them was not, may have had a role in the development of GATT decision making by consensus. Members were each known individually as a “Contracting Party” to the GATT, making their obligations under the GATT “contractual” in the sense that no organizational body was empowered above them to order a particular Contracting Party to take a certain action. Rather, each individual Contracting Party was responsible for upholding its obligations under the “contract,” agreeing voluntarily to abide by the multilateral GATT rules and disciplines governing trade.

Another influence on the development of consensus decision making may have been the form of rounds taken by multilateral trade negotiations where all parties negotiate in essentially a simultaneous environment and must compromise through the give-and-take of requests and offers, finally agreeing to a single package of concessions where each participant can claim success in achieving its interests in certain areas that offset other areas where it was less successful.

In the multilateral trade system under both the GATT and the WTO, “consensus” is considered where none present object at the meeting where the decision is taken. The advantage of such a unanimity rule in decision making is that compliance is maximized, as when all participants agree to accept the single package of results from a completed trade round; the disadvantage is that a single party can obstruct unanimity and thus action. Whereas acceptance of results arising out of GATT multilateral trade negotiations worked well under the rule of taking decisions “by consensus,” the acceptance of results arising out of GATT dispute-settlement procedures was widely regarded as largely the opposite.

Dispute Settlement—Toward a System of Rules, Away from Consensus

The Dispute Settlement Understanding (DSU) arrived at during the Uruguay Round marks the first time since Havana that the multilateral system attempted a complex binding dispute settlement mechanism.⁶⁷ As such the DSU applies to all the substantive results reached in the Round including GATT 1994, GATS, TRIPs and TRIMs. The Appellate Body (AB) created by the DSU observed that “the DSU establishes an integrated dispute settlement system which applies to all the ‘covered agreements,’ allowing all the provisions of the *WTO Agreement* relevant to a particular dispute to be examined in one proceeding.”⁶⁸ Of course, this idea was recognized by the Havana drafters with their simple creation of an ITO dispute settlement system that would cover the entire Draft Charter which itself encompassed all ITO disciplines.⁶⁹

⁶⁷ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 [hereinafter DSU].

⁶⁸ Brazil - Measures Affecting Desiccated Coconut, Report of the Appellate Body, AB-1996-4, WTO Doc. WT/DS22/AB/R, at sec. IV(C)(3) (Feb. 21, 1997).

⁶⁹ See generally *Havana Charter*, *supra* note 17, at ch. VIII.

The *Havana Charter's* dispute settlement mechanism was novel both in terms of its procedural mechanisms and substantive results. Procedurally, the system allows three different forums for resolution: "the amicable compromise, the administrative decision, and the judicial decision."⁷⁰ At the first stage a Member would consult with another when that Member's benefits were being nullified or impaired by the other Member's breach of obligations by action or failure to act, application of measures not conflicting with provisions of the Charter, or "the existence of any other situation."⁷¹ If both Members agreed, they could submit their dispute to binding arbitration. If, however, settlement could not be found through consultations, either Member could bring the dispute to the ITO's administrative and political institutions. By a majority vote after investigating the complaint, the Executive Board, and appeal to the Conference, could resolve the dispute in either party's favor. Finally, if aggrieved at this administrative/political level, either Member could bring their complaint to the International Court of Justice—the United Nations' World Court.⁷² Clair Wilcox

⁷⁰ Commission B, Summary Record, Second Session of the Preparatory Committee of the U.N. Conf. On Trade and Employment, U.N. Doc. E/PC/T/B/SR/18, at 16 (July 2, 1947) (attributed to Dr. Holloway, S. Africa).

⁷¹ *Havana Charter*, *supra* note 17, at art. 93(1). Members also agreed not to raise their disputes in any other international forum other than through the ITO. *See id.* at art. 92(1). Different substantive sections of the Charter also provided for slightly altered dispute settlement provisions. For instance, in the Restrictive Business Practices section, Members could bring disputes to the ITO on behalf of injured private persons. The ITO would then investigate the claim and make recommendations to that Member which did not enforce its laws against the restrictive business practices of its own national enterprises. *See id.* at art. 48. This recognition directly in the Charter that private parties were injured by restrictive business practices and should be accordingly allowed access to the dispute settlement system has not yet been recognized by the WTO's dispute settlement system.

⁷² Because of legal problems with obtaining a binding result from the ICJ, Art. 96 of the *Havana Charter* provides for a unique legal mechanism for appeal to the ICJ. Normally, the ICJ does not issue binding legal interpretations to organizations; however, it can issue non-binding advisory opinions to organizations. Art. 96 provides that, upon request by a Member, the ITO *must* request an advisory opinion from the ICJ on legal interpretations of the Charter raised by any decision of the Conference. So that the advisory opinion would be binding on both the Members and future ITO decisions, Art. 96 requires that the ICJ opinion be binding on the ITO as an organization. *See Havana Charter*, *supra* note 17, at art. 96.

suggested that this final appeal to the ICJ would provide “a basis...for the development of a body of international law to govern trade relationships.”⁷³

The Uruguay Round’s DSU adopted several of the concepts proposed for the ITO and took several others further than GATT 1947 had. The DSU marked a major change in the multilateral trade system, from that practiced under GATT 1947.⁷⁴ Under GATT 1947, the consensus rule of decision making effectively gave each individual Contracting Party a veto over the adoption of any decision by the collective GATT membership. Without adoption, multilateral action was effectively paralyzed. Thus, although a Contracting Party could request a dispute panel be established to consider a dispute that consultations had not resolved, a single Contracting Party could prevent the panel’s formation every time a request was made. Typically, the Contracting Party that exercised this veto right was the member whose trade policy was in contention. Perhaps more commonplace than preventing establishment of a GATT dispute panel was preventing adoption of the panel report. The report would explain the panel’s reasoning for judging why one of the disputants was in violation of the GATT and would typically recommend that the losing party bring its policies into conformity with its obligations under the GATT—traditionally leaving the means at the discretion of the loser. However, the Contracting Party losing the case could withhold its consent to allow adoption of the

⁷³ WILCOX, *supra* note 20, at 160. In legal terms, this would have created a type of *stare decisis* for all ITO decisions whereby the ITO could not deviate from any legal interpretations developed by the ICJ. The WTO AB has interpreted the WTO Agreements directly opposite from this ITO development of *stare decisis*: “[adopted panel reports] are not binding, except with respect to resolving the particular dispute between the parties to that dispute.” Japan - Taxes on Alcoholic Beverages, Report of the Appellate Body, AB-1996-2, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at sec. E (Oct. 4, 1996).

⁷⁴ For a concise summary of the dispute settlement procedures prior to the Uruguay Round amendments, see JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 59-69 (1990). Jackson argues that the history of dispute settlement in the GATT revolved around the conflicts of a rule-oriented or power-oriented approach. In this regard, the old GATT system with its adoption of expert panels and *prima facie* rules evolved toward the rule-orientation, despite the fact that no panel report was binding until the parties to the dispute agreed it would be. The substantive rules are contained in Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT B.I.S.D. (26th Supp.) at 210 (1980).

report, in effect preventing the report conclusions from entering into force.⁷⁵ Were the losing party to allow adoption of the report and then fail to bring its policies into “GATT conformity” as instructed, the winning party would be entitled to compensation for trade damages sustained⁷⁶; however, if adoption was prevented, so too was the recourse to compensation under GATT multilateral trade rules.

As a consequence, the multilateral trade system negotiated in the Uruguay Round and carried out under the WTO sought to remedy these flaws in the dispute-panel process.⁷⁷ Like the *Havana Charter*, it provides an integrated dispute settlement system that covers all the WTO Agreements and thereby allows for cross-retaliation for violations of any agreement; for example, a Member that does not comply with a panel decision regarding goods, might find its services benefits being stripped away. Moreover, the DSU has already been effectively used to enforce a variety of WTO Agreements including: GATT, the Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Standards Agreement, TRIPs, the Agriculture Agreement, and the Agreement on Textiles and Clothing.⁷⁸ Current disputes have invoked more agreements including: GATS, TRIMs, Subsidies and Countervailing Measures, Import Licensing, Anti-Dumping, and Safeguards. Each agreement provides for its own special path to the DSU whenever a Member feels aggrieved. For example, legally under GATT Art. XXIII, a Member that perceives its GATT benefits have been nullified or impaired would

⁷⁵ In practice, however, most panel reports were adopted; and none were explicitly rejected. See JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 74, at 66..

⁷⁶ Although in practice, the suspension of concessions was only authorized once. See *Netherlands Measure of Suspension of Obligations to the United States*, Nov. 8, 1952, GATT B.I.S.D. (1st Supp.) at 32 (1953), *cited in* JACKSON, *RESTRUCTURING THE GATT SYSTEM*, *supra* note 74, at 64.

⁷⁷ For summaries of how the WTO DSU process works both in theory and in practice, see JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 23, at ch. 4; ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997); *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (STUDIES IN TRANSNATIONAL ECONOMIC LAW, VOL. 11) (Ernst-Ulrich Petersmann ed., 1997).

⁷⁸ See *Overview of the State-of-Play of WTO Disputes* (Apr. 23, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter *WTO State-of-Play*].

formally request consultations with the offending Member, and subsequently a DSB panel.⁷⁹

Procedurally, the DSU effectively reverses the veto power formally exercised under GATT 1947 by making automatic the right to the establishment of a dispute panel. A WTO member may block formation of a panel, but only once, and a panel will be established at the second request. More important perhaps is the automatic adoption of panel reports, where reports under the WTO system must be adopted unless there is a consensus not to adopt the report.⁸⁰ Despite the appearance of consensus language in the DSU, it is now meaningless, for the victorious Member would never join a consensus against approving its victory. While the DSU retains the fiction of a political filter on the dispute settlement process by requiring adoption by the Member-represented Dispute Settlement Body, there is in fact no political filter whatsoever on the conclusions of a panel. While the exact opposite of the role of adopting reports under GATT 1947, this procedure is more extreme than the political voting done in the ITO procedure—whereby a simple majority could “block” the dispute.

⁷⁹ Nullification and impairment remains a convoluted entry into the dispute settlement mechanism. A Member may only request consultations if its benefits have been nullified or impaired by either: (1) an action by another Member in direct violation of the GATT; (2) an action by another Member not in violation of the GATT; or (3) any other situation. GATT XXIII. Under both GATT 1947 and GATT 1994, most disputes have been litigated under (1), with less than six in (2), and none in (3). For a description of how nullification and impairment works in the GATT, GATS, TRIPs and TRIMs, see Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (STUDIES IN TRANSNATIONAL ECONOMIC LAW, VOL. 11), at 125 (Ernst-Ulrich Petersmann ed., 1997). The only fully litigated (2) “non-violation” claim before the WTO has been the U.S.-Japan film dispute where the United States was unable to show that Japanese measures nullified or impaired its GATT benefits. See *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WTO Doc. WT/DS44/R (Mar. 31, 1998).

⁸⁰ Consensus adoption continues for complaints brought under Art. XXIII (3) (situation complaints) which are also subject to lesser enforcement rules—although it should be noted that no complaint has been brought under this paragraph under either the old or new GATT rules. DSU art. 26(2). It is interesting, that like the DSU, the *Havana Charter* differentiates between the remedies available to violation and situation complaints. See *Havana Charter*, *supra* note 17, at arts. 94(2)(e) and 95(3). The goal for enforcement of violation complaints is to ensure that the violating Member cease its violation, while the goal for enforcement of non-violation and situation complaints is for the defendant Member and complaining Member to “satisfactorily adjust” the conditions existing between them. See *id.*

To counteract the authority granted to panels, the DSU created the Appellate Body (AB) to review the legal conclusions of the panel report.⁸¹ Unlike the panels which sit only for the particular dispute for which they are formed, the AB is a permanent institution with its panelists serving five-year terms. This has in effect given the WTO dispute settlement system more predictability and consistency in outcomes. In practice, in fact, all but one of the eleven final reports issued by panels, as of March 1998, were appealed to the AB⁸²; and in all ten issued AB reports, the AB modified the legal rationale of the panel in some way.⁸³

Professor John Jackson argues that in practice the AB moderates the fiercely pro free trade conclusions of the panels to protect the sovereignty of the disputing Members.⁸⁴ Further than Professor Jackson's argument, it could be contended that the AB is in fact protecting the sovereignty of the WTO itself. If the AB were to allow too radical a decision by the lower panel to survive—especially against a large Member like the United States or the European Communities⁸⁵—it would risk the Member not complying with its findings and recommendations.⁸⁶ If Members were to consistently not comply

⁸¹ See DSU art. 17(6) ("[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel").

⁸² The only report not to be appealed to the panel will be Japan - Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WTO Doc. WT/DS44/R (Mar. 31, 1998). See Barshefsky Launches New Initiative to Monitor Japanese Film Market, INSIDE U.S. TRADE, Feb. 6, 1998, at 7. USTR Barshefsky indicated that one of the key reasons the U.S. would not appeal the report was that it agreed with the legal conclusions developed by the panel and did not want them modified by the AB; further, the conclusions in that report were mainly factual and could not be appealed. See *id.*

⁸³ See *WTO State-of-Play*, *supra* note 78.

⁸⁴ See John H. Jackson, Address at *The Future of the World Trading System*, A Conference hosted by the Institute for International Economics (Apr. 15, 1998)

⁸⁵ In the WTO/GATT context, the European Union (EU) participates only through its role as the European Communities (EC) due to the limited powers given to the EU by the Maastricht Treaty. Therefore, this book will follow that distinction and, when referring to the EU's participation in WTO activities, use the term EC; while at other times, remaining with the newer EU.

⁸⁶ In fact in the *Hormones* case, the AB both softened the panel report's conclusions on the EC and provided the EC with a simple means of restructuring its laws to come into compliance with its GATT TBT/SPS obligations. See EC Measures Concerning Meat and Meat Products (*Hormones*), Report of the Appellate Body, AB-1997-4, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

and merely offer compensation, the purposes of the AB and the WTO to foster a trading system of laws would be endangered.

Institutionalization of the Multilateral Trade System

The creation of the WTO as the permanent institution to administer the multilateral trade system is also a major advance over the ad hoc institutional arrangements organized under the GATT Secretariat developed over the decades since 1947. The original 1947 vision for the multilateral trade system did include the ITO as a permanent institution but because the U.S. Senate would not ratify the *Havana Charter*, only the GATT remained as a set of multilateral trade rules and disciplines came into force. This ad hoc institutional arrangement supporting the GATT often proved to be a critical gap in the effective functioning of the General Agreement, with no central administration to champion the multilateral disciplines as counterbalance to any major trading partner that took action contradictory to the multilateral trade system.

The Uruguay Round's creation of the WTO as a permanent institution goes a long way toward establishing the framework for achieving the vision of the multilateral trade system first set out by Hull. Yet, as set out in Chapter Two, it still falls far short of the *Havana Charter's* truly integrated approach. Under the WTO, systemic elements will link together the expanded multilateral trade system. For example, the DSU will link remedies into a single system where trade in goods is considered equivalent to trade in services which are in turn equivalent to trade concerning intellectual property rights. The Trade Policy Review Body (TPRB) will review trade policies of the quadrilateral or "quad" member countries (Canada, the European Communities, Japan, and the United States) every two years to ensure their compatibility with the disciplines of the multilateral trade system, will review the policies for the next 16 major trading partners every 4 years, and will review the trade policies of other trading partners every 6 years (least developed country trade policies may be reviewed on a schedule to be selected) in

order to ensure that members are following trade policies that do not undermine the multilateral trade system and its benefits for all member countries.⁸⁷

However, both the DSB and TPRB are mirror images of the same WTO governing institution, the WTO General Council. While the General Council manages the day-to-day decision making of the WTO, the periodic (at least once every two years) Ministerial Conference sets the policy courses for the organization and takes major decisions on both specific problems and the WTO's future agenda. The General Council comprises ambassador-level representatives from each of the WTO Member countries and directs the operations of the WTO. For instance, in 1997, the General Council met eight times where it granted observer status to certain intergovernmental organizations, acted on waiver requests, managed the renegotiations of national schedules, worked on accession issues, managed the WTO Secretariat's budget and terms of service for its Directors, and approved a new logo for the organization.⁸⁸ While consensus is the desired form of decision-making, voting is possible when consensus cannot be reached with each Member having one vote.

The WTO's system of equitable voting is a tremendous advance for developing and smaller countries from the system proposed for the ITO. Within the ITO, while final authority rested with the Conference of delegates voting by majority with one vote per Member, the daily execution of ITO policies was effected by an Executive Board made up of eighteen Members with eight permanent seats dedicated to the eight most prominent Members—then envisioned to be the United States, the United Kingdom, Canada, France, the Benelux Customs Union, India, China and the Soviet Union.⁸⁹ Like the United Nations Security Council's relation to the U.N. General Assembly, the

⁸⁷ Trade Policy Review Mechanism, Apr. 15, 1994, WTO Agreement, Annex 3, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 [hereinafter TPRM]. For a description of the TPRM and recommendations for its reform, see DONALD B. KEESING, IMPROVING TRADE POLICY REVIEWS IN THE WTO (IIE Paper No. 52, Apr. 1998).

⁸⁸ *General Council - Annual Report*, WTO Doc. No. WT/GC/10 (Jan. 7, 1998).

⁸⁹ *Havana Charter*, *supra* note 17, at arts. 74-81; WILCOX, *supra* note 20, at 154-155.

Havana Charter's proposed system could have resulted in a more powerful Executive Board and less powerful Conference.

Of course, major decisions are often reached outside the General Council in informal discussion between smaller groups of countries. Arising from a practice in the Uruguay Round,⁹⁰ these "Green Room" (named from the side room to main negotiating hall in Geneva) discussions often facilitate "consensus" decision-making. Both the General Council and its subservient Councils (Councils for trade in goods, for TRIPs, and for Services) and Committees (i.e., Environment, Regional Trade Agreements, Government Procurement) are served by the WTO Secretariat with its staff of 500 and budget of approximately \$93 million and its Director-General Renato Ruggiero. While the Secretariat is designed to provide the administrative and professional support to the Councils, it also serves as a vocal proponent and international image of the WTO with constant campaigning by Director-General Ruggiero and a major Internet presence to provide some degree of transparency to the WTO's decision-making.

3.4 Post-Uruguay Round Issues and Multilateral Trade Agreements

Even during the negotiating of Uruguay Round it became clear that the results could not satisfy all parties concerned. In the middle of the Round, partly as a result of the GATT *Tuna-Dolphin* panel report, environmentalists discovered the GATT and the ongoing Round of negotiations, and immediately began to press the system to allow room for environmental policy. Likewise, labor issues, which had always lurked in the background of trade negotiations, arose as the central counterpoints to the arguments for freer trade.

⁹⁰ For a negotiating history of the Uruguay Round, see generally JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM* (1995).

In terms of the tariffs being negotiated, by the end of the Round, it was clear that the negotiators missed an entire new and burgeoning sector. The Round began in 1987 when information technology was little more advanced than primitive facsimile machines and telephones; when the Information Technology Agreement was finally negotiated, it encompassed Internet technologies, advanced computer hardware and software, and global trade totaling \$500 billion.⁹¹ Perhaps because of the relative youth of the products involved, within a very short time, countries representing 92% of global IT trade were able to negotiate an agreement that effectively eliminates tariffs in the sector by the year 2000. While this tariff elimination may be an anomaly, it may represent a new trend in goods' liberalization of sector-by-sector zero-tariff negotiations.

This section discusses these three new issues facing the multilateral system: trade and the environment, trade and labor, and sectoral ITA liberalization. It concludes in each case that, while the liberalization of the system may be proceeding slowly and reluctantly, it is gradually expanding its scope to include the policies underlying these subjects.

3.4(a) Trade & the Environment

Although not recognized as an issue when the GATT was born, or when the ITO was contemplated—both because of advances in the environmental movement and the increased scientific recognition of the damage done to the environment by rapid industrialization—trade and environment have become intertwined. The intersection of environmental and trade issues comes at essentially two points. The first concern is over sovereign domestic environmental regulation. Because of national treatment and TBT reductions, environmentalists fear that environmental laws will be challenged and removed by WTO/GATT and other free trade mechanisms or that alternatively

⁹¹ USITC, PUB. 3024, THE YEAR IN TRADE: OPERATIONS OF THE TRADE AGREEMENTS PROGRAM DURING 1996, at 20 (1997) [hereinafter USITC, YEAR IN TRADE 1996].

environmental laws will be sacrificed by domestic interests in the name of global competition.

The other intersection lies in global environmental policy. Since many environmental problems are global in nature and cannot be solved unilaterally (i.e., global warming, ozone depletion, species survival), the international community has developed two methods of coping. First, some countries attempt extra-territorial legislation aimed at specific environmental issues. Because of the nature of extra-territorial laws, the penalty for failing to comply is almost always economic and inherently trade-related. As such, the GATT/WTO process stepped in and struck down these extra-territorial assertions of power as violations of MFN and national treatment. The international community has also attempted multilateral solutions with, for example, species survival and ozone protection. Again because of the nature of international agreements, oftentimes the most effective penalties for noncompliance with the treaty—either for signatories or non-signatories—are trade sanctions. For signatories to the treaty, this is not particularly a problem with the GATT/WTO because they made a promise and waived any objections they might have had in the WTO. For non-signatories, the use of trade sanctions against goods from these violating countries is an explicit violation of general principles of MFN.

Because of these two fundamental problems regarding domestic environmental laws and global environmental protection, the issues of trade and the environment have come to the forefront of the GATT/WTO process. Several key disputes have arisen in both the pre-Uruguay GATT and in the modern WTO dispute settlement system that question the very nature of the GATT 1947 treaty. At the close of the Uruguay Round, the WTO created a working party to deal with problems that arise in this area. Table 3-1 highlights the key points at the intersection of trade and the environment being raised in both the WTO and elsewhere.

Table 3-1: Issues Raised at Intersection of Trade and Environment⁹²

Trade, Growth & Environment. Environmentalist argument that international trade promotes economic growth which in turn promotes natural resource damages. Johnson & Beaulieu criticize for being overly simplistic. Sustainable growth is not incompatible with the protection of the environment.

Downward Pressures by International Trade Regimes. International dispute mechanisms designed to remove TBT's both regionally and globally threaten domestic environmental legislation.

Race to the Bottom (or Race to the "Pollution Havens"). Race to compete and make up for comparative advantage will result in a slackening of environmental standards worldwide.

Trade Regimes Disallow International Environmental Harmonization. Because of principles of national treatment and MFN, most international trade regimes seem to prevent harmonization of environmental regulations. They do so by precluding parties to international environmental standards agreements to punish non-members in order to compel them to join and comply.

Lack of Transparency in International Trade Dispute Settlement. Because most dispute settlement regimes remain relatively opaque, the environmental movement sees them as having reduced credibility and political legitimacy. The regimes do not offer interested environmental NGOs to participate in treaty-formation or dispute settlement.

Disguised Protectionism. Fear by developing countries that environmental protection laws are merely disguised protectionism for developed markets.

Multilateral Trading System Dilution. Fear by absolute free traders that because of the history of the GATT's single-minded focus on trade barriers alone, the introduction of non-trade issues will overwhelm the successes reached thus far by the WTO and will eventually cause the international dispute settlement mechanisms to collapse.

These issues have arisen in two separate contexts: protecting legitimate domestic environmental legislation; and improving the global environment through unilateral and multilateral efforts. This section will begin with an introduction to GATT history with environmental issues and then focus on the WTO/GATT experience in each context. The section concludes with an analysis of the WTO Committee on Trade and the Environment's work on these issues with a more in depth focus on trade sanction provisions of multilateral environmental treaties and harmonization issues surrounding eco-labeling.

⁹² See PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA 37-58 (1996).

Although GATT 1947 makes no express mention of the word “environment,” several portions of the GATT 1947 agreement enabled environmental issues to merge with trade issues. The introduction to the WTO Agreement recognizes that trade should expand “while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”—in other words, sustainable development.⁹³ Further, in GATT 1947, there are two provisions that allow Members to apply GATT-violating measures that do not “constitute...arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,” if those measures are “(b) necessary to protect human, animal or plant life or health” or “(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁹⁴ Finally, the Agreement on Technical Barriers to Trade (TBT) contains language that allows for environmental technical regulations so long as they are no more “trade-restrictive than necessary.”⁹⁵

⁹³ WTO Agreement.

⁹⁴ GATT 1947 art. XX. For the most recent appellate body interpretation of the application of Art. XX “environmental exceptions,” see *United States—Standards for Reformulated Gasoline*, WTO Doc. WT/DS2/AB/R (Apr. 22, 1996) [hereinafter *Reformulated Gasoline*]. The Appellate Body report breaks Art. XX into two sections. First, the panel will look to whether the measure in dispute fits the enumerated exception—in this case, Art. XX(g). Even if it finds that the measure is within the subsection, the panel will test the measure under the “chapeau’s” restriction that application of the measure does not constitute “‘arbitrary discrimination...unjustifiable discrimination...or disguised restriction’ on international trade.” *Id.* at 18. In *Reformulated Gasoline*, the Appellate Body found that the baseline provisions of the U.S. Clean Air Act were necessary for the U.S. policy of environmental protection, but found that the U.S. failed to show that it chose a method of enforcement that was least burdensome and therefore constituted “‘unjustifiable discrimination’ and a ‘disguised restriction on international trade.’” *Id.* at 23.

⁹⁵ Agreement on Technical Barriers to Trade, Art. 2.2, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 27 (1994) [hereinafter *TBT Agreement*].

Of course GATT 1947 had good reason not to mention the word environment, when Article XX's predecessor was originally drafted in the 1920's, chlorofluorocarbons and other substances that destroy the ozone layer had yet to be invented—environmentalism was not much of a local issue, much less a global one.⁹⁶ Clair Wilcox classified the natural resources conservation exception as a minor one that was only included in the charter at the insistence of the United States which was protecting export controls used in conjunction with domestic conservation.⁹⁷ However, Wilcox recognized that allowing the U.S. to maintain these controls would have a “material effect on the total volume of international trade.”⁹⁸

WTO Disputes and Domestic Environmental Regulation

Thus far, all but two of the GATT/WTO reports addressing domestic environmental protection legislation have been against U.S. laws.⁹⁹ The two main cases in this area are the *Superfund* case and the *Reformulated Gasoline* case. In both, the purposes and legitimacy of U.S. environmental policy were not questioned—only the means of implementation were.

Although the U.S. was not completely successful, the *Superfund* report was a victory for environmentalists.¹⁰⁰ The EEC and Mexico complained that the U.S. tax collected on imported petroleum and petroleum products to fund the Superfund which is

⁹⁶ See THOMAS ANDERSSON ET AL., TRADING WITH THE ENVIRONMENT 90 (1995). The language of Arts. XX (b) and (g) is identical to that of the exception in the Havana Charter. See *Draft Havana Charter*, *supra* note 17, at Art. 45(1)(a)(ii, vii).

⁹⁷ See WILCOX, *supra* note 20, at 182.

⁹⁸ *Id.*

⁹⁹ The other cases were brought against Canada by the U.S. and against Thailand by the U.S. See *Canada—Herring and Salmon*, GATT B.I.S.D. (35th Supp.) at 98 (1988); *Thai Cigarettes*, GATT Doc. DS10/R (1990).

¹⁰⁰ United States—Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT Doc. L/6175 - 34S/136, GATT B.I.S.D. (34th Supp.) at 136 (1987) [hereinafter *Superfund*].

used for domestic environmental cleanup violated the principle of national treatment. The GATT panel reasoned that it was not a violation of national treatment and dismissed the notion that the GATT should review the purposes of the tax being imposed:

Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of [whether the tax violates national treatment].¹⁰¹

The very first dispute brought before the WTO was an effort to strike down portions of another U.S. environmental law. In *United States—Standards for Reformulated Gasoline*, Venezuela challenged the statutorily imposed baselines for gasoline content under the Clean Air Act.¹⁰² Although the baselines were found to violate national treatment and could not be exempted under Article XX, the Appellate body's reasoning had more to do with Congress' intent and lack of finding alternative, less trade-restricting means of implementing the policy than to do with the actual environmental policy of the United States.

Therefore, it could hardly be said that the Appellate Body review of *Reformulated Gasoline* constituted a loss for environmentalists. Notably the report recognizes that any measure understood by the Member to be in furtherance of a legitimate policy under one of the exceptions (in this case Article XX(g)) would fall into the scope of allowed exceptions. The WTO will not second-guess the legislative efforts of the Member when it decided to effect its sovereign environmental policy through a particular law or regulation. In *Reformulated Gasoline*, the Appellate Body accepted the Congress' conclusion that the baseline provisions would improve the air quality and therefore the environment of the U.S.. Moreover, the report tacitly identified "clean air" as an "exhaustible natural resource."

¹⁰¹ *Id.* at ¶ 5.2.4.

¹⁰² See generally *Reformulated Gasoline*, *supra* note 94.

Perhaps the single most significant GATT action thus far is the *Tuna/Dolphin* panel report.¹⁰³ Despite the fact that it was never adopted by the GATT, this report—and the approval of it by 39 of 40 Members who have commented on it—marks the limitations of what can and cannot be regulated extraterritorially.¹⁰⁴ Prompted by a judge's order to enforce provisions of the U.S. Marine Mammal Protection Act (MMPA), the U.S. banned all tuna caught from countries whose fleets exceeded the dolphin-kill ratio of the U.S. fleet. However, the U.S. had an extremely low ratio because U.S. fisheries had stopped fishing the portion of the Pacific Ocean where the dolphins lived. Although five countries continued to fish there, only Mexico complained to the GATT, while the rest agreed to U.S. demands.

Mexico complained that the ban violated Article XI (prohibition on quotas). The U.S. defended itself with the national treatment principle of Art. III (it was not treating domestic goods any different) and, in the alternative, under Art. XX's "environmental" exceptions. Notably the panel found that the ban violated the national treatment principle by placing restrictions not on the good itself but on the process and production methods (PPMs). Proceeding to the U.S. claim for an Art. XX exception, the panel found that Article XX (b) and (g) could only be applied to the national territory of the U.S.—in other words, the jurisdiction of the U.S.. The panel therefore clearly shut the door on any

¹⁰³ There were two complaints: the first brought by Mexico and the second brought by the European Communities. *United States—Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna/Dolphin I*]; *United States—Restrictions on Imports of Tuna (Tuna II)*, GATT Doc. DS29/R (June 16, 1994) [hereinafter *Tuna/Dolphin II*]. For general descriptions of *Tuna/Dolphin I* and *Tuna/Dolphin II*, see Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, in *FAIR TRADE AND HARMONIZATION*, VOL. 2 LEGAL ANALYSIS 95, 117-119 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); DANIEL C. ESTY, *GREENING THE GATT*, 30-31, Appendix C at 268-269 (1994); ANDERSSON ET AL., *supra* note 96, at 92-95; SANDRA L. WALKER, *ENVIRONMENTAL PROTECTION VERSUS TRADE LIBERALIZATION: FINDING THE BALANCE* 94-99 (1993).

¹⁰⁴ See Hudec, *supra* note 103, at 117. This view of the illegality of unilateral trade-restricting environmental measures prevails at the WTO; most delegations to the WTO Committee on Trade and the Environment (CTE) condemned the practice as well. See *Report of the WTO Committee on Trade and Environment*, WTO Doc. WTO/PRESS/TE 014, at ¶ 7 (Nov. 14, 1996) [hereinafter *CTE Report*].

possibility of nations enforcing their global environmental policies through unilateral trade-restricting measures.

In the aftermath of the *Tuna-Dolphin* decisions, some environmentalists found a new rallying call—oppose a GATT that puts trade in front of the environment. The decision provided the protectionist movement in the United States new fodder and ammunition to oppose the upcoming NAFTA and Uruguay Round treaties.¹⁰⁵ Further, the decision helped to mobilize the environmental movement around the legitimate concerns about trade enforcement provisions in environmental agreements, incompetence of trade panelists in resolving environmental issues, and the lack of transparency—and therefore legitimacy, to the environmental movement—in the dispute settlement and decision-making process of the GATT/WTO.

The WTO Committee on Trade and the Environment (CTE)

History and Development

Prior to the Uruguay Round amendments, the GATT Group on Environmental Measures and International Trade discussed the relationship between GATT trade rules and the environment. Similar to the present WTO Committee on Trade and the Environment, the primary issues of discussion were unilateral, environmental trade restrictions, trade restrictions based on PPMs and MEAs containing trade restrictive

¹⁰⁵ See ESTY, *supra* note 103, at 35-59.

enforcement measures.¹⁰⁶ This working group suspended its discussion in Fall 1993 in anticipation of the end of the Uruguay Round.

During the Uruguay Round, environmental opposition to the GATT surfaced specifically toward the proposed Multilateral Trade Organization (MTO). Wary of *Tuna/Dolphin*, environmentalists sought to ensure that the MTO would not proceed without a clear environmental mandate and that Congress would always have the authority to enact environmental protection laws.¹⁰⁷ The U.S. government responded in its proposal to replace the MTO by creating a Committee on Trade and the Environment (CTE) that would report directly to the Ministerial Conference and the GATT Council.¹⁰⁸ Further, the U.S. sought to increase transparency and public participation in DSB Panels in response to environmental criticisms of past GATT panel findings against U.S. environmental laws.¹⁰⁹ Despite a proposal to negotiate the CTE, environmentalists still found the Final Act inadequate without substantive changes to the language of a GATT which favored trade over the environment.¹¹⁰

On the other side of the environmentalists, developing countries fought to remove any environmental objectives from the Uruguay Round. Despite early success at

¹⁰⁶ See *GATT Environment Group Postpones Work Until End of Uruguay Round*, INSIDE U.S. TRADE, Oct. 15, 1993; *TEXT: Austrian Summary of GATT Environment Talks*, INSIDE U.S. TRADE, Oct. 15, 1993. The discussion over how to accommodate trade-restricting enforcement measures of MEAs included a proposal to include another exception under Art. XX that would explicitly use the word environment and allow for environmental "trumping treaties" that would supersede GATT obligations if the MEA is a "genuine multilateral environmental agreement." *Id.* Furthermore, the EC explicitly modeled their proposal for testing whether the MEA was genuine on the Havana Charter's criteria for intergovernmental commodity agreements (Chap. VI) whereby: the MEA must be negotiated under the U.N. or the negotiations must be open to all countries; the MEA must be open to accession by all GATT members on terms comparable to original members'; and regional agreements cannot provide justification to apply extra-jurisdictional trade measures to countries outside of the region. *Id.* at n. 16.

¹⁰⁷ See *TEXT: Environmentalists' Letter to Finance Committee on Uruguay Round Goals*, INSIDE U.S. TRADE, July 30, 1993.

¹⁰⁸ *TEXT: U.S. Proposal to Replace MTO*, INSIDE U.S. TRADE, Nov. 5, 1993.

¹⁰⁹ *Administration Review Yields New Policy on Trade and Environment*, INSIDE U.S. TRADE, Nov. 26, 1993.

¹¹⁰ See *Environmental Groups to Oppose GATT Deal Without Further Changes*, INSIDE U.S. TRADE, Dec. 17, 1993.

blocking the creation of a permanent CTE,¹¹¹ the developing world eventually compromised, three weeks before signing the Final Act, with the EU and the U.S.'s call for a permanent CTE under the WTO and settled for a CTE without a strict structural mandate.¹¹²

The Decision on Trade and Environment at Marrakesh announced the creation of the CTE that would report to the Ministerial Conference which would review its work and terms of reference.¹¹³ Under specific terms of reference,¹¹⁴ the General Council

¹¹¹ *Developing Countries Block Creation of GATT Environment Panel*, INSIDE U.S. TRADE, Dec. 14, 1993.

¹¹² See *LDCs Prepared to Drop Fight Over WTO Environment Committee*, INSIDE U.S. TRADE, Jan. 21, 1994; *GATT Talks on Environmental Workplan Highlight North-South Split*, INSIDE U.S. TRADE, Feb. 4, 1994; *LDCs Want to Limit Lifespan of WTO Environment Committee*, INSIDE U.S. TRADE, Mar. 11, 1994. The LDCs also sought to limit the CTE's workplan from including specific agenda items. *Id.* Eventually, the LDCs achieved a workplan that was not too specific—yet allowed the developed countries to pursue more controversial objectives such as PPMs. *GATT Talks Close to Conclusion on Environment Committee, Agenda*, INSIDE U.S. TRADE, Mar. 25, 1994.

¹¹³ *Trade and Environment*, WTO Doc. MTN/TNC/45(MIN) (Decision of Apr. 14, 1994) [hereinafter *Trade and Environment Decision*], available in *CTE Report*, *supra* note 104, at Annex I.

¹¹⁴ The terms of reference recall the preamble the WTO Agreement “seeking both to protect and preserve the environment,” note the Rio Declaration on Environment and Development, Agenda 21 (which disapproves of unilateral trade-restricting environmental measures) and the previous work of the GATT Trade and Environment working group, and desire to “coordinate the policies in the field of trade and environment...without exceeding the competence of the multilateral trading system.” Further, pursuant to the Temporary Negotiating Committee decision of Dec. 15, 1993, the terms of reference seek:

- “(a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
- (b) to make appropriate recommendations on whether any modifications of the provision of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
 - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration of the needs of developing countries, in particular those of the least developed among them; and
 - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and

(continued...)

instructed the CTE to address four types of issues.¹¹⁵ The Agenda also included topics such as the relationship of dispute settlement mechanisms in trade treaties and in environmental agreements and the environmental aspects of TRIPs and GATS.¹¹⁶ Table 3-2 reflects the CTE's interpretation of its agenda.

Table 3-2: CTE Agenda¹¹⁷

Item	Issue
1	the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements
2	the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system
3	the relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes, and requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling
4	transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects
5	the relationship between the dispute settlement mechanisms in the WTO and in MEAs
6	the effect of environmental measures on market access and environmental benefits of removing trade restrictions and distortions
7	the issue of exports of domestically produced goods
8	TRIPs and the environment
9	Decision on Trade and Services and the Environment
10	Input to the WTO about the appropriate role of NGOs and IGOs in the CTE

¹¹⁴ (...continued)

— surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures."

Trade and Environment Decision, supra note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See CTE Report, supra* note 104.

From its birth at the first post-Uruguay GATT General Council meeting in January, 1995, the CTE met thirteen times to discuss the ten items specified as its agenda.¹¹⁸ Although CTE membership is limited to WTO Members, the CTE invited observer governments and extended on an observer status to certain intergovernmental organizations and other NGOs such as the UN (including UNEP, UNCTAD, UNDP & the UN Commission for Sustainable Development), UNIDO, FAO, IMF, the World Bank, ITC, OECD, the World Customs Organization, and the International Organization for Standards (ISO).¹¹⁹ In its report to the Singapore Ministerial Conference, the CTE discussed what progress had been made on those items and recommended that its mandate be renewed under the same terms of reference.¹²⁰ The SMC agreed that the “breadth and complexity of the issues” required further work by the CTE on all the issues.¹²¹

¹¹⁸ *Id.* at ¶¶ 1-3.

¹¹⁹ *Id.* at ¶ 3; WTO, ANNUAL REPORT, 1996, *supra* note 38, at 149. For a discussion on the continued admission of NGOs to WTO committee meetings, in particular the relevance of their admission to the CTE, see WTO, *Trade and Environment Bulletin No. 16*, WTO Doc. PRESS/TE 016 (Nov. 28, 1996). Some participants of the CTE expressed concern that the CTE procedures were still not transparent enough, NGOs were not receiving enough access to the WTO meetings, and official documents were taking too long to be declassified. *Id.*

One other notable difference of the CTE from that of all other WTO bodies is that its practice and procedures are considerably more public and transparent. For example, the CTE published sixteen separate reports in its *Trade & Environment Bulletin* series prior to the Singapore Ministerial. This is probably an outgrowth of the environmental movement’s concern for transparency in environmental matters. Some delegations have even suggested that in the context of MEAs being contested in the WTO Dispute Settlement Body, that all meetings be public—a dramatic change from the norm of private, confidential panels. *CTE Report*, *supra* note 104, at ¶ 32. This movement toward public access will perhaps mollify some environmentalists’ fundamental distrust of the secretive nature of trade dispute resolution.

¹²⁰ *Id.* at ¶ 219.

¹²¹ WTO Ministerial Conference, *Singapore Ministerial Declaration*, at ¶ 16, WTO Doc. WT/MIN(96)/DEC (Dec. 18, 1996).

16. The Committee on Trade and Environment has made an important contribution towards fulfilling its Work Programme. The Committee has been examining and will continue to examine, *inter alia*, the scope of the complementarities between trade liberalization, economic development and environmental protection. Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development. The work of the Committee has underlined the importance of policy coordination at the national level in the
(continued...)

CTE: The Relationship Between the GATT and Environmental Regulation

This issue centers around two types of trade restrictive measures taken to improve the environment outside of a state's domestic jurisdiction: unilateral trade measures as a result of domestic law; and trade measures taken pursuant to multilateral environmental agreements (MEAs).¹²² On the first issue, there is wide agreement within the CTE that the dispute panel was correct in *Tuna/Dolphin*; specifically, the CTE endorsed the position taken by governments at the 1992 UN Conference on Environment and Development that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."¹²³

Although there are approximately 20 MEAs with trade-related provisions, there has never been a dispute over the WTO/GATT compatibility of these agreements.¹²⁴ If

¹²¹ (...continued)

area of trade and environment. In this connection, the work of the Committee has been enriched by the participation of environmental as well as trade experts from member governments and the further participation of such experts in the Committee's deliberations would be welcomed. The breadth and complexity of the issues covered by the Committee's Work Programme shows that further work needs to be undertaken on all items of its agenda, as contained in its report. We intend to build on the work accomplished thus far, and therefore direct the Committee to carry out its work, reporting to the General Council, under its existing terms of reference.

Id. at ¶ 16.

¹²² *CTE Report*, *supra* note 104, at ¶ 5.

¹²³ *Id.* at ¶ 171.

¹²⁴ *Id.* at ¶ 8, 174(I). The agreements in force include: Convention Relative to the Preservation of Fauna and Flora in Their Natural State (1933); convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1940); International Convention for the Protection of Birds (1950); International Plant Protection Agreement (1951); Plant Protection Agreement for the South East Asia and Pacific Region (1956); Convention on Conservation of North Pacific Fur Seals (1957); Agreement Concerning the Cooperation in the Quarantine of Plants and Their Protection Against Pests and Diseases (1959); Phytosanitary Convention for Africa (1967); African Convention on the Conservation of Nature and Natural Resources (1968); European Convention for the Protection of Animals During International Transport (1968); Benelux Convention on the Hunting and Protection of Birds (1970); Convention on International Trade in Endangered Species (CITES) (1973); Agreement on the Conservation of Polar Bears (1973); Convention for the Conservation and Management of the Vicuña (1980); ASEAN Agreement on the Conservation of Nature and Natural Resources (1985); International Code of Conduct on the Distribution and Use of Pesticides (UN FAO) (1985); Montreal Protocol on Substances That Deplete the Ozone Layer (1987); Convention on the Prohibition of Fishing with Long Drift Nets in the South Pacific
(continued...)

any should arise, the CTE recommends that disputes between parties of the MEA be brought before the MEA's dispute settlement mechanism and not before the WTO.¹²⁵ Further the CTE recommends that future negotiations of MEAs consider specifically how to apply trade measures to non-parties. The CTE failed, however, to make any conclusions as to how the WTO should govern disputes in the WTO between parties to a MEA and non-MEA parties that complain that the measures taken pursuant to that MEA nullify or impair their GATT benefits. In this regard, the CTE discussed means of amending GATT 1947 to provide explicitly for MEAs.

While, for the most part, WTO Members believe that those MEAs can and should be included in the GATT—so long as they are not discriminatory to non-MEA signors—a difference of opinion exists as to where. Some argue that all environmental measures should remain within the confines of GATT 1947, Art. XX¹²⁶; some suggest that the better place would be to allow for MEA waivers under Art. IX which allows waivers from GATT obligations; and others even suggest various other means of incorporation.¹²⁷

CTE: Eco-Labeling and the TBT

In the CTE, the United States proposed that all voluntary eco-labeling schemes be governed by the TBT Agreement.¹²⁸ Although few agreed with the U.S., the CTE agreed with part of the U.S. proposal by coming to the consensus that a starting point for

¹²⁴ (...continued)
(1989); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989); and Amended London Guidelines for the Exchange of Information on Chemicals in International Trade (1989). GATT Secretariat, *Trade and Environment Report* (1992), cited in ESTY, *supra* note 103, at Appendix D.

¹²⁵ *CTE Report*, *supra* note 104, at ¶ 178.

¹²⁶ Indeed the *Havana Charter*, in the article that became Art. XX of the GATT, contains a specific exception for measures "taken in pursuance of any inter-governmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals." *Havana Charter*, *supra* note 17, at art. 45(1)(x).

¹²⁷ See *CTE Report*, *supra* note 104, at ¶¶ 8, 11-14.

¹²⁸ WTO, *Trade and Environment Bulletin No. 15*, WTO Doc. PRESS/TE 015 (Nov. 18, 1996).

analyzing eco-labeling schemes would be to discuss "how to ensure adequate transparency in their preparation, adoption and application."¹²⁹ The main disagreement over the application of the TBT to eco-labeling programs centered around the issues of eco-labeling criteria based on PPMs and not on the product itself.¹³⁰ Canada felt that putting off the more contentious issues of life-cycle assessment (LCA) (as proposed by the EU) and PPMs until after Singapore would better serve the CTE; in the meantime, Canada suggested that the CTE should focus on notification requirements in eco-labeling programs. Additionally, after Singapore, Canada recommended that the CTE take up the issue of multilateral guidelines currently being developed such as ISO 14000 and what their impact might be on trade.

In this last regard, the Secretariat prepared a report for the CTE detailing the current multilateral eco-labeling efforts.¹³¹ Those sponsors of those efforts include: the Codex Alimentarius Commission (developing eco-labels for organically produced foods); the International Trade Centre (developing eco-labels for textiles and the clothing sector); OECD (examining the eco-labeling schemes of OECD countries); UNCTAD (addressing developing countries' interests in developing transparent open eco-labeling schemes); the UN Environment Program (examined mutual recognition of eco-labeling schemes and compared the environmental criteria used for similar products in different environmental schemes); UN Industrial Development Organization (analyzing multilateral eco-labeling programs including ISO 14000); and the International Organization for Standardization (ISO 14000).¹³² Despite discussing the issue of eco-labeling in depth, the CTE has come

¹²⁹ *CTE Report*, *supra* note 104, at ¶ 184.

¹³⁰ WTO, *Trade and Environment Bulletin No. 15*, *supra* note 128.

¹³¹ WTO Secretariat, *Eco-Labeling: Overview of Current Work in Various International Fora*, WTO Doc. WT/CTE/W/45 (Apr. 15, 1997).

¹³² *Id.* The ISO 14000 series of environmental standards is focusing on environmental management systems, environmental auditing and related environmental investigations, environmental labeling, environmental performance evaluation, and life cycle assessment. *Id.* For a more detailed discussion of the ISO 14000 series, see COMMODITIES DIV., UNCTAD, ISO 14001: INTERNATIONAL ENVIRONMENTAL MANAGEMENT SYSTEMS STANDARDS (Draft for Comments, 1996). For an analysis of whether ISO 14000's
(continued...)

to no conclusions regarding the GATT compatibility of these voluntary eco-labeling schemes.

CTE: Conclusion

Despite some partial achievements in the CTE, generally it has not been successful. Since it originally began meeting, it has continued to discuss the same issues with little resolution. USTR Charlene Barshefsky has described the CTE's pace as "glacial."¹³³ Other observers, including WTO Director General Renato Ruggiero and Professor John Jackson, have blamed the CTE's dismal performance, in part, for the current batch of environmental disputes in the WTO.¹³⁴

For example, had the CTE been able to come to some form of binding resolution as to the use of unilateral environmental measures to extraterritorially protect endangered species, the *United States—Shrimp Turtle* dispute may have had a better environmental and trade outcome at the first panel level. In that case, a United States law banning the import of shrimp caught with nets that did not protect sea turtles was found inconsistent with U.S. obligations under the GATT, under a similar analysis as that done in *Tuna-Dolphin*.¹³⁵ A more rigorous CTE could have addressed the problems in *Shrimp-Turtle* through political consensus rather than leaving it to the dispute settlement panel to creatively interpret the GATT to find an obligation for the United States not to use

¹³² (...continued)

counterpart, ISO 9000 (management systems standards), constitutes a technical barrier to trade under the TBT Agreement, see Thompson & Thompson, *The ISO 9000 Quality Standards: Will They Constitute a Technical Barrier to Free Trade Under the NAFTA and the WTO?*, 14 ARIZ. J. INT'L & COMP. L. 155 (1997).

¹³³ USTR Charlene Barshefsky, Address at *The Future of the World Trading System*, A Conference hosted by the Institute for International Economics (Apr. 15, 1998).

¹³⁴ Director General Renato Ruggiero, Address at *The Future of the World Trading System*, A Conference hosted by the Institute for International Economics (Apr. 15, 1998); John H. Jackson, Address at *The Future of the World Trading System*, A Conference hosted by the Institute for International Economics (Apr. 15, 1998).

¹³⁵ See *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WTO Doc. WT/DS58/R (May 15, 1998) (concluding that the U.S. measures violated GATT XI:1 and were not otherwise justifiable under GATT XX).

unilateral extraterritorial measures because of the its general obligation to uphold the multilateral system.

Whether the CTE, or any multilateral *trade* institution can effectively deal with international environmental concerns remains a large question. Ernst-Ulrich Petersmann compares the efforts in the WTO to how the EU has dealt with social policy concerns and concludes that, without the deeper integration of a single market where the problems still exist, “attempts at ‘policy integration’ may be neither economically desirable nor political acceptable or legal enforceable in the worldwide context of the WTO.”¹³⁶ Indeed, drawing on Daniel Esty’s proposal for an international environmental organization, Petersmann concludes that “the needed establishment of a global environmental organization with ‘GATT-like’ multilateral rules and enforcement mechanisms must take place outside the WTO.”¹³⁷

Future negotiations on trade and the environment should go beyond the current system but remain limited to those points where environmental policies truly intersect with trade disciplines. While there is good reason for trade policy officials to be concerned about having non trade-related issues “trespass” into and complicate the trade regulatory system, true “cross-over” areas—such as import bans on endangered species—should have appropriate access to trade rules, and the related dispute settlement process. But these areas of true intersection and cross-over need to be agreed upon pursuant to the WTO consensus process in the context of ongoing CTE meetings and future rounds, and not dictated by a few members acting to multilateralize their respective preferred domestic policy prescriptions.

¹³⁶ ERNST-ULRICH PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND 94 (1995).

¹³⁷ *Id.*

3.4(b) Trade & Labor

Although the linkage between labor rights and trade liberalization is by no means a recent development, what is new is the revitalized interest by many countries—principally the United States and some European countries—in placing the issue “front and center” on the stage of the international trade agenda.

The concept of linking labor standards to trade was introduced in 1948 during the drafting of the Havana Charter for the proposed ITO. Chapter II of the draft charter stated that member states recognize “that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”¹³⁸ The Charter even contemplated disputes being raised against Members that did not provide fair labor conditions, with the possibility of compensation being available to the complaining Member once a negative determination was reached.¹³⁹ Notwithstanding continued U.S. pressure to do so, the GATT has never adopted such language.¹⁴⁰

While the GATT 1947 or the WTO Agreement do not specifically address labor standards, both Preambles recognize that expanded trade is not an end itself and that it should contribute to other objectives (*e.g.*, “raising standards of living...[and]...ensuring full employment”).¹⁴¹ Arguably, improving worker rights (*e.g.*, raising living standards) can be viewed as an indirect objective of the GATT. In 1953, the United States

¹³⁸ *Havana Charter*, *supra* note 17, at art. 7.

¹³⁹ Members could make a nullification and impairment claim under any provision of the Charter. *Id.* at art. 93. Moreover, the labor standards article explicitly allowed the ITO to refer to the International Labor Organization when labor disputes were raised. *Id.* at art. 7(3).

¹⁴⁰ However, Art. XXIX of GATT 1947 states that the contracting parties undertake to observe the general principles of certain chapters of the *Havana Charter*, including Chapter II which contains the reference to fair labor standards quote above. GATT 1947 art. XXIX. There is no consensus as to whether this creates any specific obligations.

¹⁴¹ WTO Agreement; GATT 1947.

informally proposed that a fair labor standards clause be introduced in the GATT.¹⁴² This initiative failed, in large part over differences on how to define fair labor standards.

The Tokyo Round of the GATT saw a number of U.S. proposals come to light. The Trade Act of 1974 listed U.S. negotiating objectives for the President to seek during the Tokyo Round. These included "adoption of international fair labor standards and of public petition and confrontation procedures in the GATT."¹⁴³ U.S. strategy during the Round focused on four minimum international labor standards (MILS): (1) slave or forced labor; (2) child labor; (3) health and safety practices; and (4) discriminatory practices applied to exports. Informal U.S. proposals to address these minimum standards during the Tokyo Round received no support, except from the Nordic countries, which eventually backed off. The Nordic countries introduced, but did not pursue actively, their own proposal for a GATT social clause. In the end, the United States decided not to make a formal proposal for consideration of labor standards because it might have complicated ongoing negotiations on other issues. Instead, prior to the October 1979 meeting of the GATT Consultative Group of 18 (CG-18), the U.S. submitted a written proposal calling for consideration of minimum international labor standards as part of the post-Tokyo Round work program. The proposal was not supported by other CG-18 members.¹⁴⁴

Section 1101 of the Omnibus Trade and Competitiveness Act of 1988 listed sixteen trade negotiating objectives for the United States during the Uruguay Round. The Act stated that the principal negotiating of the U.S. regarding workers rights were:

- to promote respect for worker rights;
- to secure a review of the relationship of worker rights to GATT articles, objectives and related instruments with a view to ensuring that the benefits of the trading system are available to all workers; and

¹⁴² Note on file with author from discussions with U.S. Trade Official.

¹⁴³ Pub. L. No. 93-618, § 121(a)(4), 88 Stat. 1986 (codified as amended at 19 U.S.C.A. § 2131 (1975)).

¹⁴⁴ Note on file with author from discussions with U.S. Trade Official.

- to adopt, as a principle of the GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade.¹⁴⁵

In response to this Congressional mandate, the U.S. sought during meetings of the Uruguay Round Preparatory Committee to have worker rights included in the Round's agenda. Again, this proposal received no support from any of the delegations. Consequently, the Punta del Este declaration, which launched the Uruguay Round, did not list worker rights as one of the negotiating topics.¹⁴⁶

After meeting unanimous opposition to inclusion of worker rights as a negotiating topic, the U.S. decided to seek the establishment of a GATT working party, separate from the Uruguay Round, to hold initial discussions of worker rights. Thus, in July 1987 at the GATT Council meeting, the U.S. made its first formal request for a working party on the relationship between worker rights and trade.¹⁴⁷ The five basic international labor standards to be addressed were:

- freedom of association;
- freedom to organize and bargain collectively;
- freedom from forced or compulsory labor;
- a minimum age for the employment of children; and
- measures setting minimum standards in respect to conditions of work.

¹⁴⁵ Pub. L. No. 100-148, § 1101(14), 102 Stat. 1125 (codified as amended at 19 U.S.C.A. 2901 (1988)).

¹⁴⁶ See Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, GATT B.I.S.D. (33d Supp.) at 19 (1987).

¹⁴⁷ See *U.S. Proposal to Bring Worker Rights Issues Up at GATT Council Draws Cautious Response*, 4 Int'l Trade Rep. (BNA) 942 (July 22, 1987); *Japan Tells GATT Council Tokyo May Request Arbitration Panel on Semiconductors Issue*, 4 Int'l Trade Rep. (BNA) 1432 (Nov. 18, 1987).

These are essentially the worker rights standards contained in U.S. GSP law.¹⁴⁸ At the October, 1990 GATT Council meeting, the U.S. stated it was willing to begin by examining only the first three standards.

Developing countries argue that U.S. intentions are protectionist and that the issue belonged in the International Labor Organization (ILO), not the GATT.¹⁴⁹ In the face of renewed U.S. interest in proceeding with this issue in the GATT/WTO context, fears of protectionism or misplaced Western paternalism resurfaced.

The Clinton Administration began to articulate its goals and the policy to achieve them with a speech by President Clinton at the NAFTA signing ceremony in 1993. He said that the United States will “press for workers in all countries to secure rights that we now take for granted, to organize and earn a decent living.”¹⁵⁰

Ambassador Mickey Kantor was quoted as saying that to have “‘prosperity here at home; build jobs and serve the American people,’ this country will have to insist ‘that its trading partners follow the same standards, including worker standards...that we do.’”¹⁵¹ On the same day that his remarks were published, French Prime Minister Edouard Balladur, in year-end remarks to the *Financial Times*, also addressed similar themes. There he argued that the EU should seek protection against unfair foreign competition based on lower wages. “If we do not resolve these social....problems, we will perforce have major distortions of competition and uprooting of companies [in western Europe].”¹⁵²

¹⁴⁸ See Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, 601, 98 Stat. 2948, 3018 (codified as amended at 19 U.S.C.A. 2461 (1988)).

¹⁴⁹ *U.S. State Department Officials Seek to Reassure Latin America on Trade Law*, 5 Int'l Trade Rep. (BNA) 1278 (Sept. 21, 1988).

¹⁵⁰ See President Bill Clinton and Vice President Al Gore, Remarks at the NAFTA Signing Ceremony 7 (December 8, 1993).

¹⁵¹ Hobart Rowen, *New Trade Buzzword*, WASH. POST, Dec. 31, 1993, at A21 (quoting Ambassador Kantor).

¹⁵² Andrew Gowers & David Buchan, *EU Action over 'Unfair' Trade Urged by Balladur*, FIN. TIMES, (continued...)

Mr. Balladur went on to note the high level of European “social protection” and worried about the inability of Europe to compete with poorer trading partners. The Prime Minister then made comments which the *Financial Times* described as making clear that “France would try to use the new World Trade Organization, which Paris championed as a replacement for GATT, to restrain market forces.”¹⁵³ Mr. Balladur said:

Can we [West Europeans] take it for granted that we will remain sufficient leaders in a sufficient number of sectors to survive--in the face of countries with populations infinitely larger than ours and with levels of social protection infinitely smaller?...I say we should leave this to the market, but only up to a certain point. What is the market? It is the law of the jungle. The law of nature. And what is civilization? It is the struggle against nature.¹⁵⁴

Despite reluctance to proceed with the issue from many WTO Members, the United States continued to press for a trade and labor working party within the newer WTO context. In 1994, Labor Secretary Robert Reich argued for global labor standards that can be enforced via trade sanctions: “[t]he improvement of labor conditions as developing countries grow richer advances America’s moral agenda and our economic interest at the same time.”¹⁵⁵ Reich further defended the WTO as the appropriate forum for core labor standards because it could “shore up support for additional trade liberalization” by persuading voters in any country voting on further trade liberalization that “other nations are adhering to core labor standards.” He said:

[T]rade liberalization and the implementation of core labor standards must go hand-in-hand, first because it is right, and second because separating the two risks stalling global economic progress. With this in mind, can we

¹⁵² (...continued)
Dec. 31, 1993, at 1.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Reich Urges Development of Policy by U.S. on Global Labor Standards*, 11 Int’l Trade Rep. (BNA) 651 (Apr. 27, 1994).

really have a sensible set of trade rules if they are indifferent to the trade in items produced by exploited children.¹⁵⁶

With the issue being constantly deferred by the GATT/WTO Council, the ILO made its position known when the ILO Director General called for the “inclusion of a ‘social clause’ in the WTO’s work related to the ILO’s conventions” including the right to collective bargaining and the bar against slave or forced labor.¹⁵⁷

The Road to Singapore

Prior to the Singapore Ministerial Conference (SMC), the various factions began to stake their positions in opposition to the U.S. push for core labor standards to be analyzed by a trade and labor working party. The ASEAN members took a unified position against including social issues such as labor being included in WTO agenda at Singapore and beyond. Speaking for ASEAN, Indonesian Industry and Trade Minister Tunky Ariwibowo said that trade and labor should not be linked because there is no common standard and that such a linkage “would be detrimental to the functioning of the WTO in the future.”¹⁵⁸ Instead, ASEAN officials suggested that a strengthened ILO would be a better forum for discussing core labor standards. India, Pakistan, Chile, Korea and Hong Kong joined ASEAN in opposing any linkage of trade and labor in the WTO.¹⁵⁹

¹⁵⁶ *Reich Calls for Trade, Labor Rights Discussion at Singapore*, INSIDE U.S. TRADE, June 14, 1996.

¹⁵⁷ *Reich Calls for Guidelines on World Trade-Labor Practices*, 11 Int’l Trade Rep. (BNA) 941 (June 15, 1994).

¹⁵⁸ *ASEAN Ministers Oppose Talks on Trade-Labor Linkages*, 13 Int’l Trade Rep. (BNA) 711 (May 1, 1996).

¹⁵⁹ *Japan Floats Idea for Trade-Labor Declaration at WTO Ministerial*, INSIDE U.S. TRADE, June 28, 1996.

Japan proposed what would eventually be incorporated into the Singapore Declaration: a one-time endorsement of core labor standards without any promise to initiate follow up work in the form of a committee or otherwise.¹⁶⁰

As the only country to generally support the U.S. position, Norway offered a third road for trade and labor to enter the WTO, including: clear recognition that the ILO is in charge of the issue, but that the WTO can play a complementary role; “open and non-confrontational dialogue with no sanctions involved”; political and not contractual role for discussion and promotion of core labor standards within WTO; and clear enunciation of specific guidelines for what the WTO should be doing and not be doing, with goal toward exploration as to how governments could best cooperate to improve core labor standards.¹⁶¹

In its offer for the SMC Declaration, the United States proposed the creation of a Working Party on Trade and Core Labor Standards that would:

- examine the relationship between the ILO and the WTO;
- recommend ways WTO Members might cooperate within the WTO and the ILO to promote core labor standards with the objective of raising living standards; and
- recommend ways the WTO could promote core labor standards with constraints of open, non-discriminatory system and activities of ILO and other mechanisms.

In its definition of core labor standards, the United States included the older desires of freedom of association, right to collective bargaining, prohibition of forced

¹⁶⁰ *Id.*

¹⁶¹ *TEXT: Norwegian Paper on Trade and Labor*, INSIDE U.S. TRADE, Aug. 9, 1996 (proposal for WTO Ministerial in Singapore).

labor, elimination of child labor, but also added an express provision for non-discrimination in employment.¹⁶²

In its search for a common position, the EU heard a plea for cooperation by the Director General of the WTO. Director General Ruggiero identified four areas of common ground on the core labor standards debate—the Universal Declaration of Human Rights, the primacy of the ILO, competitive advantage of low-wage countries is not being questioned, and the desire not to utilize trade sanctions. Director General Ruggiero expressed the suspicion of many WTO members that the further discussion of core labor standards is fueled by protectionist desires by its proponents. He said, “[t]here can only be one reason for raising this issue, and that is concern for the human beings involved. Only an approach which is unequivocally grounded in this concern and privileges positive ways of addressing it can therefore hope to attract widespread support.”¹⁶³ The EU ministers were unpersuaded, however, and still could not overcome the basic rift between the UK position and that of France. They left the EU Trade ministers Meeting in Dublin without making any decision on the EU’s position for the Singapore Ministerial.¹⁶⁴ Only one month before the SMC, despite the vehement objection of Britain supported by Germany against any discussion of labor issues in the WTO, the EU finally agreed upon a decision to support a minor WTO statement of the recognition of trade’s effects on living conditions and the ILO’s primary role in promoting core labor standards.¹⁶⁵

¹⁶² *TEXT: U.S. Paper on Trade and Labor*, INSIDE U.S. TRADE, Aug. 9, 1996 (proposal for WTO Ministerial in Singapore).

¹⁶³ *Director-General’s Speech to EU Trade Ministers in Dublin*, WTO/PRESS/56 (Sept. 18, 1996) (speech by Renato Ruggiero, Director-General, WTO).

¹⁶⁴ Although European Trade Commissioner, Leon Brittan, remained confident that a consensus could be reached by the SMC and reiterated that all EU members were against using core labor standards as disguised protectionism. *EU Trade Ministers Meeting in Dublin Discuss WTO Issues, But Make No Decisions*, 13 Int’l Trade Rep. (BNA) 1499 (Sept. 25, 1996).

¹⁶⁵ *EU Member States Offer Scant Support for WTO Role on Labor Rights*, INSIDE U.S. TRADE, Nov. 1, 1996.

Even the U.S. position was not as solid as it seemed. Congressman Bill Archer and Phil Crane, respectively Chairmen of the House Ways and Means Committee and its Subcommittee on Trade, called for the Administration to stop pushing for the establishment of a working party and to instead focus on the ILO as the appropriate forum for the promotion of workers rights.¹⁶⁶

At its final meeting in preparation for the SMC, the Quad Ministers were unable to reach any kind of firm decision on how the issue should be handled, other than to express a promise to build a consensus based upon the Director General's assessment of the four areas of agreement.¹⁶⁷ Supporting the original U.S. position, the International Confederation of Free Trade Unions (ICFTU), a group representing 200 trade unions with 124 million members, called on the SMC to establish a working party on trade and labor standards, stating that "[i]f intellectual property rights can be strictly enforced why should minimum standards for the humane and decent treatment of workers be treated any differently."¹⁶⁸

After four days of negotiation, two weeks prior to the SMC, the WTO gave up on drafting a proposal for trade and labor for the Ministerial and set aside the question until the actual Ministerial. Despite the fact that both the United States and Norway offered watered-down provisions, the opposition of the developing countries including ASEAN and reluctance of the EU doomed any hope at coming to a consensus.¹⁶⁹

¹⁶⁶ Interestingly, in an oblique characterization of the Administration's position as protectionist driven, they said that "[w]hile we support efforts to improve the welfare of the American worker, we believe that the best prospects for deriving tangible benefits for workers from the WTO Ministerial lie in achieving greater market access for U.S. goods and services." *Critical on Labor, Committee Chiefs Urge Focus on Implementation, ITA*, INSIDE U.S. TRADE, Dec. 12, 1996 (quoting a letter from Reps. Archer, Crane, Dreier and Kolbe to Acting USTR Barshefsky, Dec. 4, 1996).

¹⁶⁷ See *TEXT: Quad Meeting Final Statement*, INSIDE U.S. TRADE, Oct. 1, 1996 (Chairperson's Summary, Final Quadrilateral Trade Minister's Meeting, Seattle, Sept. 27-28, 1996).

¹⁶⁸ *International Union Group Seeks to Broaden WTO Role on Labor*, INSIDE U.S. TRADE, Dec. 6, 1996.

¹⁶⁹ *Marathon Talks on Labor Fail, Leaving Unresolved Issues for Singapore*, 13 Int'l Trade Rep. (BNA) 1849. The new text put forth by the U.S. recognized that the ILO as the major forum, but that the
(continued...)

With a large group of countries opposing any mention of labor standards in the declaration, the U.S. proposal failed in a last ditch effort at the SMC to create a working party. Led by India, Indonesia and Malaysia, the developing countries blocked any potential “follow-up work” by the WTO on the issue.¹⁷⁰ Accordingly, the SMC Declaration ultimately stated:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.¹⁷¹

Steve Charnovitz notes that this “pale” statement merits several important observations.¹⁷² First, the statement reflects the beliefs of the representatives in their capacity as national ministers; it does not reflect any WTO institutional recognition of core labour standards. More notably, Charnovitz notes that the “willingness of the [ministers] to reject the use of labor standards for protectionist purposes should be

¹⁶⁹ (...continued)

“WTO can contribute to the promotion of such standards through increased adherence to the rules-based system fostered by increased trade...that protectionist measures should not be used to enforce labor standards, and that the competitive advantage of low-wage countries not be put into question.” *Id.* The Norway draft softened this further by excising all mention of the WTO and substituted the prohibition of “protectionist measures” for “trade restrictive measures.” *Id.* Only Canada supported both proposals, while the EU stated that it would have agreed to the U.S. proposal but not the weakened Norwegian one.

¹⁷⁰ *Developing Countries Block U.S. Plan to Include Labor Issue in Work Agenda*, 13 Int’l Trade Rep. (BNA) 1925 (Dec. 11, 1995).

¹⁷¹ *Singapore Ministerial Declaration*, available in WTO Annual Report 1996, *supra* note 38.

¹⁷² Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMP. INT’L & COMP. L.J. 131, 156 (1997).

contrasted with its unwillingness to reject the use of tariffs for protectionist purposes.”¹⁷³ So contrasted, this sentence reflects a rather remarkable shift toward the recognition of labor standards in an otherwise watered-down, from a U.S. perspective, ministerial declaration.

In their interpretations of the statement, the ministers attempted to defend the decision not to go forward with any institutional action investigating the relationship between trade and core labour standards. Identifying the primary concern of developed Members, Günter Rexrodt, German Federal Minister of Economics, observed:

Social Issues deal with the political order of nations and with their societal values as a whole. [They]...cannot be dealt with by trade policy measures which are precisely defined in a legal sense but limited in scope. We must not bring into the WTO a confrontation about cultural and social values. This would destroy the credibility of the system including the highly valuable dispute settlement instrument...[which] [h]as to be applied to real trade disputes and not to foreign or social policy issues.¹⁷⁴

For the developing world, the Brazilian representative stressed Brazil’s “serious concern with the possibility that the protection of core labour standards, which is in itself an ultimate goal to be pursued by all, [would] be utilized as a “scapegoat” to deal with the problem of structural unemployment in the developed economies.”¹⁷⁵

The European and Brazilian concerns were echoed by a number of countries expressing their desire to have the ILO remain the sole forum for the promotion of core

¹⁷³ *Id.* at 156-157.

¹⁷⁴ Germany, Statement by Mr. Günter Rexrodt, Federal Minister of Economics, WTO Doc. WT/MIN(96)/ST/13 (Dec. 9, 1996). Britain seconded this statement with the idea that “trade measures in support of social standards...[w]ould only weaken the economies of the countries concerned and make them less able to remedy social problems.” United Kingdom, Statement by the Right Honourable Ian Lang, M.P., President of the Board of Trade, Head of the Dep’t of Trade and Industry, WTO Doc. WT/MIN(96)/ST/9 (Dec. 9, 1996).

¹⁷⁵ Brazil, Statement by H.E. Mr. Luiz Felipe Lampreia, Minister for External Relations, WTO Doc. WT/MIN(96)/ST/8 (Dec. 9, 1996).

labor standards and for labor not to become intermingled with a trading system that is designed to deal with trade-specific issues.¹⁷⁶

The WTO's interpretation of the last sentence Singapore Ministerial Declaration intersects closely with the above interpretations and concerns. Aside from the ban on protectionist use of core labour standards, at best, the declaration recognizes the status quo, a continued informal sharing of information between the ILO and the WTO.¹⁷⁷

U.S. Efforts After Singapore

Despite its failures at the SMC, the United States has persisted in its attempt to create a working party on trade and labor within the WTO. Seeing the inclusion and recognition of core labor standards as a success from Singapore, the Labor Department noted the growing consensus of countries shifting toward its position including Argentina, Chile, Uruguay, South Africa and Tunisia.¹⁷⁸ Reaffirming the linkage between trade and labor in U.S. foreign policy, Ambassador Barshefsky said, "[a]dvancing worker

¹⁷⁶ See, e.g., Bolivia, Statement by Mr. Victor Rico Frontaura, Minister of Int'l Economic Relations, WTO Doc. WT/MIN(96)/ST/38 (Dec. 10, 1996); Dominican Republic, Statement by Mr. Luis Manuel Bonetti, Minister of Industry and Commerce, WTO Doc. WT/MIN(96)/ST/24 (Dec. 9, 1996); El Salvador, Statement by Mr. René Antonio Leon, Vice-Minister of the Economy, WTO Doc. WT/MIN(96)/ST/40 (Dec. 10, 1996); Mexico, Statement by Dr. Herminino Blanco Mendoza, Minister of Foreign Trade and Industrial Development, WTO Doc. WT/MIN(96)/ST/14 (Dec. 9, 1996); Myanmar, Statement by H.E. Lieutenant-General Tun Kyi, Minister for Commerce, WTO Doc. WT/MIN(96)/ST/124 (Dec. 12, 1996); Senegal, Statement by H.E. Mr. Idrissa Seck, Minister of Commerce, Handicrafts and Industrialization, WTO Doc. WT/MIN(96)/ST/122/Rev.1 (Dec. 12, 1996); Thailand, Statement by H.E. Mr. Amnuay Viravan, Deputy-Prime Minister and Minister of Finance, WTO Doc. WT/MIN(96)/ST/15 (Dec. 9, 1996).

¹⁷⁷ As Director General Ruggiero phrased it, "[i]f the ILO has to make a recommendation to governments, they [will] want to know whether this is in line with the rules of our organization." *Ruggiero Says Declaration Allows Only Information Swaps with ILO*, INSIDE U.S. TRADE, Dec. 16, 1996; see also, *WTO Ministerial Chairman Emphasizes Weakness of Labor Agreement*, INSIDE U.S. TRADE, Dec. 16, 1996.

¹⁷⁸ *Administration Will Continue to Press for Creation of Labor Group at WTO*, 14 Int'l Trade Rep. (BNA) 14 (Jan. 1, 1997).

rights and labor standards is in our national interest and it is consistent with our deepest national values.”¹⁷⁹

Unsuccessful at the ministerial level, in early 1997, the United States began to insert core labor standards concerns into a lower body, the Trade Policy Review Mechanism (TPRM). At Fiji’s 1997 TPRM, the United States raised concerns with Fijian compliance with ILO core labor standards.¹⁸⁰ Fiji, Australia, Columbia, Cuba, Hong Kong, Mexico, New Zealand, Peru and Singapore on behalf of ASEAN immediately informed the United States that core labor standards should only be discussed at the ILO and are outside the TPRM.¹⁸¹ The United States responded with an argument that labor standards are a core WTO question of transparency, and therefore are reasonable to raise within the TPRM.¹⁸² Finally, the Trade Policy Review Board (TPRB) removed the issue from the Fiji review and forwarded the various interpretations of whether core labor standards can be injected into the TPRM to the Chairman of the TPRB.¹⁸³

Unsatisfied with the results of Singapore, Norway provoked the issue in the WTO by asking in July, 1997, for WTO Director General Ruggiero to report on the WTO’s cooperation efforts with the ILO on developing core labor standards. The United States also raised the interaction between the ILO and the WTO by suggesting that the WTO seek ILO input for such areas as export processing zones. Egypt, Pakistan, India, Hong

¹⁷⁹ Ambassador Charlene Barshefsky, USTR, Testimony before the Trade Subcommittee of the House Ways and Means Committee (Mar. 18, 1997) <http://www.ustr.gov/testimony/barshefsky_7.html>.

¹⁸⁰ See Trade Policy Review Body (TPRB), Trade Policy Review: Fiji, Minutes of Meeting, WTO Doc. WT/TPR/M/24/Rev.1 (Apr. 9-10, 1997) [hereinafter TPRB: Fiji].

¹⁸¹ One official was quoted as saying that “the TPRM is supposed to look at WTO consistency, not ILO consistency.” *Quad Ministers Call for Technology Transfer Measures in ITA*, INSIDE U.S. TRADE, May 9, 1997. See also TPRB: Fiji, *supra* note 180.

¹⁸² *Id.*

¹⁸³ Norway continued to raise the issue of core labour standards in questions posed in the TPRB, during a recent review of Cyprus. TPRB, Trade Policy Review: Cyprus, Minutes of Meeting, WTO Doc. WT/TPR/M/25, at ¶ 43 (Jul. 22, 1997).

Kong, Colombia, Brazil, Morocco, ASEAN, Japan, Switzerland and Australia all strongly opposed this latest effort by the U.S. to strengthen the issue of labor before the WTO.¹⁸⁴

The Debate Before the ILO

At the ILO's June, 1997 Ministerial, the United States encouraged ILO Director General Michel Hansenne's support of the ILO Working Party on the Social Dimensions of the Liberalization of International Trade which came to the consensus that the "liberalization of trade and the realization of the ILO's objectives are interdependent."¹⁸⁵ One proposal for ILO reform concerns the promotion of social-labeling—a voluntary, non-governmental effort that would label a product for its manufacturer's adherence to the ILO's core labor standards.¹⁸⁶ After developing its core labor standards, the ILO, according to Hansenne, should strengthen the standards by requiring that they hold a higher place in international law and are ratified by a larger majority of the member states of the ILO than the ILO Conventions of the past.¹⁸⁷ Debate in the Working Party went further than the Director General by suggesting that supervisory procedures of core labor standards could be strengthened through the use of regional monitoring mechanisms, peer reviews, and country policy reviews.¹⁸⁸

¹⁸⁴ Of course, some suggested that this effort was more political than real with the Clinton Administration seeking to position itself prior to the upcoming fast-track debate in the Fall of 1997. See John Zarocostas, *Action by U.S., Norway Revives Rift in WTO*, J. COM., July 17, 1997, at 3A.

¹⁸⁵ *The ILO, Standard Setting and Globalization*, Report of the Director-General to the International Labour Conference, 85th Sess., at Part I (1997), available at ILO, *Report of the Director-General* (visited June 25, 1997) <<http://www.ilo.org/public/english/10ilc/dg-rep.htm>>; John Parry, *United States Supports ILO Official's Call for Linking Trade, Labor Standards*, Daily Rep. for Executives (BNA) No. 114, at A-35 (June 13, 1997).

¹⁸⁶ *The ILO, Standard Setting and Globalization*, *supra* note 185.

¹⁸⁷ *Id.*

¹⁸⁸ *Report of the Chairperson of the Governing Body to the Conference for the Year 1996-97*, ILO Report to the Int'l Labour Conference, 85th Sess. (1997), available at ILO, *Governing Body Report* (visited June 25, 1997) <<http://ilc.ilo.org/ILC97/gb-rep.htm>>.

The developing countries, however, rejected both proposals, especially the concept of social-labeling, arguing that “[t]here is no empirical evidence to support the view that there is a link between trade liberalization and labor standards...[and]...[t]he thesis that low wages in developing countries are responsible for loss of jobs and lower wages in the developed countries has been refuted by many authoritative analyses.”¹⁸⁹

Trade and Labor in the MAI

With Labor and Socialist governments rise in the United Kingdom and France, the U.S. and Nordic countries have new support in introducing labor—and environment—issues into the MAI negotiations. Without opposition by the developing world who, for the most part, are not members of the OECD, the only vocal opponents of labor’s incorporation into the MAI are New Zealand, Australia, Japan, and Mexico. The United States floated proposals in July, 1997 that it would formally introduce later for debate in October, 1997 for the inclusion of labor proposals based on the principle of national treatment, although it is unclear how binding these proposals might be.¹⁹⁰

Conclusion

In early 1997, Steve Charnovitz assessed the current debate and came to the same conclusion as the ASEAN, the rest of the developing world, and much of the EU: the ILO

¹⁸⁹ Parry, *supra* note 185, at A-35 (quoting a resolution by the developing countries at the ILO Conference).

¹⁹⁰ *OECD Members Leaning in Favor of Labor, Environment Rules in MAI*, INSIDE U.S. TRADE, July 11, 1997, at 1, 25. U.S. industry groups voiced their strong opposition to including preambular language on the trade and labor and turning the MAI into “a vehicle to promote...labor objectives unrelated to (and possibly inconsistent with) the goals originally outlined by the Agreement.” *USCIB Warns Against Adding Environment Provisions to MAI*, INSIDE U.S. TRADE, July 18, 1997; *Text: USCIB Letter on MAI*, INSIDE U.S. TRADE, July 18, 1997.

is better equipped to address the issues surrounding core labour standards.¹⁹¹ Significantly Charnovitz argues that the primary reason for placing labor standards into the WTO—its binding dispute settlement system—is misdirected; the ILO could create a stronger enforcement system with less interference from its members.¹⁹² Practically, the ILO could emulate MEAs with trade sanctions against products manufactured in violation of core labour principles (e.g., made by prison labor). Pointing to the recent reluctance of most Members at the SMC, Charnovitz concludes that advocates of trade and labor linkage should “[i]nstead of striving for a WTO discipline regarding labor...strive for an ILO discipline regarding trade.”¹⁹³

Nevertheless, despite the logical appeal of limiting trade issues to the WTO and labor issues to the ILO, countries like the United States and Norway continue to see both organizations as appropriate forums for raising the issue of core labour standards. Both countries’ practices in the TPRB reflect their interest in continuing to use the WTO—if not through its formal bodies and committees of experts—as a forum to improve the transparency of its Member’s adherence to the core labour standards agreed to by the ILO. While the rest of the WTO Members may resist, the United States, Norway, and others will presumably persist in broadening the WTO’s scope to include more politically popular international economic issues like labor and the environment, both as a tool to assuage domestic opposition to global market liberalization and as a tool for pursuing domestic social goals. Both goals could, however, be achieved through strengthened ILO disciplines.

¹⁹¹ Charnovitz, *supra* note 172, at 160 (arguing that the WTO will never be adept at dealing with labor rights because trade ministers, not labor ministers are the primary representatives, the WTO is not a champion of labor rights, and consensus decision-making in the WTO—as opposed to the ILO’s two-third’s—effectively limit new directions the WTO may pursue).

¹⁹² Essentially, Charnovitz argues that because labor standards and a common reference are not yet within the scope of competence of the WTO, it would take massive amendments to the treaties through a consensus of WTO Members to allow the dispute settlement system to adjudicate labor issues. On the other hand, the ILO could relatively simply assert new jurisdiction for enforcement provisions. *See id.* at 162.

¹⁹³ *Id.* at 163.

3.4(c) Sectoral Liberalization—The Information Technology Agreement

In terms of progress achieved, the Information Technology Agreement (ITA) represents a far more substantive step than the other new areas before the WTO. Although more traditional in some respects because it concerns tariffs on trade in goods, the ITA was drafted, negotiated and signed quicker than any previous round of tariff-reduction negotiations. While it deals with a relatively new area of products, and therefore might be more unique, the ITA achieves free trade in information technology products. Short of a new negotiating Round, tackling goods tariffs sector-by-sector is one practical approach to increasing market access. This section provides background information on the ITA, discusses its implementation, and places it in the context of previous bilateral and multilateral trade agreements with respect to information technology.

Background

At a December 1995 summit, leaders of the United States and the European Union agreed to launch discussions on an International Technology Agreement (ITA) that would eliminate tariffs on a broad spectrum of information technology products.¹⁹⁴ Among the products considered for the ITA were computer hardware, computer software, telecommunications equipment, semiconductors and integrated circuits, and many of the parts and components for these products.¹⁹⁵ Strong support for such an agreement was

¹⁹⁴ President Clinton, President Santer of the European Commission, and then-Prime Minister Gonzalez of Spain (representing the EU Presidency) met in Madrid on Dec. 3, 1995, to launch an initiative to revitalize the US-EU partnership, that became known as the New Trans-Atlantic Agenda (NTA), which sets a framework for cooperation and action to further common US-EU interests. See *The New Transatlantic Agenda* (Dec. 3, 1995) <<http://europa.eu.int/en/agenda/eu-us/pub/tai/agenda.htm>>, also available at <<http://www.useu.be/docs/nta1.html>>.

¹⁹⁵ U.S. Dep't of State, Cable 139276, *Demarche Request on ITA Tariff Initiative* (July 9, 1996) [hereinafter U.S. Dep't of State, *ITA Tariff Initiative*]; Information Technology Industry Council (ITIC), *Global IT Industry Associations Reach Accord on Tariff Elimination, Telecom Liberalization, and* (continued...)

immediately expressed by business leaders on both sides of the Atlantic, as well as in Canada and Japan, who urged their governments to conclude an ITA by the year 2000.

Free trade in electronics products (including a number of information technology products) was a major U.S. objective in the Uruguay Round. As such, the electronics sector was included as one of the so-called “zero-for-zero” sectors for which U.S. trade negotiators hoped to achieve total elimination of tariffs by major trading partners. Although complete duty elimination was achieved in a number of product sectors, the electronics “zero-for-zero” initiative was not fully realized despite the strong support for it by business interests in the United States, the EU, Japan, and Canada.¹⁹⁶

In view of continued U.S. support for tariff elimination in a number of the unsuccessful “zero-for-zero” sectors, provision was made in the *Statement of Administrative Action* (SAA) accompanying the *Uruguay Round Agreements Act* (URAA) to allow for continued negotiations in the sectors involved, including the electronics sector.¹⁹⁷ The SAA, for example, cited the partial success achieved in the negotiations to eliminate tariffs in some sectors, but noted that this objective was not met in the electronics sector and certain other sectors.¹⁹⁸ The SAA declared that “obtaining further reductions and elimination of duties in these sectors is a priority objective for U. S. multilateral, regional, and bilateral negotiations.”¹⁹⁹ The URAA provides the Administration with limited residual authority to negotiate further reduction or

¹⁹⁵ (...continued)

Encryption Policy, News Release, (Apr. 16, 1996) <<http://www.itic.org/newsroom/96prs/960418.htm>>.

¹⁹⁶ For the United States, this interest was understandable: in 1995, it was estimated by the American Electronics Association that U.S. technology exports of \$76.5 billion were affected by tariffs that totaled \$5 billion. IBM and Compaq each estimated that they will individually save \$100 million from complete IT liberalization. See USITC, *YEAR IN TRADE 1996*, *supra* note 91, at 22-23.

¹⁹⁷ URAA, SAA needs actual cite..

¹⁹⁸ H.R. Doc. No. 103-316, Vol. 1, at 700-703. [See previous questions re statements].

¹⁹⁹ *Id.*

elimination of tariffs on a range of product sectors, which could be useful in regional and bilateral negotiations and further negotiations in the WTO.²⁰⁰

In January 1995, the information technology industry associations of the United States, Europe, and Japan agreed to a set of industry recommendations to the G-7 meeting in Brussels on the Global Information Infrastructure (GII). One of their key recommendations was to eliminate tariffs in the information technology sector through the adoption of an ITA.²⁰¹

In November 1995, U.S. and EU business and industry leaders, meeting in Seville for the Trans-Atlantic Business Dialogue, urged their political leaders to vigorously pursue the ITA in Madrid, the following month, when the leaders were to discuss how they could revitalize the Trans-Atlantic partnership.²⁰² On December 3, 1995, President Clinton and leaders of the EU announced an initiative known as the New Transatlantic Agenda (NTA), which sets up a framework for U.S.-EU cooperation in several realms and calls for a number of actions to further common U.S.-EU interests, including cooperation in the areas of economics and trade.²⁰³ Among other things, the political leaders announced recommendations closely tracking those previously urged by U.S. business leaders with regard to an ITA that would eliminate tariffs in that sector.²⁰⁴

²⁰⁰ President's Advisory Committee for Trade Policy and Negotiations, "WTO Implementation Report," *Cementing and Improving Existing Agreements*, Mar. 11, 1996. [how was this published??].

²⁰¹ *Industry Recommendations for an Information Technology Agreement* (Apr. 16, 1996) <http://www.itic.org/iss_pol/ppdocs/ita/ita3.htm>. The participating groups included the Information Technology Industry Council (ITIC), European Association of Manufacturers of Business Machines and Information Technology Industry (EUROBIT), and Japan Electronic Industry Development Association (JEIDA). These groups were later joined by Canada's IT industry association (ITAC).

²⁰² Over 100 U.S. and European business leaders met in Seville, in November 1995, to conduct a Transatlantic Business Dialogue aimed at improving the Trans-Atlantic marketplace, strengthening the multilateral system and preparing concrete recommendations on how to boost trade and investment across the Atlantic. Transatlantic Business Dialogue, *Seville Conference: Overall Conclusions* (Nov. 10-11, 1995) <<http://www.mac.doc.gov/tabd/tabdrpt.htm>>.

²⁰³ *The New Transatlantic Agenda*, *supra* note 194.

²⁰⁴ *Id.*; INT'L DIV., U.S. CHAMBER OF COM., THE FUTURE OF TRANS-ATLANTIC TRADE RELATIONS: A U.S. BUSINESS PERSPECTIVE (Nov. 1995); BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, FACT SHEET: (continued...)

ITA Negotiating History

Information technology associations from Canada, Japan, the European Union, and the United States (Quad Partners) issued a joint statement on April 16, 1996, urging their respective governments to agree to conclude an ITA at an upcoming meeting in Kobe, Japan, and set a process for completing negotiations before the December 1996, Singapore WTO Ministerial.²⁰⁵ U.S. trade negotiators indicated their desire to conclude such an ITA by the Singapore Ministerial, so that tariff reductions could either be implemented at zero immediately, or be staged to reach zero by the year 2000. At Kobe, ministers indicated strong support for the ITA, and tasked negotiators to work on the specifics of product converge. Ministers also agreed that many other countries, particularly in Asia, must join the ITA.²⁰⁶

To pursue the ITA, U.S. negotiators outlined a process for negotiating the ITA that was accepted by the Quad Partners as a framework for the discussions. The approach called for defining a positive list of specific products in commercial terms to allow trade officials, not customs nomenclature officials, to negotiate the issue. The list would then be transcribed into traditional customs nomenclature so it can be administered. Methods would be developed periodically to review the positive list in the light of product developments (to avoid slippage away from zero duty commitments and to add new products) and to address in a timely manner other issues that may result from new technology. Using this framework, technical discussions among Quad members continued from February 1996 as to the coverage of the ITA.²⁰⁷

²⁰⁴ (...continued)

THE NEW TRANS-ATLANTIC AGENDA (Dec. 1995).

²⁰⁵ See *Industry Recommendations for an ITA*, *supra* note 201.

²⁰⁶ U.S. Dep't of State, *ITA Tariff Initiative*, *supra* note 195.

²⁰⁷ *Id.* Despite endorsement by EU leaders, and the majority of the EU industry (some semiconductor producers such as Philips were an exception), it appeared in early 1996 that the EU Commission wanted to delay progress in achieving an ITA. In April, the Commission began to link the ITA with other issues, such as EU participation in the U.S.-Japan Semiconductor Arrangement and completion of the Mutual
(continued...)

All Quad Members agreed that an ITA should include as many participants as possible outside the Quad, particularly APEC members such as Korea, Taiwan, Malaysia, Indonesia, Thailand, the Philippines, Singapore, and (key to the EC) China. These economies would be important beneficiaries of tariff elimination under an ITA, both as producers and as users.²⁰⁸

Concerned about possible backpedaling on the ITA initiative because of these technical differences, the U.S. Chamber of Commerce issued a statement on June 10, 1996 calling on leaders of the United States and the European Union, at their summit meeting later that week, to press ahead with work on a number of unfinished bilateral and multilateral trade agreements, including the ITA, indicating that “decisive government action” was needed at that time.²⁰⁹

With the Singapore Ministerial on the horizon, Asia-Pacific Economic Cooperation (APEC) made the final drive to signing an ITA. At its annual leaders’ meeting in the Philippines, the APEC governments, including the prominent “missing” Asian economies, agreed to sign an ITA at Singapore.²¹⁰

Following last-minute negotiations at the WTO Singapore Ministerial Conference in December 1996, the EC and the United States reached agreement on a plan to eliminate tariffs on information technology products.²¹¹ By the end of the SMC, a total of twenty-eight current and prospective WTO members had issued the Ministerial

²⁰⁷ (...continued)

Recognition Agreement (MRA) on telecommunications. As a result of dissatisfaction with the U.S. Government’s position on semiconductors and, potential other linkages, EU negotiators were instructed not to participate in the Quad technical discussions on ITA product coverage.

²⁰⁸ *Id.*

²⁰⁹ Gary G. Yerkey, *U.S. Companies Press U.S., Europe to Act on Unfinished Trade Agenda*, Int’l Trade Daily (BNA), at 73-74 (June 11, 1996).

²¹⁰ See *APEC Economic Leaders’ Declaration: From Vision to Action* (Subic, Phil., Nov. 25, 1996), at ¶ 14, in *SELECTED APEC DOCUMENTS 1996* (APEC Secretariat ed., 1997).

²¹¹ Undercutting the argument that these sectoral negotiations were conducted in isolation, the EC’s final accession to the ITA came only after the United States agreed to unilaterally eliminate its tariffs on a variety of alcoholic beverages by, the latest, 2002. See USITC, *YEAR IN TRADE 1996*, *supra* note 91, at 22.

Declaration on Trade in Information Technology Products, representing roughly 85 percent of global information technology trade.²¹² The Declaration stipulated that the ITA would not enter into force by July 1, 1997 until 90% of global information technology trade was covered. The ITA declaration contained an annex listing products on which participants intend to eliminate and bind customs duties and other charges.²¹³

Negotiations to finalize aspects of the ITA resumed in Geneva in January 1997. By the end of March 1997, thirty-nine participants covering some 92 percent of world trade in information technology products concluded the ITA.²¹⁴ The types of products covered ranged from supercomputers and automatic teller machines to cellular phones and fiber-optic cable.²¹⁵ Most of the participants, including the United States, agreed to stage tariff reductions on these products to zero by 2000.²¹⁶

Conclusion

²¹² Ministerial Declaration on Trade in Information Technology Products, WTO Doc. WT/MIN(96)/16 (Dec. 13, 1996) [hereinafter ITA Declaration]; USTR, *United States Praises Sweeping Information Technology Agreement, WTO Process*, press rel. 96-96 (Dec. 13, 1996).

²¹³ Notably, in addition to listing the classifications of the goods covered, the Declaration included a positive list of products to be covered described the each covered product by its function ranging from computers to set top boxes for television access to the Internet. See ITA Declaration, *supra* note 212, at attachment B.

²¹⁴ The thirty-nine Members included Australia, Canada, Czech Republic, Costa Rica, Estonia, the European Communities, Hong Kong, Iceland, Indonesia, Israel, Japan, Korea, Macau, Malaysia, New Zealand, Norway, Romania, Singapore, Slovak Republic, Switzerland, Taiwan, Thailand, Turkey, and the United States. Council for Trade in Goods, Implementation of the Ministerial Declaration on Trade in Information Technology Products, WTO Doc. G/L/160 (Apr. 2, 1997); USTR, *Information Technology Agreement on Track Toward March 26 Conclusion*, press rel. 97-21 (Mar. 13, 1997). Additional countries such as Panama, Poland, and the Philippines have indicated they may join the ITA shortly. USTR, *ITA A DONE DEAL!*, press rel. 97-25 (Mar. 26, 1997).

²¹⁵ See USTR, *ITA Product Landscape* (1997) <<http://www.ustr.gov/agreements/index.html>>.

²¹⁶ See USTR, *ITA A DONE DEAL!*, *supra* note 214. For the exact commitments taken by each participant, see WTO Secretariat, *Information Technology* (visited Dec. 1, 1997) <<http://www.wto.org/wto/goods/infotech.htm>>.

A multilateral ITA eliminating remaining tariffs on information technology goods and components will likely enhance the competitiveness of U.S. firms.²¹⁷ The United States currently has the most competitive information technology industry in the world. However, it will face increasing competition in future years from producers in the EU, Japan, and rapidly developing economies in East Asia. In the increasingly price-sensitive global information technology market, a number of successful companies have found it necessary to outsource components that they cannot manufacture competitively themselves. Reciprocal elimination of remaining tariffs in this industry will benefit U.S. producers by reducing their costs and enabling them to become more price competitive in foreign markets where tariffs are still relatively high.²¹⁸ In addition, elimination of the remaining U.S. tariffs on many components will also enable U.S. high-technology producers to remain competitive by enabling them to procure high quality components at the lowest cost anywhere in the world and allow U.S. companies to concentrate their efforts on their core competencies in designing and manufacturing high value-added, finished information technology products.²¹⁹

For the WTO, this agreement signifies the speed at which modern tariff reduction negotiations can take place if there is enough will. From inception to implementation, this agreement was completed in less than two years. In fact, pleased with the success in the first round of ITA negotiations, both EU and U.S. negotiators have begun to float proposals for an ITA II agreement to reduce tariff barriers on those goods not covered by ITA I.²²⁰ Both offers expand the scope of the ITA to include such products as ATM parts,

²¹⁷ U.S. industry representatives, telephone interviews by USITC staff, Aug. 7, 1996; U.S. and European industry representatives and trade association officials, interviews by USITC staff, San Jose, CA, Apr. 14-24, 1993; and Munich, Frankfurt, Ivrea, Paris, and London, May 6-24, 1993.

²¹⁸ ITI, *The Information Technology Agreement: A Proposal of the Information Technology Industry Council*, in ITI ONLINE: PUBLIC POLICY 4 (1996).

²¹⁹ U.S. industry representatives, telephone interviews by USITC staff, Aug. 6-7, 1996.

²²⁰ For the EU and U.S. proposals, see Submission by the EC to the Committee of Participants on the Expansion of Trade in Information Technology Products, *Proposed Additions to Product Coverage*, WTO Doc. No. G/IT/SPEC/3 (Jan. 12, 1998); *Submission of the United States of America Regarding the ITA* (continued...)

satellites, lasers, flat panel displays and manufacturing equipment for the production of printed circuit boards and capacitors. The official negotiations for ITA II began in February, 1998 and, as of this writing, are stalled until the end of 1998.²²¹

3.5 The WTO & a Millennium Round

Along with completing the first ITA agreement, the first Ministerial Conference at Singapore in December 1996 reflected how policy would be set for the infant organization. At Singapore, the Ministers addressed the core labour standards issue, pushed for an end to the GATS basic telecommunications negotiations, and created working groups to address those issues not dealt with in the Uruguay Round: investment and competition policy.²²²

The second Ministerial Conference found itself celebrating the fifty year anniversary of the GATT multilateral trading system. As such, it provided an historic opportunity to reassess the past fifty years and develop policy approaches for the next fifty. USTR Charlene Barshefsky viewed the past fifty years as a “resounding success” with its creation of a “contractual system, based on a broad vision of openness, the rule of law, mutual benefit, and enlightened self-interest,” yet identified four areas where the WTO could improve:

- Completing the unfinished agenda as regards to goods, agricultural products, and services and increase the depth of that coverage;
- Incorporating the rest of the global community into the WTO system on “commercially meaningful terms”;

²²⁰ (...continued)
(visited Feb. 5, 1998) <<http://www.ustr.gov>>.

²²¹ See *U.S. Firms Pressing USTR for Additions to Proposal for ITA Expansion*, INSIDE U.S. TRADE, May 29, 1998; WTO, Second Ministerial Conference of The WTO, *Press Pack* (May 18-20, 1998) <<http://www.wto.org/wto/anniv/press.htm>>.

²²² For our proposals on WTO agreements on both investment and competition policy, see *infra* at chs. 5 and 7. For the text of the Singapore Ministerial, see WTO, ANNUAL REPORT 1997, *supra* note 43, at 97.

- Easing the passage of new technologies into the marketplace by protecting them from barriers to international trade; and
- Addressing the concerns of citizens about “openness, transparency, and the effect of trade on the quality of life.”²²³

The unfinished agenda has two components. Certain subjects were either left off the table during the Uruguay Round (e.g., certain GATS sectors), while others were drafted into Agreements with built-in time frames for review. These elements of the unfinished agenda are outlined in Table 3-3. What USTR Barshefsky may not have been referring to, but is otherwise part of the unfinished business of the past fifty years, will be addressed in chapters 5 through 8 on completing the Cordell Hull vision.

Table 3-3: The WTO's Unfinished Agenda

Year	Agreement	Action
1998	Sanitary and Phytosanitary Measures (SPS)	Review of the operation and implementation of the Agreement.
	Technical Barriers to Trade (TBT)	Review of the operation and implementation of the Agreement
	Intellectual Property Rights (TRIPS)	Further negotiations starting in 1998, with a view to broadening and improving the Agreement on the basis of mutual reciprocity.
	Dispute Settlement Understanding (DSU)	Full review of dispute settlement rules and procedures.
1999	Government Procurement	Further negotiations starting in 1999, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity.
	Investment Measures (TRIMS)	Review of the operation of the Agreement and discussion on whether provisions on investment policy and competition policy should be included in the Agreement
2000	Agriculture	Negotiations for continuing the process of substantial progressive reductions in support and protection.

²²³ Statement Circulated by Ambassador Charlene Barshefsky to the Geneva Ministerial Conference, WTO Doc. WT/MIN(98)/ST/57 (May 18, 1998).

Year	Agreement	Action
	Intellectual Property Rights (TRIPS)	Review of the implementation of the Agreement after 1 January 2000
	Trade Policy Review Body	Appraisal of the operation of the policy review mechanism.
	Services	New round of negotiations starting in 2000 with a view to achieving a progressively higher level of liberalization.
2001	Textiles and Clothing	Review of the implementation of the Agreement.
2004	Textiles and Clothing	Review of the implementation of the Agreement.

Secondly, the *World Trade Organization* should include the world. With China and Russia still negotiating entry, the WTO is not yet complete.

Indeed, the Ministerial process has allowed the WTO to address issues like the ITA that were never envisioned during the Uruguay Round for inclusion in the WTO trading system. At the Geneva Ministerial, the Ministers issued a *Declaration on Global Electronic Commerce* as a response to a recent WTO study on the rise of global Internet business which authorized the General Council to develop a work program to address the variety of issues raised by electronic commerce whether they be privacy related, taxation, market access, intellectual property or content regulation.²²⁴ As USTR Charlene Barshefsky observed, as the second fifty years of the multilateral trading system proceeds, it is imperative that it can adapt to technological advances in international economic relations.

Finally, USTR Barshefsky raises the new social issues of the world trading system, and asserts the importance of incorporating them into the structure of the WTO. More likely, however, whether issues as the environment and labor will become more deeply integrated into the world trading system, is likely to be a matter of ongoing contention among Members.

²²⁴ See *Declaration on Global Electronic Commerce*, Ministerial Conference, Second Session, WTO Doc. WT/MIN(98)/DEC/2 (May 20, 1998).

Structurally, the European Union has recommended that both the unfinished agenda and the newer issues be dealt with in a new Round. As EC Commission President Jacques Santer argued, the global approach of a Millennium Round would be a better “way of advancing multilateral liberalization” than “a regional or sectoral approach.”²²⁵ Starting with the Sir Leon Brittan’s proposal in December 1997, the Millennium Round is gaining ground as the appropriate forum for addressing the multiplicity of reform issues facing the world trading system.²²⁶ Indeed, a Millennium Round may prove to be the best forum for addressing not only the unfinished business of the Uruguay Round, but the unfinished business of the Havana “Round” and new business of the next fifty years of international trade.

²²⁵ Statement by Mr. Jacques Santer, President, E.C. Commission, WTO Doc. WT/FIFTY/H/ST/5 (May 19, 1998).

²²⁶ See *Trade Officials Say Telecom Deal Shows Viability of Sectoral Pacts*, INSIDE U.S. TRADE, Feb. 18, 1997.

Chapter 4. Non-Multilateral Approaches to Trade Liberalization

4.1 Introduction

As can be seen from the preceding chapter, the evolution of multilateral trading disciplines has, from the start, been uneven and disjointed. When the *Havana Charter* failed, governments attempted to replicate the Cordell Hull vision in regional trading arrangements. Indeed, “the spirit of the GATT was to be found...at the very heart of the Treaty of Rome establishing the European Economic Community.”²²⁷ Many countries, who otherwise may well have placed greater reliance on the multilateral system as the trade liberalization modality, had negative reactions to the “birth defects” of the GATT system.²²⁸ This was one, but not the only, reason why the trading system has witnessed such a proliferation of non-multilateral approaches. This chapter reviews a representative range of such approaches, and examines the extent to which they achieve the objectives of the trade system as envisaged by Hull, and as incorporated in the *Havana Charter*. Particular emphasis is given to the European Union and NAFTA arrangements, which provide two differing examples of deeper economic integration more reflective of Hull’s original vision, with significant treatment given to the APEC, ASEAN and MERCOSUR systems, which describe differing regional liberalization approaches.

4.2 The European Union

After the devastation of World War II, the early founders of the European Union pursued west European integration as a means to guarantee peace and rebuild their economies. The first European Community, the European Coal and Steel Community,

²²⁷ Statement by Mr. Jacques Santer, President, E.C. Commission, WTO Doc. WT/FIFTY/H/ST/5 (May 19, 1998).

²²⁸ See JACKSON, *WORLD TRADE AND THE LAW OF GATT*, *supra* note 2, at ch. 2.

began in 1951 with six members: France, Germany, Italy, the Netherlands, Belgium, and Luxembourg.²²⁹ Although its immediate goal was economic—to guarantee the supply of energy and raw materials to its members—its political dimension was significant. For the first time, national governments gave up some of their sovereignty to a supranational authority.

After the failure of efforts to establish European defense and political communities, the six member states concentrated on economic cooperation.²³⁰ In 1957, they signed the Treaties of Rome establishing the European Economic Community and the European Atomic Energy Community.²³¹ The goal of the three communities was the same: economic expansion and higher standards of living for the peoples of Europe.²³²

Over its more than forty year history, the EU grew from six member states to fifteen. The areas of EU competence expanded from steel and nuclear energy to a complete internal common market and a common currency to foreign policy and social rights. Today, the EU is the most integrated of the world's regional trade blocs. Although there have been setbacks along the way, the momentum towards deeper integration continues to move forward. Table 4-1 highlights these major steps toward European unity.

²²⁹ TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY (ECSC), Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]. Due to ratification, and implementation dates, the ECSC's common market did not begin to function until 1953. Professor Ernst Haas analyzed the creation of the ECSC and its impact on greater economic and regional integration in his landmark book *The Uniting of Europe*. ERNST HAAS, THE UNITING OF EUROPE (1958).

²³⁰ For a summary of the attempts at developing the European Defense Community, see MARTIN J. DEDMAN, THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN UNION 1945-95, at 70-92 (1996).

²³¹ TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY (EEC), Mar. 5, 1957, 298 U.N.T.S. 11 [hereinafter EC TREATY]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY].

²³² See, e.g., EC TREATY art. 2; ECSC TREATY art. 2; EURATOM TREATY art. 1.

Table 4-1: Key Dates in European Integration²³³

Year	Event	Description
1951	European Coal and Steel Community (ECSC)	Six members: Germany, France, Italy, Netherlands, Belgium, and Luxembourg. Purpose is to manage production of coal and steel by an authority independent of national governments and whose decisions are binding on members.
1958	European Economic Community (EEC)	Six members. Goal to establish a common market and progressively approximate (align) the economic policies of the member states. Called for the elimination of barriers to the free movement of goods, people, services, and capital between the member states; the establishment of a common commercial policy toward third countries, common agricultural and transport policies, and competition policy to prevent market distortions; coordination of member-state economic policies; approximation of member state laws; creation of a European social Fund; and establishment of a European Investment Bank.
1958	European Atomic Energy Community (Euratom)	Six members. Purpose to further the use of nuclear energy for peaceful purposes.
1965	Institutional Merger	Established a single Council and Commission for the 3 communities.
1968	Customs Union	Remaining industrial tariffs abolished and the Common External Tariff entered into force.
1973	Enlargement	Ireland, the United Kingdom, and Denmark join the Community.
1981	Enlargement	Greece joins the Community.
1985	White Paper on Completing the Internal Market (the EC 1992 program)	After a period of economic stagnation, the EC realized that the original goals of the EEC Treaty had not been fulfilled. To improve unity and increase competitiveness, the White Paper proposed nearly 300 actions to eliminate remaining barriers to the free movement of goods, services, people, and capital.
1986	Enlargement	Spain and Portugal join the Community.
1987	Single European Act (SEA)	Amends and supplements the EC treaties. Commits to completing the internal market by 1992; increases use of majority voting in certain areas; and expands EC competence to the fields of R&D and the environment.

²³³ This timeline was derived from several sources. For more information on EU history, see CLIVE H. CHURCH & DAVID PHINEMORE, *EUROPEAN UNION AND EUROPEAN COMMUNITY* 13-38 (1994); DEDMAN, *supra* note 230; DELEGATION OF THE EUROPEAN COMMISSION IN THE UNITED STATES, *THE EUROPEAN UNION AND THE UNITED STATES IN THE 1990'S* (1996); Derek W. Urwin, *From A Europe of States to a State of Europe*, in *THE EUROPEAN UNION HANDBOOK* 3-14 (Phillipe Barbour ed., 1996).

Year	Event	Description
1990	Enlargement	Former German Democratic Republic enters as part of a united Germany.
1993	The Treaty on European Union (TEU)	Imposes the European Union above the original communities to mark the move to a three-pillared Union: 1) economic component including the 3 original communities; 2) common foreign and security policy; and 3) cooperation in justice and home affairs. Institutions established to meet the needs of the latter 2 pillars are inter-governmental rather than supranational. Established the timetable and conditions for EMU. Also introduced the principle of "subsidiarity" — the EU takes action only where objective is better met at the EU level than at the national or local level.
1995	Enlargement	Sweden, Finland, and Austria join the Union.
1997	Draft Treaty of Amsterdam (not ratified prior to 1998)	Expands first pillar's scope to include policies on the free movement of persons and labor and employment rights. Alters legislative process by extending codecision procedure that uses Parliament approval to almost all areas and by increasing the number of areas subject to qualified majority voting. Increases the power and status of the President of the Commission.
1997	Agenda 2000	Commission Communication outlines broad policy areas in need of reform, assesses problems that may arise with enlargement, and addresses financial restructuring of the Union including the Common Agricultural Policy.
1998	Enlargement Negotiations	EU will begin accession negotiations for Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. Commission will begin "screening" other candidates for EU law compliance, including: Lithuania, Latvia, Slovakia, Romania, and Bulgaria.
1999	European Monetary Union (EMU)	The national currencies of the participating member states will be fixed to the Euro, and by 2002, the national currencies will cease to exist.

Unique among international organizations, the EU today is far more than a customs union or a common market. The commitment to seek eventual political union has broadened the scope of EU competence gradually over the years. As shown in table 4-1, the Single European Act and the Maastricht Treaty significantly extended the powers

of the EU into new policy areas. Major EU policies relating to trade, investment, and economic integration are shown in table 4-2.²³⁴

Table 4-2: Major EU Policies²³⁵

Policy	Description
Tariffs	None between the member states; Common External Tariff (CET) imposed on imports from third countries.
Rules of Origin	None between the member states; impose common rules for the determination of the origin of goods imported into the EU from third countries.
Quantitative Restrictions and Import Licensing	None.
Customs Procedures	Customs procedures and formalities significantly reduced under the EC 1992 program. The 1997 Single Market Action Plan identifies eliminating all frontier controls as an issue to come to agreement by 1999.
Standards	The EC 1992 program significantly reduced technical barriers to trade through harmonization and mutual recognition of standards and testing and certification procedures.
Government Procurement	The EC 1992 program reduced discrimination and increased transparency in public procurement. It provides remedies for wronged suppliers. The legislation covers government entities throughout the EU, including private bodies operating on the basis of special or exclusive rights granted by governments.

²³⁴ The two intergovernmental policies (the last two "pillars" outlined in the Maastricht Treaty) are not discussed in this table.

²³⁵ For more information on these policies and programs that are not discussed elsewhere in this section, see generally EC TREATY; DELEGATION OF THE EUROPEAN COMMUNITY, *supra* note 233; *Europa* (1997) <<http://europa.eu.int>>; Action Plan for the Single Market, Communication of the Commission to the European Council, CSE(97) 1 final (June 4, 1997); Single Market Scoreboard, No. 1 (Nov. 1997) <<http://europa.eu.int/comm/dg15/en/update/score/score.htm>>; The Impact and Effectiveness of the Single Market, Communication from the Commission to the European Parliament and Council, COM(96)520 final. For a recent review of progress on fulfilling EC 1992 goals (e.g., in removing technical barriers), see MICHAEL CALINGAERT, EUROPEAN INTEGRATION REVISITED: PROGRESS, PROSPECTS, AND U.S. INTERESTS (1996). For IPR issues, see Commission Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM(97)628 final; *Promoting Innovation Through Patents: Green Paper on the Community Patent and the Patent System in Europe* (June 25, 1997) <<http://europa.eu.int/comm/dg15/en/intprop/indprop/558.htm>>. For AD/CVD regulation, see Council Regulation (EC) 384/96 on Protection Against Dumped Imports, 1996 O.J. (L 56/1); Council Regulation (EC) 3284/94 on Protection Against Subsidized Imports, 1994 O.J. (L 349/22).

Policy	Description
Intellectual Property Rights	Community Trademark may be registered with the Office of Harmonization in the Internal Market located in Alicante, Spain. Current European patent system not connected to the EU institutions. In a 1997 green paper, the Commission raised the issue of developing an institutional EU patent system. In copyright protection, harmonization continues with a recently proposed directive to further harmonize in accordance with WIPO obligations.
AD/CVD	Provisions relate only to imports from third countries and are exclusively enforced by the EU and not the Member States. Trade between Member States is governed by Community Competition policy.
Investment	Nondiscriminatory (freedom of establishment)
Subsidies	National subsidies to firms ("state aids") are permitted by the EU under certain circumstances. Other subsidies are administered by the EU itself in sectors such as agriculture and R&D, and for economic development.
Common Agricultural Policy	Goals are to guarantee the security of food supplies at stable and reasonable prices, improve productivity, and ensure farmers receive a fair return. An important foundation stone of the EU.
Common Transport Policy	Imposes common rules for international transport and conditions for third country carriers in the EU.
Services	Common market in services.
Competition Policy	Common rules to prevent member states from distorting competition by giving favored treatment to certain businesses and to prevent firms from forming cartels or abusing a dominant market position. Enforced by the Commission.
Social Dimension	Common rules in areas such as worker health and safety, working conditions, etc.
Environment	Common rules to protect the environment.
R&TD	Research and Technological Development Activities, e.g.: in-house; shared-cost or contract research (EU shares the cost with others, such as universities or firms); and EU ensures coordination of work at national level but does not supply funds.
Energy	Working toward common rules to eliminate obstacles to the free trade of energy.
Dispute Settlement	Court of Justice (ECJ), assisted by the Court of First Instance, ensures EC laws are interpreted and applied correctly. Resolves conflicts between EC and national laws. Commercial disputes are handled by national courts under national laws; all questions of interpretation of EC law are referred to the ECJ.

To carry out the EU's policies, its planners conceived a unique institutional structure. Unlike other international organizations, the EU structure is much more

developed and complex. Of the three pillars of the European Union, the first pillar, the European Communities (EC), is decidedly supranational in nature, while the other two are more intergovernmental. The EC, through joint action by the Council, the Commission, and, sometimes, the Parliament can enact legislation that is binding on all member states. Overall, EC institutions propose, adopt, and enforce EU legislation, which immediately takes precedence over national law.²³⁶ Alternatively, the institutions may issue directives to the Member States to amend their national laws to comply with the goals of the directive.

The major supranational EU bodies are the Commission, the Council of Ministers, the European Parliament, and the Court of Justice.²³⁷ The Commission is the executive arm and is responsible for proposing and implementing policies and legislation. The twenty Commissioners, two each from the larger member states (France, Germany, Italy, Spain and the United Kingdom) and one from each of the smaller member states, act independently of their national governments.

The Council of Ministers adopts the policies and measures proposed by the Commission. There are different councils for each major issue area; for example, agriculture ministers and energy ministers.²³⁸ The ministers represent the national governments of the member states and, when legislation requires qualified majority voting, their votes are weighted in proportion to the size of their country. Other decisions may require unanimity or simple majority vote.²³⁹

²³⁶ See Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1; Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585 ([EC law as] “an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions...without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”).

²³⁷ See EC TREATY pt. 5.

²³⁸ This division can lead to conflicting and overlapping legislation, since there is no effective coordination across the councils.

²³⁹ When a simple majority suffices, each member state has one vote. More often, decisions are made by qualified majority whereby votes are weighted so that the larger member states may exert more

(continued...)

Among other roles, the European Parliament issues opinions on proposals for legislation and in some areas, sharing powers with the Council, adopts legislation. The Parliament is composed of members directly elected by universal suffrage. As such, it is the only directly elected multi-state assembly in the world. Member states are represented in the Parliament in proportion to their national populations.

The European Court of Justice (ECJ) ensures that the treaties are implemented according to the rule of law. The ECJ, along with the Parliament, is by far the most unique supranational institution in the world. Along with a traditional international dispute settlement role for Member States disputing the provisions of the treaty and their implementation, the ECJ additionally takes on a role as the sole guardian and interpreter of the Treaties and all acts of the institutions. Its power in this regard supersedes national judicial interpretations of acts of the Community—in fact, any question of Community law raised in a national court must be referred to the ECJ for its interpretation of both the meaning and validity of the EC law.²⁴⁰ Moreover, the ECJ has the power to declare any national law in its areas of competency inconsistent with EC law, and essentially override the national law.²⁴¹ These last two facts ensure deeper integration as much as any other facet of the EU. Much like the United States Supreme Court, the ECJ provides uniform interpretation of EU law that is applicable to each Member State regardless of its own “sovereign” interpretation of the provision.

²³⁹ (...continued)
influence.

²⁴⁰ See EC TREATY art. 177 (lower national courts have the option of not referring to the ECJ; the highest appellate national courts must refer to the ECJ).

²⁴¹ See EC TREATY art. 177. The EU Supremacy doctrine arose in two seminal cases. See Case 6/64, *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, 1964 E.C.R. 585; Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA (II)*, 1978 E.C.R. 629. While not all EC rights have direct effects on EU citizens, those rights with direct effects pass directly to citizens, completely bypassing the national governments; once passed, citizens can directly enforce them in national courts. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

Table 4-3: European Union Institutions

Institution	Description
Council of the European Union	Intergovernmental Council of Ministers from each Member State. Primary legislative body in the EU. Acts upon proposals by the Commission. Votes either by unanimity or qualified majority voting.
European Parliament	626 Members serving five-year terms directly elected in EU-wide elections. Has some differing legislative rights depending on the area involved. Has approval rights of the EU budget.
European Commission	20 Commissioners form the EU's administrative and policy institution. Initiates and proposes all legislation. Each individual Commissioner is assigned to one or more policy areas (comprising 25 Directorates-General) to develop new policies and monitor the implementation of past legislation. Enforces EU competition policy. Initiates judicial actions against Member States that have failed to implement directives.
Court of Justice	15 Judges act as sole interpreters of the treaties and any legislation enacted thereunder. Rule in disputes between Member States, between Institutions, between a Member State and an Institution, and between private parties against Institutions, Member States, or other private parties. Acts as appellate court to Member State judiciaries where questions of EU law are raised in national civil and criminal disputes.

4.2(a) Completing the Internal Market

In 1985, the European Community began a program to stimulate growth and international competitiveness by increasing the economic integration of the internal market among its 12 member states. Economic stagnation, reduced European competitiveness, and the increasing ineffectiveness of Community institutions provided the impetus for agreement on further integration by the member-state governments. A White Paper issued in June 1985 by the EC Commission set out a timetable for the issuance of nearly 300 legal measures that were designed to abolish all remaining

obstacles to the free movement of goods, people, services, and capital among the member states.²⁴² The integration program was scheduled for completion by the end of 1992.

The single market program outlined in the White Paper contained measures covering the following topics: customs controls, standards, government procurement, competition policy, company law, taxation, intellectual property, financial services, transport, residual quantitative restrictions, and free movement of people. Follow on and flanking policies—such as the internal energy market, telecommunications, and the social dimension—have also been considered part of the program.

The four principle EC institutions each played a major role in the 1992 program. The Commission proposed internal market measures and enforced EC law, the Parliament reviewed and commented on the proposed measures, the Council approved and issued the measures, and the ECJ adjudicated matters involving the EC treaties and EC law. The Single European Act (SEA), which became effective in 1987, established the institutional framework for the 1992 program. The Act altered the legislative process by setting up a new cooperation procedure between the Council and the Parliament on certain issues, and introduced less than unanimous Council voting on most matters through qualified majority system.²⁴³

Internal market measures are issued primarily as regulations and directives. Regulations are binding in their entirety, generally and directly applicable in member states, and need no implementing legislation to ensure effectiveness. Directives instruct the member states only as to the result to be achieved but leave open the choice of the form and methods of implementation. The Commission, however, may bring suit in the ECJ against a member state for failure to properly implement a directive.

²⁴² Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final [hereinafter Completing the Internal Market].

²⁴³ See EC TREATY arts. 189(c) (cooperation procedure) & 100(a) (qualified majority voting).

The 1992 integration program met its deadline to the extent that the Commission and the Council passed most of the nearly 300 internal market measures called for in the 1985 White Paper. However, implementation of EC directives by the member states was less successful. The USITC, taking a broader definition of the 1992 program than the EU, examined the status of member-state implementation as of September 1993 and found that the implementation rate was about 81 percent. The USITC reported that implementation lagged in the areas of public procurement, intellectual property, the social dimension, telecommunications standards, and miscellaneous standards, where implementation rates ranged between 41.3 and 61.1 percent.²⁴⁴

By 1995, the EU Commission found that the member states had adopted 93.4 percent of the national measures required to implement the single market legislation.²⁴⁵ Implementation continued to lag in several key sectors: public procurement, intellectual property, and insurance. Priorities for EU action include achieving the liberalization of gas, electricity, and telecommunications markets, and “the challenge of streamlining the regulatory requirements imposed on businesses and individuals [with] less but better regulation at all levels: local, regional, and national as well as the Community level.”²⁴⁶

According to a 1995 study, in the view of most companies, one of the most important mechanisms for increasing competition within the EU was the single market program.²⁴⁷ However, according to that study many nontariff barriers remain, due to lack of enforcement of EU regulations, a failure to accept the principle of mutual recognition, and cases where national legislation exceeds EU requirements. They cited as a major problem inconsistent implementation of EU directives and differences in the enforcement

²⁴⁴ USITC, INV. NO. 332-267, PUB. NO. 2723, IMPLEMENTING THE EUROPEAN COMMUNITY SINGLE MARKET: SIXTH FOLLOWUP REPORT (1994) [hereinafter USITC, SIXTH FOLLOWUP REPORT].

²⁴⁵ The Single Market in 1995, Report from the Commission to the Council and the European Parliament (Feb. 2, 1996). [hereinafter *The Single Market in 1995*].

²⁴⁶ *Id.*

²⁴⁷ UNION OF INDUS. AND EMPLOYERS' CONFEDERATIONS OF EUR., RELEASING EUROPE'S POTENTIAL THROUGH TARGETED REGULATORY REFORM 17, 42, 46 (1995).

of directives between member states, which results in an “uneven playing field.” In certain cases, they claim, the transposition and enforcement of EU legislation is used by member states to create barriers to trade. Although problems continued, most observers agreed that the 1992 program was a remarkable success.²⁴⁸

In 1996, the Commission reported that the transposition rate for EU directives was progressing and averaged 90%; however, it noted that only 56% of the 1985 White Paper measures had been adopted by all the Member States.²⁴⁹ Additionally, the Commission observed the Council had not even legislated several key elements of the 1985 White Paper, including: measures regarding the free movement of persons, taxation issues, corporations law, and adjustment of existing legislation such as construction projects and financial services.

As a result of these successive studies, in 1997, the EU embarked on perhaps its final push at completing the Single Market effort with the adoption by the Amsterdam European Council of the *Action Plan for the Single Market*.²⁵⁰ The *Action Plan* identifies four strategic targets for internal market reform:

- Making the rules more effective (e.g., simplifying legislation, compelling implementation of outstanding directives);
- Dealing with key market distortions (e.g., eliminating tax competition, implementing an origin-based VAT system, strengthening competition policy by reducing state aids);
- Removing sectoral obstacles (e.g., lower barriers to services trade, improving inspection regimes); and
- Delivering Single Market benefits to individuals (e.g., eliminating border controls, promoting free movement of labor, protecting consumer rights).

²⁴⁸ See, e.g., CALINGAERT, *supra* note 235, at 34.

²⁴⁹ The Impact and Effectiveness of the Single Market, Communication from the Commission to the European Parliament and Council, COM(96)520 final at sec. 4.1 [hereinafter Impact and Effectiveness of the Single Market].

²⁵⁰ See generally Action Plan for the Single Market, Communication of the Commission to the European Council, CSE(97)1 final (June 4, 1997).

Progress on the results of the *Action Plan* will be reflected bi-annually with the *Single Market Scoreboard*.²⁵¹ As to the implementation of Single Market directives, this plan is already producing tangible results. As of Feb. 1, 1998, 79% of the Single Market directives had been implemented in all Member States—a significant improvement from the 56% of less than two years earlier.²⁵² Additionally, on an individual Member State basis, implementation averaged over 95%—improved from the 1996 levels of 90%.

4.2(c) Regulatory Reform

According to the EU Commission, “the whole objective of the single market legislation is to eliminate regulatory barriers to free movement.”²⁵³ Although new EU legislation was needed to accomplish the single market program, there was also an increase in mutual recognition of national legislation as functionally equivalent accompanied by national deregulation. The intent was not to extend the scope of regulation, but rather to reduce it where possible.²⁵⁴ For example, over half of the original White Paper measures addressed the elimination of standards-related barriers. In standards, the goal was mutual recognition of existing standards where possible, and harmonization in exceptional cases.

At the same time that the EU was establishing a regulatory framework under the internal market program, there was an effort to keep the EU’s rule-making in check. In 1993, the Maastricht Treaty introduced the principle of subsidiarity, which states that in areas that do not fall within its exclusive competence, the EU shall “take action...only if

²⁵¹ See generally EUROPEAN COMMISSION, SINGLE MARKET SCOREBOARD, NO. 1 (Nov. 1997).

²⁵² See *Informal Meeting of Internal Market Ministers, Cambridge, Feb. 13-14* (Feb. 16, 1998) <<http://europa.eu.int/comm/dg15/en/pdate/general/camb.htm>>.

²⁵³ *The Single Market in 1995*, *supra* note 245, at 4.

²⁵⁴ CALINGAERT, *supra* note 235, at 20.

and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”²⁵⁵ The EU continues to face pressures to lighten the regulatory burden.

This section analyzes three examples of regulatory reform arising from the Single Market effort: standards harmonization, public procurement, and transport regulation. Additionally, the discussion on telecommunications and financial services liberalization later in this section illustrate that the EU is attempting deregulation at the national level while developing a common regulatory policy.²⁵⁶

Standards

The EU’s efforts to address standards and conformity-assessment barriers to trade also have had a deregulatory effect. The EU had a long-standing program of harmonization of product standards regulations as a means of facilitating commerce among its member states. Only modest success was attained, however, and that success came at the cost of substantial delays and overly prescriptive regulation. A series of actions over the past 15 years gave fresh impetus to the EU’s efforts to dismantle standards-related obstacles to trade. The effect of these actions has been to dramatically reduce the scope of Community-level regulation and to make it more responsive to market forces.

EU level regulation on product standards is now generally goal- (versus process) oriented. In large segments of European industry (food, autos, pharmaceuticals and chemicals being the principal exceptions) the private sector develops the technical means

²⁵⁵ EEC TREATY art. 3(b) (as amended 1994).

²⁵⁶ However, continued state control over competition in key infrastructural sectors, particularly telecommunications, energy, and road transport, is perceived to remain a major cost to doing business. UNION OF INDUS. AND EMPLOYERS’ CONFEDERATIONS OF EUR., *supra* note 246, at 43.

to meet such regulatory goals and has a range of options for demonstrating conformity with them. A less recognized benefit has been that, by virtue of revisiting its already copious body of Community law on product standards, the EU has modernized its regulatory requirements to reflect the innovations in technology and governmental and private quality control that have occurred in recent years. This too has had a generally deregulatory effect.

The EU's biggest deregulatory push came with the advent of the Single Market Initiative in 1985, which fundamentally altered the EU's approach to standards-related regulation. A "new approach" to standards regulation was adopted that redefined—and thereby substantially narrowed—the range of products for which EU-wide uniform requirements would be set. Only products that pose risks to vital public interests—namely, animal, plant or human health and safety—or that threaten the environment or consumers would be regulated at the EU level.²⁵⁷ For all other products, the principle of "mutual recognition" would guarantee free movement.²⁵⁸

In addition to narrowing the range of products subject to EU-wide requirements, the new approach resulted in a faster and more targeted EU legislative process. For the goods subject to the new approach (generally capital goods), EU policy makers now had just two tasks: identifying the public interest in regulating the product and defining product characteristics that were essential to attaining these ends. These became known as "essential requirements."²⁵⁹ The private sector, in the form of European-level

²⁵⁷ These mirror the permissible national exceptions to free movement found in Article 36 of the Treaty of Rome; with implementation of the Single European Act in 1987, such exceptions are also found at Article 100 A of the Treaty. EEC TREATY arts. 36 and 100A.

²⁵⁸ The mutual recognition principle as it pertains to the standards area was first articulated in the European Court of Justice's landmark *Cassis de Dijon* decision. It requires member states to permit the free sale on their markets of any product lawfully made and marketed in any other member state unless it can demonstrate that a vital national interest recognized in the Treaty as justifying exceptions to free movement is at stake. See Case 120/78, *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494.

²⁵⁹ The requirements are "floors" not "ceilings" in that member states may impose higher standards if they have a vital interest in doing so as defined by the Treaty and if the means chosen is no more onerous (continued...)

standards-writing bodies, was then tasked with the technical work of elaborating the detailed product and process features that would ensure “essential requirements” were reliably met. The result are European Norms.

Manufacturers whose products conformed with these standards were often permitted to self-declare conformity with European requirements. Manufacturers were also permitted to demonstrate that an alternative technical solution attained the required result. Where a product was required to undergo outside testing, certification, or surveillance, manufacturers were often given a choice, both in terms of the conformity assessment procedures to be used as well as who, among a list of qualified bodies, would perform them.²⁶⁰

The EU’s single market has been largely successful in reforming product standards regulation and indeed in reshaping thinking about the need for and best means to safeguard the public. In addition to passing legislation for products subject to the “new approach,” a variety of measures were taken to harmonize requirements and procedures in the food, chemical, and automotive sectors. By 1995, nearly all the legislation needed to complete the standards agenda had been finally acted upon, and most of it has been

²⁵⁹ (...continued)

than necessary to attain the desired end. These national mandatory standards must be notified to the EU, as must all proposed technical regulations by member states under the so-called information procedure directive. Council Directive 83/189 of 28 March 1983 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1983 O.J. (L 109) 1. The information procedure was further strengthened in 1995 with passage of a Council decision requiring member states to notify the EU of national regulations preventing mutual recognition of products lawfully made and marketed in other member states.

²⁶⁰ To illustrate how this change in procedure permitted the EU to quickly enact broad-reaching legislation and at the same time increase the depth of private sector involvement in the standards-writing process, one EU “new approach” directive on machinery safety was passed in the span of two years. The directive affects thousands of kinds of machinery. (Previously, it had taken years to reach agreement on much narrower legislation.) The technical details still had to be ironed out, but they are being developed by the private standards institute CEN. CEN’s standardization program on machinery involves the drafting of more than 200 separate product standards. Only a few classes of machinery require third-party certification, compared with the past, where some member states required it for most machines.

transposed into national law at the member state level.²⁶¹ Perhaps most important, the foundations of a more coherent regulatory and technical support infrastructure had been laid—increasing communication, trust, and the likelihood that common solutions will be pursued.

There are a few areas where progress has been slow. The areas that lag are mostly those subject to the “new approach” that relate to technical infrastructure and/or rapidly evolving technology. Even in areas where legislation is complete, the threat of a proliferation of new national requirements remains. The Commission, which must be notified of national standards legislation and has been empowered to temporarily halt it if it poses a threat to the internal market, worries about the continued push by individual EU member states to impose new technical requirements, particularly in the environmental protection area.²⁶² Moreover, problems have been encountered at the operational level. Businesses still complain about differential interpretation of EU rules by member state authorities and conformity assessment bodies.²⁶³

Finally, foreign suppliers have fewer and less attractive options for demonstrating that their products conform with European requirements. Efforts to mitigate this problem, by negotiating mutual recognition agreements (MRAs), have been underway since 1992. In 1997, the United States and the EU agreed to a package of MRAs—including telecommunications, medical devices, electromagnetic compatibility, electrical safety, recreational craft, and pharmaceuticals—covering approximately \$50 billion in trans-Atlantic trade.²⁶⁴

²⁶¹ See *The Single Market in 1995*, *supra* note 245, at sec. 4

²⁶² *Id.* at 31-32.

²⁶³ See, e.g., INT’L SECTION, U.S. CHAMBER OF COMMERCE, *THE FUTURE OF TRANSATLANTIC TRADE RELATIONS* (1995).

²⁶⁴ USTR, Press. Rel. 97-54, *U.S., EU Reach Agreement on Mutual Recognition of Product Testing or Approval Requirements* (June 13, 1997). For the text of the agreement, see *Agreements Negotiated by the USTR*, <<http://www.ustr.gov/agreements/index.html>>.

Nevertheless, the standards component of the single market program is among the most successful in terms of progress achieved.²⁶⁵ The importance of the EU's success in this area is evident in the high rank standards has placed in the eyes of EU and U.S. businesses providing input into regulatory reform efforts. For example, the Transatlantic Business Dialogue report of November 1995 placed standards at the top of the list of business priorities for further U.S.-EU cooperation.²⁶⁶

Public Procurement

The 1985 White Paper cited discriminatory public procurement as "one of the most evident barriers to the achievement of a real internal market."²⁶⁷ Public purchasers in the EU relied almost exclusively on national suppliers. It was estimated that public-sector markets in 1986 represented 15 percent of the EU's GDP and that only about 2 percent of public contracts were awarded to firms in other member states. To correct the massive inefficiencies associated with these markets, the 1992 program introduced EU-wide rules requiring transparency and nondiscriminatory treatment. For all public contracts over a certain size, the public authority must publish the tenders in the Official Journal of the EC. To ensure competition, the directives specify procedures for the awarding of contracts and the criteria which may be used. The legislation covers

²⁶⁵ Ian and Pamela Barnes argue that standards harmonization increased rapidly after the 1985 "new approach" precisely because legislative efforts were limited to specific essential areas, while technical specifications were developed by outside standards organizations. IAN BARNES AND PAMELA BARNES, *THE ENLARGED EUROPEAN UNION* 62 (1995).

²⁶⁶ See Transatlantic Business Dialogue, *Seville Conference: Overall Conclusions* (Nov. 1995) <<http://www.mac.doc.gov/tabd/tabdrpt.htm>>.

²⁶⁷ Completing the Internal Market, *supra* note 242. For a history of the EU's public procurement policies, see Public Procurement in the European Union: Exploring the Way Forward, Green Paper Communication adopted by the Commission on Nov. 27, 1996. For a summary of the economic effects of completing the internal market for public procurement, see Keith Hartley, *The Single European Market*, in *THE EUROPEAN UNION HANDBOOK*, *supra* note 233, at 159, 160-164.

government entities as well as private enterprises operating on the basis of special or exclusive rights granted by governments.²⁶⁸

Despite the development of this legislation, the Member States have a “poor record of implementation of the procurement regime.”²⁶⁹ Additionally, even in those states that have fully transposed the EU directives, the results were inadequate—there have been twenty-seven infringement cases against Member States for legislation that does not meet the requirements of the directives.

Public procurement liberalization has been slow due to the strength of entrenched local and national interests and difficulties in administering and enforcing the new legislation.²⁷⁰ For example, the huge number of public purchases has proved difficult for the limited resources of the Commission to monitor and enforce.²⁷¹ However, despite these difficulties, there has been and there is likely to be a steady, gradual shift to more open markets.²⁷² And the Commission will continue to lead the effort because “[o]pen competition in public procurement is the key to a vigorous enterprise economy and successful Single Market.”²⁷³

²⁶⁸ USITC, INV. NO. 332-267, PUB. NO. 2628, THE EFFECTS OF GREATER ECONOMIC INTEGRATION WITHIN THE EUROPEAN COMMUNITY ON THE UNITED STATES: FIFTH FOLLOWUP REPORT 89 (1993) [hereinafter USITC, FIFTH FOLLOWUP REPORT].

²⁶⁹ For information on the current state of public procurement in the EU, see EU COMMISSION, DG XV, SPECIAL SECTORIAL REPORT NO. 1: PUBLIC PROCUREMENT (Nov. 1997), available at Special Sectorial Report No. 1: Public Procurement (Jan. 9, 1998) <<http://europa.eu.int/comm/dg15/en/publproc/sector/publrep.htm>>.

²⁷⁰ Indeed, public procurement is the second worse sector as to Member State implementation with only 45% of all directives fully transposed into national legislation. See SINGLE MARKET SCOREBOARD, *supra* note 251, at 3.

²⁷¹ The Commission recognized its efforts could not be sufficient: “[f]or the full benefits of procurement liberalisation to be achieved, more effort is needed both from *national* public authorities to implement the Directives and from purchasing entities to apply them to their procurement procedures.” Impact and Effectiveness of the Single Market, *supra* note 249, at sec. 3.6 (emphasis added).

²⁷² CALINGAERT, *supra* note 235, at 28-29, 121.

²⁷³ Impact and Effectiveness of the Single Market, *supra* note 249, at sec. 3.6. The Commission observes that in 1994 public procurement accounted for 11.5% of EU GDP with 110,000 public authorities required to follow EU procurement procedures. Despite the fact that only 15% of public authorities are

(continued...)

Transport

Transport Policy is embedded in the original Treaty of Rome itself which calls for the development of a Common Transport Policy.²⁷⁴ With few initiatives launched in the intervening years, it did not become an active issue until the 1992 single market effort began in 1985 with two major objectives.²⁷⁵ The first objective was to create a unified transport market among the Member States. This encompassed such measures as eliminating border controls, streamlining customs documentation requirements, and harmonizing technical and safety standards. The second objective of economic deregulation entailed removing barriers to entry and limiting governmental involvement in routing and pricing decisions.²⁷⁶

In its 1985 White Paper, the Commission identified its major goal for the air-transport sector as that of increasing competition.²⁷⁷ To achieve this goal, it advocated measures to change the system for the establishment and approval of tariffs and measures to limit the rights of government bodies to restrict capacity and access to the market. The Council accordingly adopted three "liberalization packages" in 1987, 1990 and 1992 that:

²⁷³ (...continued)

actively participating in the new procurement regime, a survey of 1,600 suppliers revealed that the EU market opening initiatives have led to 44% of the respondents winning new business opportunities. *Id.*

²⁷⁴ EEC TREATY arts. 74 and 3(f).

²⁷⁵ See generally USITC, FIFTH FOLLOWUP REPORT, *supra* note 268, at 111, 115-16; USITC, SIXTH FOLLOWUP REPORT, *supra* note 244, at 3-15; Completing the Internal Market, *supra* note 242, at 29-30; The Single Market in 1995, *supra* note 245, at 53; CALINGAERT, *supra* note 235, at 24; CLIVE H. CHURCH AND DAVID PHINNEMORE, EUROPEAN UNION AND EUROPEAN COMMUNITY: A HANDBOOK AND COMMENTARY ON THE POST-MAASTRICHT TREATIES 130-136 (1994).

²⁷⁶ EU transport initiatives generally focus on a particular sector—air transport (including both passenger and freight), surface transport (including trucks, passenger buses, barges, combined motor-rail and motor-barge services, and to a limited extent railroads), or ocean transport (carriage of goods in ocean vessels).

²⁷⁷ See Completing the Internal Market, *supra* note 242.

- restricted the scope of capacity-sharing agreements between airlines that were then in effect on most passenger routes between points in different Member States;
- restricted member states' ability to regulate changes in passenger fares, liberalized the conditions under which new carriers could enter the market, and further restricted the scope of capacity-sharing agreements; and
- limited Member States' ability to regulate fares, eliminated most capacity restrictions and barriers to entry for EU carriers that desire access to routes between member states, and granted limited rights to perform cabotage—the transportation of passengers by a carrier licensed in one member state between two points in another member state.

In surface transport the White Paper described two priorities: eliminating frontier checks in carriage by road; and easing capacity and entry restrictions pertaining to motor transport. To help achieve the first objective, the Council eliminated in 1989 the requirement that persons engaged in EU transit operations submit (or “lodge”) a transit advice note to the customs office at the border of each member state through which a shipment is transported. The EU additionally adopted numerous initiatives to reduce the scope and number of border checks for surface transport operations. To ease the capacity and entry restrictions, the Council pursued several initiatives in 1991 and 1992, including: abolishing the quota system that controlled access to the market for international carriage of goods by road, standardizing licensing of carriers engaging in bus and coach transport between member states, granting limited cabotage rights for road-passenger-transport systems, and eliminating most cabotage restrictions in inland waterway transport. Legislation adopted in 1993 will result in elimination of all restrictions concerning cabotage rights for motor carriage of goods by July 1, 1998.

The principal objectives of the White Paper in the ocean-transport sector were to permit the freedom to offer ocean-transport services between member states and to set rules of competition. Regulations in 1986 addressed the application of EU competition law to ocean transport and ensuring the right of citizens of one member state to provide maritime-transport services among other member states. In 1992, the Council partly

liberalized cabotage in ocean transport, although put off complete liberalization until 2004.

In addition to the White Paper measures, the Council also adopted measures designed to harmonize standards in the area of transport services notably in the areas of transport's effect on the environment, safety standards, and a harmonized transportation infrastructure system. Despite the fact that EU transport initiatives, especially those concerning competition and economic regulation, appeared mostly in the form of regulations directly applicable to member states, implementation in the transport sector is the lowest of all single market initiatives: the Member States have implemented only 40% of the transportation directives.²⁷⁸

4.2(d) Competition Policy

Unlike the Single Market initiatives, EU competition policy does not rely on the harmonization of Member States legislation. Instead, the Treaty of Rome creates a supranational authority in the Commission for the regulation of anticompetitive practices that may affect trade between Member States—in doing so, the Treaty of Rome replaces AD/CVD law between Member States with the EU's common rules on competition. Member States still maintain their own competition laws and use them frequently when the Commission does not challenge an anticompetitive practice.

In general, EU competition policy is broader than U.S. antitrust regulation. It includes the control of state aids, deregulation, and antitrust issues and is applied primarily by articles 85, 86, 90, and 92 of the Treaty of Rome, as well as by the Merger Regulation and several block exemption regulations.²⁷⁹ The scope extends to restrictive

²⁷⁸ See SINGLE MARKET SCOREBOARD, *supra* note 251, at 3.

²⁷⁹ For detailed discussions of EU competition policy, see generally Eleanor M. Fox, *US and EU Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY 339 (Edward M. Graham & J. David (continued...))

practices, abuses of dominant positions, and the impact that publicly owned or regulated monopolies and state aids may have on competition and trade within the EU. However, since deregulation and state aids are covered elsewhere in this chapter, this section will focus on restrictive business practices and abuses of dominant positions.

Structured much like the United States' Sherman Act, the Treaty of Rome targets two methods of anticompetitive behavior: article 86 concerns acts by a single firm; article 85 concerns practices among multiple firms. Article 86 per se prohibits abuses by those firms in a dominant position, including: monopoly or predatory pricing, limiting markets or production to the prejudice of consumers, refusals to deal, and imposing conditional or tying contracts or agreements.²⁸⁰ Article 85(2) automatically voids any horizontal or vertical agreement between firms—and makes illegal any concerted practices—that has anticompetitive effects on trade among the Member States, including the following types of practices: price fixing, joint agreements to limit production, market division, price discrimination, and exclusive contracts.²⁸¹ Under article 85(3) and through subsequent legislation, however, a firm can escape this broad prohibition if the firm: notifies the Commission of its arrangement; qualifies for a block exemption; or does not enter into an agreement that creates market share above a certain threshold percentage.

²⁷⁹ (...continued)

Richardson, eds., 1997); Kalypso Nicolaïdis & Raymond Vernon, *Competition Policy and Trade Policy in the European Union*, in *id.* at 271; G. BERMAN, R. GOEBEL, W. DAVEY & E. FOX, *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* (1993); *COMPETITION AND ECONOMIC INTEGRATION IN EUROPE* (Saul Estrin & Peter Holmes, eds., 1998); *COMPETITION LAW AND POLICY IN THE EUROPEAN UNION* (Claus Dieter Ehlermann & Laraine Laudati, eds., 1998); EU COMMISSION, XXVITH REPORT ON COMPETITION POLICY - 1996 (1997) [hereinafter XXVITH REPORT]; Jeffrey Harrop, *European Union Competition Policy*, in *THE EU HANDBOOK*, *supra* note 233, at 167; IAN BARNES & PAMELA BARNES, *THE ENLARGED EUROPEAN UNION* 212-222 (1995).

²⁸⁰ EC TREATY art. 86. The ECJ has laid out definitions for what kind of market share constitutes "dominance." See *Case 85/76, Hoffman-La Roche v. Commission*, 1976 E.C.R. 461 (defining dominance in terms of market share); *Case C-62/86, AKZO Chemie BV v. Commission*, 1991 E.C.R. I-3359 (citing 40-50% as possible examples of dominance).

²⁸¹ EC TREATY art. 85.

If a firm notifies the Commission of its agreement under Regulation 17, the firm argues that while the agreement may, on its face, violate the prohibitions of article 85(1), it should nevertheless be allowed because it is good for either competition or consumers.²⁸² Until the firm notifies, the agreement is per se void and the Commission cannot make any negative clearance determinations under article 85(3). If the Commission chooses not to challenge the notified agreement, it will be considered legal.

Since so many agreements were notified to the Commission early in the EC's history, the Commission issued block exemptions for certain classes of agreements that would be considered legal without notification if they met the terms of the exemption. As such, the Commission exempted certain categories of exclusive distribution agreements, exclusive purchasing agreements, service station franchises, specialization agreements, research and development agreements, franchise agreements, and technology transfer agreements.²⁸³ Currently, the EU is considering new approaches to vertical restraints other than the exemption approach. Because of the potential competition enhancing effects of vertical agreements, the Commission has proposed four alternatives: maintaining the current system; widen the existing block exemptions; narrow the scope of applicability to firms with less than 40% market share in their relevant market; or create a rebuttable presumption of compliance with 85(1) for agreements between firms with less than 20% aggregate market share.²⁸⁴

Finally, the Commission has indicated that, while possibly still illegal, agreements in violation of article 85(1) will not be prosecuted if the parties to the agreement hold a combined market share of less than 5% (for horizontal agreements) or 10% (for vertical

²⁸² Council Regulation No. 17, art. 4, 1959-1962 O.J. SPEC. ED. 87.

²⁸³ Commission Regulation 1983/83, 1983 O.J. (L 173) 1 [exclusive distribution]; Commission Regulation 1984/83, 1983 O.J. (L 173) 5 [exclusive purchasing]; Commission Regulation 417/85, 1985 O.J. (L 53) 1 [specialization]; Commission Regulation 418/85, 1985 O.J. (L 53) 5 [research and development]; Commission Regulation 4087/88, 1988 O.J. (L 359) 46 [franchise agreements]; Commission Regulation 240/96, 1996 O.J. (L 31) 2 [technology transfer].

²⁸⁴ See Green Paper on Vertical Restraints in EC Competition Policy, COM(96) 721 final.

agreements).²⁸⁵ However, the Commission will continue to investigate horizontal agreements designed to fix prices, limit production or share markets, and vertical agreements designed to fix resale prices or grant exclusive territories.

In its regulation of these practices, the Commission does not have the traditional powers of a government and cannot make these practices illegal; however, the Commission is able to impose fines for violations.²⁸⁶ These fines can range up to ECU 1 million or 10% of worldwide turnover of the firm, whichever is greater.²⁸⁷

Procedurally, under Regulation 17, the Commission has a great deal of authority to investigate violations of articles 85 or 86—whether the investigations were instigated under the Commission's own authority, a complaint by another firm, or through a Regulation 17 notification.²⁸⁸ It can request any kind of information from the accused firms which will be subject to penalty for failure to comply with the request. Finally, it can conduct "dawn raids" of any firm whereby Commission representatives will enter the premises, seize records, and interrogate employees on the spot to discover evidence of the violations. Throughout the 1990's, Directorate IV of the Commission has investigated a number of possible violations of the Treaty of Rome. In 1996 alone, it began 471 new investigations.²⁸⁹

The Treaty of Rome does not expressly address the anticompetitive problems raised by mergers. As such, early EC policy did not challenge mergers as anticompetitive; in fact, the Commission encouraged mergers as a method of making EC

²⁸⁵ Notice on Agreements of Minor Importance which do not Fall within the Meaning of Article 85(1) of the Treaty establishing the European Community, 1997 O.J. (C 372) 4. However, the Commission indicated that national authorities may still challenge agreements falling under the thresholds. *See id.* at ¶ 8; Commission Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling within the Scope of Articles 85 or 86 of the EC Treaty, 1997 O.J. (C 313) 3.

²⁸⁶ EC TREATY at 87(3)(a).

²⁸⁷ Regulation No. 17, *supra* note 282, at art. 15.

²⁸⁸ *See generally id.* at arts. 10 and 14.

²⁸⁹ *See XXVIth Report on Competition Policy (1996), at Graph 1, COM(97) 628.*

firms more competitive globally.²⁹⁰ However, as the 1992 Single Market deadline approached, the EC found it necessary to squarely address the issue of mergers. In 1989, under its general authority to promote the Common Market and competition policy, the Council promulgated its Merger Regulation.²⁹¹ The Merger Regulation charges the Commission with the duty of determining whether a particular proposed merger will significantly impede effective EC competition. Procedurally, the Regulation and the Commission require all proposed mergers between firms above a certain size²⁹² to notify their intended merger to the Commission.²⁹³ Upon notification, the Commission will decide whether to investigate the merger or not. If the Commission assumes authority over the merger, then EC law directly trumps the national Member State laws on merger controls—this is significantly different than U.S. antitrust law which allows for parallel merger regulation at both the state and federal levels.²⁹⁴

One of the primary questions in any competition investigation—from mergers to cartel agreements to abuses of a dominant position—is determining the market share of

²⁹⁰ See BERMAN ET AL., *supra* note 279, at ch. 24; Fox, *supra* note 279, at 348.

²⁹¹ Council Regulation 4064/89 on the Control of Concentrations between Undertakings, 1989 O.J. (L 395) 1, as amended by Council Regulation 1310/97 (June 30, 1997).

²⁹² Size is measured on a complex calculation based upon “turnover” within the EU. This turnover has a global requirement, a much lower EC requirement and, sometimes, a requirement as to the concentration of turnover in a particular Member State. The turnover requirements were amended in 1997 to go into effect in March, 1998. See *id.* at art. 1. It is significant that the EC does not require that the firms be domiciled or based within the EC. As such, this turnover requirement allowed the Commission to dictate several amendments to the recently proposed merger between two U.S. aerospace companies, Boeing and McDonnell Douglas. For the results of that merger notification, see Commission Decision 97/816 of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M. 877 - Boeing/McDonnell Douglas), 1997 O.J. (L 336) 16 [hereinafter *Boeing/McDonnell-Douglas*].

²⁹³ The firms submit a form detailing the effects of the merger, including: the annual turnover of the firms, a definition of the relevant product and geographic markets, approximate market shares of all relevant market participants, barriers to entry in that market, and other economic factors. See Commission Regulation No. 3384/94, at Annex (Form CO Relating to the Notification of A Concentration Pursuant to Regulation No. 4064/89), 1994 O.J. (L 377) 1. Although the substantive regulations are unclear as to what may be an anticompetitive level of concentration, the Form only requires the firms to provide information on the relevant markets if the merger will result in joint market share above 15% (for horizontal mergers) or 25% (for vertical mergers). *Id.* at § 6.

²⁹⁴ See Fox, *supra* note 279, at 348.

the participants. In order to answer that question, however, it is necessary to define what the relevant market consists of. The EU has been relatively slow to conclusively define, in an economic sense, what the relevant market is. In the merger context, the Commission finally laid out a framework for determining what the relevant market consisted of in its landmark decision in *Nestlé/Perrier*.²⁹⁵ In their proposed merger of their bottled water businesses, the two firms attempted to argue that the relevant market of their products was so broad as to include everything from bottled water to Coca-Cola. Using an economic approach, the Commission applied a “small but significant and non-transitory increase in price” (“SSNIP”) test to determine the cross-elasticity of demand for consumers of Nestlé’s bottled water products and found that with a very loss cross-elasticity of demand, a merged Nestlé/Perrier could profitably raise prices without any significant loss of demand.²⁹⁶ The Commission finalized this economic approach to defining relevant market in late 1997.²⁹⁷ In that notice, the Commission created a two-factor definition for relevant market: geography and product. And, in its definition of the relevant product market, cemented the SSNIP test into Community law. Nevertheless, EC merger control remains a much more political process than its U.S. counterpart.

The Commission is also beginning to accept other traditional forms of merger analysis. For example, in its decision on the Boeing/McDonnell-Douglas merger, while not applying it, the Commission recognized that the “failing firm” defense could possibly

²⁹⁵ See Commission Decision of 22 July 1992, 1992 O.J. (L 356) 1 [hereinafter *Nestlé/Perrier*].

²⁹⁶ In more basic terms, the consumer response to a SSNIP would not be significant; consumers would not switch to other types of drinks. If consumers would switch in response to a SSNIP, then that beverage switched to would be included in the relevant product market. The SSNIP test failure, when coupled with the high barriers to entry in the European bottled water market (because of brand-conscious Euro-consumers that would only purchase the brand names owned by the two firms), effectively caused the Commission to propose modification in the merger terms before it would issue its approval. The Commission finally approved the merger with an agreement by Nestlé and Perrier that they would sell off some of their brand names to others in the market so as to lower the barriers to entry.

²⁹⁷ See Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 3.

be used to allow monopoly mergers to proceed if one of the firms is no longer a viable competitor.²⁹⁸

Despite a new willingness to approach mergers on a more economic basis, the Commission still will rarely block a merger outright. For example, in 1996, of the 125 decisions taken on 131 notifications of mergers and joint ventures to it, the Commission only questioned ten agreements; of those, it only absolutely blocked three—the rest were approved with subsequent modification, upon further investigation or referred to national authorities.²⁹⁹ Both the Boeing/McDonnell-Douglas and Nestlé/Perrier cases are illustrative; despite being hotly contested by the Commission, both agreements were subsequently approved following modifications of the merger agreements. The future, however, may find a more proactive Commission willing to attack major parts of merger agreements. Some evidence may be found in the current merger investigation regarding two U.S. telecommunications companies, Worldcom and MCI, and their dominance of the Community Internet market—with forced divestiture of Worldcom's European Internet holdings a possible outcome. Its treatment of the Citibank/Traveller's arrangement will also be closely watched in the U.S.

4.2(d) Free Movement of Capital: Investment Liberalization

Articles 52-58 of the Treaty of Rome extended the right of establishment and the right to do business throughout the Community to any company, irrespective of ownership, formed in accordance with the law of a member state and having its registered office, central administration or principal place of business within the EC.³⁰⁰ Consequently, there are no local ownership requirements between the member states. Investment is generally open, except in certain sectors, notably services.

²⁹⁸ See *Boeing/McDonnell-Douglas*, *supra* note 292.

²⁹⁹ See XXVITH REPORT ON COMPETITION POLICY (1996), at sec. III-G (1997).

³⁰⁰ EC TREATY arts. 52-58.

So that the right of establishment is not diluted by an investor's inability to bring money into the investee Member State, the Treaty additionally eliminates all national legal barriers to the movement of capital between Member States and any discrimination based upon the nationality of the party involved.

Partly because the Treaty is so specific, efforts to facilitate investment have not resulted in a formal EU policy on investment as such, but rather policies aimed at regulatory reform in specific service sectors and broader policies aimed at eliminating distortions in the flow of investment funds. For example, the Commission sets upper limits for state aid in respect of investment, to prevent the development of "subsidy races" as governments compete to attract investment.³⁰¹

The single market program contained measures in company law and taxation designed to facilitate cross border operations by enterprises. Some progress was made, but much remains to be done. Opposition to provisions on worker rights has stalled progress in the area of company law. In the area of taxation, differences between the member states in their tax treatment of savings and the lack of harmonization of withholding taxes continue to distort investment flows. For example, Luxembourg has no tax on savings and thus, has attracted huge investment funds. Reportedly, there has not been much pressure for harmonization of tax systems and rates from companies because they believe the ability to operate in many national markets affords a competitive advantage.³⁰²

³⁰¹ *Trade Policy Review: European Union* (June 30, 1995).

³⁰² CALINGAERT, *supra* note 235, at 23, 32, 123.

Free Movement of Services

Efforts at regulatory reform in specific sectors should result in a more investment-friendly environment. As the two case studies point out, regulatory reform in financial services and telecommunications should ensure the rights of freedom of establishment and the free movement of services, as recognized in the Treaty of Rome.

Liberalization of Financial Services

In the EU, the financial services sector has made commendable progress in market liberalization during the single market exercise, but real liberalization has thus far been limited primarily to national taxation, accounting, contract law requirements, and exchange-rate uncertainties among EU member states. Despite the Community's formal efforts at financial services liberalization, impending monetary union should surpass the EU's regulatory efforts and bring truly significant liberalization to Europe's financial markets.

As laid out in the 1985 White Paper, the single market concept for financial services was based on harmonization of essential standards regarding authorization to operate, supervision, and prudential rules. However, little progress was made until the breakthrough Second Banking Directive was agreed to in December 1989.³⁰³ This breakthrough established the precedent of cross-recognition of national rules, rather than harmonization of such rules, and thus made possible much faster progress, in all financial sectors, towards single market goals by establishing the principle of home-member state control across the EU and a single passport for financial services companies throughout the EU. Some 40 EC Directives, now passed and increasingly implemented, deal with capital movements, banking, insurance, securities trading, investment, and a host of related financial sector services and specialties.

³⁰³ Council Directive 89/646, 1989 O.J. (L 386) 1.

These directives have resulted in some significant merger and acquisition activity across EU borders, as well as foreign investment. In London, for example, several British stockbrokers were bought by other EU banks.³⁰⁴ Also, for example, the directives have had a major effect in expanding competition in the German insurance sector, but the effect has been considerably more muted than originally expected.³⁰⁵

Many of the major EU financial services directives were not implemented until 1994 or later, so the short time they have been in effect may also help account for the so-far modest effects of liberalization. Because many of the interpretations of the directives are being challenged in national courts, the European Court has had scant opportunity to deliver definitive opinions on these directives.

There exists, however, many other recognized impediments that prevent increased trade liberalization. A major one is the failure of EU member states to harmonize taxation policies in the financial sector. From life insurance sales, stock market transactions, mortgage requirements for home buying, to reserve requirements for banks, EU member states offer tax advantages to companies and individuals who purchase their required financial service from a domestic firm, rather than a foreign one (which includes other EU member state firms). Another remaining difficulty is the lack of a EU-wide accounting standard. Companies expanding or crossing member state lines must thus face all the difficulties of differing accounting systems. A related difficulty is the general failure to harmonize contract law, making uncertain which member state law applies to cross-border transactions.

On July 1, 2002, Europe will attempt a task never before achieved among sovereign nation-states by replacing national currencies with the first pan-European

³⁰⁴ *In Memoriam*, *ECONOMIST*, Oct. 26, 1996, at 92. Such merger and acquisition activity is likely due to many factors, of which the EU single market program is but one. Such major British firms as Morgan Grenfell and Kleinwort Benson are now in German hands; S.G. Warburg is Swiss-owned.

³⁰⁵ *E.g.*, PAOLO CECCHINI, *THE EUROPEAN CHALLENGE*, 1992 (1988) (a hugely influential study commissioned by the EC Commission).

currency since the Roman Sestertius over 2,000 years ago. On that day, July 1, 2002, the Euro will become the only legal tender in the eleven prospective members of the European Monetary Union (EMU).³⁰⁶

While uncertain at times in the past, the path to monetary union is now all but certain. On Euro-day, January 1, 1999, the eleven EMU Member States will permanently fix the exchange rates of their national currencies to the Euro and will begin using the new currency for a period of three years in commercial financial transactions.³⁰⁷ On January 1, 2002, dual pricing will begin throughout the EU and the Euro itself will begin to circulate. Six months later, national currencies within the EU will cease to be accepted.

The EU's path to EMU most directly began with the Maastricht Treaty's amendments to the Treaty of Rome as envisioned by the Single Market Plan.³⁰⁸ At the inception of the European Union in 1994, the Member States created the European Monetary Institute (EMI) as the forerunner to the European System of Central Banks (ESCB) and its primary bank, the European Central Bank (ECB).³⁰⁹ More recently, at the Amsterdam European Council Meeting in June 1997, the Council of Ministers set forth

³⁰⁶ EMU participants currently include Belgium, Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal and Finland. See Commission Recommendation for a Council Recommendation in Accordance with Article 109j(2) of the Treaty (Mar. 15, 1998), *available at* EURO 1999, Convergence Report 1998 (Mar. 25, 1998) <http://europa.eu.int/comm/off/rep/conver/recom_en.htm>. For general background on the introduction of the Euro and the variety of problems and issues surrounding it, see EUROPEAN COMMISSION, DG II, ECONOMIC & FINANCIAL AFFAIRS, THE EURO: EXPLANATORY NOTES (Feb. 1998); Welcome to the Euro, <<http://europa.eu.int/euro/default.asp?lang=en>>. The Council has adopted specifications on the look of the new euro coins and paper currencies. Council Resolution 5145/98, Jan. 19, 1998.

³⁰⁷ For a description of how central banks and finance ministries will set the exchange rates without traumatically disturbing the financial markets, see EUROPEAN UNION, JOINT COMMUNIQUE ON THE DETERMINATION OF THE IRREVOCABLE CONVERSION RATES FOR THE EURO (May 2, 1998), *available at* Welcome to the Euro, <<http://europa.eu.int/euro/default.asp?lang=en>>.

³⁰⁸ EEC TREATY arts. 3a, 102a-109m.

³⁰⁹ Because Denmark formally opted out of the ESCB and the ECB in its accession to Maastricht, the Statute creating and governing the ESCB and the ECB was designed as a protocol annexed to the TEU. See PROTOCOL (N° 3) ON THE STATUTE OF THE EUROPEAN SYSTEM OF CENTRAL BANKS AND OF THE EUROPEAN CENTRAL BANK, 1992 O.J. (C 191) 68-79.

the final legal implementation steps for the Euro as January 1, 1999 and officially replaced Europe's prior basket "currency," the ECU, with the Euro.³¹⁰ In May, 1998, the Council, with assistance from the Commission and EMI, determined that all the countries seeking participating in EMU met the conditions set forth by the Commission and would join in 1999.³¹¹ Finally, EMU created the ECB, which will come into existence in 1999, as a new separate and independent institution to set and coordinate macroeconomic and fiscal policy in conjunction with the national central banks, with its principal objective being to manage price stability throughout the EU.

The effect of the Euro's introduction on financial services trade both within Europe and globally is probably inestimable at this point—indeed, its effects on the single market, and regional integration altogether, may be even more profound.³¹² Even the mere preparation by some countries to bring their deficits below the 3% of GDP required for qualification to EMU has already had a tremendous impact on those countries' GDP growth rates.³¹³

Clearly, with EMU, the EU is at a potential turning point. The financial sector will be especially impacted by the single currency and central bank. All financial institutions of EMU members will be required to furnish all statements to their customers in both the local national currency and the new Euro for a three year period following the implementation of the single currency. Given all these circumstances, it is not surprising that further liberalization of the EU financial sector has been delayed. With monetary union certain to proceed from this point onward, there will be profound effects on the

³¹⁰ Council Regulation 1103/97 of 17 June 1997 on Certain Provisions Relating to the Introduction of the Euro, 1997 O.J. (L 162) 1.

³¹¹ EUROPEAN UNION, JOINT COMMUNIQUE ON THE DETERMINATION OF THE IRREVOCABLE CONVERSION RATES FOR THE EURO (May 2, 1998), *available at* Welcome to the Euro, <<http://europa.eu.int/euro/default.asp?lang=en>>.

³¹² See e.g., COMMUNICATION FROM THE COMMISSION: THE IMPACT OF THE INTRODUCTION OF THE EURO ON CAPITAL MARKETS, Comm. Doc. No. II/338/97 - EN - 2 (Euro Paper No. 3, 1997).

³¹³ See DG II, ECONOMIC & FINANCIAL AFFAIRS, EUROPEAN COMMISSION, DOC. II/33/98, GROWTH AND EMPLOYMENT IN THE STABILITY ORIENTED FRAMEWORK OF EMU (1998).

further integration and consolidation of the EU financial sector, and its continued liberalization.

Liberalization of Telecommunication Services

As of January 1, 1998, the EU has successfully constructed a fully-liberalized competitive telecommunications market.³¹⁴ The progressive liberalization of the EU telecommunications sector has spanned one decade and involved 15 member states with vastly different economic and political situations, ranging from the lesser developed, tightly regulated members, such as Ireland, Greece, and Portugal, to the more developed, liberalized members, such as the United Kingdom, Sweden, Finland, and Austria.³¹⁵

Regulation of the formerly national telecommunications service markets resulted in the retention of domestic monopolies. In particular, regulation placed strict limitations on the participation of foreign carriers in the national markets. Restrictions on operating licences and the regulation of both tariffs and cross-subsidizations were factors that impeded the creation of effective, competitive telecommunications markets.³¹⁶

The United Kingdom (UK) was the first to embrace a liberalized telecommunications sector in 1983, by creating the independent regulatory body, OFTEL, following the privatization of more than one-half of British Telecom (BT). Four years later the EC released a Green Paper that obliged each Member State to create an independent regulatory organization, which was considered necessary prior to the

³¹⁴ See Directorate General XIII, European Commission, Doc. No. DGXIII/A/1, Status Report on European Union Telecommunications Policy (Jan. 1998).

³¹⁵ Greece, Ireland, and Portugal have been granted a five year extension for the liberalization of their telecommunication markets. Commission Decision 97/607, 1997 O.J. (L 245) 6 [Greece]; Commission Decision 97/114, 1997 O.J. (L 41) 8 [Ireland]; Commission Decision of 12 February 1997, 1997 O.J. (L 133) 19 [Portugal]. Luxemburg has been given a two year extension due to the small size of its network. Commission Decision 97/568, 1997 O.J. (L 234). Spain has until the end of 1998 to open its telecommunication sector to competition. Commission Decision of 10 June 1997, 1997 O.J. (L 243).

³¹⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN ECONOMY SOCIAL EUROPE 299 (1993).

introduction of competition in the telecommunications services market.³¹⁷ In 1988, the Commission released its first directive on competition in the telecommunications terminal equipment market,³¹⁸ and followed it in 1990 with a more comprehensive directive on competition in the telecommunications service markets.³¹⁹

With the 1996 full competition directive, the Commission amended the 1990 directive, to correct for the failure of certain member states to implement it in accordance with the “spirit” of the previous directive.³²⁰ For example, there were complaints that certain telecommunication organizations still controlled access to their network at the expense of competitors in the services market, and that providers still applied excessive tariffs and improperly used information acquired as infrastructure providers to target potential clients. It also appeared that certain members were imposing obligations on new entrants that were “not in proportion with the aims of general interest.”³²¹ It was also reported that certain member states were maintaining exclusive rights to the provision of telephone directories and inquiry services, as well as cross-subsidizing certain categories of calls by charging higher rates on one type of call in order to subsidize another type of call.

The 1990 directive on competitiveness did not address mobile telephony. Although many member states had opened their mobile communication service sectors to competition and introduced licensing schemes after the 1990 directive, a number of members still maintained restrictions or preserved monopoly control over certain mobile personal communication services. The 1996 directive, amending the 1990 competitiveness directive, remedies this incongruity by providing for the transparent

³¹⁷ Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290.

³¹⁸ Council Directive 88/301, 1988 O.J. (L 131) 73.

³¹⁹ Council Directive 90/388, 1990 O.J. (L 192) 10.

³²⁰ Council Directive 96/19, 1996 O.J. (L 74) 13.

³²¹ *Id.* at para. 9.

allocation of cellular licences for radio frequencies and stipulating that frequencies may be limited based solely upon physical limitations.³²² Members are also obligated to grant mobile telephone operators access to telecommunication networks on a non-discriminatory basis. Although this directive establishes the parameters for a competitive mobile and personal communication market, it does give preference to the use of Pan-European standards.

The use of cable TV networks for the provision of telecommunication services was also excluded from the original 1990 directive. Although one member state already permitted the use of cable TV networks for voice telephony, other members maintained severe restrictions on the provision of telephony services over cable networks. This aspect of the 1990 directive was amended in 1995 to require all the Member States to “abolish all restrictions of the supply of transmission capacity by cable TV networks and allow the use of cable networks for the provision of telecommunications services, other than voice telephony.”³²³

In November 1990, the EU released a Green Paper on satellite services defending the view that there should be competition in both the space and earth segments.³²⁴ Several members subsequently opened up some satellite communications services to competition and introduced licencing schemes. Nevertheless, certain licencing procedures remained less than transparent, and some restrictions on telecommunication equipment remained. The EC amended this aspect of the 1990 directive in 1994, and further liberalized the satellite service sector.³²⁵ However, the content of satellite broadcasting services to the general public continues to be subject to specific rules adopted by Member States in accordance with Community law. The Commission recognized that this lack of

³²² Council Directive 96/2, 1996 O.J. (L 20) 2.

³²³ Council Directive 95/51, 1995 O.J. (L 256) 49.

³²⁴ Green Paper on a Common Approach in the Field of Satellite Communications in the European Community COM (90) 490.

³²⁵ Council Directive 94/46, 1988 O.J. (L 268) 1.

conformity has reduced the EU's competitiveness in the global markets for satellite services, and proposed an action plan to improve the EU's global position.³²⁶ In addition to enforcing the current internal market harmonization measures, the Commission will develop a regulatory plan to eliminate any additional market barriers.

4.2(e) Conclusion

Of all of the liberalization efforts examined in this work, the European Union clearly comes closest to achieving the ideals of a truly contestable market and Cordell Hull's vision. The EU is more than a customs union or a common market, it is moving towards a nearly complete political union. Investment is generally unimpeded in the EU—firms have the right of establishment and the right to do business throughout the Community, irrespective of ownership, formed in accordance with the law of a member state and having its registered office, central administration or principal place of business within the EC. As such, there are no local ownership requirements, and legal barriers to the movement of capital between Member States has been eliminated.

Regulatory reform has also made significant inroads within the EU. There has been an increase in mutual recognition of national legislation as functionally equivalent accompanied by national deregulation, which has not sought to extend the scope of regulation, but rather sought to reduce it. A good example is in the areas of standards where the goal was mutual recognition first, followed by harmonization in exceptional cases.

Perhaps most significant of all integration efforts within the EU is its competition policy. Unlike any other trade agreement, EU competition policy does not rely on the

³²⁶ "This lack of harmonization may seriously hamper the imminent introduction of satellite personal and advanced broadband satellite services in Europe." EU Action Plan: Satellite Communications in the Information Society, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM(97) 91 final, at sec. 3.1.

harmonization of Member States legislation. Instead, the Treaty of Rome creates a supranational authority in the Commission for the regulation of anticompetitive practices that may affect commerce among Members. Consequently, EU competition law supersedes EU antidumping law for intra-EU commerce. In addition, Member States still maintain their own domestic competition laws and use them frequently when the Commission does not challenge an anticompetitive practice. While it is unlikely that a WTO competition regime could be established that resembles the EU's regime, many of the contentious issues surrounding the debate today for international competition rules may be resolved by looking towards the EU system for guidance.

4.3 The Australia-New Zealand Closer Economic Relations Trade Agreement

In 1983, the Australia-New Zealand Closer Economic Relations Agreement (CER) replaced the 1966 Australia-New Zealand free-trade agreement (FTA) and a succession of earlier trade agreements dating from 1922.³²⁷ Approximately 80 percent of bilateral trade had been rendered duty free under the prior free-trade agreement before the CER was implemented.³²⁸ The purpose of the CER was to strengthen relations between the two countries and improve international competitiveness by gradually removing remaining barriers to trade. It is today far more than an FTA and has been considered second only to the EU in terms of the extent of its regional integration.³²⁹

³²⁷ Australia-New Zealand: Closer Economic Relations-Trade Agreement, Mar. 28, 1983, 22 I.L.M. 945 (1983). See also M.S. Burnett, *Introductory Note*, in *id.*

³²⁸ PACIFIC ECONOMIC COOPERATION COUNCIL (PECC), MILESTONES IN APEC LIBERALISATION: A MAP OF MARKET OPENING MEASURES BY APEC ECONOMIES 109 (1995).

³²⁹ See P.J. Lloyd, *A CER-NAFTA Link?*, in *THE CHALLENGE OF NAFTA: NORTH AMERICA, AUSTRALIA, NEW ZEALAND, AND THE WORLD TRADE REGIME* 233 (Robert G. Cushing, John Higley, & Michael Sutton eds., 1993)

The CER is viewed as a “relatively clean” free trade agreement in terms of the coverage of bilateral trade and instruments, lack of exceptions, and simple rules.³³⁰ After using an incremental “positive list” approach under the FTA, the CER adopted a comprehensive “negative list” of reserved sensitive items with special phase-in arrangements.³³¹ There is no special administrative or judicial body to monitor and enforce the agreement. Instead, the similarities between Australia and New Zealand in terms of language, laws, and legal and administrative procedures facilitate the liberalization process.³³²

The CER is a bilateral trade agreement designed specifically for neighboring Australia and New Zealand. There are no provisions for other countries to accede to the agreement. However, the CER countries are talking with ASEAN FTA (AFTA) members about the possibility of establishing a closer economic relationship between the two regions.

4.3(a) Provisions of the CER

The CER eliminated duties on bilateral trade in manufactured products, which had been exempted under the older agreement.³³³ Over the years, the CER has been extended to include trade in services. However, the agreement contains no investment or IPR provisions. Table 1 describes the major provisions of the CER.

The two countries meet to periodically review the CER for modifications and further liberalizations. CER reviews occurred in 1988, 1992, and 1995. During the 1992

³³⁰ *Id.*

³³¹ PECC, *supra* note 328, at 109.

³³² See Lloyd, *supra* note 329, at 233.

³³³ PECC, *supra* note 328, at 109.

review, the two countries instituted annual ministerial and senior official talks to enable a regular review process and expeditiously address trade difficulties.³³⁴

Tariffs

The original CER timetable fixed the goal of free trade in goods by 1995. In a 1988 general review of CER, the two countries accelerated the liberalization timetable to remove tariffs and quantitative restrictions by July 1990 to further improve industrial cooperation. CER rules of origin require that not less than 50 percent of the final cost or value of products be produced in Australia or New Zealand.³³⁵

Table 4-4: Major provisions of the CER³³⁶

<i>Policy</i>	<i>Description</i>
Tariffs	80 percent of bilateral trade before 1983 already duty free. Remaining tariffs on manufactured goods removed (1990).
Rules of origin	Products (1) wholly produced in a member country, exported directly to the other; or (2) with not less than 50 percent CER content and the last manufacturing process done in a CER country. Adjustments to 50-percent rule: (1) 2-percent margin of tolerance allowed; (2) additional labor, materials, and overheads may count towards CER content; (3) materials of mixed CER origin used in final processing also may be included.
Quantitative restrictions and licensing	Quantitative restrictions removed (1990).
Customs procedures	Harmonizes customs and quarantine regulations.
Standards	A mutual recognition agreement, expected to enter into force in 1997, says any good legally sold in one country can be sold in the other's market, and a person who is registered to practice an occupation in one country is entitled to practice the equivalent occupation in the other country.
Government procurement	Nondiscriminatory treatment.

³³⁴ *Trade Policy Review Mechanism: Australia*, at 23-24, GATT Doc. C/RM/G/43 (Jan. 6, 1994).

³³⁵ PECC, *supra* note 328, at 109-110.

³³⁶ See *Trade Policy Review Mechanism: Australia*, *supra* note 334, at 23-24; PECC, *supra* note 328; NEW ZEALAND MINISTRY OF FINANCE AND TRADE, A GUIDE TO CER (1996).

Policy	Description
Intellectual property	No provisions. Ongoing efforts to harmonize intellectual property laws.
Dispute settlement	No formal mechanisms; agreement calls for consultations at the request of either member.
Regulatory issues	Domestic competition laws were extended to address anticompetitive business practices affecting trade. Ongoing efforts to harmonize business law.
AD/CVD administration	Antidumping actions not permitted; CVD actions permitted.
Subsidies	Export subsidies and incentives removed (1990). Production subsidies prohibited.
Investment	No direct provisions. Freedom of establishment in all financial services sectors (except insurance for Australia) provided for in Protocol on Trade in Services.
Services	Trade in Services Protocol (1988) eliminated barriers in most sectors based on nondiscriminatory treatment. Uses a negative list of services specifically excluded by each member country. Regular reviews to liberalize barriers in other sectors.

In their 1992 review of the CER, the two members amended the rules of origin to remove the direct shipment requirement.³³⁷ A working group was set up on rules of origin in 1994 to evaluate the CER's rules in the context of approaches taken in other fora such as WTO and APEC.³³⁸

Nontariff Barriers

The CER has dealt with a variety of nontariff barriers. The 1988 CER review set July 1990 as the deadline for removing quantitative restrictions.³³⁹ In their 1992 CER review, the two countries issued a joint guide to customs procedures and renewed a

³³⁷ *Trade Policy Review Mechanism: Australia*, *supra* note 334, at 23-24.

³³⁸ PECC, *supra* note 328, at 111.

³³⁹ *Id.* at 109.

commitment to harmonize business law and cooperate on customs and quarantine matters.³⁴⁰

The CER has helped Australia and New Zealand eliminate technical barriers to trade and harmonize standards. The two countries agreed to work to eliminate technical barriers to trade under a 1988 Memorandum of Understanding (MOU); the MOU was updated during the 1992 CER review in light of Australia's accession to the GATT Standards Code that year.³⁴¹ The two countries signed a MOU on Standards, Accreditation and Quality in October 1992 to eliminate differences in standards and give mutual recognition of accreditation and quality tests. A mutual recognition regime for occupational standards became effective in March 1993. The 1995 CER review led to the Trans-Tasman Mutual Recognition Arrangement for goods and occupations, which is expected to further integrate goods and labor markets when the arrangement is fully implemented in 1997. The CER implemented a policy of nondiscriminatory treatment in government procurement in 1989.³⁴²

The CER also addresses business law harmonization, with the goal of reducing business transactions and compliance costs and enhancing efficiency and competitiveness within the region. Discussions involving both private and public sector officials in the two countries have led to arrangements on enforcing legal judgements, harmonizing business regulations, and consulting on legislation affecting business activities.³⁴³

Competition Policy

³⁴⁰ *Trade Policy Review Mechanism: Australia*, *supra* note 334, at 23-24.

³⁴¹ *Id.*

³⁴² PECC, *supra* note 328, at 111.

³⁴³ *Id.* at 111.

CER essentially replaces national trade restraints with harmonized competition laws and, in the process, eliminates the use of antidumping laws between the two countries.³⁴⁴ The agreement eliminated the use of antidumping remedies on July 1, 1990 and provided for the amendment of domestic antitrust laws to incorporate CER anticompetitive behavior.³⁴⁵ Additionally, CER effectively eliminates subsidies that may affect trans-Tasman trade on goods and services.³⁴⁶ Although never tested, the CER partners amended their antitrust laws to allow for cross-border investigation and enforcement by the national competition authorities.³⁴⁷ However, factors unique to CER such as the high level of market integration and similarity of legal and economic institutions have facilitated trade liberalization and harmonization of competition policies.

Services

The 1988 Trade in Services Protocol established free and nondiscriminatory trade in services.³⁴⁸ Adopting a negative list approach, the Protocol applies to all services not listed on its accompanying annex. Each country sets its own negative list annex and the services exempted only apply to its obligations and not to the other's. If the service is not

³⁴⁴ PECC, *supra* note 328, at 111; EMINENT PERSONS GROUP, APEC, IMPLEMENTING THE APEC VISION: THIRD REPORT OF THE EMINENT PERSONS GROUP 33 (1995).

³⁴⁵ See WTO ANNUAL REPORT 1997, *supra* note 43, at 85.

³⁴⁶ See Graeme Thomson, *Australia and New Zealand*, in GLOBAL COMPETITION POLICY 385, 399 (Edward M. Graham and J. David Richardson, eds., 1997).

³⁴⁷ Although some differences remain as to the definition of a dominant position. New Zealand allows for the definition of market power to be based on New Zealand market power, Australian market power, or both, while Australia limits its market power definition to those with market power in a trans-Tasman market. Once market power is found, both countries will find an abuse of a dominant position when an entity uses that power to limit access to the domestic market or otherwise harms competition. See *id.*

³⁴⁸ Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations - Trade Agreement, August 18, 1988. A summary of the commitments can be found in *Australia-New Zealand Protocol on Trade in Services, Communication from the Parties to the Agreement*, WTO Doc. WT/REG40/1 (Oct. 4, 1997).

exempted, the Protocol provides national treatment, market access and transparency and prevents government actions such as increased export subsidies or state aid that may have the affect of distorting trade in services between the two countries. Even if a service is included on the negative list, the country still must offer MFN treatment to services, thereby preventing either country from creating a more liberalized services market for a third-party country. Australia's exempted services sectors include broadcasting, maritime transport, air transport, postal services, and insurance; while New Zealand only exempts its aviation, postal and coastal shipping service sectors.³⁴⁹

4.3(b) Effects on Trade

Australia and New Zealand were not each other's principal trading partners prior to the implementation of the CER, although regional arrangements tend to exist between major trading partners. Nevertheless, the CER has resulted in little discrimination against non-members, largely due to the implementation of unilateral trade liberalization by both Australia and New Zealand simultaneously with the CER. Also, the relative importance of intra-area trade has not increased significantly, unlike most other regional arrangements among developed nations. According to the IMF, between 1980 and 1990, intraregional trade as a percent of total trade increased from 6.4 percent to 7.6 percent. The faster growth in intraregional trade than external trade is attributable mostly to a large increase in New Zealand exports to Australia.³⁵⁰

Results of studies that measure the welfare effects of the CER have been inconclusive. One study found the CER provided more trade creation than trade diversion in the Australian manufacturing sector. The study also found that trade gains

³⁴⁹ In the 1992 review, Australia removed its reservation on banking, and New Zealand removed its reservation on broadcasting. PECC, *supra* note 328, at 110.

³⁵⁰ AUGUSTO DE LA TORRE & MARGARET R. KELLY, REGIONAL TRADE ARRANGEMENTS 17-21 (International Monetary Fund Occasional Paper No. 93, 1992); Lloyd, *supra* note 329, at 233.

from trade creation, specialization, and economies of scale were higher for New Zealand than for Australia. However, another study found New Zealand's competitiveness did not benefit significantly from the CER.³⁵¹

4.3(c) Conclusion

ANZCERTA goes far in achieving many of the goals articulated herein. Although the agreement does not have specific investment provisions, it does allow for the freedom of establishment in all financial services sectors (except insurance for Australia). Concerning government regulation, domestic competition laws were extended to address anticompetitive business practices that impact trade and efforts are underway to harmonize business law. But most significantly, ANZCERTA replaced national trade restraints with harmonized competition laws, thus eliminating antidumping actions between the two countries. In addition, Australia and New Zealand amended their competition laws to allow for cross-border investigation and enforcement by their respective competition authorities. This relatively small two-country agreement goes far in developing a contestable international marketplace worth emulating.

³⁵¹ See DE LA TORRE & KELLY, *supra* note 350, at 23 (providing an overview of the results of major studies).

4.4 The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA), which entered into force on January 1, 1994, encompasses the United States, Canada, and Mexico, a combined market of some 390 million consumers and an annual output of about \$8,662 billion³⁵². NAFTA's principal objectives include: eliminating barriers to trade in goods and services between the parties; promoting conditions of fair competition; substantially increasing investment opportunities; and enhancing the competitiveness of the partners' firms in global markets.³⁵³

4.4(a) Background

The United States-Canada Free Trade Agreement (CFTA) first paved the way towards trade liberalization in North America when it entered into effect in 1989.³⁵⁴ Concerned about growing United States protectionism, Canada sought to negotiate this agreement as a supplement to the market access it would gain through the Uruguay Round.³⁵⁵ Expressly modeled after free trade agreements envisioned under Art. XXIV of the GATT, CFTA set "a new standard for trade agreements, as it builds on the parties'

³⁵² GDP is calculated as purchasing power parity with 1995 figures. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (1996), *also available at* <http://www.odci.gov/cia/publications/nsolo/factbook/namr.htm>.

³⁵³ NAFTA, *supra* note 37, at pmbl. and art. 102.

³⁵⁴ Canada-United States Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988) [hereinafter CFTA]. See ARLENE WILSON, THE CANADA-U.S. FREE TRADE AGREEMENT: LESSONS FOR THE NAFTA (Congressional Research Service (CRS) Report No. 93-153 E, 1993). This agreement marked the conclusion of a long history of attempts by the parties to negotiate a free trade agreement dating back to the 1850's. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 39 (1995).

³⁵⁵ See J.G. CASTEL, A.L.C. DE MESTRAL & W.C. GRAHAM, THE CANADIAN LAW AND PRACTICE OF INTERNATIONAL TRADE WITH PARTICULAR EMPHASIS ON EXPORT AND IMPORT OF GOODS AND SERVICES 46-47 (1991). For a detailed discussion of the provisions of CFTA, see *id.* at ch. 2.

mutual rights and obligations under the GATT, other multilateral and bilateral arrangements, and *ad hoc* arrangements.”³⁵⁶

When the idea of expanding the CFTA to all of North America began to take shape in the early nineties, Mexico had already made significant progress in deregulating, privatizing and opening up its economy for foreign trade and investment.³⁵⁷ In a matter of a few years, Mexico moved from a closed economy and highly protective trade regime to a relatively liberal one by most developing country standards; it cut down tariffs from virtually prohibitive levels for most products to an average of 11 percent, and dramatically reduced its sweeping quantitative import restrictions. The Government of Mexico also privatized a considerable portion of its large public sector. Thus NAFTA was to complete a process of trade liberalization that had been under way in Mexico since the mid-1980s.³⁵⁸

Before NAFTA came into being, NAFTA was, and still is, controversial in all three countries. At the time NAFTA was conceived, analysts concentrated principally on benefits from a trilateral free-trade agreement (FTA) to the United States and to Mexico, since benefits to Canada were discussed earlier, in the context of the CFTA. Moreover, Canada’s economic relations with Mexico were historically insignificant.³⁵⁹ The impetus

³⁵⁶ *Id.* at 48-49 (additionally concluding that CFTA is consistent with the United States and Canada’s obligations under GATT 1947 art. XXIV). For an assessment of CFTA’s success, see Peter Morici, *Assessing the Canada -U.S. Free Trade Agreement*, P. Morici Canada-US Free Trade Agreement FTA NAFTA OAS (visited Sept. 26, 1997) <http://www.sice.oas.org/forum/non_govt/academic/PMor1.htm>. For a further discussion of the resulting constitutional issues of creating a regional FTA between two federal governments (the U.S. and Canada) and their effects in Canada, see A.L.C. de Mestral, *Constitutional Law and Foreign Trade Law in Canada: The Impact of the Canada-USA Free Trade Agreement*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 443 (Meinhard Hilf & Ernst-Ulrich Petersmann, eds., 1993).

³⁵⁷ See USITC, INV. NO. 332-381, PUB. 3045, THE IMPACT OF THE NORTH AMERICAN FREE TRADE AGREEMENT ON THE U.S. ECONOMY AND INDUSTRIES: A THREE-YEAR Review 2-2 (1997) [hereinafter USITC, NAFTA THREE-YEAR REVIEW].

³⁵⁸ For a detailed discussion of Mexico’s unilateral trade liberalization measures, see USITC, PUB. 2275, REVIEW OF TRADE AND INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED STATES-MEXICAN RELATIONS (1990).

³⁵⁹ For Canada’s initial reaction to a possible NAFTA, see USITC, PUB. 2326, REVIEW OF TRADE AND
(continued...)

for Canadian participation in a NAFTA appeared to be the long-run potential for trade gains rather than short-term benefits.³⁶⁰

Advocates for both Mexico and the United States saw a “win-win” proposition in NAFTA—generally major benefits for Mexico but also meaningful gains for the United States.³⁶¹ These benefits were generally seen in terms of new markets, improved trade balances, job creation, inflows of foreign investment or increased investment opportunities. Advocates argued that NAFTA would help both the United States and Mexico gain markets since the economies of the two countries were largely complementary; that NAFTA would foster mutual trade and generate jobs on both sides; and that it would provide Mexico with much needed foreign investment for economic growth, while providing United States investors greater opportunities.³⁶²

Detractors on the U.S. side, principally those representing manufacturing labor, saw a net loss of U.S. jobs, arguing that the number of jobs to be lost to cheap Mexican imports would not be offset by the jobs additional exports might generate.³⁶³ Opponents also argued that the threat of job loss could weaken the bargaining position of workers in

³⁵⁹ (...continued)

INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED-STATES-MEXICO RELATIONS (PHASE II: SUMMARY OF VIEWS) 1-25 -1-29 (1990); CASTEL, DE MESTRAL & GRAHAM, *supra* note 355, at 65. It should be noted, however, that Canada now considers its relationship with Mexico beneficial such that even if the United States were to withdraw from NAFTA, Canada would pursue an FTA with Mexico alone. See SIDNEY WEINTRAUB, *NAFTA AT THREE* 70 (1997).

³⁶⁰ Arguments favoring Canadian participation are contained in *Mexico-U.S. free-trade talks: Why Canada should get involved*, ECONOSCOPE, Sept. 1990.

³⁶¹ See, e.g., GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS* (1992).

³⁶² Indeed, Professor Frederick Abbott argues that NAFTA was principally designed to remove Mexico's barriers to foreign investment and imports. See FREDERICK M. ABBOTT, *LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATIONAL SYSTEM* 61-96 (1995).

³⁶³ Jeff Faux & William Spriggs, *U.S. Jobs and the Mexico Trade Proposal* (Briefing Paper, Wash. Economic Inst., 1991). Others opposed NAFTA on more “principled” grounds arguing that NAFTA constituted a threat to U.S. sovereignty. See Patrick J. Buchanan, *America First, NAFTA Never* (Nov. 7, 1993) <<http://www.buchanan.org/never.html>>.

the United States and Canada, thus induce workers to accept lower wages and deteriorating working conditions.³⁶⁴

On the Mexican side, there were concerns that NAFTA would expose unprotected domestic industries to United States competition, and that United States ventures would exploit Mexican labor and environment.³⁶⁵ Perceived "United States imperialism" leading to the expropriation of United States corporations in the 1930's was revived by Mexican opponents of NAFTA. Mexico's status as a developing country, compared with the highly advanced stage of its potential partners was also seen as a problem in Mexico as well as the United States.³⁶⁶

Despite the opposition, Prime Minister Mulroney, President Bush, President Salinas and signed the North American Free Trade Agreement on December 17, 1992. And less than a month after the Uruguay Round was completed, after a contentious implementation fight in the United States Congress, and the completion of the two side agreements on labor and the environment, NAFTA came into effect on January 1, 1994.³⁶⁷

4.4(b) Interaction between NAFTA and the Uruguay Round

One of the more difficult tasks in evaluating the effects of NAFTA on North American trade is that the Uruguay Round Agreements (URA) came into effect one year after NAFTA did. Distinguishing the effects of each becomes difficult since both involved increased market access for the United States and Canada into Mexico. NAFTA

³⁶⁴ Timothy Koechlin & M. Larudee, *The High Cost of NAFTA*, 35 CHALLENGE 1 (1992).

³⁶⁵ Testimony of Adolfo Aguilar Zinser before the House Subcommittee on International Economic Policy and Trade (Mar. 1991).

³⁶⁶ See, e.g., USITC, REVIEW OF TRADE AND INVESTMENT LIBERALIZATION MEASURES BY MEXICO, *supra* note 358, at 26.

³⁶⁷ For a time line of relevant NAFTA events, see USITC, NAFTA THREE-YEAR REVIEW, *NAFTA Time Line*, *supra* note 357, at 2-4 - 2-6.

negotiations did not begin until after the Uruguay Round did and were concluded before the URA were—in fact, CFTA negotiations only began three months before the Uruguay Round.³⁶⁸ As a result, both negotiations borrowed heavily from the innovations and lessons of the other.³⁶⁹

When the results of the two do overlap, NAFTA usually provides for greater and quicker strides toward complete market access. For example, in the area of intellectual property, TRIPs borrowed heavily from the NAFTA; however, under TRIPs, Mexico could have delayed implementing a new intellectual property regime for several years, while NAFTA required it to implement IPR protection within the first years of NAFTA.³⁷⁰ Finally, NAFTA directly references WTO dispute settlement procedures and indicates that the complaining party may choose NAFTA tri-national panels or the WTO Dispute Settlement Body when the disputed issue is covered by both agreements.³⁷¹

4.4(c) Institutional Structure of NAFTA

Despite its intergovernmental nature, NAFTA, for purposes of efficiency maintains some structure. The leading institution of NAFTA is the Free Trade Commission which supervises implementation at the highest (cabinet) level, and oversees the accord's further elaboration.³⁷² Beginning in 1997, the Free Trade Commission will be supported administratively by the NAFTA Coordinating Secretariat situated in Mexico

³⁶⁸ See USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at 2-8.

³⁶⁹ GATT Director General Arthur Dunkel's draft text for the UR, along with CFTA, served as the floor for NAFTA. See *id.* at 2-22.

³⁷⁰ See *id.* For a comparison NAFTA and URA treatment of other issue areas, see *id.* at table 2-3.

³⁷¹ See *id.* at 2-29; NAFTA, *supra* note 37, at art. 2005.

³⁷² Notably, however, the Commission is nothing like the European Union Commission—it does not have the ability to make its own proposals and meets irregularly, “as often as not to prevent disagreements from becoming major conflicts.” See WEINTRAUB, *supra* note 359, at 69; NAFTA, *supra* note 37, at art. 2001. Additionally, the Commission has the power to “resolve disputes that may arise regarding [the treaty's] interpretation or application.” *Id.* at art. 2001.2.

City.³⁷³ The Secretariat supports any groups or committees established by the Commission, and acts as a registrar for dispute settlement panels.³⁷⁴ Separate from the intergovernmental restraints on the major NAFTA institutions where only the trade ministries participate, the working groups and committees created under the Free Trade Commission are comprised of representatives from a variety of substantive policy areas from the environment to transportation to criminal.³⁷⁵

4.4(d) Dispute Settlement

During the first three years of NAFTA, old intra-member frictions prevailed and new ones emerged. The Helms-Burton legislation of the United States enacted in March 1996, which allows foreign companies (including Canadian and Mexican companies) to be sued in U.S. courts for investing in Cuba, is sharply criticized by both NAFTA partners.³⁷⁶ This conflict indicates that NAFTA has not reduced the possibility of disagreements between North American countries on broad policy issues, nor has it diminished the customary commercial tensions between members on specific issues, including trade practices perceived by a partner as unfair.

³⁷³ The NCS will serve as both a formal archive and working secretariat to the Commission. DEP'T OF FOREIGN AFFAIRS & INT'L TRADE [DFAIT], CANADA, NAFTA: A PARTNERSHIP AT WORK (1997). Additionally, individual secretariats are located in each member country. See NAFTA, *supra* note 37, at art. 2002.

³⁷⁴ See *id.* at art. 2002.3. For a discussion of NAFTA institutions, see also GENERAL ACCOUNTING OFFICE (GAO), GAO/GGD-95-10BR, NORTH AMERICAN FREE TRADE AGREEMENT, STRUCTURE AND STATUS OF IMPLEMENTING ORGANIZATIONS (1994); TREBILCOCK & HOWSE, *supra* note 354, at 48.

³⁷⁵ Sidney Weintraub argues that these organized inter-agency meetings provide the parties a forum to prevent conflicts from arising; more importantly, it has fostered a more collegial atmosphere between United States and Mexican officials in a variety of policy areas. See WEINTRAUB, *supra* note 359, at 72.

³⁷⁶ The Canadian and Mexican Governments have even considered challenging this United States law under NAFTA. *U.S. Agrees to talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measure*, 13 Int'l Trade Rep. (BNA), at 476 (Mar. 20, 1996); *Canada Considers Helms-Burton Law to Be Deal-Breaker in MAI Negotiations*, Daily Rep. for Executives (BNA) No. 188, at A-10 - A-11 (Sept. 29, 1997). Further, Title IV of the Libertad Act (Helms-Burton) has resulted in the United States restricting the entry of executives of Canada's Sherritt International and Mexico's Grupo Domos for their companies "trafficking" in U.S.-claimed expropriated property in Cuba. See USITC, YEAR IN TRADE 1996, *supra* note 91, at 160.

Nonetheless, NAFTA has led to greater bilateral and trilateral consultation and collaboration among the partners, providing a new framework for dealing with problems. As of July 1997, twenty-eight dispute proceedings were initiated under NAFTA's Chapter 19,³⁷⁷ which allows private parties to appeal antidumping and countervailing duty decisions to binational panels.³⁷⁸ Twelve cases were filed to review U.S. agencies' decisions, nine to review Canadian decisions, and seven to review Mexican decisions.

Chapter 20 of NAFTA provides for the more traditional form of dispute settlement by allowing government-to-government dispute resolution on matters arising directly from the implementation of NAFTA dispute resolution. Chapter 20 consultations have occurred six times thus far; however, the outcomes of these consultations have been deemed a "mixed success."³⁷⁹

One dispute has risen all the way to a panel report. There, the United States formally requested the establishment of an arbitral panel under NAFTA to settle its dispute with Canada over high Canadian tariffs on imports of dairy, poultry and egg products that Canada applied in accordance with its Uruguay Round commitments and, according to the United States, contrary to its NAFTA obligations to reduce all tariffs.³⁸⁰ The panel upheld Canada's tariffs as conforming to both its WTO and NAFTA

³⁷⁷ USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at Table 2-2, p. 2-20.

³⁷⁸ Chapter 19 provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." NAFTA, *supra* note 37, at art. 1904. Each binational panel is comprised of five members—a majority of which must be lawyers—with two appointees from each involved country (with four peremptory challenges available to the other country) and a mutually-agreed-upon fifth panelist. *Id.* at annex 1901.2. Each country, however, is allowed to maintain its own antidumping laws, subject to some restrictions for amendment, and the panel will only review the case in light of the relevant country's law. *Id.* at art. 1902.

³⁷⁹ *Id.* The consultations were mostly requested of the United States with Canada and Mexico requesting consultation in issues including tomatoes, trucking, broomcorn brooms, sugar-containing products, and Helms-Burton. See USITC, YEAR IN TRADE 1996, *supra* note 91, at 71. The United States did request consultations regarding Mexico's treatment of United States small-package delivery services. See *id.* However, United Parcel Service found that the process had not achieved a "timely and equitable resolution of its concerns" over market access. USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at Table 2-2, p. 2-20.

³⁸⁰ See USITC, YEAR IN TRADE 1996, *supra* note 91, at 87.

obligations because NAFTA provided for an exception which would allow for certain agricultural subsidy tariffs reached as a result of the Uruguay Round Agreements.

4.4(e) Free Trade in Goods and Beyond

In terms of the level of economic integration sought by its members, NAFTA's name conveys that it is a free-trade agreement. The usual market-access provisions that characterize NAFTA as an FTA for merchandise trade are shown in Table 1. In terms of its tariff provisions, NAFTA is less than a customs union, because it does not aim for a common external tariff like the EU, instead it asserts tariff preferences vis-a-vis partners through a complicated system of rules of origin.³⁸¹ NAFTA is also ending nontariff impediments to imports, such as most quantitative restrictions, discriminatory government procurement, and trade barriers embedded in testing, standards provisions or in customs procedures.

Table 4-5: NAFTA: Free Trade in Goods Provisions³⁸²

Tariffs	Intra-regional duties eliminated for many products on Jan. 1, 1994. All remaining duties to be phased out by 2009, with non-sensitive products' duties phased out by 2004; U.S.-Canada duties to be phased out by Jan. 1, 1998. The countries agreed to accelerate the schedule on certain items beginning July 1, 1997.
Quantitative restrictions and licensing	To be phased out. Import licenses to be replaced with tariff quotas; Mexico retains licensing for basic petrochemicals, while Canada retains its "cultural exemption." ³⁸³

³⁸¹ See NAFTA, *supra* note 37, at arts. 401-415.

³⁸² For a more detailed description of tariff implementation and phase-in, see USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at 2-7 - 2-9. For non-tariff barriers, see *id.* at 2-10. For customs procedures, see NAFTA, *supra* note 37, at ch. 5. For government procurement, see *id.* at ch. 10. For rules of origin, see *id.* at 2-11. For standards, see USITC, NAFTA THREE-YEAR REVIEW, *supra*, at 2-14.

³⁸³ See NAFTA, *supra* note 37, at art. 2106, annex 2106. A recent WTO Appellate Body report agreed with a United States complaint and found Canada's cultural exemption implemented in its tariffs regarding split-run editions of periodicals to be inconsistent with its GATT 1994 national treatment obligations. See *generally* Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body, AB-1997-2, (continued...)

Customs procedures	To be harmonized among members
Government Procurement	Provides for nondiscriminatory treatment of partners' products and services; applies only to listed entities and enterprises, specified goods and services, and contracts that exceed specific thresholds.
Rules of Origin ³⁸⁴	Generally, to qualify for preferential FTA treatment, products must be wholly produced in North America; non-NAFTA-origin goods must undergo substantial transformation to require change of tariff classification. In some cases regional content is also specified: Automotive items: 60-65 percent North American content; High technology goods: manufacturing-based rules require production in a NAFTA country of specific subassemblies. Most textiles and apparel products: special yarn-forward requirement; fiber-forward requirement for certain products (e.g., cotton and man-made fiber yarns).
Standards and testing ³⁸⁵	Modeled after WTO TBT Agreement, provides for nondiscriminatory treatment of members' products. Goal is to prevent a partner from using a technical standard to restrict trade. Provides for joint undertakings and efforts to harmonize sanitary and phytosanitary standards.

It is clear from additional provisions shown in table 2 that NAFTA, although less ambitious than the EU, is also far more than a traditional FTA, and achieves many of the ITO's objectives. For example, NAFTA's scope extends beyond merchandise trade to services, as contemplated by Article 53 of the *Havana Charter*.³⁸⁶ Additionally, NAFTA

³⁸³ (...continued)

WTO Doc. WT/DS31/AB/R (June 30, 1997).

³⁸⁴ It has been suggested that the number of separate rules of origin contained in the NAFTA are in excess of 11,000. See N. David Palmeter, *Rules of Origin in a Western Hemisphere Free Trade Agreement*, in *TRADE LIBERALIZATION IN THE WESTERN HEMISPHERE* 193 (IDB-ECLAC ed., 1995). In the first two NAFTA years, customs officials needed to familiarize themselves with these rules and resolve differences in interpretations. Complications relating to rules of origin continue to be a large problem for transborder shipments. A report based on a survey of Canadian exporters, importers, trading houses, customs brokers and freight forwarders noted that "[o]rigin determinations, while necessary to determine whether goods qualify for preferential tariff rates within the regional trading area can be an imperfect and extremely complicated matter as many products are agglomerations of domestic and foreign inputs. *Classifications, Rules of Origin Biggest NAFTA Customs Problems, Survey Shows*, 12 Int'l Trade Rep. (BNA) 1411 (Aug. 23, 1995).

³⁸⁵ According to the United States Dep't of Commerce, NAFTA goes further than any existing U.S. trade agreement by allowing companies and other interested parties to participate directly in the development of new standards in a partner country on the same basis as domestic firms in that country. U.S. DEP'T OF COMMERCE, DOC. NO. 3001, NAFTA FACTS 10 (1995).

³⁸⁶ CFTA established the first comprehensive set of principles governing services trade and contained (continued...)

contains some features of a common market. A traditional common market like the EU allows mobility among members not only of traded products but also of additional production factors such as capital and labor.

As table 2 indicates, NAFTA provides for the protection of capital by protecting investments and investors of the Partners with national treatment and MFN status. While NAFTA does not explicitly encourage Partner companies to go abroad, it gives them the right to establish firms or acquire existing firms in any NAFTA country. Such flexibility of investment under NAFTA approximates the status of free capital movement in North America.

By contrast, NAFTA does not provide for free intra-regional movement of labor as the EU does.³⁸⁷ All parties understood that such a provision would invite massive northbound migration from low-wage, developing Mexico to higher-wage Canada and the United States.³⁸⁸

³⁸⁶ (...continued)

specific provisions as to financial services. *See* CFTA, *supra* note 354, at chs. 14 & 17. NAFTA broadens these protections and extends them to Mexico. *See*, NAFTA, *supra* note 37, at pt. Five.

³⁸⁷ Citizens of an EU country are allowed to work in another EU country. *See* EC TREATY art. 48.

³⁸⁸ Nevertheless, Chapter 16 of NAFTA does provide for the temporary entry of business persons and the resolution of some questions of immigration. NAFTA, *supra* note 37, at ch. 16. This migration dilemma highlights a unique feature of NAFTA—that it is the first reciprocal trade accord between two advanced industrial countries, and a developing country, which only recently opened up its highly protected economy. For a detailed discussion of the problems related to migration, see WEINTRAUB, *supra* note 359, at 79-81.

Table 4-6: NAFTA Provisions Beyond The Scope of a Free Merchandise Trade Accord

Investment ³⁸⁹ (intra-regional movement of capital)	Provides for the better of national treatment or MFN for NAFTA investors and investments (art. 1104). Parties may not impose a minimum level of equity in investment to be owned by nationals, may not require a NAFTA investor to dispose of property based on nationality (art. 1102), and cannot impose performance requirements (art. 1106). Prohibits expropriation unless done for a public purpose, on a non-discriminatory basis, in accordance with due process and international law and with compensation (art. 1110). Dispute settlement available to individual investors (art. 1116).³⁹⁰ Exemptions. Generally, all countries have some rights to limit investment in certain "public" sectors where the government is the major provider of services (art. 1101:4).³⁹¹ NAFTA provisions do not cover some types of investments in any member country, including maritime and basic telecommunications investments (annexes I-III). Canada (annex I, I-C-2) and Mexico (annex I, I-M-4-6) retain some screening rights of foreign investment.
Intellectual property rights ³⁹²	Similar extensive protection to that offered by TRIPs; however, requires Mexico to develop intellectual property regime immediately, instead of affording it TRIPs' developing country transition periods.

³⁸⁹ Generally, NAFTA investment provisions go beyond WTO TRIMs Agreement and APEC's Non-Binding Investment Principles. For a comparison of NAFTA investment provisions to others in the Western Hemisphere, see OAS Trade Unit, *Investment Agreements in the Western Hemisphere: A Compendium*, OAS Doc. SG/TU/WG.INV/DOC.10/Rev.1 (May 1, 1997) (report submitted to FTAA Working Group on Investment).

³⁹⁰ Arbitration claims may be submitted under the International Convention on the Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. NAFTA, *supra* note 37, at art. 1120. Trebilcock and Howse argue that this individual right of direct access to dispute settlement, using international arbitration conventions, is novel among international trade treaties with the exception of the Treaty of Rome. See TREBILCOCK & HOWSE, *supra* note 354, at 297. However, as the later section on ASEAN details, the ASEAN investor arbitration mechanism does utilize international arbitration mechanisms as well as call on the International Court of Justice to appoint arbitrators if the parties cannot agree.

³⁹¹ For example, Mexico will continue to prohibit foreign investment in certain constitutional activities, such as energy, railroads, and social services. For a discussion of the legal application of this scope provision, see *id.* at 296-297.

³⁹² See generally, NAFTA *supra* note 37, at ch. 17. According to the Commerce Department, NAFTA provides the highest standards of protection for intellectual property available in any bilateral or international agreement. U.S. DEP'T OF COMMERCE, DOC. NO. 3001, NAFTA FACTS 9 (1995).

Competition policy	Provides for exchange of information and cooperation in areas on antitrust enforcement (art. 1501.2). Requires each Party to develop antitrust regulation measures (art. 1501.1). Provides for binational appellate review of importing Party's application of its own AD/CVD laws to NAFTA exporting Party (art. 1904).
Cross-Border Trade in Services ³⁹³	Provides for the better of national treatment or MFN to NAFTA service providers (arts. 1202-1204).³⁹⁴ Eliminates residency requirements for service providers (art. 1205). Temporary entry of business persons allowed (ch. 16). Limitations: Does not require recognition of education, experience, licenses or certifications obtained in the territory of another Party (art. 1210.2). Does not allow for permanent movement of persons (art. 1201.3). Exclusions: Does not include air transportation, financial services, and government procurement of services (art. 1201.2). Also does not include services provided by an investment as defined in chapter 11 (art. 1213).
Financial Services ³⁹⁵	Provides for limited right of establishment in other NAFTA countries (art. 1403). Uses residency test in order to determine nationality of investor—does not include branch services of a non-Party service provider (art. 1416). Provides for better of MFN or national treatment (arts. 1405-1406). Mexico allowed transition period until 2000 to further liberalize before which United States and Canadian banks will only be allowed a 15% market share (annex VII-M-13-17).
Telecommunications Services ³⁹⁶	Guarantees firms of NAFTA partners equal access to public telecommunications services (art. 1302). Non-discriminatory and transparent regulations for the provision of enhanced or value-added services (art. 1303).

³⁹³ For a comparison of NAFTA services provisions to others in the Western Hemisphere, see OAS Trade Unit, *Provisions on Trade in Services in Trade and Integration Agreements of the Western Hemisphere*, OAS Doc. SG/TU/WG.SER/DOC.1/96/Rev.3 (Apr. 21, 1997) (report submitted to FTAA Working Group on Services). For trade between the United States and Canada, the NAFTA services provisions expanded CFTA's scope of coverage to include virtually all areas of services. See also Harry G. Broadman, *International Trade and Investment in Services*, 27 INT'L LAWYER 623, 637-644 (1993).

³⁹⁴ A Party may deny benefits to service provider if: provider is owned or controlled by a non-Party that does not have diplomatic relations with the denying Party or is legally prohibited from doing business by the denying Party; or the provider is owned or controlled by a non-Party that does not have substantial business activities in the territory of any Party. See NAFTA, *supra* note 37, at art. 1211.

³⁹⁵ For a comparison of NAFTA financial services provisions with those of other RTAs in the Western Hemisphere, see OAS Trade Unit, *Provisions on Trade in Services*, *supra* note 393.

³⁹⁶ For a comparison of NAFTA telecommunications services provisions with those of other RTAs in the Western Hemisphere, see OAS Trade Unit, *Provisions on Trade in Services*, *supra* note 393.

4.4(f) NAFTA's Success at Age Four?

This section surveys attempts to analyze the NAFTA's success four years into the agreement. Before discussing modes of analysis, it is necessary to discuss the impact of Mexico's peso crisis on any economic statistics of the last four years. After doing so, this section will first look at the USITC's analysis of NAFTA's effect on the United States economy and then to Sidney Weintraub's much broader analysis of NAFTA's effects on the North American economy and on regional integration itself.

Peso Crisis

Mexico's peso crisis should figure prominently in any analysis of NAFTA's effects on the economies of North America. Because of the peso's rapid devaluation, imports from NAFTA partners decreased while Mexico's exports necessarily increased (due to their relatively lower prices). With or without the NAFTA in effect, this single event was probably the most influential on trade in North America. In fact, some even consider NAFTA's greatest effect on North America to be the fact that Mexico survived the peso crisis while further liberalizing trade as opposed to entering into new protectionist policies.³⁹⁷

After the crisis, Mexico was devastated: economic activity dropped 6.9% from the year before; average wages fell more than 20%; unemployment (under several types of measures) grew by 100% with Mexico losing 1 million jobs in total from the crisis; inflation increased 35%; and interest rates approached 90% at times.³⁹⁸ Trade was accordingly affected, following four years of trade deficits and a 1994 deficit of \$18.5 billion, Mexico showed a trade surplus of \$7.1 billion for 1995 resulting from a 30.5%

³⁹⁷ USITC, NAFTA THREE YEAR REVIEW, *supra* note 357, at 3-25.

³⁹⁸ See *id.* at 3-21 – 3-23.

growth in exports and an 8.8% decline in imports. Further, Mexico was able to maintain this export growth with 1996 growth of 23.7%.

Given that the United States market was the destination for over 80% of Mexican exports and that approximately 75% of imported goods in Mexico were from the United States, the United States should have felt the effect of increased Mexican exports more than any other country.³⁹⁹ However, the United States' share of Mexican exports actually decreased after the crisis erupted. While exports grew to all Mexico's trading partners, exports to North America did not grow as fast as Mexico's total foreign exports.

There are several causes of the peso crisis. While some attempt to lay blame directly on NAFTA, J.F. Hornbeck notes the more accurate relationship between NAFTA and the crisis:

Although NAFTA may have encouraged increased trade and investment flows at the margin, it was not the underlying cause of the peso plunge. The reason for Mexico's financial mishap rests squarely on anti-inflationary macroeconomic (particularly exchange rates) policies and dubious financial arrangements used to support the resulting high volume of imports and capital flows.⁴⁰⁰

In terms of measuring NAFTA's role, it is important to consider what happened after the peso crisis. In response to Mexico's situation, President Clinton authorized \$20 billion in loan support (which was coupled with IMF and other loans to total close to \$50 billion) conditioned on harsh requirements for fiscal and monetary reform.⁴⁰¹ Sidney Weintraub argues that the United States might not have made the loan had the survival of

³⁹⁹ *Id.* at Table 3-3, p. 3-26.

⁴⁰⁰ J.F. Hornbeck, *United States-Mexico Economic Relations: Has NAFTA Made a Difference?* (CRS Rep., 1995). See also WEINTRAUB, *supra* note 359, at 54-60.

⁴⁰¹ *Id.* at 61-64. Mexico only used \$13.5 billion of the loans and had repaid them in full with considerable interest by 1997. *Id.*

NAFTA not been at stake.⁴⁰² In this sense, NAFTA contributed positively to Mexico's quick and brutal recovery by forcing the United States to participate in Mexico's recovery and internal regulatory reform.⁴⁰³

Analyses of NAFTA's Effects and its Success

The USITC found that NAFTA had only small effects on the United States economy. Essentially, in its Three-Year Review study, the USITC analyzed aggregate effects on GDP, trade, industry trade, labor and productivity and conducted a review of specific industry sectors affected by NAFTA.

In terms of measuring the aggregate effects on GDP, employment and investment, it is important to note the relative size of the United States as compared to its neighbors. With its nearest competitor Canada only 10% of its size, the United States' role in NAFTA can probably not be overstated.⁴⁰⁴ It represents 80% of North American GDP, a population more than double that of both its neighbors, and the highest regional GDP per capita rate at \$27,500.⁴⁰⁵ Accordingly, the USITC concluded that NAFTA had no effects on GDP levels or growth rates, no effects on aggregate domestic employment and no effects on aggregate investment in the United States.⁴⁰⁶

⁴⁰² *Id.* at 64. However, Weintraub notes that the United States would have probably also made the loan to stabilize the international monetary system in general as evidenced by the participation of the IMF loans. *Id.*

⁴⁰³ For more on the recovery and a comparison of the 1994 crisis to the 1983 devaluation crisis, see WEINTRAUB, *supra* note 359, at 64-66; USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at 3-23.

⁴⁰⁴ Also measured on a purchasing power parity basis, Mexico's economy is almost the same size. However, on an exchange rate basis, Canada's GDP is under 8% of the United States, while Mexico produces only 4% of United States GDP. See USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at 3-1, 3-2.

⁴⁰⁵ Calculated at a purchasing power parity rate. *Id.*

⁴⁰⁶ USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at xxi.

Because of already low tariffs, the USITC concluded that NAFTA did not affect aggregate trade levels with Canada; while it significantly affected the United States trade with Mexico. Both imports and exports between US and Mexico increased as a result of NAFTA. In the only non-Peso crisis year, 1994, exports to Mexico increased over imports from Mexico (note: this is a rather logical conclusion given the relevant tariff decrease of Mexico as compared to the US which already had low tariffs).⁴⁰⁷ The USITC found that NAFTA was responsible for United States import growth of goods from Mexico of 1%, 5.7%, and 6.4% for each of NAFTA's first three years, and export growth of 1.3%, 3.8%, and 3.2%, respectively.⁴⁰⁸

In looking at NAFTA's effects on United States industries, the USITC looked at over 200 industries accounting for over 80% of NAFTA trade, in order to determine which industries experienced statistically significant changes in trade.⁴⁰⁹ As expected because of the prior implementation of CFTA, affected industries constituted a larger share of US-Mexican bilateral trade than US-Canadian. For the largest number of industries, there was no effect shown on the growth of bilateral trade.⁴¹⁰

The USITC concluded that there was no NAFTA effect on the aggregate labor force due to several factors—not least of which was nearly full employment in the United States economy during the relevant years.⁴¹¹ Therefore, NAFTA's only effect lies in certain sectors. Only 29 of 120 manufacturing industries experienced any NAFTA-effect—constituting 4% of non-farm labor and 17% of manufacturing labor.⁴¹² Of these

⁴⁰⁷ US import increases from Mexico: 1994 – 1%; 1995 – 5.7%; 1996 – 6.4%. US export increases to Mexico: 1994 – 1.3%; 1995 – 3.8%; 1996 – 3. *Id.* at 4-13.

⁴⁰⁸ *Id.* at 4-14.

⁴⁰⁹ *See id.* at 4-2 – 4-13.

⁴¹⁰ *Id.* at 4-7.

⁴¹¹ *Id.* at 4-19 – 4-20.

⁴¹² 7 sectors were adversely affected; 4 were positively affected. *Id.* at 4-14.

industries only a small percentage of the total work force of NAFTA-affected industries of 4 million workers were affected in some slight degree.⁴¹³

Due to a lack of data, the USITC did not focus directly on the effects of NAFTA on labor productivity, but instead attempted to focus more broadly on the effects of increased import competition from Canada and Mexico. While it was able to conclude generally that increased import competition could have a positive effect on productivity, the USITC did not identify any specific areas where it has occurred; instead, it merely identified sectors where productivity may increase as a result of increased import competition.⁴¹⁴

In looking at NAFTA's effects on United States industries, the USITC grouped US industries into 68 sectors. It found that only 9 out of 68 industries were significantly affected by NAFTA.⁴¹⁵

Finally, the USITC analyzed the effects of NAFTA on North American trade in services. In this regard, it was not able to directly link specific NAFTA liberalizations to increased trade in services.⁴¹⁶ In fact, the United States experienced a negative effect from services liberalization: services exports to Canada decreased in the first year of NAFTA and only gained slightly for Mexico; and previous trade surpluses with Canada shrunk during all the years of NAFTA and increased at a much lower rate than pre-NAFTA years with Mexico.⁴¹⁷

⁴¹³ *Id.* at 4-18.

⁴¹⁴ Over half of these sectors include those in electronic and electrical equipment, while the rest include textiles and other goods. *See id.* at Table 4-6, 4-21 – 4-24.

⁴¹⁵ *See generally id.* at ch. 6.

⁴¹⁶ *Id.* at 6-225.

⁴¹⁷ *See id.* at 6-226 - 6-231. For a description of the effects on particular services industries, *see id.* at 6-232 – 6-235.

Sidney Weintraub argues that NAFTA's success should be judged on much broader criteria than that required of the USITC study.⁴¹⁸ He first takes note of what he considers to be incorrect criteria for evaluation. According to Weintraub, the merchandise trade balance is an inaccurate measure because it does not take into account services, and moreover, it incorrectly states the role of the United States in a multilateral system of trading by focusing on its bilateral relations with Mexico.⁴¹⁹ Focusing on jobs and wages is equally misleading because given the low level of unemployment and the rapid rate of job creation during the first three NAFTA years, the labor impact of the NAFTA is of relatively minor significance.⁴²⁰

Instead, Weintraub argues that a comprehensive analysis should be focused instead on: measuring total trade and growth in intra-industry trade; productivity and wages; effect on competitive position of industries; effects on environment; and institution building. Since most of these factors are discussed elsewhere in this chapter, this section will only focus on Weintraub's measure of total trade and intra-industry trade.

By any measure total trade between the United States and Mexico increased every year since NAFTA was signed.⁴²¹ Annually, total trade growth among all the NAFTA partners averaged 13.8% through 1996.⁴²² This trade growth can be linked to a number of factors including the growth in investment in Mexico, with trade between related parties

⁴¹⁸ See generally WEINTRAUB, *supra* note 359.

⁴¹⁹ See *id.* at 9-11.

⁴²⁰ *Id.*

⁴²¹ From \$79 billion in 1993, to \$128.9 billion in 1996. USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at figure 3-15, 3-28. Moreover, exports and imports grew every year except 1995 when exports from the United States to Mexico fell by 10%. *Id.* It should be noted that Canada did not even experience this loss in exports, Canadian exports to Mexico continued to grow by 5% in 1995—albeit a smaller increase than the prior year's of 31%. DFAIT, *supra* note 373.

⁴²² *Id.*

(intra-industry trade) constituting a significant portion of the total trade growth.⁴²³ How NAFTA and this trade growth are related is of some contention; however, generally it can be said that NAFTA has provided the legal basis for uniformly protecting investment rights in North America, and that the legal protection provides comfort for foreign investment.⁴²⁴ Regardless, Weintraub argues that withdrawing from the NAFTA would have a detrimental effect because it would indicate a return to protectionism that would serve to deter investment.⁴²⁵

As both the USITC report and Weintraub's analysis suggest, given the Peso crisis, it is too early in the history of NAFTA to make any definite assessments of its success or failure. Generally, it has thus far proven to be benign to the United States' global trading position. The multilateral agreements reached in the GATT/WTO context have had a far greater liberalizing effect in terms of total volumes of trade covered and direct tariffs effected. Accordingly, measuring the effect of NAFTA on North American free trade is difficult given the simultaneous implementation of the GATT/WTO Agreements.

4.4(g) NAFTA's Side Agreements

As previously discussed, in order to pass NAFTA through Congress without reopening the negotiation of the main text, the Clinton Administration sought the completion of two side agreements to NAFTA that would go beyond the provisions of NAFTA in order to further protect the United States' environmental and labor policies.

⁴²³ For a more detailed analysis of production-sharing's contribution to trade growth, see USITC, NAFTA THREE-YEAR REVIEW, *supra* note 357, at 3-29-3-33; WEINTRAUB, *supra* note 359, at 31-33.

⁴²⁴ "The NAFTA in particular has proved a powerful catalyst for Liberalization, both through its formal requirements and because of the competitive pressures it has created to increase overall efficiency in the Mexican Economy." WTO, PRESS/TPRB/63, *Mexico's Regional Agreements Stimulate Liberalization But Complicate Trade Regime* (1997).

⁴²⁵ "In a practical sense, it does not really matter whether NAFTA originated, caused, stimulated, or reinforced the substantial increase in trade and investment between Mexico and the United States. Both have grown. Vested interests have developed on both sides of the border for the continuation of trade growth." WEINTRAUB, *supra* note 359, at 33

While neither agreement on labor cooperation and environmental cooperation are as strong as NAFTA, they do go beyond all other prior international regimes other than the European Union in linking the effects of trade on the environment and labor. In that regard, although limited, both agreements are extraordinary accomplishments for two developed and one developing nation.

The North American Environment

While the North American Agreement on Environmental Cooperation (NAAEC) is the primary regional trade and environment treaty, NAFTA contains very specific provisions on trade-related environmental measures. NAFTA divides environmental measures into two types: those implemented by domestic regulation; and those implemented in accordance with international environmental treaties.⁴²⁶ Domestic environmental regulations may be challenged under the NAFTA, similar to the GATT, as contrary to the sanitary and phytosanitary provisions or contrary to the technical barriers to trade provisions.⁴²⁷ Further, the investment chapter allows for government-to-government consultations if a Party feels that another Party relaxed its environmental regulations in order to attract investors, and also allows a Party to regulate investment so

⁴²⁶ See JOHNSON & BEAULIEU, *supra* note 92, at 70.

⁴²⁷ See *id.* at 74-95. Similar to the GATT, if a country justifies its environmental measure under the SPS provisions, the panel may find a measure contrary to NAFTA obligations if: the measure is not necessary to protect "human, animal or plant life or health in its territory" (Art. 712.1); the measure is not "based on scientific principles," limited in duration as needed, or "based on a risk assessment, as appropriate to the circumstances" (Art. 712.3(a-c)); the measure does not "arbitrarily or unjustifiably discriminate" between goods (Art. 712.4); the measure does not go beyond the extent necessary to achieve the environmental goal (Art. 712.5); and the measure does not constitute a "disguised restriction on trade" (Art. 712.6). See *id.* at 74-86. Chap. Nine's protection of environmental standards measures that do not fall into SPS categories is considerably broader with the key elements being that "the obligation that the measures be 'related to' the protection of the environment, the absence of a reference to 'the adopting party's territory,' the requirement for 'nondiscriminatory treatment,' and the bar on 'unnecessary obstacles to trade.'" *Id.* at 89. For Johnson & Beaulieu's comparison of the likely differences in interpretation between these provisions and similar ones of the GATT (discussed in Trade & Environment Section, *infra*), see *id.* at 74-95.

that it is environmentally benign.⁴²⁸ As to measures taken in accordance with international environmental treaties, NAFTA specifically provides for obligations under five specific environmental treaties to supersede any contrary provisions of the NAFTA.⁴²⁹ According to Johnson & Beaulieu, despite NAFTA's revolutionary accomplishments in trade and the environment, it remained unfinished until the negotiation of the North American Agreement on Environmental Cooperation: "[w]ith the NAAEC...NAFTA moves beyond trade and investment to become the NAFTA package, an incomplete yet ground breaking attempt to integrate the social agenda of trade in and around trade institutions."⁴³⁰

Not willing to directly renegotiate NAFTA upon calls for environmental protection for the trade package, Canada, the United States, and Mexico entered into negotiations for a side agreement on environmental cooperation—what emerged was the North American Agreement on Environmental Cooperation (NAAEC).⁴³¹ NAAEC contains a variety of treaty obligations ranging from general commitments to provide for high levels of environmental protection to an obligation to effectively enforce current domestic environmental laws.⁴³² Trebilcock and Howse note however that of these, "only

⁴²⁸ See NAFTA, *supra* note 37, at Art. 1114.

⁴²⁹ These agreements include CITES and the Montreal Protocol among others. See JOHNSON & BEAULIEU, *supra* note 92, at 108. Johnson & Beaulieu note that "[t]his rule breaks new ground: Though it is increasingly commonplace for nations to subordinate their internal law to certain international obligations, one would be hard-pressed to find so explicit a 'hierarchization' of international obligations where environmental treaties are perched at the top." *Id.* John Jackson unsuccessfully suggested a similar "waiver" approach for the WTO/GATT agreements. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1244-45 (1992).

⁴³⁰ JOHNSON & BEAULIEU, *supra* note 92, at 118.

⁴³¹ North American Agreement on Environmental Cooperation, Sept. 8, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]. NAAEC, notably, is not part of the NAFTA agreements; in international law, it is an entirely separate document and agreement. While NAAEC is equally binding in international law to NAFTA, in the United States, the agreement was completed as an executive agreement whereby President Clinton never received the advice and consent of the Senate as required by the Constitution. For a complete discussion of the relationship of NAFTA to NAAEC, see JOHNSON & BEAULIEU, *supra* note 92, at 126-130.

⁴³² See NAAEC, *supra* note 431, at arts. 3 and 5.

a Party's obligation to enforce effectively its own environmental law can be regarded as 'hard' trade law" because this is the only enforceable obligation.⁴³³

NAAEC's enforcement provisions only address a party's domestic environmental laws⁴³⁴: if another country feels that one of the parties is not adequately enforcing its environmental protection laws, it may begin dispute settlement.⁴³⁵ Upon a dispute settlement panel's report that a country has persistently failed to effectively enforce its laws,⁴³⁶ and after several attempts at remedying the situation, eventually, the other country can impose fines or denial of NAFTA benefits if the fines are not paid.⁴³⁷ NAAEC's other primary innovation, the creation of the Commission for Environmental Cooperation (CEC) comprised of a Council, Secretariat and Joint Public Advisory Committee,⁴³⁸ if it succeeds, could eventually supersede dispute settlement as the "primary method of supervising the performance of NAAEC parties of their new environmental obligations."⁴³⁹

⁴³³ TREBILCOCK & HOWSE, *supra* note 354, at 354.

⁴³⁴ Of course, one of the first questions left unanswered by this provision is what constitutes an environmental law. Art. 45 defines it as "any statute or regulation...the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health" through several listed means. NAAEC, *supra* note 431, at Art. 45(2)(a). Johnson & Beaulieu note that "this definition is uncomfortably broad" and is subject to several jurisdictional restrictions and a natural resources management exception. JOHNSON & BEAULIEU, *supra* note 92, at 185.

⁴³⁵ "Any Party may request...consultations with any other Party regarding whether there has been a persistent pattern of failure...to effectively enforce its environmental law." NAAEC, *supra* note 431, at art. 22(1).

⁴³⁶ A finding of a persistent pattern of failing to enforce one's environmental laws might be a difficult legal threshold to meet. See JOHNSON & BEAULIEU, *supra* note 92, at 210.

⁴³⁷ See NAAEC, *supra* note 431, at arts. 32-36. Johnson & Beaulieu contend that punishment in the form of monetary enforcement assessments because of their high costs and visibility "is clearly a novel technique for international environmental behavior modification. JOHNSON & BEAULIEU, *supra* note 92, at 214. More importantly, because of the extremely difficult process to reach monetary penalties or denial of benefits, NAAEC may avoid the fate of antidumping penalties which because of the relative ease of establishing a dumping case, have become subject to capture by protectionist interests. See *id.* at 223.

⁴³⁸ NAAEC, *supra* note 431, at art. 8.

⁴³⁹ JOHNSON & BEAULIEU, *supra* note 92, at 169. Johnson & Beaulieu argue the importance of institution building even further:

(continued...)

Deputy USTR Jeffrey Lang testified that the CEC “has strengthened trilateral cooperation on a broad range of environmental issues, including illegal transboundary shipments of hazardous wastes, endangered wildlife, and the elimination of certain toxic chemicals and pesticides.”⁴⁴⁰ CEC has produced a study on the effects of NAFTA and free trade on the North American environment.⁴⁴¹ More importantly, the CEC increased transparency by publishing a summary of environmental laws in Canada, Mexico and the United States⁴⁴² and opening up North American trade relations to NGO’s through public committee meetings and annual meetings.

Labor Rights in North America

Under similar forces as the environmental side agreement to the NAFTA, the United States called for a labor side agreement to address the inequalities of worker rights among the parties.⁴⁴³ Two concerns drove the United States to negotiate this

(...continued)

Maybe one day a different, more powerful CEC will be empowered, like the European Commission, to voice the joint position of NAAEC member states in international environmental negotiations, or, like some UN organizations, to formally enter into treaties and conventions. At the very least, a mandate for environmental cooperation within the territory of the parties will persistently influence the conduct of environmental negotiations and cooperation with non-parties.

Id. at 145. One method that the CEC is already using to assess the enforcement record of the member countries is through its *North American Report on Environmental Enforcement* as required by NAAEC art. 12(2)(c). See CEC, ANNUAL REPORT 1996, at 71-101 (1997).

⁴⁴⁰ USIA, *NAFTA Goals Are Clearly Being Met, Says USTR*, Sep. 11, 1997.

⁴⁴¹ See CEC, *supra* note 439, at 19. The Annual Reports and other reports of the CEC, particularly the upcoming *State of the North American Environment Report* (expected 1998), also provide additional transparency for environmental regulation in North America.

⁴⁴² See generally Commission for Environmental Cooperation, *Summary of Environmental Law in North America* (visited Oct. 21, 1997), <<http://www.cec.org/infobases/law/index.cfm>>.

⁴⁴³ NAALC is intellectually based on an Office of Technology Assessment Study on the impact of NAFTA and the current state of labor conditions in the United States and Mexico. See Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 J. Int’l L. & Bus. 900, 919 (1996).

agreement.⁴⁴⁴ Labor unions, like the AFL-CIO, thought that the poor enforcement of Mexican labor laws put United States workers in a competitive disadvantage; and that the exodus of US manufacturing to *maquiladora* plants in Mexico would thereby increase upon NAFTA's entry into force.⁴⁴⁵ Nevertheless, labor rights advocates also saw an opportunity in the side agreements to force Mexico to enforce its generally strong labor protection laws in exchange for Mexico receiving NAFTA benefits.

Like the NAAEC, the North American Agreement on Labor Cooperation (NAALC) primarily focuses on domestic enforcement of national laws and not on enforcing minimum international standards.⁴⁴⁶ Nevertheless, this agreement opened a new chapter in the relationship between worker rights and trade policy by creating the possibility that monetary enforcement assessments based on trade could be used to confront violations of worker rights.

Institutionally, NAALC is divided into two separate components.⁴⁴⁷ The Commission is comprised of the ministerial-level Council and the administrative Secretariat which provides informational support to both the Council and the National Administrative Offices (NAOs). NAAEC also created NAOs within each national labor ministry which serve as the conduit between the tri-national Commission and the citizens and governments of the parties. Additionally, the NAOs act as the initial litigants in

⁴⁴⁴ For a brief history of these forces, see Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in FAIR TRADE AND HARMONIZATION, VOL. 2, at 177, 205-206 (Jagdish Bhagwati and Robert E. Hudec eds., 1996).

⁴⁴⁵ See Abbott, *supra* note 444, at 918-919.

⁴⁴⁶ See North American Agreement on Labor Cooperation, Final Draft, Sept. 13, 1993, arts. 2-4, 32 I.L.M. 1499 (entered into force Jan. 1, 1994). "The phrase 'internationally recognized labor standards' is nowhere found in the Agreement." Leary, *supra* note 444, at 207. It could be argued, however, that developing actual core labor standards are requiring their enforcement was unnecessary under the NAALC. Neither the United States or Canada would generally oppose each other's labor laws, thus leaving Mexico as the most likely violator. However, Mexico, among developing nations, has strong labor laws and has agreed to more ILO treaties than the United States. See *id.* Therefore, to some extent, core labor standards have already been legislated in all three domestic systems. The only necessary provision of NAALC is thereby the domestic enforcement obligation.

⁴⁴⁷ See generally NAALC, *supra* note 446, at pt. 3 (Commission for Labor Cooperation).

dispute resolution by requesting consultations with the another national NAO regarding its failure to effectively enforce its domestic environmental laws.⁴⁴⁸

Generally, NAALC dispute settlement is more limited in scope than NAAEC's. While both agreements only target domestic enforcement of national laws and not enforcement of international standards, NAALC further limits the types of claims that might result in a denial of NAFTA benefits to three issue areas: minimum wages, child labor, and worker health and safety.⁴⁴⁹ The process begins with NAO-level consultations, proceeds to ministerial level consultations, and then, upon failure to reach a result, to an Evaluation Committee of Experts (ECE).⁴⁵⁰ Following an ECE report, any country may request consultations over persistent failures to enforce those technical labor standards. Those consultations may result in an arbitral panel decision that may impose monetary enforcement assessments which are guaranteed with denial of NAFTA benefits upon failure to pay.⁴⁵¹

Other technical labor standards such as sexual or racial discrimination, forced labor, and protection of migrant workers are subject to a lesser form of dispute settlement where the maximum result that may be achieved for a claimant is a negative report by an ECE on the Member's enforcement of those standards.⁴⁵² The third tier of labor standards—those regarding organized labor—are subject to the least amount of scrutiny with the maximum result being a ministerial level consultation.⁴⁵³

Of the claims brought to national NAO's, most allege violations of organized labor laws. The most prominent claim was brought against a subsidiary of the Sony Corporation alleging violations of the freedom of association and the right to organize at

⁴⁴⁸ See generally *id.* at pt. 4 (Cooperative Consultations and Evaluations).

⁴⁴⁹ *Id.* at art. 27(1).

⁴⁵⁰ See *id.* at pt. 4.

⁴⁵¹ See *id.* at pt. 5 (Resolution of Disputes).

⁴⁵² *Id.* at art. 23(2). Technical labor standards are defined in NAALC, art. 49(1).

⁴⁵³ *Id.* at art. 22(1).

its plant in Nuevo Laredo, Mexico. Upon a recommendation by the United States NAO (USNAO) for ministerial consultations, the United States and Mexico met and came to an agreement resulting in a series of meetings between affected workers and Mexican officials and seminars on union registration and certification.⁴⁵⁴ Critics, including the initial petitioners, allege, however, that the Mexican government is still failing to meet its NAALC obligations by failing to provide impartial tribunals to consider labor disputes.⁴⁵⁵

In November 1997, the USNAO heard the first petition alleging failure to enforce sexual discrimination claims.⁴⁵⁶ If USNAO agrees with the petitioners, this will be the first test of the ECE process and whether it may result in changes of enforcement policy by the government of Mexico. Further, workers in a previous claim against a Tijuana auto parts plant plan to amend their petition before USNAO to include a claim of worker health and safety violations.⁴⁵⁷ If that claim succeeds, it will result in the first test of the binding dispute settlement provisions of NAALC.⁴⁵⁸

⁴⁵⁴ NAALC, Annual Report - Ministerial Consultations (visited Nov. 7, 1997) <http://www.naalc.org/english/resource/an_ch3.htm>. US NAO Secretary Irasema T. Garza described the first seminar as an "historic event" because "it afforded Mexican workers the rare opportunity to question Mexican government officials about labor law and policy in a public forum." *Researchers Examine Union Registration in Second Seminar Following Sony Charge*, Daily Lab. Rep. (BNA) No. 217, at D-13 (Nov. 9, 1995).

⁴⁵⁵ *'Bias' In Mexican Union Registration Should Be Reexamined, Sony Petitioners Say*, Daily Lab. Rep. (BNA) No. 63, at D-12 (Apr. 2, 1996).

⁴⁵⁶ The petitioners alleged that they were subject to pregnancy tests as part of applying for employment in Mexico. Mexico denied that this was a violation of Mexican labor law (and therefore unactionable under NAALC); however, several experts on Mexican law and international law testified that this practice was illegal under Mexican law and moreover was contrary to Mexico's obligations under several ILO treaties. See Pamela M. Prah, *Charges That Mexico Fails to Enforce Sex Discrimination Laws Focus of Hearing*, Daily Lab. Rep. (BNA) No. 224, at D-18 (Nov. 20, 1997).

⁴⁵⁷ USNAO agreed to hear that petition and will issue a report of its findings within 180 days from November 17, 1997. *Hotly Disputed Mexican Union Case to Be Reviewed by U.S. Officials*, INSIDE U.S. TRADE, Nov. 28, 1997.

⁴⁵⁸ The monetary assessments are limited under NAALC Annex 39 to .007% of total trade of goods between the United States and Mexico. A USNAO representative suggested that monetary assessments in this petition could exceed \$25 million. See *id.*

While most analysts of NAALC have found its provisions to be relatively weak,⁴⁵⁹ the fact that labor standards are addressable at all with reference to a trade agreement is a significant leap forward for the international community. As the debate within the WTO reflects, most of the developing world and many in the developed world do not accept the linkage of labor standards and trade.⁴⁶⁰ With NAALC, North America voiced its opinion on this linkage. The possible penalty of denial of free trade benefits that could result from the auto parts claim signifies that, at least, Canada, the United States and Mexico agree that linking worker rights to trade is legitimate.

4.4(h) Conclusion

Although comprehensive in its liberalization efforts, NAFTA falls short in many areas in its attempt to provide a truly contestable marketplace in North America. Probably the greatest disappointment NAFTA is the retention of antidumping actions among the three trading partners, which necessitated the development of an antidumping regime in Mexico. Although the agreement requires each party to develop antitrust measures (i.e., Mexico) and cooperate and exchange information, the regimes remain distinct and do not ensure contestable markets across the region. On the other hand, NAFTA's investment provisions generally go beyond the WTO TRIMs agreement and APEC's Non-Binding Investment principles by providing better of national treatment or MFN for NAFTA investors and investments. In addition, parties may not impose a minimum level of equity to be owned by nationals, may not require an investor to dispose of property based on nationality, and cannot impose performance requirements. Other areas of the agreement show promise as well including its intellectual property rights

⁴⁵⁹ See Leary, *supra* note 444, at 210 (citing NAALC's failure to include core labor standards, complex dispute settlement procedures and limited enforceability).

⁴⁶⁰ See Trade and Labor section *infra* ch. 3.

protection provisions, its services trade provisions, and its sectoral provisions in telecommunications and financial services.

4.5 Asia Pacific Economic Cooperation

Proposals and ideas for economic cooperation in the Asia-Pacific region date back to the mid-1960's with Kiyoshi Kojima's proposal for a Pacific Free Trade Area.⁴⁶¹ Thirty years later, some of the early concepts for economic cooperation have been realized in the ambitious agenda of the Asia-Pacific Economic Cooperation (APEC) forum which includes achieving complete liberalization of trade and investment by the years 2010 and 2020.⁴⁶² The purpose of this section is to provide an overview of APEC's institutional structure and functions and to discuss APEC's goals for, and approach to, trade and investment liberalization (including potential challenges and incentives), and to examine the degree of trade liberalization facilitated by this approach, as compared to others.

4.5(a) Background

At the initiative of Australian Prime Minister Hawke, APEC was established in 1989 as an informal consultative forum at a Ministerial Conference held in Canberra, Australia. The twelve original members of APEC included the six ASEAN economies (Singapore, Malaysia, Thailand, Indonesia, the Philippines and Brunei), Japan, Korea, Canada, Australia, New Zealand and the United States. In 1991, China, Taiwan and Hong Kong joined APEC, increasing the total membership to 15 countries. The admission of the "Three China's" was important in providing a broader basis for regional cooperation and for promoting an exchange of views among these economies. Currently, with the addition of Papua New Guinea and Mexico (in 1993), and Chile (in 1994) there

⁴⁶¹ See, e.g., Hadi Soesastro, *The Institutional Framework for APEC: An ASEAN Perspective*, in APEC: CHALLENGES AND OPPORTUNITIES 36 (Chia Siow Yue ed., 1994).

⁴⁶² Developed countries aim toward complete liberalization by 2010, while developing countries are targeting 2020. *APEC Economic Leaders' Declaration of Common Resolve*, at ¶ 6 (Bogor, Indon., Nov. 15, 1994), reprinted in SELECTED APEC DOCUMENTS 1989-1994 (APEC Secretariat ed., 1995).

are eighteen APEC members.⁴⁶³ Many other economies (Russia, Vietnam, Peru, Ecuador, India, Colombia and Mongolia, for example) expressed an interest in or formally requested to join APEC. However, in 1993 APEC Ministers agreed to a 3-year moratorium on admitting new members.

In November 1996, at the Manila Ministerial, the Ministers ended the moratorium, and adopted a set of admission criteria at the Vancouver Ministerial in 1997, with the announcement of new members based on those criteria expected at the Kuala Lumpur Ministerial in 1998, and admission of the same to come in Auckland in 1999.⁴⁶⁴ Of those possible new members, some consider both Vietnam and Peru as the most likely candidates for membership.⁴⁶⁵ For those non-members still seeking to participate at some level, the Manila Ministerial issued recommendations regarding APEC's policy toward non-member participation in APEC working groups.⁴⁶⁶ Some non-APEC members already participate in the Working Groups (such as Peru in the Fisheries Working Group) that have programs and activities closely related to the interests of their economy.

At the Canberra conference establishing APEC, there was a recognition among economies of the region of the need for an effective means of drawing the region closer together, for strengthening the multilateral trading system, for providing an opportunity to assess trade and investment trends, and for identifying common interests.⁴⁶⁷ From the United States' perspective, APEC was viewed as a vehicle which could serve as a counterweight to the possible emergence of an exclusionary regional organization. The

⁴⁶³ *APEC Ministerial Meeting Joint Statement*, at ¶ 1 (Manila, Phil., Nov. 22-23, 1996), reprinted in *SELECTED APEC DOCUMENTS 1996*, at 127 (APEC Secretariat ed., 1997) [hereinafter *Manila Ministerial Statement*].

⁴⁶⁴ *Id.* at ¶ 88.

⁴⁶⁵ Mark Felsenthal, *APEC Plans Pledge Liberalization; Some New Members to Be Admitted*, Int'l Trade Rep. (BNA) No. 47, at 1839 (Nov. 27, 1996).

⁴⁶⁶ *Manila Ministerial Statement*, *supra* note 463, at ¶ 89; *Consolidated Guidelines On Non-Member Participation in APEC Working Group Activities* (Nov. 1996), reprinted in *SELECTED APEC DOCUMENTS 1996*, *supra* note 463, at 148.

⁴⁶⁷ *Chairman's Summary Statement* (Canberra, Austl., Nov. 6-7, 1989), reprinted in *SELECTED APEC DOCUMENTS 1989-1994*, *supra* note 462.

United States, however, was initially concerned that the Asia-Pacific region was too diverse economically and politically to create a viable cooperative organization. Meetings subsequent to Canberra allayed these fears as the group was able to resolve progress on issues of trade facilitation without being sidelined by politically divisive issues.⁴⁶⁸ The Asian economies, for their part, were worried that APEC could overwhelm their own organization, the Association of Southeast Asian Nations (ASEAN).⁴⁶⁹ However, the Joint Statement from the first APEC ministerial meeting in Canberra noted the "significant role ASEAN institutional mechanisms can continue to play in supporting the present effort to broaden and strengthen regional economic cooperation."⁴⁷⁰

4.5(b) Organization

APEC is a relatively unbureaucratic, consultative organization with a practical, yet wide-ranging work program. The chairmanship of APEC is rotated annually between ASEAN and non-ASEAN members of APEC. The Chair is responsible for hosting annual meetings of foreign and economic ministers in the region, preparatory Senior Officials Meetings (SOMs), and Leaders meetings. Since 1989, eight annual Ministerial meetings have been held in Canberra, Singapore, Seoul, Bangkok, Seattle, Jakarta, Osaka, Manila, and Vancouver. In 1998, Malaysia will hold the chairmanship and host the Ministerial in Kuala Lumpur. These November Ministerial meetings are a focal point and the culmination of APEC activities throughout the year. Major decisions regarding

⁴⁶⁸ NATIONAL CENTER FOR APEC, ASIA-PACIFIC ECONOMIC COOPERATION (APEC), PART I: A SHORT HISTORY (1996).

⁴⁶⁹ See Merit E. Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 N.W. J. INT'L L. & BUS. 947, 955 (1996).

⁴⁷⁰ *Joint Statement* (Canberra, Austl., Nov. 6-7, 1989), reprinted in SELECTED APEC DOCUMENTS 1989-1994, *supra* note 462. Merit Janow recognizes that "[i]t was agreed that APEC would be characterized as a 'process' complementary to, but not competitive with ASEAN." Janow, *supra* note 469, at 955.

APEC's ongoing work and future activities are taken by the Ministers and recommendations are made to APEC Leaders at the November meetings.

Other Ministerial-level meetings are also held throughout the year. As APEC's agenda has widened and as the organization has begun moving towards implementation of its liberalization objectives, the number of ministerial level meetings has increased from five in 1995 to a total of nine in 1996. In 1996, these meetings included ministers in charge of trade, finance, transportation, telecommunications, education, energy, sustainable development, environment, and small and medium-sized enterprises.⁴⁷¹

One feature of APEC's operations which is different than that of the European Union or NAFTA are regularized meetings of the heads of state of the APEC economies. The APEC Leaders' meetings are held in conjunction with the annual November Ministerial and provide sustained political momentum for APEC's initiatives. The first APEC Leaders' meeting was held on Blake Island near Seattle, Washington in November 1993 at the invitation of President Clinton. Leaders from every APEC economy, except Malaysia, attended the meeting. In initiating the Leaders' meetings, the United States believed that the meetings could serve as a mechanism for guarding against the potential for malaise or inertia that could develop following the conclusion of the Uruguay Round.⁴⁷² Individual APEC Leaders played an important role at the meetings in shaping and in providing forward momentum for APEC's agenda. For example, President Soeharto's personal appeal to APEC to "resolve to continue and promote the endeavor to facilitate the flow of investment and trade, both for ourselves and for other regions," was critical in beginning to implement the APEC vision for trade and investment liberalization set forth in Seattle.⁴⁷³ By contrast, President Clinton's decision not to

⁴⁷¹ NATIONAL CENTER FOR APEC, *supra* note 468.

⁴⁷² Nancy Adams, Assistant U.S. Trade Representative, Remarks at "APEC: What's in it for Business," U.S. Chamber of Commerce (July 24, 1996).

⁴⁷³ President Soeharto, the Republic of Indonesia, Speech at the Inauguration of the Sixth APEC Ministerial Meeting at the State Palace, Jakarta, Indonesia (Nov. 11, 1994).

attend the November 1995 Ministerial because of domestic budget issues was widely criticized by other APEC members as a possible indicator of the United States' diminished interest in the forum.⁴⁷⁴ During 1996, however, the United States sought to dispel this perception and to reaffirm its support for APEC's work and goals.

APEC Senior Officials are responsible for making operational decisions for the organization, putting forth recommendations to, and implementing the decisions of, the Ministers.⁴⁷⁵ Typically, four Senior Officials Meetings or SOMs are held each year. The Senior Officials review the work of APEC's permanent committees—the Committee on Trade and Investment (CTI), the Economic Committee, and the Budget and Administrative Committee.

The CTI is APEC's permanent focus group for development and implementation of APEC's trade and investment agenda. The adoption of APEC's Declaration on Trade and Investment Framework which established the CTI in 1993 was a key action-forcing event, marking a turning point in the organization's focus by expanding its agenda from facilitation and cooperation to liberalization.⁴⁷⁶ During 1996, CTI focused on implementing and reporting on the APEC collective actions (see explanation below), including reviewing, refining and expanding on them. Lead economies or conveners were designated by the Committee to be responsible for compiling matrices of collective actions for each of the 15 issue areas contained in the Osaka Action Agenda. The CTI also continued its ongoing work in other areas including: investment (updated the *APEC Investment Guidebook*); standards and conformance (completed a report on standards alignment and agreed to proceed with MRAs in food products and toy safety information); customs procedures (developed Framework for Technical Assistance and

⁴⁷⁴ *Clinton's No-Show In Tokyo May Strain U.S.-Japan Relations*, JAPAN ECON. SURV., Dec. 1995, at 1-2; *Clinton's Absence at Trading Forum Worries Japanese*, J. COM., Nov. 28, 1995, at A13.

⁴⁷⁵ WILLIAM BODDE, JR., VIEW FROM THE 19TH FLOOR 9 (1994).

⁴⁷⁶ See APEC, *Committee on Trade & Investment* (visited July 29, 1997) <<http://www.apecsec.org.sg/cti.html>>.

Human Resources Development in order to better implement Customs Action Plan); government procurement (completed two surveys on existing GP rules and their transparency); dispute settlement (began compiling guidebook of arbitration, mediation and conciliation services); Tariff Data Task Force (developed APEC Tariff Database on the Internet); deregulation and competition policy (conducted a workshop); rules of origin (held seminars on WTO rules of origin compliance and compiled compendium on rules of origin); Uruguay Round implementation (held UR compliance seminars); intellectual property rights (prepared IPR Contact Points list and surveyed domestic IPR legislation); and mobility of business persons (prepared handbook on business travel in APEC countries and considered developing an APEC Business Travel Card).⁴⁷⁷ The CTI's two Subcommittees on Customs Procedures and Standards and Conformance have made substantial contributions to the CTI's work in these areas.

The Economic Committee serves as APEC's analytical group and provides reports on economic trends and related issues in the region, including an annual economic outlook paper.⁴⁷⁸ The Committee is expected to be especially useful in providing studies of cross-cutting issues in support of APEC work in the future. In this regard, it published *The State of Economic and Technical Cooperation in APEC* as a progress report on APEC's achievements as of 1996.

There are 10 APEC Working Groups, each covering a broad issue area: human resources development (HRD), telecommunications, transportation, tourism, energy, marine resources, fisheries, trade and investment data review, trade promotion and industrial science and technology. The Working Groups are headed by "shepherds" or APEC economies which volunteer to take responsibility for guiding their activities for a select period of time. The Working Groups report directly to the Senior Officials. In

⁴⁷⁷ APEC Ministerial Meeting Declaration on an Asia Pacific Economic Cooperation Trade and Investment Framework (Seattle, U.S., Nov. 19, 1993), in SELECTED APEC DOCUMENTS 1989-1994, *supra* note 462; see also APEC Committee on Trade & Investment (CTI), 1996 Annual Report to the Ministers (visited Jul. 28, 1997) <<http://www.apecsec.org.sg/mapa/cti.html>>.

⁴⁷⁸ Prepared in 1996 by the United States.

addition, because of its program on trade and investment the CTI has also instituted a process to monitor the Working Groups activities. Each of the Working Groups has extensive work programs and activities. For example, the Working Group on Human Resources development has already completed 30 work projects, is engaged in another 40 and envision an additional 20.⁴⁷⁹

Since its initiation, APEC additionally sought to integrate and encourage business participation in every level of its work program.⁴⁸⁰ In recognition of the need for regularized input from the business community, in 1993, APEC leaders called for the creation of the Pacific Business Forum (PBF), or a temporary business-sector experts group to provide APEC with a vision and advice to the Leaders on practical steps for how to facilitate trade and business in the Asian-Pacific Region.⁴⁸¹ At the November 1994 APEC Ministerial, the PBF submitted its first report which included in its recommendations the achievement of free trade in the region by no later than 2010.⁴⁸² At the Osaka Ministerial in 1995, the PBF called for the creation of a new permanent business sector advisory committee to ensure the integration of the business community into APEC's work program. Following upon these recommendations, APEC Leaders called for the establishment of the APEC Business Advisory Council (ABAC) "to provide insights and counsel for our APEC activities."⁴⁸³ The PBF was subsequently disbanded.

⁴⁷⁹ APEC, *Human Resources Development (HRD) Working Group* (visited Aug. 6, 1997) <<http://www.apecsec.org.sg/hrdwg.html>>.

⁴⁸⁰ The Pacific Economic Cooperation Council (PECC), a permanent observer to APEC, provides technical assistance to the organization through reports and studies. BODDE, *supra* note 475, at 56

⁴⁸¹ *APEC Leaders Economic Vision Statement* (Blake Island, Seattle, U.S., Nov. 20, 1993), in *SELECTED APEC DOCUMENTS 1989-1994*, *supra* note 462.

⁴⁸² See *Pacific Business Forum Report List of Recommendations*, in *SELECTED APEC DOCUMENTS 1989-1994*, *supra* note 462.

⁴⁸³ *APEC Economic Leaders' Declaration for Action* (Osaka, Japan, Nov. 19, 1995), in *SELECTED APEC DOCUMENTS 1995 (1996)*.

The ABAC's two functions are: 1) to provide advice on implementation of the APEC Action Agenda and on other specific business sector priorities; and 2) to respond to APEC requests for information about business-related issues or other business perspective on specific issues of cooperation.⁴⁸⁴ The Committee, consisting of three representatives from each member economy, held its first meeting in June 14-16, 1996 and submitted recommendations to APEC Ministers in November 1996.⁴⁸⁵ In the areas of trade liberalization and facilitation, these recommendations included establishing a central registry for patents and trademarks, adopting a set of common professional standards for business service providers, and providing technical cooperation for small and medium-sized enterprises.⁴⁸⁶ In the area of economic and technical cooperation (Ecotech), ABAC recommended launching a new Ecotech agenda based on a strategic focus on Osaka Action Agenda "priority items," a partnership between business and governments, and the establishment of an APEC Network for Ecotech.⁴⁸⁷ Considering these recommendations, the 1996 Leaders Meeting Statement instructed the Ministers to examine ways to implement these recommendations.⁴⁸⁸

Another business initiative sponsored by the Philippines is the "APEC Business Forum" which took place in conjunction with the 1996 Ministerial. The APEC Business Forum provides an opportunity for networking among senior business representatives and for defining short-term private-sector initiatives to facilitate intra-APEC cooperation.⁴⁸⁹

⁴⁸⁴ NATIONAL CENTER FOR APEC, ABAC, THE APEC BUSINESS ADVISORY COUNCIL (1996).

⁴⁸⁵ *APEC Economic Leaders' Declaration for Action*, *supra* note 483.

⁴⁸⁶ *ABAC Report to the APEC Economic Leaders, APEC Means Business: Building Prosperity for Our Community*, in *SELECTED APEC DOCUMENTS 1996*, *supra* note 462.

⁴⁸⁷ *Id.*

⁴⁸⁸ See *APEC Economic Leaders' Declaration: From Vision to Action* (Subic, Phil., Nov. 25, 1996), in *SELECTED APEC DOCUMENTS 1996*, *supra* note 463, at ¶¶ 23-24.

⁴⁸⁹ The APEC Business Forum, briefing paper presented at U.S. Chamber of Commerce, *APEC 1996: What's in It for Business*, (Washington, D.C., July 24, 1996).

4.5(c) APEC's trade and investment liberalization goals

The 1991 Seoul APEC Declaration laid out APEC's primary goals, including its primary and consistent aim of supporting the multilateral trading system:

a) to sustain the growth and development of the region for the common good of its peoples and, in this way, to contribute to the growth and development of the world economy; b) to enhance the positive gains, both for the region and the world economy, resulting from increasing economic interdependence, including by encouraging the flow of goods, services, capital and technology; c) to develop and strengthen the open multilateral trading system in the interest of Asia-Pacific and all other economies; [and] d) to reduce barriers to trade in goods and services and investment among participants in a manner consistent with GATT principles, where applicable, and without detriment to other economies.⁴⁹⁰

APEC members have indicated that they are opposed to the creation of an inward-looking trading bloc. Open regionalism⁴⁹¹—the extension of APEC benefits to other members in conformity with the WTO—remains a main tenet of the organization. APEC trade ministers recently stated that they consider it “especially important that regional and multilateral approaches to trade and investment liberalization support and reinforce each other.”⁴⁹²

⁴⁹⁰ *Seoul APEC Declaration* (Seoul, S. Korea, Nov. 14, 1991), reprinted in SELECTED APEC DOCUMENTS 1989-1994, *supra* note 462, at 61.

⁴⁹¹ The concept of “open regionalism” has been interpreted differently, but generally refers to regional trade liberalization that does not disadvantage other countries while supporting the multilateral trading system. For a discussion of the term, see Ross Garnaut, *Options for Asia-Pacific Trade Liberalization (A Pacific Free Trade Area?)*, in APEC: CHALLENGES AND OPPORTUNITIES, *supra* note 461, at 94-97.

⁴⁹² *APEC Meeting of Ministers in Charge of Trade Statement of the Chair* (Christchurch, N.Z., July 15-16, 1996), in SELECTED APEC DOCUMENTS 1996, *supra* note 463. Japan has sought to have the benefits of APEC trade liberalization extended to non-APEC members on an MFN basis. However, this would invite free-riders and has not gained the support of APEC. The United States has argued that benefits should be accorded to non-APEC members on a reciprocal basis. Merit Janow concludes that “[t]he divisive issue of MFN or non-MFN liberalization within the APEC context is unlikely to be resolved in the short term.” Janow, *supra* note 469, at 1010.

At the SOM held in Seattle in November, 1993, the Eminent Persons Group (EPG)⁴⁹³ presented its “vision” for APEC by the year 2000, recommending initiatives in the areas of trade liberalization, trade facilitation, technical cooperation and institutionalization towards a goal of free trade and investment in the region.⁴⁹⁴ The EPG vision also called for the creation of an Asia-Pacific Economic Community, generating an intensive debate within about the aim of APEC and specifically about the meaning of the term “Community.” Many of the Asian representatives (China, Indonesia, Japan, Brunei, the Philippines and Malaysia) were concerned that the term could imply institutionalization in the sense of the European Community, a concept they opposed. Ultimately, APEC ministers endorsed the EPG’s “broad thrust and direction” regarding open trade, investment and economic cooperation, but did not accept all of its recommendations. APEC Leaders, in their meeting, adopted a vision for free trade and investment in the region and agreed to create a “community of Asia-Pacific Economies.”⁴⁹⁵

The following year in Bogor, the Leaders’ committed to achieving “free and open trade and investment in the Asia-Pacific no later than the year 2020.”⁴⁹⁶ This Bogor commitment marked a turning point for APEC—representing an important step toward the creation of the world’s largest free-trade area. After reaffirming APEC’s commitment to the WTO and the multilateral trading system, the Leaders agreed that APEC members should accelerate their Uruguay Round commitments and refrain from introducing new

⁴⁹³ The Eminent Persons Group (EPG) was formed following the recommendation at the 1992 Ministerial that a group be nominated by member APEC economies to develop “a vision of trade in the Asia-Pacific region to the year 2000.” *APEC Ministerial Meeting Joint Statement*, at ¶ 14 (Bangkok, Thai., Sept. 10-11, 1992), in *SELECTED APEC DOCUMENTS 1989-1994*, *supra* note 462.

⁴⁹⁴ EPG, *A Vision for APEC: Toward an Asia-Pacific Economic Community* (Nov. 1996), in *SELECTED APEC DOCUMENTS 1989-1994*, *supra* note 462.

⁴⁹⁵ *APEC Leaders’ Economic Vision Statement* (Seattle, U.S., Nov. 20, 1993), reprinted in *SELECTED APEC DOCUMENTS, 1989-1994*, *supra* note 462. According to U.S. officials, “community” means different things to different people, but includes all of the underpinnings that hold APEC together or it is all of the ways that we recognize that we are a region.” Remarks by Nancy Adams, *supra* note 472.

⁴⁹⁶ *APEC Economic Leaders’ Declaration of Common Resolve*, *supra* note 462, at ¶ 6.

protectionist measures. Reflecting the Chairman's (Indonesia) status as a leading developing economy, the Bogor Declaration also called for developed economies to provide growth opportunities to developing economies at the same time that developing economies will strive to maintain high growth rates.⁴⁹⁷ According to the Bogor Declaration, "[t]he approach will be coherent and comprehensive, embracing the three pillars of sustainable growth, equitable development and national stability."⁴⁹⁸

In November 1995, the Leaders adopted the Osaka Action Agenda which sets forth a "template" for implementing the commitment made in Bogor to liberalize trade and investment, beginning in January 1997.⁴⁹⁹ In adopting the Osaka Action Agenda, the Leaders noted, "[w]e have, with Osaka, entered the action phase in translating this vision [of a community of Asia-Pacific economies] and these goals into reality...[t]oday we adopt the Osaka Action Agenda, the embodiment of our political will, to carry through our commitment at Bogor."⁵⁰⁰ The Leaders emphasized that the Osaka Action Agenda rests on the three pillars of trade and investment liberalization, trade and investment facilitation, and economic and technical cooperation. The Leaders reaffirmed APEC's determination to lead in strengthening the multilateral trading system, as represented by down payments or "initial actions" brought by each of the APEC economies to Osaka to accelerate implementation of their commitments made in the Uruguay Round and their commitment to advancing global trade and investment liberalization.

⁴⁹⁷ The Declaration did not identify which economies would be considered developed or developing. See *id.* at ¶ 8.

⁴⁹⁸ *Id.* at ¶ 3.

⁴⁹⁹ *APEC Economic Leaders' Declaration for Action*, *supra* note 483.

⁵⁰⁰ *Id.*

4.5(d) APEC's Liberalization Efforts

In order to move towards its long-term goal of free trade and investment in the region, APEC is employing voluntary efforts by both individual economies and collective actions. This process has been labeled "concerted unilateral liberalization" whereby a series of principles and guidelines agreed to by APEC economies are used to guide individual APEC economies' actions. APEC members do not formally refer to the process as "negotiations"; however, each economy through its Individual Action Plan or IAP has indeed set forth its positions regarding 15 issue areas. According to one United States official, despite the denials by Asian APEC members, it "walks and talks like a negotiation, but we just don't use the term."⁵⁰¹ The fact that APEC economies will progress faster or slower during the liberalization process is no different than any other trade negotiation, according to United States officials.⁵⁰² Through the "competitive liberalization" process it is expected that APEC members will have an incentive to move forward with their commitments in order to ensure that they do not lose business opportunities to neighboring economies who will be implementing their own liberalization programs.

The guiding principles to be used in advancing liberalization and business facilitation are contained in Part One of the Osaka Action Agenda, including: comprehensiveness; WTO-consistency; comparability; non-discrimination; transparency; standstill; simultaneous start, continuous process and differentiated timetables; flexibility and cooperation.⁵⁰³ The collective actions or steps that all APEC members have agreed to implement, represent APEC's "value-added" to the multilateral liberalization process, according to United States officials. Overall objectives, guidelines for the collective

⁵⁰¹ Robert Cassidy, Asst. USTR for Asia and the Pacific, Remarks at "APEC: What's in it for Business," U.S. Chamber of Commerce (July 24, 1996).

⁵⁰² *Id.*

⁵⁰³ *APEC Osaka Action Agenda* (Osaka, Japan, Nov. 16, 1995), in *SELECTED APEC DOCUMENTS 1995*, *supra* note 483.

actions and individual actions are defined for 15 concrete issue areas: tariffs, non-tariff measures, services, investment, standards and conformance, customs procedures, intellectual property rights, competition policy, government procurement, deregulation, rules of origin, dispute mediation, mobility of business people, implementation of Uruguay Round outcomes, and information gathering and analysis.⁵⁰⁴

Complementing the collective actions, each APEC economy drafted its own individual action plan (IAP). The IAPs are intended to provide concrete actions and timetables for fulfilling the Osaka Action Agenda's goals of trade and investment liberalization for each concrete issue area, including implementation of the collective actions and fulfillment of WTO obligations, "plus." Work began on both the individual and collective action plans following the 1995 Osaka Ministerial. At the SOM held in Cebu during May 1996, all eighteen APEC members tabled an IAP. A consultative process then took place to ensure that there was a balance between the IAPs overall, although the plans were not presumed to be identical. Despite an understanding that all members should move at a comparable pace with no back-loading or free riding,⁵⁰⁵ these initial IAPs reportedly varied in content, quality and format, including some that were very detailed and addressed all fifteen issue areas, and others that contained only vague commitments in a few issue areas.⁵⁰⁶ The IAPs will continue to be evaluated and compared on an overall basis through bilateral exchanges with a view to potentially leveraging offers and reciprocity. However, unlike the GATT negotiations, individual economies' offers for each subsection will not be assessed.⁵⁰⁷

At the Manila Ministerial, each APEC economy officially submitted its IAP resulting in a recognition by the APEC ministers that the IAPs represent "a credible

⁵⁰⁴ *Id.*

⁵⁰⁵ NATIONAL CENTER FOR APEC, *supra* note 468, at 3.

⁵⁰⁶ See, e.g., *APEC Rejects Rigid Disputes Mechanism*, FIN. TIMES, May 25/26, 1996, at. 3.

⁵⁰⁷ U.S. Dep't of State, telegram prepared by U.S. embassy, message ref. No. 003602, *APEC: Ambassador Wolf's 4/30 Meetings with DFA/DTI* (May 8, 1996).

beginning to the process of liberalization.”⁵⁰⁸ These IAPs went into effect on January 1, 1997 pursuant to the Osaka Action Agenda which designed them.⁵⁰⁹ Table 1 reflects highlights of the offers by the eighteen APEC economies in four of the 15 areas including tariffs, services, investment and competition policy.⁵¹⁰

⁵⁰⁸ *Manila Ministerial Statement*, *supra* note 463?, at ¶ 11.

⁵⁰⁹ *Id.* at ¶ 12.

⁵¹⁰ This table is drawn from several sources. See APEC Secretariat, *Highlights of Individual Action Plans*, in *SELECTED APEC DOCUMENTS 1996*, *supra* note 463?. For individual IAPs, see APEC Secretariat (visited July 29, 1997) <<http://www.apecsec.org.sg>>.

Table 4-7: 1996 Individual IAPs for Tariffs, Services, Investment & Competition Policy

<i>Country</i>	<i>Tariffs</i>	<i>Services</i>	<i>Investment</i>	<i>Competition Policy</i>
Australia	Reductions in applied tariffs until year 2000 beyond UR obligations with average tariff reduced from 6.1% in 1996 to 4.8% in 2000.	Full & Open telecommunications competition from July 1, 1997.	Will review screening system for FDI in non-sensitive sectors. Will liberalize restrictions on foreign investment in real estate.	Will review exemptions to current rules and pursue a policy of "competitive neutrality" between public & private-sector businesses.
Brunei Darussalam	Beyond UR commitments, will bind 82% of total tariff lines at 5%.	Will continue to make improvements.	Will review current investment laws and consider negotiating bilateral investment agreements with other APEC economies.	In addition to cooperation in APEC fora, will establish a national consumer protection body.
Canada	Continued liberalization with some focus on reducing General Preferential Tariff rates to developing countries.	Bound by comprehensive offer to all APEC economies in financial, telecoms, tourism and transportation sectors.	Will consider amending the TRIMs Agreement, supports an investment agreement within the FTAA, will negotiate bilateral investment agreements, and raise the limits on foreign broadcasting ownership from 20% to 33⅓%.	Will propose to amend Competition Act, will cooperate to develop international competition policy, will provide technical assistance to other countries seeking stronger competition laws, and will continue to deregulate and privatize.
Chile	2010: Will reduce current average applied tariff of 11% (below UR obligations) to zero on all sectors except agriculture, instead of 2020 deadline for developing countries.	Where barriers still exist, will seek to remove including the following sectors: business, communications, construction, distribution, education, environmental, financial, medical, tourism and transport.	Will further APEC investment liberalization by negotiating bilateral Investment Promotion and Protection Agreements.	Will strengthen anti-trust enforcement and promote cooperation between enforcement agencies.

<i>Country</i>	<i>Tariffs</i>	<i>Services</i>	<i>Investment</i>	<i>Competition Policy</i>
China	By 2000: Will reduce simple average tariff from 23% to around 15%.	Provide greater market access to foreign companies and continue sectoral liberalization and reforms.	Will improve transparency and increase investment opportunities.	Will study & develop complete competition mechanism. For long term, transition from planned economy to market economy.
Hong Kong	By 2010: 0% tariff on all imports.	Beyond telecoms offers, further liberalization could include lawyers, financial services, and some health care.	Will review and consider relaxing current open investment regime.	Will consider future liberalization when current studies are completed regarding state of Hong Kong competition.
Indonesia	Current tariffs of 20% or less will be reduced to 0 - 5% by 2000. Current tariffs of more than 20% will be reduced to 0 - 10% by 2003.	In addition to financial services & international maritime services talks, will identify and attempt to reduce market access restrictions in industrial services & tourism.	Will enhance transparency, expand bilateral investment guarantee agreements, and simplify the regulations for industrial zones.	Will continue to promote competition through deregulation and enhanced transparency.
Japan	Full implementation of URA and some accelerated tariff reduction on 697 items.	In addition to offers and participation in WTO agreements and negotiations in telecoms, financial services and maritime transport, Japan will consider liberalizing restrictions on foreign lawyers.	In short term, will improve transparency and liberalize by lifting the prior notification requirement in mining. In long term, will analyze possibility of deregulating industries not currently available to FDI, will take steps to expand FDI in Japan equivalent to Japanese investment abroad, and will define the optimal global framework for liberalized investment rules.	Will strengthen current Fair Trade Commission for enforcement, will publish announcements of application of current anti-monopoly law and regulations, and will provide technical assistance in terms of Japanese competition policy.

<i>Country</i>	<i>Tariffs</i>	<i>Services</i>	<i>Investment</i>	<i>Competition Policy</i>
Korea	In addition to current tariffs that are below UR bindings, will further reduce tariffs on a line-by-line basis	Various liberalization in telecoms, transportation, energy, tourism, legal services, accounting, distribution, and construction.	Redefine FDI to include acquisition of outstanding shares of domestic firms & inducement of long-term loans; allow loans of 5 plus years in order to import capital goods. Liberalize 92 sectors over 4 years.	Strengthen enforcement, offer technical assistance, and participate in APEC fora to enhance knowledge of competition policies.
Malaysia	Augmenting its already low 7% trade-weighted average tariff, Malaysia will reduce tariffs on some items and continue to review reducing them on others.	Higher FDI allowed in brokerages; 30% FDI allowed in legal, accounting, & other services; telecoms market access for enhanced value-added providers.	Will enhance transparency and expand bilateral investment treaties.	New policy will be drawn to "address unethical trade practices and abuse of market power."
Mexico	In addition to ITA commitments, Mexico will "accelerate WTO tariff reduction commitments if APEC and non-APEC members agree to do so."	Will actively participate in all GATS negotiations and will endeavor to remove all barriers to trade in services through a new round of WTO negotiations.	Will eliminate FDI limits in auto parts manufacturing, will increase the percentage of foreign capital allowed in transportation to 100% by 2004, and will simplify FDI registration requirements.	Will enhance transparency of newly created Federal Competition Commission by publishing all laws and decisions and will continue to support international efforts in other intergovernmental fora.
New Zealand	Will reduce simple tariff average to 3% by 2000 exceeding UR bindings in both amount of tariffs and scope of tariffs with almost all goods bound from 55% bound by the UR.	Will continue participation in services liberalization through GATS negotiations.	No changes proposed to already liberal non-discrimination investment regime, "no market-distorting investment incentives," and "minimal sectoral restrictions."	Will maintain current transparent competition policy and work to enforce it.

<i>Country</i>	<i>Tariffs</i>	<i>Services</i>	<i>Investment</i>	<i>Competition Policy</i>
Papua New Guinea	Will reduce bound rate of 40% on non-agricultural goods to 30% by 2006.	As of 1996, began deregulating all services industries toward more privatization and competition.	Will revise rules for greater transparency & non-discrimination; negotiate bilateral investment & double taxation agreements with other APEC countries.	Will seek to develop a national competition policy.
Philippines	Accelerate tariff reduction beyond UR bindings to target of 5% on all but sensitive agricultural products by 2004.	Beyond GATS, will consider measures to deregulate telecoms, transport, energy, tourism, distribution and financial services.	Besides services related TRIMS, will work to guarantee greater transparency; will negotiate more bilateral investment agreements.	Will consider enacting a competition law and enforcement mechanism.
Singapore	Will aim for 85% of goods bound at 6.5% and below by 2000; for 100% bound at 6.5% and below by 2005; and 100% bound at 0% by 2010.	Will consider liberalizing accounting, tax consulting, medicine, and tourism. Will eliminate requirements of 2/3 architect ownership of architectural ltd. liability corporations.	In addition to cooperation within APEC, will seek to negotiate more bilateral investment agreements.	Will deregulate and privatize telecoms, energy, broadcasting and transportation sectors to allow for greater competition.
Chinese Taipei (Taiwan)	2000: average nominal tariff rate to 7.9% with 50% of lines below 5%. 2005: 6.3% with 60% below 5%. 2010: 6% with 65% below 5%.	Services commitments in accordance with GATS offers— only one MFN exception & a few national treatment exceptions. Will allow foreign lawyers.	Will revise investment laws by liberalizing sectors for FDI, clarify which areas are prohibited from FDI, and eliminate restrictions on remittance rights for FDI.	In current competition law, will strengthen compliance education program and enforcement mechanism.

<i>Country</i>	<i>Tariffs</i>	<i>Services</i>	<i>Investment</i>	<i>Competition Policy</i>
Thailand	By 2000: will implement fully its UR bindings. Post-2000: will consider further liberalization in accordance with Osaka Action Agenda goal of free trade by 2020.	Will participate actively in GATS negotiations and unilaterally liberalize some other service sectors.	2000: will liberalize Alien Business Law to expand FDI, remove local content rules & restrictions on business visas, open up rural markets to FDI, and negotiate more bilateral investment agreements. 2020: will further liberalize.	2000: will enhance enforcement of current competition laws and establish cooperation agreements with other APEC economies. 2010: will amend anti-monopoly laws to allow for greater competition.
United States	By 2000: will reduce trade weighted average bound MFN rate from 3.4% to 2.7% on "virtually all products" with over 35% of tariff lines bound at zero. 2010/2020: free trade in region.	In addition to GATS negotiations, will participate in multilateral negotiations beginning no later than 2000 to reduce all barriers to trade in services. Prepared to negotiate "open skies" agreements with other APEC economies.	In addition to MAI, will seek to negotiate bilateral investment agreements with other APEC economies.	Will continue to enforce its competition laws and ensure transparency.

Despite the fact that these IAPs are difficult to compare given the variety of commitments made by the APEC economies,⁵¹¹ some observations might be useful as a preliminary step at analyzing the various IAPs. While ten countries announced time-bound tariff reductions, only five—Brunei, Chile, Hong Kong, New Zealand and Singapore—committed themselves in their IAPs to zero tariffs within the Bogor time frame⁵¹²; the rest only offered intermediate timetables. In services, virtually all the APEC economies expressed support for the continuing GATS negotiations. Moreover, the individual undertakings of the IAPs seem to embark into areas “traditionally regarded as untouchable,” such as energy, distribution and marketing.⁵¹³ Sixteen APEC economies made investment liberalization commitments, while eight economies proposed specific actions bound to a timetable. While the Osaka Action Agenda commits the APEC economies to national treatment of investors, it specifies no timeline; the IAPs indicate that those economies used APEC’s non-binding principles of investment to develop specific plans to open up investment in countries that are relatively new to investment agreements.⁵¹⁴

Another aim of the Osaka Action Agenda (Part Two) is to continue to build a sense of community and cooperation within APEC. This section of the Osaka Action Agenda elaborates on the third APEC pillar of economic and technical cooperation (Ecotech) to be undertaken jointly by APEC members in the ten areas covered by the APEC Working Groups. Common policy concepts, including goals, basic principles and priorities will be developed in each of the 10 specific areas (for example, providing a

⁵¹¹ Merit Janow argues that “the patchwork of undertakings comprising the initial IAPs are difficult to evaluate” because of little uniformity and no benchmark to compare the offers to. Janow, *supra* note 469, at 969, n.77.

⁵¹² For a detailed discussion of the IAP’s scheduled tariff reductions, see PECC ET AL., *PERSPECTIVES ON THE MANILA ACTION PLAN FOR APEC 11-17* (2d ed., 1996).

⁵¹³ *Id.* at 21.

⁵¹⁴ See *id.* at 27. The PECC report finds even more encouraging in this regard that many countries undertook to analyze technical cooperation with other APEC economies to learn from the investment liberalization experience of the United States, Canada, and others. *Id.*

quality basic education is one priority in the area of human resources development). In each area, joint activities such as compilation and sharing of data and information, surveys, training, seminars, research and technical demonstrations will be conducted. In addition, an economic policy dialogue will review and evaluate the common policy concepts and the joint activities.⁵¹⁵

In the buildup for the Manila Ministerial, the Economic Committee undertook a comprehensive assessment of the Ecotech agenda and produced a report analyzing the 320 APEC Ecotech joint activities undertaken and the 151 activities successfully completed.⁵¹⁶ Recognizing this call for a greater role for the Ecotech agenda, ministers meeting in Manila agreed upon the main goals of Ecotech: "to attain sustainable growth and equitable development in the Asia-Pacific region; to reduce economic disparities among APEC economies; to improve the economic and social well-being of the people; and to deepen the spirit of community in the Asia Pacific."⁵¹⁷ With these goals in mind, the ministers' framework calls upon Ecotech projects to be centered around six organizing themes: developing human capital, developing capital markets, strengthening economic infrastructure, harnessing future technologies, encouraging environmentally sound growth, and strengthening the dynamism of small and medium-sized enterprises.⁵¹⁸

⁵¹⁵ *APEC Osaka Action Agenda*, *supra* note 503.

⁵¹⁶ See *Manila Action Plan for APEC (MAPA) Highlights, Strengthening Economic and Technical Cooperation*, in *SELECTED APEC DOCUMENTS 1996*, *supra* note 463, at 38. Alan Oxley notes that while trade liberalization is important it relies on independent actions and thus far has produced limited results. However, he argues, Ecotech's goal of improving economic infrastructure will be more important to the "growth and modernization" of the APEC economies than trade liberalization over the next five years. Alan Oxley, *The Ecotech Agenda - APEC's Other Side: Will Infrastructure Be APEC's Orientation?* (Austl. APEC Study Centre Issues Paper No. 10, 1997), available at *The Ecotech Agenda* (visited Aug. 8, 1997) <<http://www.arts.monash.edu.au/ausapec/iss10.htm>>.

⁵¹⁷ *Declaration On An APEC Framework for Strengthening Economic Cooperation and Development* (Manila, Phil., Nov. 22-23, 1996), reprinted in *SELECTED APEC DOCUMENTS 1996*, *supra* note 463, at 144.

⁵¹⁸ *Id.* Prior to the Ministerial, APEC had already begun to focus more intensively on these themes; for instance, in September, 1996, it created the APEC Center for Technology Exchange and Training of Small and Medium Enterprises to "promote entrepreneurship and SME training in the region." *Id.*

This declaration alters the Ecotech agenda in two notable ways.⁵¹⁹ First the declaration shifts the focus from government-to-government joint projects to a more diverse development cooperation mechanism involving the private sector. More importantly, the declaration more explicitly defines what Ecotech's priority areas should be which might suggest "fewer but more streamlined and integrated joint activities" which diverge from previous activities which tended to focus on surveys and research.⁵²⁰ A PECC report on MAPA notes that the true challenge of this new Ecotech framework will be in its implementation, and whether APEC can continue to allow more people into the Ecotech process while ensuring that adequate financing remains.⁵²¹

4.5(e) Progress and obstacles to attaining APEC goals

APEC members committed to achieving free trade in a GATT-consistent manner. Endorsing the principle of non-discrimination, the Osaka Action Agenda states: "[t]he outcome of trade and investment liberalization in the Asia-Pacific region will be the actual reduction of barriers not only among APEC economies but also between APEC economies and non-APEC economies."⁵²² The commitments in the 1994 Bogor Declaration are ambitious, covering not only goods, but also services trade and capital flows.⁵²³ APEC's commitments extend beyond border measures to include investment regulations, financial markets, infrastructure, environmental protection, and competition policy. However, leading up to the 1995 Ministerial in Osaka there was some question whether APEC's commitments would be comprehensive in terms of sectoral coverage. Japan, Korea, China and Taiwan favored excluding agriculture from their commitments.

⁵¹⁹ For a more comprehensive discussion of this Declaration, see PECC ET AL., *supra* note 512, at 36-38.

⁵²⁰ *Id.* at 37.

⁵²¹ *Id.* at 38.

⁵²² *Id.*

⁵²³ *APEC Economic Leaders Declaration of Common Resolve*, *supra* note 462, at ¶ 6.

Indeed it is likely that the APEC liberalization in the agricultural sector would have the most severe impact on employment in Japan and Korea. In other APEC economies, the adjustments would be relatively minor. In all cases, the improvements in efficiency and gains from greater specialization would lead to an increase in per capita disposable incomes for employees in the agricultural sector. Ultimately, the principle of comprehensiveness was endorsed by the Ministers in Osaka and the commitment to liberalization of agriculture remains.⁵²⁴

According to some studies, the gains from APEC liberalization on a non-discriminatory basis would lead to real GDP being higher than otherwise in all APEC economies, with greater gains tending to be in the smaller and more open economies such as Singapore.⁵²⁵ With regard to terms-of-trade effects, some analyses suggest that an APEC FTA covering tariffs and non-tariff barriers could lead to upward and downward shifts in certain sectors such as fisheries, forestry, primary ferrous metals, meat products, milk products, other food products, textiles, and wearing apparel.⁵²⁶ However, achievement of full liberalization could be difficult because post-Uruguay Round tariffs for many developing economies of APEC (China, Indonesia, Korea, Malaysia, Papua New Guinea, the Philippines, Taiwan and Thailand) will remain high, and non-tariff measures remain prevalent in the manufacturing, agricultural and services sectors. Some of the major non-tariff barriers to trade and investment in APEC economies include restrictive import policies, lack of harmonization in standards and certification policies, non-transparent and discriminatory investment policies, inadequate protection of

⁵²⁴ *APEC Osaka Action Agenda*, *supra* note 483, at 2.

⁵²⁵ PHILIPPA DEE, CHRIS GEISLER, & GREG WATTS, *THE IMPACT OF APEC'S FREE TRADE COMMITMENT 16* (Australian Industry Commission Staff Information Paper, 1996).

⁵²⁶ K. M. HUFF, R. MCDUGALL, K. R. PEARSON & A. A. POWELL, *MEDIUM-RUN CONSEQUENCES FOR AUSTRALIA OF AN APEC FREE TRADE AREA: CGE ANALYSES USING THE GTAP AND MONASH MODELS* (Monash University, COPS and Impact Project General Paper No. G-11, 1995), *reprinted in* PECC, *SURVEY OF IMPEDIMENTS TO TRADE AND INVESTMENT IN THE APEC REGION* 63-64 (1995).

intellectual property rights, excessive and non-transparent regulations and anti-competitive business practices.⁵²⁷

With regard to facilitation, estimated gains from implementing APEC commitments on trade facilitation range from \$216 to \$442 billion per year, gains from liberalization of services total \$128 billion and gains from merchandise trade liberalization total \$175 billion.⁵²⁸ It is not clear whether APEC's goal will lead to the complete elimination of border controls. If APEC forms a free trade area on a discriminatory basis, monitoring and enforcement of rules of origin could become complex.

However, Merit Janow sees a discriminatory free trade area as an unlikely result of the APEC process.⁵²⁹ For one, she argues, such a move might generate more inward-looking protectionism from other regional trading areas. More importantly, the traditional elements of FTAs (reduction of tariffs, quotas, etc.) that can be achieved more easily on a regional basis than a multilateral one, would not solve the major trading problems between the two most economically important members of APEC, the United States and Japan. Tensions between the United States and Japan do not center around traditional barriers, but instead focus on non-tariff barriers and market access restrictions in Japan. Finally, it is unlikely that the United States would be willing, in the near future, to enter into any FTA that included a state-controlled economy such as China; or whether China would be willing to enter into an agreement with Japan and the United States of whom it remains distrustful.⁵³⁰

⁵²⁷ For examples of specific barriers to trade and investment in APEC economies, see USTR, 1996 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (1996).

⁵²⁸ DEE, GEISLER, & WATTS, *supra* note 525.

⁵²⁹ Janow, *supra* note 469, at 1011-1012.

⁵³⁰ Janow also suggests a third possibility for a smaller APEC FTA that would alleviate these two problems by excluding China and Japan, and including the United States, Canada, South Korea, Australia, Singapore and New Zealand. She concludes, however, that such a possibility seems politically unlikely. *Id.* at 1013.

As has been noted, APEC has set definitive goals and time frames for achieving liberalization and the first steps are being taken to implement them (i.e., agreement upon collective actions and the submission of IAPs). However, APEC officials have cautioned the business community, in particular, about raising any expectations for short-term results. According to the United States Representative to APEC, Ambassador John Wolf, it could take at least seven years (of the 14 to 24-year liberalization process) before there is concrete forward movement towards liberalization.⁵³¹

Already, APEC has produced concrete results in several areas of its Action Plan including: production of an APEC-wide tariff database CD-ROM and Internet site⁵³²; simplified and harmonized customs procedures; work on databases for telecommunications, tourism, transportation and energy; the initiation of a Pacific Ocean red tide control program; establishment of seafood inspection regimes; work in the area of standards and conformance; development of a compendium on rules of origin for the APEC economies⁵³³; and the conduct of training programs in agricultural and industrial technology and business management.

As already noted, the Seoul Declaration recognized APEC's primary role in supporting global multilateral liberalization of trade.⁵³⁴ Notably, the APEC forum has successfully provided a means for diverse economies to cooperate to complete multilateral negotiations of the GATS telecommunications and financial services talks, the Information Technology Agreement (ITA), and the Uruguay Round itself. Beginning with the Canberra Joint Statement and ending with the *Seattle Declaration of APEC Ministers on the Uruguay Round*, APEC ministers used the forum to continuously

⁵³¹ Ambassador John Wolf, U.S. Representative to APEC, Remarks at APEC: What's in it for Business, U.S. Chamber of Commerce (July 24, 1996).

⁵³² The tariff database is available online at <http://www.apectariff.org>.

⁵³³ APEC, ASIA-PACIFIC ECONOMIC COOPERATION COMPENDIUM ON RULES OF ORIGIN (1996).

⁵³⁴ *Seoul APEC Declaration*, *supra* note 490, at ¶ 1.

encourage the completion of the Uruguay Round.⁵³⁵ Most recently, the APEC ministers used the Manila meeting to gather support for completing the ITA.⁵³⁶

4.5(f) Conclusion

Although APEC does not provide the same immediate degree of trade liberalization as the EU, NAFTA, CER or MERCOSUR, it holds the prospect of ultimately achieving tariff-free trade in the region, and disciplines which remove many impediments to contesting domestic markets. In this sense, it may, in the future, achieve much of the Hull vision, at least as reflected in the *Havana Charter*. Ideally, APEC should serve as an anchor for more uniform economic policy coordination and dialogue in the region, as a vehicle for deepening economic integration, for promoting multilateral liberalization and for guarding against the development of an exclusive economic bloc. In addition to serving as the primary institutional means of engagement for the economies of the Asian-Pacific region, APEC is presently viewed by many regional officials as one of several “diplomatic tools” for liberalizing trade and investment, in addition to multilateral, regional and bilateral efforts.⁵³⁷ From various members viewpoints, i.e., the United States, APEC’s agenda on such issues as removing structural barriers to trade and encouraging deregulation is viewed as being mutually reinforcing of other of their regional economic goals. For example, in talks in 1998, the United States used the APEC forum to criticize Japan’s limited sectoral liberalization, both by tariff reduction and

⁵³⁵ See *Joint Statement* (Canberra, Austl., Nov. 6-7, 1989), *APEC Declaration on the Uruguay Round* (Sing., Jul. 30, 1990), *APEC Declaration on the Uruguay Round* (Seoul, S. Korea, Nov. 14, 1991), *APEC Declaration on the Uruguay Round* (Bangkok, Thail., Sep. 11, 1992), *Declaration of APEC Ministers on the Uruguay Round* (Seattle, U.S., Nov. 19, 1993), in *SELECTED APEC DOCUMENTS 1989-1994*, *supra* note 462.

⁵³⁶ *APEC Economic Leaders’ Declaration: From Vision to Action*, *supra* note 488, at ¶ 14.

⁵³⁷ Remarks by Ambassador John Wolf, *supra* note 531.

regulatory reform, as being too slow for APEC's goal of free trade and investment by 2010.⁵³⁸

Some Asian APEC members, however, hold contradictory views of the potential impact of the organization on the region. On the one hand, since APEC's founding, Asian members have been worried that the United States would use APEC to pursue its own liberalization priorities and that the larger economies of the United States and Japan, in particular, would dominate the organization. Some of these fears have lessened over time and APEC's work program has grown to include priority issue areas of both Asian and non-Asian members. For example, human resources development and assistance to small and medium-sized companies—both important issues to ASEAN—have been incorporated into the work program. In addition, while APEC is indeed gradually moving away from being solely a consultative body, it has not yet been transformed into a formal negotiating program as many had feared. On the other hand, because of concerns about a perceived decline in the United States military presence in the region, Asian members have viewed APEC as a potential fora for discussing security issues and thereby serving their interests as a stabilizing institution.⁵³⁹

If APEC achieves its goals of free trade and investment, the members economies will have established free trade in an amount equal to one-half of the United States trade deficit—that with China and Japan.⁵⁴⁰ In order for Asia to resume its economic growth and development, it is important that it demonstrate its re-commitment to liberalization; however, expecting achievements may not come as early as some major western countries

⁵³⁸ T.J. Tan, *US and Japan in APEC Clash*, FIN. TIMES, June 23, 1998, at 5.

⁵³⁹ DICK K. NANTO, APEC - ASIA PACIFIC ECONOMIC COOPERATION: FREE TRADE AND OTHER ISSUES 6 (CRS Rep., 1993). So far, APEC has not engaged in discussions on political or security issues, but Secretary of Defense Perry commented informally that APEC could address regional defense issues.

⁵⁴⁰ DICK K. NANTO, APEC AND FREE TRADE IN THE ASIA PACIFIC 1 (CRS Rep., 1995).

might prefer. This is the current tension of APEC. In the words of one U.S. official, "APEC needs results; the United States needs patience."⁵⁴¹

⁵⁴¹ Remarks by Nancy Adams, *supra* note 472.

4.6 Association of South East Asian Nations

Established in 1967 as a forum to promote economic growth and progress, promote regional peace and stability, and improve transportation, communications, and other links, the Association of South East Asian Nations (ASEAN) plays a key role in today's international trade liberalization efforts. ASEAN is already taking steps to establish a free trade area among its nine current members and is playing an influential role in shaping the WTO's future agenda. The group's approach to both reflects the developing status of ASEAN members and their dependence on an open world trading system. ASEAN's aims in terms of integrating economies in the region area have consistently been modest and often frustrated. ASEAN's economic successes include presenting a unified, effective voice in international fora and fostering the conditions that underpin economic prosperity and expanded global trade.

4.6(a) Membership and Institutional Features

ASEAN-9 encompasses a region of 481 million people with \$632 billion in GDP.⁵⁴² ASEAN is open for participation to all states in the south-east Asian region subscribing to the organization's founding principles, which include respect for justice and the rule of law.⁵⁴³ ASEAN's original signatories were Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Brunei became the sixth ASEAN member in 1984,

⁵⁴² See *ASEAN-9 Selected Economic Indicators* (visited Jan. 15, 1998) <<http://www.asean.or.id/stat/asean9.htm>>.

⁵⁴³ ASEAN, *Joint Communique, First Ministerial Meeting* (Bangkok, 1967), reprinted in *LAW & PRACTICE UNDER THE GATT AND OTHER TRADING ARRANGEMENTS: THE ASSOCIATION OF SOUTH-EAST ASIAN NATIONS*, at IIA-1 (Paul Davidson ed., 1995) [hereinafter *The ASEAN Declaration*], also available at <<http://www.asean.or.id/history/leader67.htm>>. [Note: hereinafter all policy documents and agreements will be referred to only by name, country and date; they are all available through ASEAN's Internet site "ASEANWEB" at <<http://www.asean.or.id>>]. ASEAN is discussed in more detail in USITC, PUB. 2621, *EAST ASIA: REGIONAL ECONOMIC INTEGRATION AND IMPLICATIONS FOR THE UNITED STATES* 53-54 (1993) [hereinafter *USITC, EAST ASIA*]. The following membership and structural information is available in *ASEAN: An Overview* (Jan. 15, 1998) <<http://www.asean.or.id/history/asean.htm>>

and Vietnam became the seventh ASEAN member in 1995. ASEAN became nine with the entry of Laos and Myanmar (Burma) in 1997. All current ASEAN members except Vietnam and Laos are also members of the World Trade Organization, while both are seeking membership.

Cambodia and Laos became observers to ASEAN in 1995. ASEAN invited Burma (Myanmar) as a guest to the its December 1995 summit. All three acceded to the ASEAN basic Treaty of Amity and Cooperation—the first step to gaining observer status. The July 21, 1996 decision by ASEAN foreign ministers to grant Burma full observer status, despite pressure from ASEAN's Western dialogue partners over the country's poor human rights record and recent crack-down on pro-democracy activists,⁵⁴⁴ belies the organization's ambition to encompass all Southeast Asian nations. While that decision may have been evidence that pragmatism, low-key diplomacy, and non-interference in domestic matters characterize ASEAN actions, ASEAN became more involved in domestic policy when it halted Cambodia's planned July 1997 admission when political turmoil threatened Cambodian stability.⁵⁴⁵ Leaving Cambodia behind, Laos and Myanmar joined ASEAN in July 1997.⁵⁴⁶

ASEAN decisions are reached on the basis of consensus. Among ASEAN's key legal instruments are the August 1967 *Bangkok Declaration*, establishing ASEAN and setting out the aims of the organization. Heads of Government of ASEAN member countries are presently scheduled to meet once every three years. Five such summits have been held, the latest being in December 1995. The organization's economic cooperation efforts are overseen by ASEAN Economic Ministers (AEM) which meet

⁵⁴⁴ For a statement on U.S. policy on this issue, see Winston Lord, Assistant Secretary of State for East Asian and Pacific Affairs, Statement before Asia and Pacific Subcommittee of the House International Relations (May 30, 1996), *reprinted in* U.S. Dep't of State, *Dispatch*, May 27, 1996, at 267-270.

⁵⁴⁵ *ASEAN to Postpone Cambodian Entry Due to Fighting*, 14 Int'l Trade Rep. (BNA) 1233 (July 16, 1997).

⁵⁴⁶ See Joint Communique of the Thirtieth ASEAN Ministerial Meeting (Subang Jaya, Malaysia, July 24-25, 1997).

formally or informally as needed. Senior Economic Officials meet quarterly to implement decisions reached at the AEM's yearly meeting. A separate organ, known as the AFTA Council, was formed in 1992 to oversee implementation of the ASEAN Free Trade Area (AFTA). Meetings among ministers in various specialized fields relevant to economic cooperation, such as energy, agriculture, science and technology and transportation, are held on an ad hoc basis. ASEAN created a permanent secretariat in 1977 which comprises four Bureaus including the AFTA Bureau which monitors AFTA implementation and other trade-related issues and initiatives.

4.6(b) Early Economic Integration Initiatives

Although originally established for largely political purposes to preserve peace and counter Communism in the region, in the late 1970's and early 1980's ASEAN implemented several initiatives to increase economic cooperation and trade among its members (table 1). Among them are a scheme to encourage integrated regional production of automobiles, which has attracted some interest in recent years. These early initiatives were fairly limited in scope and achieved little success in furthering economic liberalization, economic cooperation, and trade among ASEAN countries. A variety of factors have been cited for this lackluster performance, notably the fact that ASEAN economies are generally competitive, rather than complementary, in structure and are geared toward exporting to larger markets outside the region.

Several developments have recently led ASEAN to invigorate its pursuit of greater regional economic integration. Most notable are the increasingly regional tilt of U.S. trade policy and fears that efforts to deepen economic integration in Europe would come at the expense of outside partners. The emergence of the Asia-Pacific Economic Cooperation (APEC) forum heightened concern that ASEAN would be marginalized within the region and overshadowed in dealings outside the region. The need to retain international competitiveness in export-oriented manufacturing was another key factor,

particularly given the more extensive reform efforts underway in emerging markets in Latin America and Europe. At the same time, conditions became more ripe for success. Years of strong economic performance had increased confidence, strengthened domestic industries, and expanded intra-regional trade. Meanwhile, increased intra-regional investment and horizontal and vertical specialization within multinational enterprises added fuel to ASEAN efforts to drive down barriers to trade and investment.

Table 4-8: ASEAN: Early Economic and Industrial Cooperation Initiatives⁵⁴⁷

<i>Initiative</i>	<i>Description</i>	<i>Trade liberalization</i>	<i>Status</i>
ASEAN Industrial Project (AIP)	Begun in 1976 to promote large, capital-intensive public and private sector companies in the ASEAN region. Host country provides 60 percent of project financing while other ASEAN countries jointly contribute 40 percent.	Output of AIPs enter other ASEAN countries duty-free.	As of 1995, only 2 of 5 projects proposed were implemented. Lack of broader use attributed to absence of consensus over regional industrial specialization and reluctance of governments to award large projects to other member countries.
ASEAN Industrial Joint Venture (AIJV)	A response to slow progress with AIPs. Introduced in 1983 to promote small-scale private sector projects. Projects allowed up to 49 percent participation by other ASEAN members. Modified in 1987 to streamline approval process; by 1993, up to 90 percent foreign participation allowed.	Preferential tariffs applied to trade involving two or more ASEAN countries. A 75 percent margin of tariff preference initially allowed; margin of preference raised to 90 percent in 1993.	Limited success. As of 1992, 26 projects approved. Limitations attributed to cumbersome project approval process; minimal promotion of benefits. Moreover, governments tended to favor projects in their own countries.
ASEAN Industrial Complementation (AIC) and Brand-to-Brand Complementation (BBC)	AIC introduced in 1981 to divide production processes among ASEAN members for vertically-integrated private sector industries; targeted automotive industry. Replaced by BBC in 1988; again targeted automotive industry.	Preferential tariffs for components exchanged among ASEAN members. Under BBC, manufacturers of the same brand allowed to exchange components within ASEAN with a tariff preference.	Limited success. Some governments reluctant to award high value-added processes to other countries. Mitsubishi and Toyota used BBC for regional production in Thailand and the Philippines. Problems: differences in brands and vehicles persisted; Indonesia participated as of 1994.

⁵⁴⁷ Chia Siow Yue, *ASEAN Economic Integration*, in *EAST ASIAN ECONOMIES: TRANSFORMATION AND CHALLENGES* 279-282 (Toshihiko Kawagoe & Sueo Sekiguchi eds., 1995). Additional information compiled by the staff of the U.S. International Trade Commission from U.S. Government sources.

<i>Initiative</i>	<i>Description</i>	<i>Trade liberalization</i>	<i>Status</i>
Preferential Trading Arrangement (PTA)	Implemented in 1977 to provide tariff reductions, preferential trade financing, and preferential government procurement practices. Modified in 1987 to reduce the number of product exclusions.	Tariff preference scheme for specified products. Tariff preference margin 10 percent; raised to range of 25-50 percent by 1992. PTAs being phased out under CEPT scheme of AFTA.	Estimated to cover only 5 percent of intra-ASEAN trade due to large lists of products excluded from PTAs, significant trade in products with existing zero tariffs, and widespread use of nontariff barriers.

Today, ASEAN is one of the world's largest and most dynamic regional markets. The region's combined output (GNP) exceeds \$632 billion and its population of 481 million is even larger in size than that of the EU or NAFTA.⁵⁴⁸ Intra-regional trade, though still less than 25 percent, has grown faster than extra-regional trade for the past several years.⁵⁴⁹

4.6(c) ASEAN Free Trade Area

The decision to form an ASEAN free trade area (AFTA) was reached in 1992, when ASEAN countries signed a framework agreement for further economic cooperation.⁵⁵⁰ AFTA's goals include expanding the region's trade, improving its international competitiveness, and attracting investment. The key feature of the AFTA agreement was a scheme to reduce tariffs to a range of 0 to 5 percent *ad valorem* over the next 15 years on all processed goods produced and traded within the region as well as to eliminate nontariff barriers to trade.⁵⁵¹ While not technically "free trade," AFTA's 0 to 5 percent *ad valorem* target tariff range significantly liberalizes intraregional trade. AFTA also calls for elimination of nontariff barriers. Complementary efforts—known as "AFTA-plus"—are underway to liberalize services and investment, strengthen intellectual property rights protection, and facilitate customs clearance (see table 4-9).

⁵⁴⁸ *ASEAN-9 Selected Indicators* (Jan. 15, 1998) <<http://www.asean.or.id/stat/asean9.htm>>.

⁵⁴⁹ For example, from 1995 to 1996, intra-regional exports grew twice as fast as extra-regional exports (13% as opposed to 7%). See *ASEAN Trade with Major Trading Partners* (Jan. 15, 1998) <<http://www.asean.or.id/sat/extra5.htm>>.

⁵⁵⁰ Framework Agreement on Enhancing ASEAN Economic Cooperation (Singapore, Jan. 28, 1992). AFTA implementation is discussed in USITC, EAST ASIA, *supra* note 543, at 54.

⁵⁵¹ See Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (Singapore, Jan. 28, 1992). The time frame for liberalization under AFTA has since been compressed to 10 years. See Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (Bangkok, Dec. 15, 1995).

Table 4-9: Main Features of the ASEAN FTA & "AFTA Plus" Initiatives⁵⁵²

Issue	Status
Current Members	Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Laos & Myanmar
Accession	Open only to ASEAN members; ASEAN open only to South-East Asian countries. ASEAN observers Cambodia and Laos likely to join AFTA upon joining ASEAN in 1997; Burma granted observer status in July 1996.
Agreement Background	AFTA operative since January 1, 1993. ASEAN has notified GATT of AFTA.
Rules of origin	Products (1) wholly obtained or produced in a member country; (2) with 40 percent ASEAN content, or (3) containing not more than 60 percent of value added from a nonmember country when final manufacturing process performed within; and product exported directly from, an ASEAN country. Investigating use of change of tariff classification rule for textile and apparel products.
Tariffs	CEPT tariff-reduction scheme: tariffs to be reduced to 20 percent <i>ad valorem</i> or lower by 1999. Further tariff reduction to 0-5 percent <i>ad valorem</i> by 2003. Tariff reductions apply to over 80 percent of ASEAN tariff lines. Principal exceptions: raw agricultural products.
Quantitative Restrictions and Licensing	Quantitative restrictions to be eliminated on products under the CEPT with tariffs of 20 percent or below; other nontariff barriers to be phased out and replaced with tariffs within a 5-year period.
Customs Procedures	Signed ASEAN Agreement on Customs on March 1, 1997. Developing harmonized tariff nomenclature to be implemented by 1998. Expedited clearance on CEPT products at ASEAN borders. Developed draft ASEAN Common Customs Form.
Standards	No formal provisions, but a committee to consider standards harmonization and reciprocal recognition of product tests and certification has been formed and made some progress.
Government Procurement	No provisions.

⁵⁵² Summaries of ASEAN's efforts in all these sectors are available at ASEANWEB <<http://www.asean.or.id>>.

Issue	Status
Intellectual Property	Framework Agreement for TRIPs-compliant region-wide protection; Working Group on IPR established in 1994. ASEAN-wide patent and trademark system being explored.
Dispute Settlement ⁵⁵³	Protocol on Dispute Settlement Mechanism covers all ASEAN economic agreements including the AFTA initiative. Most developed initiative outside of WTO, NAFTA or EU. After consultations, panel adjudicates the dispute. Despite its similarities to the WTO Dispute Settlement Board, the Senior Economic Officials Meeting (SEOM) is not obliged to follow the panel report, however all non-party Senior Officials vote on the dispute by simple majority. Appeal is available to the ASEAN Economic Ministers (AEM) which likewise votes as a simple majority without the parties' voting participation. Prompt compliance with the AEM is preferred over a re-negotiation of concessions.
Regulatory issues	No formal provisions. Cooperative efforts to harmonize rules to promote fair competition.
AD/CVD administration	No provisions.
Subsidies	No provisions.
Investment	Goal is to create an ASEAN Investment Area (AIA) with no trade barriers to foreign investment. Currently, ASEAN Members are allowed to negotiate bilateral national treatment under a protocol for investment liberalization. However, in the absence of an intra-ASEAN bilateral agreement, Members must provide treat ASEAN investors on an MFN basis.
Services	Sectoral liberalization similar to GATS with national treatment commitments in: Tourism (all ASEAN Members), Maritime Transport (Brunei, Indonesia, Malaysia, Thailand), Air Transport (Brunei, Malaysia, Singapore), Business Services (Singapore) and Telecommunications (Vietnam).

⁵⁵³ See generally Protocol on Dispute Settlement Mechanism (Manila, Phil., Nov. 20, 1996). Observe how similar this is to the dispute settlement mechanism envisioned under the *Havana Charter*. The only major ASEAN contribution is the addition of a panel level; otherwise, the dispute may be appealed through two separate political levels (the SEOM and the AEM). ITO disputes would have proceeded similarly through two political levels voting by majority, the eighteen Member Executive Board (EB) and the multilateral Conference. See generally *Havana Charter*, *supra* note 17, at ch. VII. More importantly, with the power to appoint commissions, the ITO EB level disputes may have functioned in practice much like that outlined in ASEAN. ASEAN, perhaps out of necessity because of its size, added an additional proviso which stipulates that disputing Members may not participate in AEM or SEOM voting. See Protocol on Dispute Settlement Mechanism, *supra*, at arts. 7 and 8.2. The ITO Charter contains no similar restrictions. See *Havana Charter*, *supra*, at ch. VII.

Tariffs

ASEAN members are implementing phased tariff reductions under a so-called Common Effective Preferential Tariff (CEPT) scheme.⁵⁵⁴ The CEPT harmonizes and lowers tariff rates on broad categories of goods traded among ASEAN partners, an improvement over the line-by-line liberalization attempted in years past. No harmonization of external tariffs is envisaged, leaving each AFTA partner free to set its own most-favored-nation tariff rates.

The CEPT encompasses approximately 81 percent of all ASEAN tariff lines, including 15 “fast track” products targeted for even faster liberalization.⁵⁵⁵ AFTA’s tariff-reductions apply to all manufactured items, processed agricultural goods, and other goods not specifically excluded. To qualify for preferences, the AFTA rule of origin requires that at least 40 percent of the product content be produced by an ASEAN member.⁵⁵⁶

Some products are presently excluded from the scheme (table 3). Articles subject to national security or health concerns and certain other articles are on a “permanent exclusion list.” To be phased in at a later date are members’ lists of raw or unprocessed agricultural products and other commodities including petroleum (placed on a “temporary exclusion” list) and rosters of more sensitive products such as rice (placed on a “sensitive” list). In addition, each country is allowed its own exemptions from the CEPT. All of the exclusion lists are to be reviewed for possible elimination after 8 years.

⁵⁵⁴ Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, art. 4 (Sing., Jan. 28, 1992) [hereinafter CEPT Agreement].

⁵⁵⁵ PECC, *Milestones in APEC Liberalisation: A Map of Market Opening Measures by APEC Economies* 105 (Singapore, 1995); U.S. Dep’t of State, telegram, prepared by U.S. Embassy, Bangkok, message reference No. 40495, *ASEAN Summit: Joint Press Statement of the Eighth AFTA Council Meeting* (Dec. 22, 1995) [hereinafter U.S. Dep’t of State, *ASEAN Summit*].

⁵⁵⁶ See CEPT Agreement, art. 2.4; *Rules of Origin for the CEPT* (Jan. 15, 1998) <http://www.asean.or.id/economic/afta/afta_ex3.htm> .

These CEPT features—namely, well-defined exclusion lists with provisions for their review—mark a significant improvement from previous schemes of ASEAN cooperation, such as preferential trading arrangements (PTAs), in which the number of items excluded from tariff reductions was allowed to proliferate and impede the tariff-reduction scheme. Additional progress in this area has already been made. At their September 1994 meeting, the ASEAN ministers agreed to work towards fully incorporating products on the exclusion lists into the CEPT.⁵⁵⁷ To this end, they agreed to move 20 percent of the items from the temporary exclusion list to the inclusion list each year beginning January 1, 1995, with 100 percent of the temporary exclusion list subject to the CEPT tariffs by January 1, 2000. Further, the new amendments expanded the scope of product coverage to include agricultural products.

⁵⁵⁷ Protocol to Amend the Agreement on the CEPT Scheme for the ASEAN Free Trade Area (Bangkok, Thai., Dec. 15, 1995). U.S. Dep't of State, telegram prepared by U.S. Embassy, Bangkok, Message Ref. No. 33583, *ASEAN Economic Ministers Speed Up AFTA, Slow Down on APEC* (Sept. 29, 1994).

Table 4-10: AFTA: 1998 CEPT Package⁵⁵⁸

General Exclusion List (892 tariff lines)	Inclusion List (45,603 tariff lines)	Temporary Exclusion List (8,789 tariff lines)	Sensitive List (379 tariff lines)
Articles subject to national security and health concerns Articles of artistic, historic, and archaeological value	<i>Normal track products</i> All manufactured and processed agricultural products <i>"Fast track" products</i> Vegetable oils; chemicals; fertilizers; rubber products; pulp and paper; wood and rattan furniture; gems and jewelry; cement; pharmaceuticals; plastics; leather goods; textiles; ceramic and glass; copper cathodes; electronics	Raw/unprocessed agricultural items Petroleum products Other products	Other raw agricultural items, e.g., rice Remaining sensitive items

According to the original CEPT timetable, tariffs were scheduled to fall first to 20 percent *ad valorem* or below, and subsequently to fall to within the AFTA target range of 0 to 5 percent *ad valorem* by January 1, 2008. Members were encouraged to implement equal, annually-staged tariff reductions. At their September 1994 meeting, the ASEAN economic ministers accelerated the date for full AFTA implementation by 5 years, to January 1, 2003. Table 4 shows the original and the current, accelerated CEPT timetables.⁵⁵⁹

To receive AFTA tariff and nontariff concessions, a CEPT product must have a tariff of 20 percent *ad valorem* or below, either on a most-favored-nation basis or through CEPT tariff reductions, by 1998. Unilateral tariff preferences under PTAs will continue

⁵⁵⁸ See Joint Press Statement: The Eleventh AFTA Council Meeting (Subang Jaya, Malay., Oct. 15, 1997)

⁵⁵⁹ *Id.*

to exist, although the margins of preference gradually will diminish. In addition, each member has the right to temporarily suspend AFTA preferences, on a GATT-consistent basis, in case of injury or threat of injury to domestic production due to imports of a product under the CEPT from another member.⁵⁶⁰

Table 4-11: AFTA: CEPT tariff reduction schedule⁵⁶¹

	Original Timetable (effective Jan. 1, 1993)	Accelerated Timetable (implemented Jan. 1, 1996)
<i>Normal track products</i>		
Tariffs above 20 percent	20 percent or lower by Jan. 1, 2001 0-5 percent by Jan. 1, 2008	20 percent or lower by Jan. 1, 1998 0-5 percent by Jan. 1, 2003
Tariffs 20 percent or less	15 percent or lower by Jan. 1, 2003 10 percent or lower by 2005 0-5 percent by Jan. 1, 2007	0-5 percent by Jan. 1, 2001
<i>"Fast track" products</i>		
Tariffs above 20 percent	20 percent or below immediately 0-5 percent by Jan. 1, 2003	0-5 percent by Jan. 1, 2000
Tariffs 20 percent or less	0-5 percent by Jan. 1, 2000	0-5 percent by Jan. 1, 1998

Singapore was the only country that began implementing the phased CEPT tariff reductions as scheduled on January 1, 1993. However, all ASEAN members had implemented the CEPT by the end of 1994. Vietnam became a signatory to AFTA effective January 1, 1996, and began to implement the CEPT on that date; the reductions will be fully phased in by January 1, 2006. Acceding to AFTA in July 1997, Laos and

⁵⁶⁰ *Id.*

⁵⁶¹ See table 3 for a definition of CEPT normal track and fast track products. Table compiled from CEPT Agreement, art 4; PECC, *supra* note 328, at 105; U.S. Dep't of State, telegram prepared by U.S. Embassy, Bangkok, Message Ref. No. 33583, *ASEAN Economic Ministers Speed Up AFTA, Slow Down on APEC* (Sept. 29, 1994).

Myanmar committed to begin implementing their CEPT agreements on January 1, 1998 and complete that implementation by 2008.⁵⁶²

At the December 1995 AFTA Council, ministers considered further modifications to the AFTA timetable. Ministers rejected a proposal to further advance the date for full implementation of AFTA from the year 2003 to 2000. Instead, they noted that that target would be “substantially” accomplished because nearly 88 percent of the tariff lines in the CEPT scheme, or some 38,397 lines, will have tariff rates of 5 percent *ad valorem* or less by the year 2000; this will represent 81 percent of all ASEAN tariff lines.⁵⁶³ However, the ministers agreed to:

- Incorporate products on the sensitive list into the inclusion list by 2010; and
- Create a subcategory of unprocessed agricultural products within the temporary exclusion list specifically for products covered by state trading enterprises and notified the WTO; the status of these products is to be reviewed in 2003.⁵⁶⁴

Nontariff Barriers

AFTA has several measures to reduce nontariff barriers to trade. These measures apply only to products subject to the CEPT scheme once applicable tariffs fall to 20 percent *ad valorem* or below. Members are to eliminate quantitative restrictions—specifically quotas, licenses, administrative measures, or other such measures which restrict trade—as soon as a product enters the CEPT scheme, at which time the restriction is replaced with a tariff. Other nonspecified nontariff restrictions are

⁵⁶² Joint Press Statement: The Eleventh AFTA Council Meeting (Subang Jaya, Malay., Oct. 15, 1997). Initially, Laos committed 15% of its tariff lines to the inclusion list (all those tariff rates are at 5%), while Myanmar committed 43% of its tariff lines to the inclusion list with a resulting CEPT tariff average of 4.47%. *Id.*

⁵⁶³ U.S. Dep't of State, telegram prepared by U.S. Embassy, Bangkok, message ref. No. 39306, *Side-Meeting on ASEAN Free Trade Area at ASEAN Summit* (Dec. 18, 1995) [hereinafter U.S. Dep't of State, *Side-Meeting*]; U.S. Dep't of State, *ASEAN Summit*, *supra* note 555.

⁵⁶⁴ *Id.*

to be phased out within 5 years after the product enters the CEPT scheme. Members also agreed to lift any foreign exchange restrictions that may impede payments for CEPT products and to consider other areas for cooperation, including the harmonization of standards, reciprocal recognition of tests and certification of products, and rules to promote fair competition.⁵⁶⁵

Investment

ASEAN investment liberalization began with the 1987 Agreement for the Promotion and Protection of Investment contains provisions for nondiscriminatory treatment, unrestricted repatriation of funds, prohibition of expropriation, guidelines for dispute settlement, transparency and double taxation agreements.⁵⁶⁶ As amended in 1996, the Agreement provides that each member must guarantee MFN treatment to investors of other Member States unless those Member States directly negotiate national treatment between themselves. Additionally, the Agreement offers investors an arbitration dispute settlement mechanism for any disputes that arise between investors of ASEAN countries and ASEAN Members. Although not as elaborate as the NAFTA chapter 14 mechanism, this investor-state dispute settlement mechanism is significant.⁵⁶⁷ The goal of ASEAN investment liberalization is to eventually create an ASEAN Investment Area for which a framework agreement is currently being negotiated.⁵⁶⁸

⁵⁶⁵ CEPT Agreement.

⁵⁶⁶ The ASEAN Agreement for the Promotion and Protection of Investments (Manila, Phil., Dec. 15, 1987) (as amended by the Protocol to Amend the Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments (Jakarta, Indon., Sep. 12 1996)). See also Bijit K. Bora, *APEC's Non-Binding Investment Principles: A Step Forward?*, in INVESTMENT ISSUES IN ASIA AND THE PACIFIC RIM table 8-1, 143-148 (Carl J. Green & Thomas L. Brewer eds., 1995).

⁵⁶⁷ State-to-state disputes are still covered by the ASEAN Dispute Settlement Mechanism. See ASEAN Agreement for the Promotion and Protection of Investments, art. IX.

⁵⁶⁸ See *ASEAN Officials Announce Initiative to Promote Investment Within Region*, 12 Int'l Trade Rep. (continued...)

Services

ASEAN generally has modeled its services liberalization after the WTO's General Agreement on Trade in Services (GATS) with a positive-list approach whereby only those sectors specifically committed to will be subject to national treatment market access provisions. ASEAN Members make commitments in specific sectors greater than their GATS obligations on an MFN basis to other Members.

Acting on the Framework Agreement for Economic Cooperation's call for cooperation in improving competition and desiring to go beyond the provisions of General Agreement on Trade in Services, ASEAN members signed the ASEAN Framework Agreement on Services.⁵⁶⁹ Negotiations on specific commitments began in 1996 on priority sectors such as financial services, transport, telecommunications, tourism, construction, air transport, and business services. At the end of 1997, the members completed the first round of negotiations..⁵⁷⁰ Going into effect in March 1998, the implementing protocol contains specific market access commitments and guaranteed national treatment in tourism, maritime transport, air transport, business services and telecommunications. Commencing at the end of 1998, a second round of negotiations will involve, in addition to the further commitment in the first round's sectors, construction and financial services.

4.6(d) Other Cooperation Initiatives

As mentioned earlier, a variety of schemes to encourage more efficient production within the ASEAN region have been introduced since 1976. In 1995, ASEAN members

⁵⁶⁸ (...continued)
(BNA) 1965 (Nov. 29, 1995).

⁵⁶⁹ ASEAN Framework Agreement on Services (Bangkok, Thailand, Dec. 15, 1995).

⁵⁷⁰ Protocol to Implement the Initial Package of Commitments Under the ASEAN Framework Agreement on Services (Kuala Lumpur, Malaysia, Dec. 15, 1997).

agreed to phase-out the existing Brand-to-Brand Complementation and ASEAN Industrial Joint Venture schemes. A new industrial cooperation scheme is presently being formulated whose goals include encouraging development of technology-based industries and of value-added activities. Cooperation in the areas of finance, banking, agriculture, minerals, energy, transportation, communications, and tourism is also being pursued. For example, efforts to facilitate multi-modal transport, achieve interconnectivity in telecommunications, and harmonize road transport regulations have been launched.

4.6(e) Successes and Failures

ASEAN's greatest success in the economic field is derived from its success in the political realm. The restoration of peace and stability to Southeast Asia since ASEAN's founding and continued spread of market-based economic policies have underpinned impressive growth and development in ASEAN members. This role continues, with the ASEAN Regional Forum (ARF), a governmental security dialogue among Asia-Pacific partners launched in 1993. The ARF has apparently had some success in encouraging China to peacefully resolve territorial disputes in the Spratlys/South China Sea in accordance with international law.

ASEAN has also been an effective voice for the region's developing economies. The organization has helped members retain tariff preferences granted by developed country trading partners, attain liberalization in such areas as textiles and tropical products in the Uruguay Round, and argue against using non-trade issues, such as environmental and worker protection, to undermine existing trade privileges. ASEAN maintains a formal dialogue with key economic partners—Australia, Canada, the EU, Korea, Japan, New Zealand, and the United States—via an annual Post-Ministerial Conference, held immediately following the ASEAN annual foreign ministers meeting.

It also holds regular consultations with trade ministries from Japan, the United States, and elsewhere.

ASEAN continues to develop its external role and to create coalitions with other partners to counter external pressure from countries. It continues to express support for formation of an East Asian Economic Caucus (EAEC) within APEC. ASEAN was also instrumental in launching the Asia-Europe Ministerial meeting held in early 1996.

ASEAN has also continued its role as the region's stabilizing institution. ASEAN ministers, by denying Cambodia entrance to their group when Cambodia erupted in political violence, sent a strong message that the benefits of southeast Asian integration could not be gained by unstable regimes. At the same time, ASEAN pursued an independent path from EU and United States foreign policy by allowing the autocratic Myanmar full access to its markets.

4.6(f) Future Prospects

While numerous factors have and continue to impede regional integration in Southeast Asia, there may be fresh grounds for optimism. Most ASEAN members have undertaken substantial economic reforms in recent years in an effort to improve economic performance and retain their attractiveness as sites for export-oriented investment. The countries undertaking the most far-reaching reforms have both encouraged similar action by ASEAN partners and pressed for bold ASEAN trade liberalization initiatives. The emergence of large trade blocs in Europe, North America, and Latin America appear to have reinforced ASEAN's resolve to reduce trade and investment barriers among its members and present a unified voice in favor of an open, rules-based trading system. ASEAN liberalization is expanding to such areas as investment, services, customs procedures, and standards. Thus far, ASEAN initiatives appear to have undergirded expanded growth and exports, encouraged regional and external cooperation, and added impetus to ongoing domestic economic reforms. ASEAN has played a constructive role

in the world trading system, and, given its members dependence on export-led growth, leads the call for a predictable, open trading environment.

ASEAN is most notable in the political stability that it helped bring to Southeast Asia prior to the financial crisis of 1998. Beyond that, it has also made significant achievements in its liberalization efforts. Of the areas focused on in this work, investment liberalization has seen the most progress. Specifically, the 1987 Agreement contains provisions for nondiscriminatory treatment, unrestricted repatriation of funds, prohibition of expropriation, guidelines for dispute settlement, transparency, and double taxation agreements. ASEAN members are also working towards intellectual property rights protection that will be TRIPs-compliant. However, in the two key areas of regulatory issues and competition policy, ASEAN members have yet to make significant progress—regulatory issues and competition policy. What remains to be seen, moreover, is whether ASEAN remains effective in dealing with complex trade and political issues, such as those recently seen in Southeast Asia. ASEAN as an organization has had a very constrained role in dealing with the Asian financial crisis, which suggests it needs to develop additional powers to handle the same.

4.7 Mercado Comun del Sur (MERCOSUR)

MERCOSUR plus two (Chile and Bolivia) comprises 13.6 million square kilometers of land mass (an area larger than the EU), 227 million people that speak only two languages, and a gross GDP of US\$1.4 trillion.⁵⁷¹ It is the most ambitious and successful of such efforts by developing countries. In its six short years of existence, it has already achieved the highest level of economic integration, a customs union, next to the EU's common market. Hoping to become a common market itself early in the next decade, MERCOSUR already stands as the world's fourth largest integrated market.⁵⁷²

A customs union since 1995, MERCOSUR's common external tariff (CET) covers approximately 85% of all goods traded and has free trade intra-regionally on over 90% of all goods. Like the EU, MERCOSUR has created several sets of institutions where trade policy can be developed.⁵⁷³ Ambitious, MERCOSUR is continuing to pursue other goals in order to become a common market, including: reduction on non-tariff barriers, more transparency, relaxed rules on services, and, possibly, a common currency.

This section first describes the basic functions and goals of MERCOSUR. In this regard, it looks to its history and development, its founding treaties, its institutional structure and the coverage of the free trade area and the common external tariff. Regarding the latter, the section looks at arguments about whether the free trade area and customs union has caused trade distortion or trade creation. Turning to the three pillars of

⁵⁷¹ GDP is calculated as purchasing power parity with 1995 figures. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (1996), *also available at* <http://www.odci.gov/cia/publications/nsolo/factbook/samr.htm>.

⁵⁷² Behind the NAFTA, the EU and Japan. *The End of the Beginning*, ECONOMIST, Oct. 12, 1997, at *MERCOSUR Survey* p. 4.

⁵⁷³ Unlike the EU though, MERCOSUR is still largely an intergovernmental organization and not a supranational one: thus far, there is only consensus voting, no enforceable dispute resolution, no MERCOSUR aocracies similar to the Commission, and no supranational court of justice.

increased market liberalization outside of tariff reductions, the section focuses on efforts to liberalize investment, competition policy and services in the region. Since MERCOSUR is a relatively new RIA, the WTO has not decided whether it is GATT legal; therefore, the paper poses the questions that will be asked in a WTO review of the free trade area and the customs union and makes some conclusions as to the possible outcome of that review. Finally, the section reviews the “foreign policy” of MERCOSUR with an in-depth look at MERCOSUR’s agreements with both Chile and the EU.

4.7(a) The Structure of MERCOSUR

History and Development

Latin American integration efforts date back to 1960 and the formation of the Latin American Free Trade Association (LAFTA).⁵⁷⁴ Failing to meet its twelve-year objective of intra-regional liberalization, LAFTA faded until it was replaced by the Latin American Integration Association (LAIA) in 1980.⁵⁷⁵ LAIA provides the institutional framework for countries to negotiate bilateral and multilateral preferential tariff agreements.⁵⁷⁶

From this framework the first agreement between Argentina and Brazil was realized. In 1986, the two countries signed the Program of Economic Integration and

⁵⁷⁴ Treaty Establishing a Latin American Free Trade Area and Instituting the Latin American Free Trade Association, Feb. 18, 1960, 2 M.I.G.O. 1575. For a general history, see WTO, REGIONALISM AND THE WORLD TRADING SYSTEM 34-35 (1995) [hereinafter REGIONALISM AND THE WORLD TRADING SYSTEM]; see generally, Frank J. Garcia, “Americas Agreements” - *An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT’L L. 63 (1997); Paul A. O’Hop, *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT’L L.J. 127 (1995).

⁵⁷⁵ Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672.

⁵⁷⁶ For a detailed analysis of LAIA’s institutional structure and how it fostered economic integration, see O’Hop, *supra* note 574.

Cooperation (PICE)⁵⁷⁷, containing twenty-four protocols with such concepts as sectoral cooperation, tariff reduction and elimination of non-tariff measures on certain products.⁵⁷⁸ PICE's main effect was an increase in bilateral trade in Brazil's favor, with total global exchange increasing from \$1.1 billion in 1986 to \$2.1 billion in 1990.⁵⁷⁹

Two interim agreements followed prior to the formation of MERCOSUR. In 1988, the Treaty of Integration, Cooperation, and Development between Argentina and Brazil aimed for gradual, automatic elimination of tariffs within ten years and laid the groundwork for a common market. The Act of Buenos Aires, in July 1990, modified the time frame for elimination of tariffs to five years.

Bilateral negotiations resumed with the Economic Complementation Accord in December 1990. However, when Argentina and Brazil desired to incorporate Uruguay and Paraguay, in order to comply with the LAIA, a new treaty was negotiated to admit the two new states. Finally, on Mar. 26, 1991, the Treaty of Asuncion established the Southern Cone Common Market.⁵⁸⁰

Two protocols augment the Treaty of Asuncion's basic goal of a common market. In 1991, the parties agreed to the Protocol of Brasilia which set up a dispute resolution mechanism. In 1994, in order to implement the CET, the parties agreed to the Protocol of Ouro Preto which officially establishes MERCOSUR as a customs union with an institutional framework to create a common market.⁵⁸¹

⁵⁷⁷ Agreement on Argentine-Brazilian Integration, July 29, 1986, 27 I.L.M. 901.

⁵⁷⁸ See *id.*; Ana Maria de Aguinis, *Can MERCOSUR Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L LAW 597, 599 (1995).

⁵⁷⁹ *Id.* at 599.

⁵⁸⁰ Treaty of Asuncion Establishing a Common Market Among Argentina, Brazil, Paraguay & Uruguay (MERCOSUR), Mar. 26, 1991, art. 1, 30 I.L.M. 1041 [hereinafter Treaty of Asuncion].

⁵⁸¹ For a general discussion, see de Aquinas, *supra* note 578, at 608-610; see also Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1244 [hereinafter Protocol of Ouro Preto].

Some argue that the parties negotiated MERCOSUR in the 1990's because of the convergence of structural and economic justifications for regional integration.⁵⁸² For the first time in this century, all four parties had achieved full democracy and none were at war with—or even hostile to—the other. Secondly, the LAIA process gave validity to the formation of regional integration areas (RIAs) among the developing countries of South America. In the multilateral context, the GATT negotiations legitimized regional efforts while it promoted general trade liberalization. Economically, the countries believed that homogeneous investment and joint venture regulation might help attract foreign investment and capital when other programs were not as effective.

The Treaty of Asuncion and the Institutional Structure of MERCOSUR

The goals of the Treaty of Asuncion are laid out in the preamble and can be summarized as follows:⁵⁸³

- Elimination of tariffs and other non-tariff duties to result in free circulation of “goods, services and factors of production”;
- Common External Tariff (CET);
- Common External Trade Policy—coordination of positions in other economic or commercial forums;
- Coordination of macroeconomic and sectoral policies; and
- Other harmonization of laws.

The treaty additionally contained a set of transition period regulations which led to the Protocol of Ouro Preto in 1994.⁵⁸⁴ The Protocol of Ouro Preto further sought to:

⁵⁸² See de Aguinis, *supra* note 578, at 600, 601

⁵⁸³ See de Aguinis, *supra* note 578, at 601-602; Treaty of Asuncion, *supra* note 580, art. 1.

⁵⁸⁴ See de Aquinas, *supra* note 578, at 608-610; see also Protocol of Ouro Preto, *supra* note 581.

- Enforce and redefine the institutional structure of MERCOSUR; and
- Establish MERCOSUR as a legal person capable of negotiating with third party countries or with other legal groups of countries for broader regional integration.⁵⁸⁵

MERCOSUR is broken into three decision-making bodies, two consultative ones, and an administrative secretariat. All three decision-making bodies are decidedly intergovernmental where all voting is done by consensus with equal votes for each member country. Table 1 illustrates the function of each body. Although there are not any supranational bodies yet in place, the MERCOSUR countries have agreed in principle to establish a supranational bank and court.⁵⁸⁶

⁵⁸⁵ *Id.* at art. 8, IV. In this regard, MERCOSUR becomes more like the EU and less like most other RIAs; international legal personality allows MERCOSUR to negotiate and enter into treaties as a bloc—as the EU has done in the WTO.

⁵⁸⁶ *MERCOSUR Countries to Establish Supranational Bank and Court*, 13 Int'l Trade Rep. (BNA) 980 (June 12, 1996).

Table 4-12: Institutional Structure of MERCOSUR after the Protocol of Ouro Preto⁵⁸⁷

Institution	Description
Council of the Common Market (CCM)	Comprised of Ministers for Foreign Affairs of State Parties with rotating presidency. Duties include: supervise the implementation of the Treaty of Asuncion; formulate policies to promote common market; assume legal personality of MERCOSUR and negotiate and sign agreements on behalf of MERCOSUR with third countries; rule on proposals submitted by CMG. Decisions are binding with voting only by consensus. ⁵⁸⁸
Common Market Group (CMG)	One representative from each State Party. Duties include: propose draft decisions to CCM; negotiate on behalf of MERCOSUR when CCM delegates; choose and manage Secretariat. Decisions (called Resolutions) are binding. Like CCM, all voting done by consensus.
MERCOSUR Trade Commission (MTC)	One representative from each State Party. Duties include: set and administer CET; propose to CMG new MERCOSUR trade regulations; provide technical support to CMG. Decisions taken as Directives (binding) or Proposals (non-binding). Hears disputes referred to it by National Sections of MTC. After analysis, vote by consensus. If no consensus, then MTC submits various alternatives to CMG, again vote by consensus.
Joint Parliamentary Commission (JPC)	Equal number of members representing parliaments of State Parties and appointed by national parliaments. Can submit non-binding recommendations to CCM through CMG. Works toward cooperation and harmonization of national laws with other MERCOSUR states parties' laws and with MERCOSUR decisions.
Economic-Social Consultative Forum (ECSF)	Consultative function. Makes non-binding recommendations to CMG. Comprised of non-governmental interests.
MERCOSUR Administrative Secretariat (MAS)	Administrative functions: translations; official publications; organization of meetings. Performs tasks requested by others. Maintains lists of arbitrators and experts for dispute resolution. Director, who must be a MERCOSUR national, is chosen by CMG and appointed by CCM to serve single two year term. (Art. 33).

Although the Treaty of Asuncion stipulated that MERCOSUR should develop a permanent dispute settlement system by the end of its transition system, the negotiations

⁵⁸⁷ See generally Protocol of Ouro Preto, *supra* note 581.

⁵⁸⁸ de Aquinas, *supra* note 578, at 609.

for the Protocol of Ouro Preto failed to produce a system.⁵⁸⁹ Instead, the parties committed to further developing a system and to rely on the interim system created by the Protocol of Brasilia which allows claims to be raised about virtually any aspect, including interpretation, of MERCOSUR law.⁵⁹⁰ Like private parties in the labor and environmental side agreements of the NAFTA, private parties must use their own local sections of MERCOSUR institutions as their agents in presenting a dispute.⁵⁹¹ Those local sections have complete autonomy to decide whether to proceed with the claim; if the local section approves the claim, it moves on to the MERCOSUR institutions for an administrative review. While these private claims are reviewed by one of the MERCOSUR institutions; intergovernmental disputes must go through a consultation process prior to arbitration. Ultimately, either party has access to binding arbitration.

Despite this structure, however, all disputes thus far have been dealt with politically. The possible upcoming establishment of a supranational court might help to alleviate the uncertainty that comes from political dispute resolution that oftentimes results in a rewriting of the rules, and, like the European Court of Justice, could possibly provide MERCOSUR with an engine for deeper integration.⁵⁹²

⁵⁸⁹ Protocolo de Brasilia Para la Solucion de Controversias, Dec. 17, 1991, 6 INTER-AM. LEG. MAT. 1, cited in Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 852, n.5 (1997). For a thorough discussion of the Brasilia Protocol and why it has not evolved into a permanent dispute settlement system, see *id.*

⁵⁹⁰ The following summary of the Brasilia Protocol system is derived from Cherie O'Neal Taylor's comparison of NAFTA and MERCOSUR dispute settlement procedures. See generally *id.*

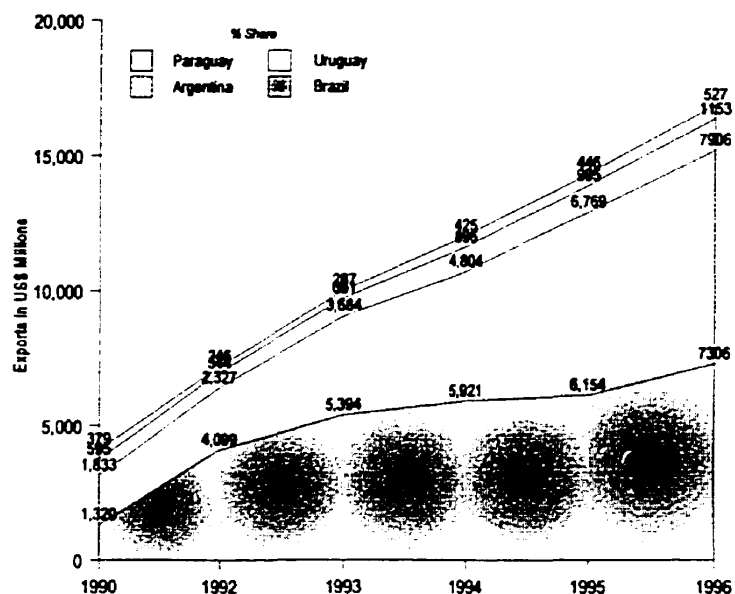
⁵⁹¹ If an Argentine private party is unable to convince its local section to go forward, it may be able to take up its claim before Argentine courts. Alone among the MERCOSUR judiciaries, the Supreme Court of Argentina has found that MERCOSUR law is equivalent to the Argentine Constitution. See *id.* at 880-881.

⁵⁹² But see O'Neal Taylor, *supra* note 589, at 869 ("[g]iven the lack of supranational institutions for the creation of the MERCOSUR law, the absence of a supranational dispute settlement institution is not surprising").

Internal Free Trade

Although most goods are tariff-free, there remain several holes to completing internal free trade.⁵⁹³ Currently, tariffs are being reduced toward zero by 1999 and 2000 for sensitive products: 407 items for Uruguay, 293 for Paraguay, 231 for Argentina and 17 for Brazil.⁵⁹⁴ The average internal tariffs on these exempted goods runs from a low of 10% in Brazil to a high of 25% in Paraguay.⁵⁹⁵ Table 2 shows the increase in intra-regional trade as a result of this lowering of internal barriers.

Figure 4-2: MERCOSUR Intraregional Trade



⁵⁹³ For a general description, see *What MERCOSUR Has Done*, ECONOMIST, Oct. 12, 1996, at MERCOSUR Survey p. 5.

⁵⁹⁴ See *id.*; MARCELO OLARREAGA & ISIDRO SOLOAGA, ENDOGENOUS TARIFF FORMATION: THE CASE OF MERCOSUR, at Table 2 (Economic Research & Analysis Division (ERAD), WTO, Staff Working Paper ERAD-97-003, Ver. 2.5, Mar. 1997).

⁵⁹⁵ *Id.*

Intra-regional exports grew at an average rate of 26% from 1990-1996.⁵⁹⁶ This is especially impressive when compared to the average percentage growth from 1990-1996 of exports to the rest of the world of approximately 8%. Moreover, some studies suggest that the remaining areas of protection of these exempted goods tend to be in areas of “potentially trade-creating sectors.”⁵⁹⁷ Therefore, once the goals of Ouro Preto are reached with complete internal free trade, more trade creation should occur.

As part of a World Bank study on MERCOSUR,⁵⁹⁸ Alexander Yeats argues instead that the increased intra-regional trade is trade distorting. Without the preferences granted within MERCOSUR, the intra-regional export of capital-intensive goods would not be successful because the MERCOSUR members have a lower comparative advantage in these sectors than third countries. He concludes that had MERCOSUR not implemented lower intra-regional tariffs—and “achieved an equivalent degree of liberalization on a non-discriminatory basis”—the countries “would have maintained a more efficient import structure, paying less and/or obtained better goods, and they would have purchased more from their trading partners outside the bloc.”⁵⁹⁹ Instead, MERCOSUR was not “internationally competitive where intra-trade was growing most rapidly, and...domestic producers [re-oriented] exports to local markets in order to charge the higher prices associated with the most restrictive trade barriers.”⁶⁰⁰

⁵⁹⁶ These figures were derived from the WTO Annual Reports. WTO, ANNUAL REPORT 1996, VOL. II, *supra* note 38, at 36; WTO, ANNUAL REPORT 1997, VOL. II, *supra* note 43, at 36. *See also* DEP'T OF INTEGRATION AND REGIONAL PROGRAMS, INTER-AMERICAN DEVELOPMENT BANK (IADB), ECONOMIC INTEGRATION IN THE AMERICAS, 1995 YEAR-END REPORT, at Table 1 (Periodic Note, Feb. 1995).

⁵⁹⁷ *See* OLARREAGA & SOLOAGA, *supra* note 594, at 21.

⁵⁹⁸ It should be noted that Brazil has protested this study before the WTO General Council. Brazil argued that the World Bank study constituted “action on a matter under WTO competence...[and was not] foreseen under cooperation established by Article III:5 of the WTO Agreement.” WTO General Council, *Annual Report (1996)*, WT/GC/7 (Nov. 20, 1996).

⁵⁹⁹ ALEXANDER YEATS, DOES MERCOSUR'S TRADE PERFORMANCE RAISE CONCERNS ABOUT THE EFFECT OF REGIONAL TRADE AGREEMENTS? 28 (Int'l Trade Division, Int'l Economics Dep't, The World Bank, Policy Research Working Paper No. 1729, 1997).

⁶⁰⁰ *Id.* at 30. Others conclude that this is a forgone conclusion because MERCOSUR is not quite fit for a natural trading bloc. The transportation cost advantages offered by geographical proximity are not alone
(continued...)

As Yeats' critics have observed, Yeats' analysis fails to consider the foreign automobile manufacturing presence in Brazil.⁶⁰¹ Despite the fact that automobiles are exempt from MERCOSUR trade rules until 2000, the analysis' trade differentials between intra-MERCOSUR trade and extra-MERCOSUR trade also take into consideration the considerable increase from 32% to 70% of Brazil's tariff on automobiles manufactured outside of MERCOSUR.

Common External Tariff

A Common External Tariff (CET) ranging from 0 - 20 % came into effect on January 1, 1995 covering approximately 85% of all goods.⁶⁰² Argentina, Brazil and Uruguay each have 300 exceptions lasting until 2001. Paraguay has 399 exceptions lasting until 2006. For all these exceptions, there will be a linear reduction of the current tariffs until they converge with the CET in either 2001 or 2006. For capital goods, Argentina and Brazil must converge on a CET of 14% by 2001, while Uruguay and

⁶⁰⁰ (...continued)

sufficient to justify preferential treatment to intra-regional goods. See generally AZITA AMJADI & L. ALAN WINTERS, TRANSPORT COSTS AND "NATURAL" INTEGRATION IN MERCOSUR (Int'l Trade Division, Int'l Economics Dep't, The World Bank, Policy Research Working Paper No. 1742, 1997). For example, no train has ever traveled from Argentina to Brazil because of different rail gauges—intra-regional goods need to be off loaded and then reloaded at the border. However, the transportation costs may be decreasing as a result of work between MERCOSUR and its FTA partners of Chile and Brazil. MERCOSUR is improving its infrastructure so that goods can be shipped more easily across the continent—especially through the Andean passes, where Argentina and Chile each have pledged US\$150 million so that MERCOSUR can have greater access to Pacific ports and Asian markets. See *The Race to Bridge Borders*, ECONOMIST, Oct. 12, 1996, at *MERCOSUR Survey* p. 18.

⁶⁰¹ See USITC, Pub. No. 3029, *A Closer Look at MERCOSUR*, INT'L ECON. REV., Feb./Mar. 1997, at 9.

⁶⁰² For descriptions of the CET, see THE ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT: BRAZIL 23 (1995); Trade Unit, OAS, *Trade and Integration Arrangements in the Americas: An Analytical Compendium*, Foreword (visited May 30, 1997) <<http://www.sice.oas.org/CP061096/english/foreword.stm>>; Americas Branch, Australian Dep't of Foreign Affairs & Trade, *MERCOSUR / MERCOSUL: What it Means for Australia* (Aug. 1995) <<http://www.dfat.gov.au/la/mercosur.html>>.

Paraguay have until 2006. And in the case of information technology, a CET of 16% will apply to all countries by 2006.

According to one Argentine official at the time, by lowering Brazil's high tariffs with the far lower CET, the cost of doing business in the region will drop and will allow MERCOSUR members to remain competitive with Chile which has tariffs only slightly lower than MERCOSUR's CET.⁶⁰³ However, while the average CET of 14% may be close to Chile's 11%, Chile's 11% is applied equally to almost all imports while the CET varies from zero to 20%.⁶⁰⁴

The CET began with a rocky start. In early 1995, soon after the CET was implemented, Brazil raised tariffs unilaterally on 109 products as a response to problems of supply and prices that had arisen as a result of its economic stabilization plan.⁶⁰⁵ After doing so, then Brazil went to its MERCOSUR partners to ask permission to increase its list of exceptions from 300 to 450. On April 25, the MERCOSUR countries reluctantly agreed to allow Brazil a one-year 150 product exception. When April 1, 1996 arrived, Brazil did lower its tariffs on 122 imports; however, it only lowered them to an average of 35%—down from the previous 62%, but far short of the CET requirement of 20%. Now, Brazil seems to have unilaterally decided that these 150 exceptions are no different than its previous 300 in that it has announced that the tariffs will be reduced yearly in order to reach 20% by 2001, exactly the same as it is required to do for the other 300.

One beneficiary of reduced internal tariff barriers and a relatively high CET is telecommunications equipment. Because of high tariffs in Argentina and Brazil prior to the formation of MERCOSUR, international telecommunications manufacturers

⁶⁰³ *Common-Tariffs Pact Draws Argentina Closer to MERCOSUR Partners*, INSIDE U.S. TRADE, Aug. 26, 1994.

⁶⁰⁴ *The End of the Beginning*, *supra* note 572, at 5.

⁶⁰⁵ See Trade Unit, OAS, *supra* note 602; *Common External Tariff Under Pressure; MERCOSUR Okays Brazil's Request for 150 More Exceptions*, LATIN AMERICA REGIONAL REPORTS: SOUTHERN CONE, June 1, 1995, at 4.

established facilities in those countries in order to meet local content requirements. With the CET still relatively high for telecommunications equipment, local manufacturers have an advantage over outside competitors throughout the entire region because they do not have to meet local content requirements to sell to the other MERCOSUR states.⁶⁰⁶

4.7(b) Increased Market Liberalization

Investment

MERCOSUR Investment will be governed by two separate documents: the Protocol of Colonia for the Reciprocal Promotion and Protection of Investment in MERCOSUR; and the Protocol for the Promotion and Protection of Investment of Third States (Buenos Aires Protocol).⁶⁰⁷ Both protocols were approved by the Council for the Common Market in 1994, and are in the process of being ratified.

While the Protocol of Colonia defines the rights for investors from member countries, the Buenos Aires Protocol outlines similar rights for investors from non-member countries. Both protocols define investment broadly to include any kind of investment activity.⁶⁰⁸ With respect to the definition of investors, the Protocol of Colonia

⁶⁰⁶ *MERCOSUR to Shape Regional Telecom Landscape*, LATIN AMERICAN L. & BUS. REP., June 30, 1996.

⁶⁰⁷ See Protocol of Colonia for the Reciprocal Promotion and Protection of Investment in Mercosur, MERCOSUR / CMC/ Dec. 11/93 (Jan. 17, 1994) [hereinafter Protocol of Colonia], cited in OAS Trade Unit, *Investment Agreements in the Western Hemisphere: A Compendium*, OAS Doc. SG/TU/WG.INV/DOC.10/Rev.1 (May 1, 1997) [hereinafter *Investment Agreements in the Western Hemisphere*]; Protocol for the Promotion and Protection of Investment of Third States (Aug. 5, 1994) [hereinafter Buenos Aires Protocol], cited in *Investment Agreements in the Western Hemisphere*, *supra*.

⁶⁰⁸ See Protocol of Colonia, *supra* note 607, at Art. 1(1) ("including in particular...movable and immovable property and any related property rights...; shares, stock and any other form of participation in a company; claims to money and claims to performance having a financial value, and loans directly related to a specific investment; intellectual property rights...; [and] concessions conferred by law or under contract to search for, cultivate, extract or exploit natural resources." *Investment Agreements in the Western Hemisphere*, *supra* note 602, at 231); Buenos Aires Protocol, *supra* note 607, at Art. 2(A)(1) (defined with same language as the Protocol of Colonia).

states that protected investors include natural persons who are nationals of, permanently reside in, or are domiciled in a MERCOSUR country and other legal persons. The Buenos Aires Protocol is not as broad and only includes natural persons who are nationals of MERCOSUR or third countries and other legal persons. Both protocols, however, limit their definitions to investors who do not permanently reside in or are domiciled in the host country at the time of the investment.

Under the Colonia Protocol, the Members are governed with respect to investors from MERCOSUR countries under the principles of national treatment and most-favored nation treatment. This is very similar to other more modern investor agreements such as that under NAFTA. The Buenos Aires Protocol, on the other hand, follows the more traditional approach of bilateral investment treaties and only binds the Members to promote investments made from third countries and admit them in accordance with their own laws.

Both protocols contain exceptions to their investment protections. The Colonia Protocol protects the gains made through international agreements related to taxation by exempting the preferences granted under these agreements from national treatment. Furthermore, each country reserved certain areas from national treatment at the admission phase.⁶⁰⁹ MERCOSUR's exceptions for treatment of non-Member investors are much more broad and include exceptions for any preferences gained as a result of a regional agreement or an international agreement related to taxation.

Both protocols contain a variety of other provisions related to national treatment of investors and investments. Under the Protocol of Colonia, performance requirements that require commitments to export, local purchase rules, or similar restrictions are

⁶⁰⁹ See Protocol of Colonia, *supra* note 607, at Annex. The exceptions for Argentina and Brazil are as follows: Argentina ("real estate in the border areas, air transportation, shipbuilding, nuclear energy centers, uranium mining, insurance and fishing"); Brazil (mining, hydraulic energy, health care, broadcasting and telecommunications, "leasing of rural property, participation in the system of financial, insurance, social security and capitalization intermediation; construction, ownership and coastal and interior shipping").

prohibited on all investments. Both protocols favor national treatment for losses suffered by all investors as a result of war or conflict. If preferences are granted in future legislation, international agreements, or specific investment agreements, under a later-in-time analysis, those preferences will survive any national treatment obligations of the Colonia Protocol.

MERCOSUR treats third-parties and Members similarly in the areas of transfers and expropriation. MERCOSUR grants all investors the free transfer of investments and returns in a fully convertible currency. Expropriation is prohibited unless it is fair and the investors are justly compensated.

Settlement of disputes between states regarding the interpretation or application of the Protocol of Colonia is governed by the Protocol of Brasilia and by the Protocol of Ouro Preto. Disputes with third-party states are automatically referred to diplomatic negotiation and then to international arbitration. Representing a departure from the norm for investment treaties, both protocols provide for international arbitration under either the ICSID or an ad hoc arbitration tribunal in the case of investor-to-state disputes.

Regulating Private Business Behavior: AD/CVD and Competition Policies

Since the original treaty did not address antidumping or competition policy directly, MERCOSUR still has several more years before it will see increased liberalization in these sectors. While the Treaty of Asuncion allowed for safeguards to be applied against other Members during the interim stage before the CET, it does not allow for the application of safeguards from January 1, 1995 on.⁶¹⁰ Unlike the EU and CER, though, antidumping measures are still allowed until at least December 31, 2000 when

⁶¹⁰ Treaty of Asuncion, *supra* note 580, at Annex IV, art. 1.

MERCOSUR should have developed a set of Common Rules on the Defense of Internal Competition.⁶¹¹

Unlike its work in AD/CVD harmonization, MERCOSUR has adopted a protocol on competition policy.⁶¹² Like Chapter V of the *Havana Charter* and the European Union's Competition policy, the Protocol is only concerned with anti-competitive practices that affect trade between the MERCOSUR countries and not with behavior limited to an individual country. In terms of sectoral coverage, the Protocol exceeds the scope of the *Havana Charter* by prohibiting anticompetitive behavior in goods, services and public procurement. Without directly developing a per se or rule of reason approach, the Protocol lists practices which could constitute a violation of the general prohibitions against abuse of a dominant position or unilateral or concerted action which has the effect of harming competition or raising barriers to entry. These practices include: price-fixing, market division, tying, exclusive behavior, predatory pricing, and market manipulation. The Protocol provides for implementation of these rules through common rules decided by consensus by the intergovernmental Committee for the Defense of Competition (CDC) and then adopted by all the countries.

Unlike the competition rules of the EU, however, an injured party may not directly complain to the CDC or to the MTC; the party must first use its national

⁶¹¹ See CMG Resolution 129/94 & CCM Decision No. 18/96, cited in SAM LAIRD, MERCOSUR: OBJECTIVES AND ACHIEVEMENTS, at ¶ 31 (Trade Pol'y Rev. Div., WTO, Staff Working Paper No. TPRD-97-002, June 1997). Paraguay does give some special consideration in its antidumping investigations if the country being complained against is a MERCOSUR Member. See Trade Unit, OAS, *Compendium of Antidumping and Countervailing Duty Laws*, at 126 (Part IV(B) Initiation of the Investigation) (1997) (report submitted to FTAA Working Group on Subsidies, Antidumping and Countervailing Duties).

⁶¹² In December, 1996, the Council of the Common Market issued Decision No. 17/96 which contains the Protocol of the Defense of Competition in Mercosur; however, the Protocol needs ratification by each member country prior to enforceability as national law. Protocol on the Defense of Competition, Decision 17/96 of December 17, 1996, excerpted in Trade Unit, OAS, *Inventory of the Competition Policy Agreements, Treaties and Other Arrangements Existing in the Western Hemisphere*, OAS Doc. SG/TU/WG.COMPOL/DOC.3/96/Rev.4 (Aug. 30, 1997) (report submitted to FTAA Working Group on Competition Policies). For a description of the draft protocol, see Malcolm D. Rowat, Competition Policy in Latin America: Legal and Institutional Issues, at 22, Paper Presented at Conference on Good Government and Law, London, England (Mar. 27-28, 1995).

authority to bring a claim before the CDC. Then, under guidelines set by the CDC defining among other things the relevant market, the national authority of the defendant company begins an investigation. Upon the report of the national authority to the CDC, the CDC, in conjunction with the MTC, will decide upon sanctions to be applied by the national authority on the defendant. Those penalties can reach 150% of the profits received from the infringing acts, 100% of the value of the assets involved, or 30% of the company's net income for the previous year.

While this Protocol is rather complex and provides for stiff sanctions, it must be placed within the context of MERCOSUR. All decisions must be made by consensus in the intergovernmental fora. Therefore, while significant, this agreement essentially only provides an injured party and its home country access to the competition authorities of the other MERCOSUR countries. Although guided by the CDC, the investigating national authority has complete autonomy in its decision. If the authority finds no violation, in effect, its decision is final because, although the CDC may override the national authority's conclusion, it may only do so by a consensus that included the government of the investigating national authority.

Services

Like ASEAN, MERCOSUR pledged to draft a framework agreement on services; however, unlike ASEAN, MERCOSUR has not yet begun drafting the document. As a common market the Treaty of Asuncion naturally identifies the free movement of services as one of the three components to its formation, however, it does not create any specific provisions for the liberalization of trade in services.⁶¹³ In December of 1996, the Common Market Group created an Ad Hoc Group on Services to make recommendations

⁶¹³ Treaty of Asuncion, *supra* note 580, at Art. 1.

for a universal Framework Agreement for Trade in Services covering all sectors.⁶¹⁴ Following the GATS model of positive lists, the Framework envisions a ten year interim period during which the Members will progressively liberalize by incorporating more sectors and subsectors through annual negotiations after making “significant initial commitments.”

While a multilateral services agreement may not take effect for some time, the Members are currently unilaterally opening up their financial services markets. For example, both Brazil and Argentina have started to open up their markets to other MERCOSUR banks. One Brazilian bank has already opened ten branches in Argentina with another 35 planned for the near future.⁶¹⁵

Government Regulations

Finally, the Council on the Common Market and the Common Market Group has done some work toward removing more procedural barriers to internal trade.⁶¹⁶ At Ouro Preto, they adopted a series of decisions and resolutions that included common rules of origin and a unified customs code. Only Paraguay ratified the customs code, however, and it now being renegotiated.⁶¹⁷

⁶¹⁴ For a more detailed analysis of this Framework, see Trade Unit, OAS, *Provisions on Trade in Services in Trade and Integration Agreements of the Western Hemisphere*, at 10 (Part I(II) Final Objective), SG/TU/WG.SER/DOC.1/96/Rev.3 (Apr. 21, 1997) (report submitted to FTAA Working Group on Services) [hereinafter OAS, *Provisions on Trade in Services*].

⁶¹⁵ *The Road to a Single Market*, ECONOMIST, Oct. 12, 1996, at *MERCOSUR Survey* p. 24.

⁶¹⁶ For a more detailed discussion of these attempts at procedural reform, see LAIRD, *supra* note 611, at 14, ¶ 32.

⁶¹⁷ *Id.* Also, “[t]he possibility of integrated customs controls at the internal frontiers has been discussed, but there is no question of their elimination...because duties and domestic indirect taxes will be collected by the member state which is the final destination of imports from third countries, while indirect taxes will also be collected in imports from other MERCOSUR countries.” *Id.*

Customs harmonization will perhaps lead to the greatest immediate gains for intra-regional and external trade. Currently, chickens being shipped to Argentina from Brazil face three separate inspections.⁶¹⁸ First, the exporter must obtain a sanitary certificate from the Brazilian government which can take up to six months. At the border, the chickens face two more inspections by the Argentine ministries of agriculture and health which can take up to two days because the inspectors only work eight to ten hours out of the day. As a result, an IADB study has found that goods traveling one hundred kilometers can cost as much as 40% more if they cross an internal MERCOSUR border.⁶¹⁹ MERCOSUR is working on these issues with a single customs document expected in 1997 and mutual recognition of sanitary certificates by 1998.

4.7(c) Legal Position within the WTO

Since the economic verdict on MERCOSUR is not yet in and the WTO has not yet finished its review of the MERCOSUR FTA or CU, it is unclear whether MERCOSUR is a GATT-friendly trade agreement.

MERCOSUR notified to the WTO under the Enabling Clause, rather than under Art. XXIV, as NAFTA and the EU did.⁶²⁰ The Enabling Clause only requires regional integration agreements (RIAs) to “facilitate trade, ...not create ‘undue difficulties’ for other countries, and...not impose new trade barriers.”⁶²¹ Because the Enabling Clause makes no explicit mention of Art. XXIV, there is some debate as to how RIAs should comply: whether they need to comply with both Art. XXIV and the Enabling Clause; Art. XXIV if the agreement is a FTA or larger; or only the Enabling Clause, and not Art.

⁶¹⁸ For a more complete story on the lack of harmonization, see *The Road to a Single Market*, ECONOMIST, Oct. 12, 1996, at *MERCOSUR Survey* p. 24.

⁶¹⁹ See *id.*

⁶²⁰ See Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT B.I.S.D. (26th Supp.) at 203 (1980).

⁶²¹ USITC, *A Closer Look at MERCOSUR*, *supra* note 601, at 9.

XXIV at all. The Working Party that was established to analyze MERCOSUR's Interim FTA notified in 1991 is taking a look at this issue.⁶²²

In 1992, under the GATT, the United States requested that a working party analyze MERCOSUR's compliance with Art. XXIV.⁶²³ In 1995, the WTO created a working party under the Committee on Trade and Development to analyze MERCOSUR's compliance with both Art. XXIV and with the Enabling Clause.⁶²⁴

Because of the most-favored nation clause in Art. I, Members of the WTO must seek permission if they form preferential trade agreements that grant lower tariffs to some Members than to others.⁶²⁵ GATT 1947 Art. XXIV identifies a customs union (CU) that does not raise barriers to other Members as an acceptable one under the GATT so long as the CU covers "substantially all trade" and the CET does not egregiously violate previous bindings.⁶²⁶

Various rationales exist for the "substantially all trade" rule. A wider sectoral coverage "helps governments resist the inevitable political pressures to avoid or minimize tariff reduction in inefficient import-competing sectors."⁶²⁷ Further, it ensures that FTA's are not being used for narrow discriminatory sectoral agreements; by requiring that all trade is covered, the GATT insures that the FTA must overcome domestic protectionist interests. This requirement can be used to "differentiate between politically unavoidable and containable deviations from the most-favoured principle, as a requirement which

⁶²² WTO, REGIONALISM AND THE WORLD TRADING SYSTEM 18-19 (1995).

⁶²³ USITC, *A Closer Look at MERCOSUR*, *supra* note 601, at 9.

⁶²⁴ The newly created Committee on Regional Trade Agreements' (CRTA) new procedures require that RIAs notified under Art. XXIV be analyzed by a separate working party from CRTA and RIAs notified under the Enabling Clause be analyzed by a working party if requested by a WTO Member.

⁶²⁵ See generally, GATT 1947 art. XXIV; Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 1 (1995) [hereinafter Art. XXIV Understanding].

⁶²⁶ GATT 1947 art. XXIV, ¶¶ 5(a), 8(a)(I).

⁶²⁷ REGIONALISM AND THE WORLD TRADING SYSTEM, *supra* note 622, at 9.

determines the point where trade policy is allowed to give way to foreign policy."⁶²⁸ In other words, this requirement will help to limit the number of RIAs because fewer countries will be able to overcome these protectionist instincts and negotiate such an agreement that covers all or substantially all trade.

So that the new CU does not violate its Members' Art. II bindings, the CET must not "on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce" prior to the formation of the CU.⁶²⁹ Currently, MERCOSUR has notified the WTO of its status as both an FTA and a CU, and the WTO has referred the matter to its Committee on Regional Trade Agreements (CRTA).⁶³⁰ CRTA has made no decision yet and is unlikely to do so in the near future, given its backlog of other FTAs to analyze.⁶³¹ Although, as WTO Director General Renato Ruggiero recognizes, "there are...no contradictions between the design of MERCOSUR and of the WTO because there is no natural contradiction between regionalism and

⁶²⁸ Frieder Roessler, *The Relationship Between Regional Integration Agreements and The Multilateral Trading Order*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 314 (K. Anderson & R. Blackhurst eds., 1993).

⁶²⁹ GATT 1947 art. XXIV(5). In its analysis, the WTO Secretariat has to make a computation as to what to compare current rates to. Understanding on the Interpretation of Art. XXIV(2). If the duties are higher, other injured members can seek modification under XXVIII. See REGIONALISM AND THE WORLD TRADING SYSTEM, *supra* note 622, at 9.

⁶³⁰ *WTO Regional Trade Agreements Committee Will Examine Details of MERCOSUR Pact*, 13 Int'l Trade Rep. (BNA) 1493 (Sept. 25, 1996) [hereinafter *WTO Regional Trade Agreements Committee Will Examine Details of MERCOSUR Pact*]. Certain factions, lead by Australia, are pushing for a quicker and more rigorous examination of RTAs and their compliance with Art. XXIV. In addition, Australia desires CRTA to further examine not just the legality of RTAs but whether they work economically and are beneficial or detrimental to further multilateral liberalization. *WTO Members Poised to Open Major Debate on Regional Trade Pacts*, INSIDE U.S. TRADE, May 9, 1997. Nevertheless, it should be noted that generally most Working Parties have failed to affirmatively approve a RIA under Art. XXIV (they have only approved six out of 98 agreements notified). Questions persist whether the lack of conclusion signifies that since the Working Party did not conclude that the RIA violated Art. XXIV, the report tacitly approved the RIA. REGIONALISM AND THE WORLD TRADING SYSTEM, *supra* note 232, at 17.

⁶³¹ See *Report (1996) of the Committee on Regional Trade Agreements to the General Council*, WT/REG/2 (Nov. 6, 1996).

multilateralism,”⁶³² CRTA, however, will not pass easily on MERCOSUR’s compliance with the “substantially all trade” and CET requirements.

First, CRTA will have to choose among several modes of interpretation of the “substantially all trade” requirement. It is unclear what “all trade” encompasses—whether it is qualitative (% of sectors covered) or quantitative (% of volume of trade covered). Proponents of the qualitative interpretation question whether a RIA which excludes agriculture (as most initially do) meets this requirement because a major sector is not included in the agreement. Quantitative arguments have come up with more precise numbers. For example, a working party analyzing the EEC determined that the substantially all trade requirement is met when 80% of total trade has been liberalized.⁶³³

The CET requirement that the new tariffs not be “higher or more restrictive” than the previous tariffs also raises some questions of interpretation. One method of testing the new CET is to average the old tariffs and compare the average to the CET. The question remains as to which third countries the tariff is compared to. The EEC interpreted this requirement to mean higher to third countries on the whole and not to any individual third countries.⁶³⁴

If the bound rates are raised as a result of the CET, then third countries have a right of modification and compensation under Art. XXIV. However, there are some logistical problems that still have not been addressed such as when the country can complain (before or after the customs union is formed) and whether different rules of origin may constitute a compensatable barrier to trade.

⁶³² *WTO Regional Trade Agreements Committee Will Examine Details of MERCOSUR Pact*, *supra* note 630.

⁶³³ REGIONALISM AND THE WORLD TRADING SYSTEM, *supra* note 622, at 13.

⁶³⁴ *Id.* at 13-14.

CRTA must also decide whether MERCOSUR has complied with several, more mundane procedural issues. Customs Unions must be completed within ten years as required by a “reasonable length of time” in Art. XXIV.⁶³⁵ If the 85% of goods already covered by the CET as of January 1, 1995 are not “substantially all trade,” then CRTA will use some of the goods listed in the exceptions that are not scheduled to converge with the CET until 2001 and 2006. When CRTA decides to start counting will figure prominently as to how badly MERCOSUR will fail this ten year limit. If CRTA begins the ten year deadline in 1991, then the CU will be far from complete even if it adheres to the time line (only Brazil and Argentina need to converge on the CET by 2001). If, however, CRTA uses the Protocol of Ouro Preto as a starting point for the formation of the customs union, then Paraguay and Uruguay will only be a year late. Either way, however, it would seem highly unlikely that CRTA would pronounce MERCOSUR GATT-illegal for the failure of Paraguay and Uruguay to meet the CET in time.

4.7(d) MERCOSUR’s Foreign Trade Relations

From its inception in 1991, MERCOSUR took advantage of its treaty-created international legal personality and began negotiating as a legal entity with other governments and trade pacts from its inception in 1991. In June 1991, the MERCOSUR presidents met with President Bush and signed the Rose-Garden Agreement establishing a consultative trade and investment council, setting forth a plan for future hemispheric integration efforts and giving the U.S. stamp of approval to the newly formed MERCOSUR FTA and its ambition of becoming a customs union.⁶³⁶

⁶³⁵ Article XXIV Understanding at para. 3.

⁶³⁶ Agreement Concerning a Council on Trade and Investment, June 19, 1991, 30 I.L.M. 1034.

Marking another in a long succession of free trade agreements for Chile and its neighbors, in June 1996, the MERCOSUR states signed a new free trade agreement with Chile that should eliminate tariffs on 90% of traded goods by the year 2007.⁶³⁷

The MERCOSUR-Chile FTA reduces tariffs over four separate periods.⁶³⁸ Overall, when the FTA went into effect, Chile's tariffs dropped from an average of 11% to 6.9% on goods imported from MERCOSUR members.⁶³⁹ Since over 50% of Chilean imports come from Argentina, this 4.1% drop represents enormous liberalization for Chile. In other liberalization areas the FTA is not as ambitious as the MERCOSUR agreements and merely contains a framework for future liberalization of intellectual property rules and trade in services. In some respects, however, the provisions for services are more ambitious than those of the Treaty of Asuncion. The Chile-MERCOSUR Treaty defines trade in services specifically as service supplied: (1) from the territory of one party to the territory of another; (2) in the territory of one party "to the service consumer of any other...Party"; (3) by the service supplier of one party through its commercial presence or through the presence of that party's natural persons in the

⁶³⁷ See *Chile Seeks Trade Pacts With Others, While U.S. Talks Stall, Minister Says*, 14 Int'l Trade Rep. (BNA) 862 (May 14, 1997) (discussing Chilean FTA's with Canada, Mexico and MERCOSUR). See also *MERCOSUR-Chile Pact Is Inked; Will Not Block Chilean Talks with NAFTA*, INSIDE U.S. TRADE, June 28, 1996; *What MERCOSUR Has Done*, ECONOMIST, Oct. 12, 1996, at *MERCOSUR Survey* 5. For a thorough description of the Chile-MERCOSUR FTA, see USITC, Pub. No. 3006, *Chile-MERCOSUR Union Creates Enlarged South American Free-Trade Area*, INT'L ECON. REV., Oct./Nov. 1996, at 24-25.

⁶³⁸ See *MERCOSUR-Chile Pact Is Inked*, *supra* note 637; see also *The Chile-MERCOSUR Free Trade Agreement Effects on Foreign Direct Investment in the Southern Cone*, LATIN AMERICAN L. & BUS. REP., Aug. 31, 1996. Covering most goods, the first period eliminates all tariffs over eight years beginning with a starting point that is 40% below the 1996 levels. Sensitive and special/sensitive goods will see their tariffs reduced over ten years. Sensitive goods' tariffs will begin at 30% below 1996 levels, remain level for three years and then reduce to zero by 2007. Special/sensitive goods' tariffs will remain frozen for three years and then reduce to zero by 2007 without the initial 30% drop. The third and fourth groups cover agricultural products with the third group allowing for phaseouts over 15 years and the fourth group not reaching zero until 18 years into the pact. Finally, to qualify for any of these preferences, goods must have regional content of at least 60%. See *What MERCOSUR Has Done*, *supra* note 637, at 5. However, rules of origin for information technology have still not been set. *MERCOSUR-Chile Pact Is Inked*, *supra* note 637.

⁶³⁹ *Chile's MERCOSUR Membership Takes Effect; Average Customs Duty to Drop to 6.9 Percent*, 13 Int'l Trade Rep. (BNA) 1576 (Oct. 9, 1996).

territory of any other party.⁶⁴⁰ The treaty also provides for liberalization of transport services “in order to offer adequate conditions to the improved circulation of goods and persons, attending the increased demand that will result of the widened economic space.”⁶⁴¹

Finally, as Chile continues to press for FTAs with other American states, the agreement allows for compensation should Chile negotiate a new free trade agreement that offers third states a lower tariff than that offered to MERCOSUR states. For example, because of the newly enacted Chile-Canada free trade agreement in which Chile offered Canada lower tariffs, MERCOSUR states invoked this Article 52 compensation clause and are currently demanding the same preferential tariffs granted to Canada.⁶⁴² If this dispute is not able to be resolved politically, the agreement provides that the states can use MERCOSUR’s largely untested dispute settlement mechanism set up by the Brasilia Protocol.

In addition to the MERCOSUR-Chile FTA, MERCOSUR has continued to negotiate and complete agreements with its local, hemispheric and global neighbors. In February 1997, the MERCOSUR-Bolivia FTA went into effect with nearly complete free trade by 2007 and no tariffs by 2015.⁶⁴³ Other negotiating partners include Peru, the Andean Community, Canada, Mexico, ASEAN and even, China and Russia.⁶⁴⁴

⁶⁴⁰ Agreement on Economic Cooperation between MERCOSUR and Chile, Oct. 1, 1996, at Art. 35, cited in OAS, *Provisions on Trade in Services*, *supra* note 614, at 15 (Part. I(IV) Definitions).

⁶⁴¹ Art. 37 provides for this transport services liberalization. *Id.* at 89 (Part. II(IV) Transports).

⁶⁴² *Prepared Testimony of Thomas Andrew O’Keefe Before the House Committee on International Relations, Subcommittee on International Economic Policy & Trade*, FED. NEWS SERVICE, June 11, 1997, available in LEXIS, News Library, Cumws File.

⁶⁴³ *See Now They Are Six*, ECONOMIST, Dec. 21, 1996, at 52; *MERCOSUR-Bolivia Free Trade Agreement to Come Into Force on 28th February 1997* (Radio Nacional Broadcast, La Paz, Bolivia, Dec. 17, 1996), excerpted in BBC Summary of World Broadcasts, Dec. 31, 1996, available in LEXIS, News Library, Cumws File.

⁶⁴⁴ Recently, Peru, formerly of the Andean Community, began negotiations for a similar four-plus-one FTA with MERCOSUR. *Government Begins Free Trade Negotiations with MERCOSUR* (Telam News Agency Radio Broadcast, Buenos Aires, June 11, 1997), excerpted by BBC Summary of World

(continued...)

However, the most ambitious agreement thus far is the Interregional Framework Cooperation Agreement that MERCOSUR negotiated and signed with the EU.⁶⁴⁵ As a medium-term goal, the agreement lays the groundwork for a future interregional association that would encourage future trade liberalization, provide for high-level political cooperation in other multilateral forums and could result in a FTA between MERCOSUR and the EU.⁶⁴⁶ Fundamentally, Argentine President Menem recognized the

⁶⁴⁴ (...continued)

Broadcasts, June 17, 1997, available in LEXIS, News Library, Curnws File. According to one Brazilian official, the association agreement talks with the remaining members of the Andean Community (Venezuela, Colombia, Ecuador and Bolivia) countries could finish in 1997. See *Special Report: 1997 Trade Outlook: The Administration Weaves the "World Network of Commerce,"* 14 Int'l Trade Rep. (BNA) 132 (Jan. 22, 1997). In spring 1997, MERCOSUR, via Brazil, and Canada entered into discussions about a possible FTA as an interim agreement to a hemispheric FTAA. Peter Menyasz, *Canada and Brazil Open Talks on Canada-Mercosur Free Trade*, 14 Int'l Trade Rep. (BNA) 728 (Apr. 23, 1997). MERCOSUR, via Argentina, entered into similar discussions with Mexico in 1996—which could lead to two stages of trade-liberalizing resulting, in the second stage, in an FTA which deals with government procurement, intellectual property, services and competition policy. *Mexico Moves Toward Future Mercosur Agreements*, MEX. BUS. MONTHLY, Dec. 1, 1996. *Mexico, MERCOSUR Make 'Moderate Progress' in Tariff-Cutting Talks*, AMERICAS TRADE, May 29, 1997, at 3. ASEAN has met with Brazil and MERCOSUR regarding further commercial and political ties with Argentine President Menem suggesting a future ASEAN-MERCOSUR FTA. *ASEAN's Ajit to Visit Brazil to Talk on Mercosur*, IAC Newsletter Database, Kyodo News Int'l (Apr. 7, 1997), available in LEXIS, Intlaw Library, Intrad File; *Prepared Testimony of Ambassador Charlene Barshefsky Before the Senate Finance Committee*, FED. NEWS SERVICE, June 3, 1997, available in LEXIS, News Library, Curnws File. Others report that bilateral trade agreements might even be in the works with China and Russia. OLARREAGA & SOLOAGA, *supra* note 594, at n. 3.

⁶⁴⁵ Interregional Framework Cooperation Agreement, Dec. 15, 1995, E.C.-Mercosur, 1996 O.J. (L 69) 1. For a more detailed description of the agreement, see *EU/MERCOSUR: Signing of the Interregional Framework Cooperation Agreement Between the European Union and Southern Cone Common Market*, RAPID E.C. Press Release, IP: 95-1374, Dec. 11, 1995; *Mercosul and the European Union* (visited May 22, 1997) <<http://www.demon.co.uk/Itamaraty/msul47.html>>.

The framework agreement: institutionalizes regular political dialogues between the various heads of state; provides for establishment of a joint-trade subcommittee to encourage trade liberalization in compliance with WTO obligations; promotes investment from the EU to MERCOSUR; reinforces institutions of democracy and human rights; and assists MERCOSUR integration efforts with European experience. European experience influence has already started to manifest itself with the European encouragement for the creation of a supranational bank and court to facilitate better trade discussions between the two blocs.

⁶⁴⁶ Any FTA will have to happen far in the future given the current European client for inter-regional agreements. Currently, all progress from the Framework Agreement is being held up by France which is looking to put the brakes on these types of agreements. *EU/MERCOSUR - Draft Calendar for Negotiation of Trade Liberalization*, AGENCE EUR., Apr. 10, 1997, available in LEXIS, News Library, Curnws File. The European Commission believes that a FTA with MERCOSUR would be GATT-legal under Art. XXIV (continued...)

true benefit of the agreement for the MERCOSUR parties: "it offers the possibility of facilitating economic and trade ties between the two regions and...it signal [sic] to the international community that the Mercosur countries' political and economic systems are stable and credible."⁶⁴⁷

Although a FTA has not been negotiated yet, there has been some progress in interregional cooperation. For example, the EC has set up a program to harmonize statistics and trade data between the two parties.⁶⁴⁸ At the second ministerial meeting between MERCOSUR and the EU, although the parties did not agree to much more than principles and the promotion of regionalism, they did agree to continue negotiating and cooperating under the Framework Agreement.⁶⁴⁹ Finally, MERCOSUR has suggested to the EU that the bloc-to-bloc negotiations for a future FTA begin in Rio de Janeiro in 1998.⁶⁵⁰

⁶⁴⁶ (...continued)

so long as it covered at least 80% of all goods. Further, since agricultural exports with zero or already preferential tariffs from MERCOSUR to the EU constitute 57% of all exports and 4% of all exports already receive a benefit under GSP, the only step remaining for the negotiation of the FTA would be to cover an additional 20% of goods. *Marin Says Free-Trade Area with Mercosur is in Line with WTO Rules*, AGENCE EUR., Apr. 6, 1995, available in LEXIS, News Library, Curnws File.

⁶⁴⁷ *EU/MERCOSUR - Liberalization of Trade Between the EU and MERCOSUR Reality in the 21st Century - Menem*, AGENCE EUR., June 11, 1996, available in LEXIS, News Library, Curnws File.

⁶⁴⁸ *EU/MERCOSUR - Cooperation Programme for Statistics Set Up (4m ECU in European Funding)*, AGENCE EUR., May 10, 1997, available in LEXIS, News Library, Curnws File.

⁶⁴⁹ *UE-MERCOSUR Noordwijk Ministerial Meeting*, RAPID, PRES: 97/100, Apr. 17, 1997. It should be noted however, that this new agreement has not prevented disputes from arising between the regions. The EU recently requested consultations before the WTO DSB for Brazil's violation of GATT 1994, SCM, and TRIMs with its unequal treatment of auto imports. *Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector*, WT/DS81/1, G/TRIMS/D/8, G/SCM/D13/1 (May 20, 1997) (consultations requested by the EU).

⁶⁵⁰ Federico Ferber, *MERCOSUR: Stopgap Solution to Dispute Paves Way for Summit*, INTER PRESS SERVICE, June 19, 1997, available in LEXIS, News Library, Curnws File.

Table 4-13: MERCOSUR in International Negotiations Timeline

Year	Event
1991	MERCOSUR signs Rose Garden (4 +1) Agreement with the United States.
1995	MERCOSUR signs Interregional Framework Agreement for Trade and Cooperation with the European Union. First such agreement between two customs unions in history.
1996	MERCOSUR negotiates and completes free trade agreement with Chile.
1996	MERCOSUR negotiates and completes free trade area with Bolivia.
1997	MERCOSUR begins talks with Canada, Mexico, the Andean Community, and Peru for future free trade areas.

For the future, by any measure, MERCOSUR's most difficult hemispheric challenge will be to complete the Free Trade Area for the Americas (FTAA) intact as a separate regional entity.⁶⁵¹ Its success at negotiating as a bloc and at deeper and wider integration will determine whether MERCOSUR can survive the FTAA process as a viable regional entity.

4.7(e) Conclusion: Other Benefits of Regional Integration

One benefit of RIAs not recognized by an economic analysis is a negotiating experience and comfort level between the nations involved that can result in broader regional integration—a broader integration especially needed in the southern cone region where in the not so distant past Argentina and Brazil were competing in a nuclear arms race.⁶⁵² For example, the four members of MERCOSUR and Chile recently signed an intra-regional air traffic accord completely outside of the MERCOSUR common market

⁶⁵¹ See FTAA Section.

⁶⁵² Others would argue that MERCOSUR is the one example of regionalism failing to produce political benefits that outweigh its economic costs—especially since, as the argument goes, the political gains could be had through multilateral negotiations as well. See *Spoiling World Trade*, *ECONOMIST*, Dec. 7, 1996, at 15.

structure.⁶⁵³ And other transportation agreements are in the works as well with MERCOSUR seeking to reinforce its economic integration with actual physical integration especially in the area of trans-Andean rail and trucking routes to link Argentina and Brazil's exporters with Chile's Asia-accessible ports.

If regional integration has not in fact resulted in trade creation, there can be no argument that MERCOSUR has had a positive external effect on democracy building in South America. In 1996 when General Lino Oviedo of Paraguay threatened President Wasmosy with a military coup, MERCOSUR foreign ministers within twenty-four hours flew to Asuncion to personally deliver the message to General Oviedo that MERCOSUR would expel a Paraguay run by the military. With such a threat frightening the commercial classes, General Oviedo's military officers reconsidered their position. Meanwhile, the MERCOSUR ministers gave President Wasmosy the resolve to fight the coup, and Paraguayan democracy survived the South American anachronism of the military strongman.⁶⁵⁴ In June, 1996, the MERCOSUR Presidents approved the so-called "democratic clause" which establishes democratic institutions as a precondition for MERCOSUR membership.⁶⁵⁵ As Strobe Talbott recognized, by its actions in Paraguay, "MERCOSUR reaffirmed...that economic integration and democracy go hand-in-hand."⁶⁵⁶

Finally, by forming MERCOSUR, Argentina, Brazil, Paraguay and Uruguay have given themselves a great advantage in future talks regarding the Free Trade Area of the

⁶⁵³ See David Knibb, *South America: Latin Five Set to Liberalise*, AIRLINE BUS., Mar. 1997, at 14.

⁶⁵⁴ Richard Feinberg, *Free Trade Saves the Day in Paraguay Crisis*, INT'L HERALD TRIB., May 2, 1996.

⁶⁵⁵ Sectoral Commission for MERCOSUR, Embassy of Uruguay, Washington, DC, *MERCOSUR, adapted, updated and translated from What We Want to know, Need to Ask, and Should Learn*, EL PAIS, Special Edition, at Question 15 (visited May 20, 1997) <<http://embassy.org/uruguay/econ/mercosur/merc-003.html>>.

⁶⁵⁶ Deputy Secretary of State Strobe Talbott, *Securing and Promoting Open Markets and Societies in the Americas*, Plenary Address before the General Assembly of the OAS, reprinted in U.S. Dep't of State, Dep't of State Dispatch, June 10, 1996.

Americas. As a customs union becoming a common market, MERCOSUR has been able to negotiate with the U.S. and NAFTA as a bloc—resulting in a much better position for MERCOSUR members. And thus far, MERCOSUR has been successful at protecting South American interests from being railroaded by the U.S. in its sputtering pursuit of the FTAA. This strengthened bargaining position in multilateral and extra-regional fora was recognized by WTO Director General Renato Ruggiero: “MERCOSUR helps to amplify and harmonize [its members’] voice in the global system—a factor which...will only become more important as we design the rules of the twenty-first century economy.”⁶⁵⁷

⁶⁵⁷ *Address to the XII Meeting of the Common Market Council, MERCOSUR Heads of State Summit, WTO Doc. Press/74 (June 19, 1997).*

4.8: Free Trade Area of the Americas (FTAA)

With negotiations set to begin by September, 1998, the Free Trade Area of the Americas (FTAA) promises to complete negotiations for a hemisphere wide free trade area by 2005 where barriers to trade and investment will be progressively eliminated. Like the ASEAN FTA and APEC, the FTAA process began with a Summit that proclaimed the broad principles of free trade, among other goals, as a hemispheric goal of the early next century.

President George Bush first proposed the concept of a hemispheric free trade zone with the Enterprise for the Americas Initiative (EAI) that would stretch from the “the port of Anchorage to Tierra del Fuego.”⁶⁵⁸ Although never expressly invoked by the Clinton Administration’s Summit of the Americas held in Miami in December, 1994,⁶⁵⁹ the EAI served as the opening move in the glacial movement toward a FTAA.

With agreement now reached on how the first round of negotiations would proceed, if United States fast-track negotiating authority succeeds in 1998, the FTAA negotiations look like they will be completed on time by 2005. If the United States does not gain fast-track authority within the first few years of the negotiations, however, it may find itself left out of a region bent on free trade and willing to negotiate substantial sub-regional agreements exclusive of the United States.⁶⁶⁰

After briefly outlining the goals and scope of the FTAA, this section presents the negotiating history behind these negotiations and focuses on the progress made at the

⁶⁵⁸ *Remarks Announcing the Enterprise for the Americas Initiative*, 1 PUB. PAPERS 873, 875 (June 27, 1990), cited in O’Hop, *supra* note 574

⁶⁵⁹ The Miami Summit proposals initially offered by President Clinton would have relied on the trade and investment councils (like the MERCOSUR-U.S. “Four-plus-one” Agreement) set up under the EAI to encourage bilateral talks on hemispheric integration issues. See *U.S. Proposal for America’s Free Trade Area Relies on Bush Initiative*, INSIDE U.S. TRADE, Nov. 25, 1994. The EAI aimed at reducing trade barriers, increasing regional investment, and relieving debt. O’Hop, *supra* note 574.

⁶⁶⁰ For example, Canada has already expanded south with its recent free trade agreement with Chile. See e.g., Canada-Chile Free Trade Agreement, Dec. 5, 1996, 36 I.L.M. 1067 [hereinafter CCFTA].

major summits in Miami, Denver, Cartagena, Belo Horizonte, and Santiago. Using this history, it will then focus on the structural and legal difficulties that face the negotiations with a particular emphasis on the bloc-to-bloc struggle of the Brazil-led MERCOSUR effort and the U.S.-led NAFTA—especially regarding the difficulty the Clinton Administration has had in getting fast-track authority from the Congress and how that lack of comprehensive fast-track authority has held up the negotiations thus far. Finally, this section will discuss the trade liberalization that is occurring without U.S. participation and how that liberalization has dictated the future model for the FTAA negotiations, and evaluate it against other models of trade liberalization.

4.8(a) Summits of the Americas

The Declaration produced by the first Summit of the Americas, held in Miami from December 9-11, 1994, announced the FTAA as part of four general principles including an affirmation of hemispheric support of democracy, the goal of eradicating poverty and discrimination, and the guarantee of sustainable development and environmental conservation.⁶⁶¹ Before announcing that the FTAA will eliminate hemispheric barriers to trade and investment, the Declaration recognizes the following:

Our continued economic progress depends on sound economic policies, sustainable development, and dynamic private sectors. A key to prosperity is trade without barriers, without subsidies, without unfair practices, and with an increasing stream of productive investments. Eliminating impediments to market access for goods and services among our countries will foster our economic growth....Free trade and increased economic integration are key factors for raising standards of living,

⁶⁶¹ Miami Summit of the Americas, *Declaration of Principles*, Dec. 9-11, 1994, available at OAS, *The Free Trade Area of the Americas (FTAA) Process* (visited Jul. 7, 1997) <http://www.sice.oas.org/ftaa_e.stm>. All thirty- four democratically elected governments of the region participated.

improving the working conditions of people in the Americas and better protecting the environment.⁶⁶²

Emboldened by such an idealistic set of principles, the Summit drafted a Plan of Action that sets forth the specific goals of the FTAA process.⁶⁶³ Immediately the Plan of Action directed the 34 regional trade ministers to begin discussion in existing trade and investment fora as to how to achieve the FTAA. With a view toward understanding the region before the FTAA transformed it, the Summit directed the OAS Special Committee on Trade to prepare a report for the First Ministerial that would make the subregional and bilateral agreements more transparent. In other economic areas, the Plan of Action developed specific goals for capital markets development and liberalization, infrastructure improvement, energy cooperation, telecommunications and information technology infrastructure improvement, cooperation in science and technology, and tourism promotion.

At the First Western Hemisphere Trade Ministerial at Denver in June, 1995, the thirty- four trade ministers planned more specific timetables and created seven new working groups to deal with specific issues.⁶⁶⁴ The ministers decided that all negotiations would be completed no later than 2005. The working groups' issues include: market access; customs procedures and rules of origin; investment; standards and technical barriers to trade; sanitary and phytosanitary measures; subsidies, antidumping and countervailing duties; and smaller economies.

⁶⁶² *Id.*

⁶⁶³ See Summit of the Americas, *Plan of Action*, Dec. 9-11, 1994, available at OAS, *The FTAA Process*, *supra* note 661.

⁶⁶⁴ Summit of the Americas Trade Ministerial, *The Denver Ministerial Declaration*, June 30, 1995, available at Tripartite Committee, *Free Trade Areas of the Americas* (visited July 7, 1997) <<http://www.ftaa-alca.org>>. The Tripartite Committee is made up of the OAS, the IADB and ECLAC (UN Economic Commission for Latin America and the Caribbean). The Denver Declaration called on the Tripartite Committee to provide the working groups with analytical and statistical support as needed.

The second trade ministerial in Cartagena, Columbia, established four more working groups in the areas of government procurement, intellectual property rights, services and competition policy.⁶⁶⁵ Further, the ministerial confirmed that the FTAA aimed to be GATT 1947 Art. XXIV and GATS Art. V compatible. Since at the time, the parties were still discussing how to best build the FTAA, GATT compatibility was of particular concern in that if the agreement built upon existing multilateral and bilateral arrangements, the ministers would have to ensure that those existing arrangements were also GATT compatible.⁶⁶⁶

At the May, 1997 ministerial in Belo Horizonte, Brazil, the ministers fixed a firm date for the beginning of the negotiations—March, 1998 at the Second Summit of the Americas in Santiago, Chile—and for the end of negotiations—2005.⁶⁶⁷ Additionally, they assigned a twelfth working group to dispute settlement. Regarding the more contentious issues surrounding the FTAA negotiating process, the ministers agreed on a number of key issues of commonality:

- Decision making based on consensus.
- FTAA will constitute a single undertaking embodying all rights and obligations.
- Co-existence with other sub-regional integration areas (sub-RIAs) to the extent that the sub-RIAs extend beyond the FTAA.
- WTO Consistency.
- Entry into FTAA individually or as part of sub-RIA.

⁶⁶⁵ Summit of the Americas Second Ministerial Trade Meeting, *The Cartagena Ministerial Declaration*, at ¶ 9, Mar. 21, 1996, available at Tripartite Committee, *supra* note 664.

⁶⁶⁶ This would be an especially difficult task, given the fact that the WTO, for the most part, has decided whether any of the existing 24 subregional arrangements are GATT compatible. See REGIONALISM AND THE WORLD TRADING SYSTEM, *supra* note 622, at 17.

⁶⁶⁷ Summit of the Americas Third Ministerial Trade Meeting, *The Belo Horizonte Ministerial Declaration*, at ¶ 4, May 16, 1997, available at Tripartite Committee, *supra* note 664. Although the summit left open the question as to how the negotiations would proceed regarding “their objectives, approaches, structure and venue.” *Id.*

- Concern with smaller economies.⁶⁶⁸

As the Second Summit of the Americas approached, Trade Ministers met in San Jose, Costa Rica, to develop the negotiating schedules, locations and other details.⁶⁶⁹ That Ministerial established nine negotiating groups with a Trade Negotiations Committee to manage the overall negotiations. The initial chairmanship of the TNC will belong to Canada, while the end stage from 2002-2004 will be co-chaired by Brazil and the United States in order to ensure the completion of the negotiations by Dec. 31, 2004. Finally, some of the more contentious issues surrounding the framework of the negotiations were decided on including the issue of whether the negotiations would represent a single undertaking or not and how RIAs would fit within the FTAA. At the Second Summit of the Americas in Santiago, Chile, the results of San Jose were given the leaders' approval.⁶⁷⁰ Recognizing the underlying importance of hemispheric economic integration, the leaders declared: "[w]e believe that economic integration, investment and free trade are key factors for raising standards of living, improving the working conditions of the people of the Americas and better protecting the environment."⁶⁷¹

Table 4-14 reflects the results produced as of the Second Summit of the Americas.

⁶⁶⁸ *Id.* at ¶ 5. Additionally, the ministers "reaffirmed" their commitment to the WTO Singapore Ministerial Conference Declaration's support of ILO supremacy regarding core labor standards and its recognition of the link between trade and labor. *Id.* at ¶ 16. For a discussion of core labor standards, see trade and labor discussion, *infra* ch. 3.

⁶⁶⁹ See Summit of the Americas Fourth Trade Ministerial Meeting, *Joint Declaration*, Mar. 19, 1998, available at Tripartite Committee, *supra* note 664.

⁶⁷⁰ See *Declaration of Santiago, Second Summit of the Americas*, Apr. 19, 1998, available at Tripartite Committee, *supra* note 664.

⁶⁷¹ *Id.*

Table 4-14: Status of the FTAA

Issue/Accomplishment	Result
Number of Nations Involved	34
Date for Beginning Official Negotiations	No later than September 30, 1998 at Miami, United States
Date for Completion of Negotiations	2005
Negotiating Style	Single Undertaking
Status of sub-RIAs (e.g., NAFTA, MERCOSUR)	Will remain if RIA goes beyond the result achieved by FTAA. E.g., MERCOSUR's Common External Tariff to non-FTAA world would survive regional integration.
Negotiating Groups	• Market Access⁶⁷² • Investment⁶⁷³ • Services • Government Procurement • Dispute Settlement • Agriculture • Intellectual Property Rights • Subsidies, Antidumping & Countervailing Duties • Competition Policy

⁶⁷² Will also address rules of origin, customs procedures, and technical barriers to trade.

⁶⁷³ At the Belo Horizonte Ministerial, a group of business executives suggested that a hemisphere-wide investment pact could be the first agreement negotiated under the FTAA process. Such an agreement could build upon existing agreements and provide for: "national treatment; full repatriation of profits and capital, and access to a convertible currency; protection against expropriation...; and access to domestic markets without performance requirements." Further, the group seeks to extend national treatment to non-FTAA nations and provide for mechanisms to prevent unfair competition among FTAA nations for foreign investment. *Investment Pact Can Be First FTAA Task, Business Execs Tell Ministers*, AMERICAS TRADE, May 29, 1997, at 4.

4.8(b) Blocs to Integration

Negotiating Problems

The debate between Brazil and the United States over how negotiations should proceed blossomed by 1995 after the Denver Trade Ministerial. The United States and Canada presented an argument for country-to-country negotiations because it feared that bloc-to-bloc negotiations could slow down the process whenever the sub-regional group had to meet to decide an issue. Canada argued that MERCOSUR and NAFTA “have fundamentally different objectives and could not be merged without one or the other dispensing with its core objectives.”⁶⁷⁴ Brazil, however, was unwilling to sacrifice MERCOSUR to the FTAA and felt at the time that the best way to achieve this was to have negotiations proceed between NAFTA, MERCOSUR, and all other regions that wanted to negotiate as a bloc.⁶⁷⁵ At Belo Horizonte—and later reaffirmed at San Jose—the thirty-four trade ministers agreed to allow all approaches with countries allowed to accede to the FTAA as a bloc or individually and with provision for the continued existence of RIAs if they go beyond the FTAA commitments.⁶⁷⁶

The second issue that came up concerns whether the FTAA should be negotiated as a single undertaking or in stages. Brazil proposed that negotiations proceed in three stages with technical issues such as customs rules come first with the more contentious issue of market access coming last. Canada, Chile and the Andean and Central American nations opposed this method and favor the single undertaking method where even the most contentious issues of competition policy and services would be negotiated at

⁶⁷⁴ *Canada, Brazil Trade Chiefs Lay Out Different Paths to FTAA*, INSIDE U.S. TRADE, Mar. 29, 1996. See *Confidential U.S. Paper Calls for Early Decision on FTAA 'Roadmap'*, INSIDE U.S. TRADE, Aug. 11, 1995; *Three Framework Proposals to Guide Talks at This Week's FTAA Vice-Ministers' Meeting*, 14 Int'l Trade Rep. (BNA) at 357 (Feb. 26, 1997).

⁶⁷⁵ See *Confidential U.S. Paper*, *supra* note 674.

⁶⁷⁶ See *The Belo Horizonte Ministerial Declaration*, *supra* note 666, at ¶ 5(b & d).

once.⁶⁷⁷ Prior to Belo Horizonte, the United States isolated MERCOSUR by dropping its proposal for two-stage negotiations and joining the rest of the hemisphere in calling for the single undertaking method.⁶⁷⁸ This issue was finally resolved in Belo Horizonte with MERCOSUR converting to a single undertaking approach.⁶⁷⁹

U.S. Fast-Track Authority

U.S. Secretary of Commerce Ron Brown, in a keynote speech to hemispheric business leaders summarized the key problem of the FTAA process—marketing:

Finally, selling the FTAA, and it is a selling job, it is an education job, it is a communications job. Because free trade, as we know is under attack, it is critical that we communicate to our communities the many concrete ways that free trade will pay off on the hemispheric level, on the national economic level, but also at the level of towns, and cities, and communities, and plants, and workers in all of our nations.⁶⁸⁰

⁶⁷⁷ See *id.*; *The Administration Weaves the 'World Network of Commerce,' Special Report: 1997 Trade Outlook*, 14 Int'l Trade Rep. (BNA) at 132 (Jan. 22, 1997).

⁶⁷⁸ *U.S. Drops Demand for Two-Stage FTAA Talks, Isolating MERCOSUR*, INSIDE U.S. TRADE, Apr. 18, 1997.

⁶⁷⁹ See *The Belo Horizonte Ministerial Declaration*, *supra* note 666, at ¶ 5(b) ("[t]he outcome of the negotiations of the Free Trade Area of the Americas will constitute a comprehensive single undertaking which embodies the rights and obligations mutually agreed upon."). Although there was consensus, at Belo Horizonte, that the final product will represent a single undertaking, MERCOSUR still favored a three-stage negotiation method where business facilitation issues would be negotiated first and tariff reducing measures delayed until the opening of the third stage in 2003. See *Brazilian Official Hints at Flexibility in MERCOSUR's FTAA Approach*, AMERICAS TRADE, May 29, 1997, at 1, 16-17. Some in MERCOSUR, however, suggested that a less-mechanistic Uruguay Round approach could be used. See *id.* at 16.

⁶⁸⁰ Ronald H. Brown, U.S. Sec. of Com., *The Role of International Investment in the Development of Trade and Integration*, Speech Before the Americas Business Forum, Cartagena, Columbia (Mar. 19, 1996), in OAS, *The Americas Business Forum: Brown* (Mar. 19, 1996) <<http://www.sice.oas.org/ftaa/cartage/kenot/keynote2.stm>>.

Ordinarily under the U.S. Constitution, the President has the authority to negotiate and complete treaties “with the advice and consent of the Senate.”⁶⁸¹ This has been interpreted to mean that treaties are signed by the President and approved by two-thirds of the Senate. A problem, however, arises during the approval process when the Senate adds amendments to the treaty. These amendments can undermine the treaty itself—sometimes causing it to collapse completely. Therefore, for the purposes of trade agreements, Congress and the President have developed the so-called “fast-track” authority, whereby Congress dictates the terms of the negotiations with its fast-track legislation, the President negotiates the agreement accordingly, and then, both the Senate and the House vote by majority on the agreement. In this congressional executive agreement, neither the Senate nor the House can suggest amendments to the process. In trade negotiations, this has had the effect of improving the USTR’s position because the United States’ trading partners know that the agreement reached will not be changed later by Congress, and are therefore more willing to make their best offers during negotiations. The most recent fast-track legislation enacted mainly for the purposes of the NAFTA and the Uruguay Round Agreements expired in 1994.⁶⁸²

Although the fast-track issue has been stirring since the U.S. debate over NAFTA and WTO membership in 1993 and 1994, the threat of stopping the legislation has gained ground since early 1997. Concerned about the NAFTA’s failure to adequately address labor and environmental issues, in a letter to congressional Democrats, House Minority Leader Richard Gephardt proposed that fast-track legislation should be limited to allowing either Chile’s accession to an amended NAFTA or a bilateral FTA with Chile—neither of which would allow for accelerate FTAA negotiations.⁶⁸³ When the

⁶⁸¹ U.S. CONST. art. II, § 2, cl. 2.

⁶⁸² Complete fast-track authority expired in 1993. The legislation contained an exception for the Uruguay Round Agreements to be completed by April 16, 1994. 19 U.S.C. §§ 2902-2906 (1996).

⁶⁸³ *Gephardt Calls on Democrats to Back Limited Fast Track Deal*, INSIDE U.S. TRADE, Feb. 28, 1997. For a discussion of why incorporating labor and environment provisions into a hemisphere FTAA might present problems for—and therefore the success of a complete FTAA with—Latin American countries that
(continued...)

Clinton administration contemplated dropping labor and environment provisions along with all other negotiating objectives from its fast-track legislation—placing them, instead into a separate side letter which would give U.S. negotiators more flexibility—Republicans expressed concern over granting too broad of a fast-track authority to the president.⁶⁸⁴ Finally, organized labor voiced their support of Rep. Gephardt's position by arguing that fast-track must force the President to include labor and environment provisions in the core trade agreement that can be enforced by the FTAA dispute settlement mechanism.⁶⁸⁵ With the Democrats and Labor on one side and the Republicans on the other, the Clinton Administration has had to walk a fine line in developing legislation that a more moderate middle might find acceptable.

Rep. Gephardt added to his list of demands in April, 1997 with requirements for worker adjustment and basic human rights as further goals to be included in the President's fast-track authority.⁶⁸⁶ Finally, the weight of competing demands and other large legislative battles (including China MFN Renewal, and the 1998 Budget) caused the Clinton Administration to delay sending the fast-track legislation to Congress.⁶⁸⁷ Unfortunately, for the prospects of broad fast-track authority, this move may have been

⁶⁸³ (...continued)

might not have the minimum protections that Mexico had prior to the NAFTA side agreements, see generally Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301 (1995).

⁶⁸⁴ The Republicans instead wanted very narrow authority that only allowed the President to negotiate treaties "'directly related' to trade negotiating objectives and 'necessary' to carry out the trade agreement." Rosella Brevetti, *Administration Floats Dropping Environment, Labor from Fast Track; Issue Still in Flux*, 14 Int'l Trade Rep. (BNA) at 604 (Apr. 2, 1997). However, a GOP staffer said that the Republicans were not opposed to including trade and environment and trade and labor objectives in new agreements, but were fearful of using trade sanctions to enforce them. *Id.*

⁶⁸⁵ See *id.*; *AFL-CIO President Launches Fight Against Fast-Track Legislation*, INSIDE U.S. TRADE, Apr. 4, 1997.

⁶⁸⁶ *Gephardt Says Trade Debate Must Cover Worker Adjustment Program*, INSIDE U.S. TRADE, Apr. 25, 1997.

⁶⁸⁷ See *Administration Decides to Delay Fast Track Until September*, INSIDE U.S. TRADE, May 23, 1997.

devastating because it has provided both Democrat/Labor and Republican interests time to gather support for their positions.⁶⁸⁸

Particularly problematic is the amount of time given the president for fast-track authority. While the FTAA is not due to be completed before 2005, there seems to be little Congressional support for fast-track authority that would last seven years.⁶⁸⁹ If the President were granted less time, the FTAA might find itself endangered once the deadline comes—especially if the other negotiators are not willing to undo whatever provisions already negotiated that Congress will undoubtedly object to.

The Importance of Fast-Track to the FTAA Process

A Brazilian FTAA negotiator expressed the desire of the United States' FTAA partners for fast track because "it will be an indication of the areas that really are subjects for concrete negotiations."⁶⁹⁰ This is especially important to the MERCOSUR nations because it will allow the negotiating team to demonstrate politically to the private sectors that their issues will be included in the FTAA process. As the FTAA negotiations proceed, the importance of fast-track will become more clear. Hopefully, with the USTR able to show tangible results from the FTAA negotiations, Congress will be persuaded to grant the President the necessary fast-track authority to complete the negotiations by 2004.

⁶⁸⁸ However, the proponents for fast-track have also been able to use the time to gather support for the success of free trade. The Clinton Administration released a report on the "success" of NAFTA, which details what free trade has and can do for American workers. See USTR, *Study on the Operation and Effects of the North American Free Trade Agreement* (July 11, 1997), at USTR Reports <<http://www.ustr.gov/reports/index.html>>. And the Administration is still very optimistic, with expectations that fast-track will be approved by at least one house of Congress by mid-October with complete authority granted by the Santiago Summit of the Americas in April, 1998. *Administration NAFTA Report to Assert Job Gains from Mexico Trade*, INSIDE U.S. TRADE, July 11, 1997.

⁶⁸⁹ See Brevetti, *supra* note 684.

⁶⁹⁰ *MERCOSUR May Take Flexible FTAA Approach*, AMERICAS TRADE, May 29, 1997, at 1, 17.

4.8(c) Other Challenges to the FTAA Process

The Americas is a region replete with regional integration agreements. All the countries of the hemisphere, except Cuba, belong to at least one bilateral agreement or RIA that has a goal of free trade.⁶⁹¹ Because of the number of agreements and the economic might of the NAFTA members, debate over the mode of integration has centered around two models: NAFTA Accession and a new multilateral FTAA.⁶⁹²

The proposal for NAFTA accession begins with the immediate accession of Chile to NAFTA and then the gradual accession of other countries as they became qualified. According to some, the model of NAFTA accession could present problems for hemispheric negotiations that could result in conflicts with sub-regional agreements, domestic laws and institutional rules.⁶⁹³ Paul O'Hop therefore suggests that integration follow an hourglass model where integration policy is developed by the sub-regional groups and independent nations at the top of the hourglass, then filtered through the middle where the NAFTA institutional structure would evaluate the proposals and adopt or reject them, and then fall back to the sub-regional groups and independent nations at the bottom of the hourglass for implementation.⁶⁹⁴

Frank Garcia suggests another mode of regional integration through interim "Americas Agreements" between NAFTA and each of the other RIAs that could grow

⁶⁹¹ For descriptions of the two largest efforts, NAFTA and MERCOSUR, see *infra*. For a brief description of some of the smaller efforts such as, the Caribbean Common Market (CARICOM), the Andean Common Market (Colombia, Venezuela, Bolivia, Ecuador, and former member Peru), the Central American Common Market (CACM) (El Salvador, Guatemala, Costa Rica, and Honduras), the Group of Three (Mexico, Columbia and Venezuela), see Frank J. Garcia, "Americas Agreements" — *An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 73-80 (1997).

⁶⁹² For a discussion of the models under the EAI, see FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION 181 (1995). The U.S. envisioned four possible methods: country-by-country accession to NAFTA; a "cluster-by-cluster" approach consisting of negotiations between sub-regional groups; a "building-block" approach consisting of the sub-RIAs acting in concert toward harmonization and tariff-reduction; and a "hub and spoke" approach whereby the U.S. would negotiate separate FTAs with each country of the Americas. *Id.*

⁶⁹³ See O'Hop, *supra* note 574.

⁶⁹⁴ See *id.*

into the FTAA.⁶⁹⁵ Since the Miami Summit's Declaration of Principles and Plan of Action are relatively broad and do not provide for a concrete procedure for the FTAA negotiations, he argues that these Americas Agreements should contain, per the European model: "[(1)] trade provisions which normalize trade relations, establish preferential trade, or commit to FTA negotiations; [(2)] institutional mechanisms for coordinated decision-making; [(3)] commitments for cooperation and harmonization in a wide variety of substantive trade and economic areas; and [(4)] provisions requiring shared commitment to fundamental principles such as democracy and human rights."⁶⁹⁶

However, a new multilateral agreement seems to have replaced the NAFTA accession model as the likely form for the FTAA. This agreement is necessitated by the complexity of agreements that have arisen from the failure of the United States to negotiate Chilean accession to NAFTA. Since 1994, when the United States first announced that Chile was a candidate for NAFTA, the United States' trading partners have not had the patience to wait for Congress to grant the President fast-track authority and have proceeded with their own free trade agreements with Chile and the rest of the hemisphere.

Canada, unwilling to wait until 2005, began to negotiate directly with South America. In April, 1997, Canada and Brazil initiated talks for a MERCOSUR-Canada free trade agreement. In July, 1997, a free trade agreement between the north and south poles of the Americas began to eliminate tariffs and other barriers to trade between Canada and Chile. Similar to NAFTA in most respects, including investment,

⁶⁹⁵ See generally Garcia, *supra* note 691, at 99-128. Garcia developed this approach from his comparative study of European Union accession through EU association agreements with possible new members prior to their full accession. *Id.* at 87-98. By providing that NAFTA countries would participate in all Americas Agreements, Garcia believes they will achieve a certain degree of consistency and normalcy that could develop the legal background for the FTAA. *Id.* at 125. It seems unlikely, however, that other burgeoning RIAs such as MERCOSUR would be willing to go along with such a process, or that the NAFTA partners could even agree on a common position as Garcia suggests they should. Moreover, there is the additional practical problem of gaining fast-track authority in the United States for such interim agreements.

⁶⁹⁶ *Id.* at 106.

environment and labor provisions, the Canada-Chile FTA liberalizes beyond NAFTA by eliminating all anti-dumping actions between the two countries.⁶⁹⁷

MERCOSUR, like Canada, did not wait for the FTAA to extend its free trade. As already discussed, MERCOSUR completed agreements with Chile⁶⁹⁸, Bolivia, the Andean Community and is negotiating—or has plans to negotiate—agreements with Mexico, Canada, Peru and, even the European Union.

Concerned that U.S. fast-track authority might not come soon enough for a complete hemispheric FTAA by 2005, Central American nations fear a partial-FTAA that would initially leave them out. The Central American Common Market is therefore strengthening its organizational structure and actively pursuing regional free trade agreements with Panama, Chile and CARICOM (the Caribbean Common Market).⁶⁹⁹

In many ways, the Belo Horizonte and San Jose Ministerials and the Second Summit of the Americas—and the rapid free trade area negotiations of the last few years—answered the negotiating problems that O’Hop and Garcia foresaw, including: a firm date for negotiations, the mode of the negotiations, and the institution of a FTAA interim secretariat to oversee the negotiations. The Belo Horizonte Ministerial, therefore, chose the model for FTAA development. As of the Second Summit of the Americas in Santiago, in 1998, the FTAA will proceed, not through NAFTA-based accession, but through a new multilateral, pan-American agreement.

⁶⁹⁷ The elimination of anti-dumping laws under Article M-01 will be phased in for each type of good as the tariff on that good reaches zero or as of January 1, 2003, whichever comes first. CCFTA, *supra* note 660, at arts. M-01, M-03. Further, the agreement creates a Committee on Anti-dumping and Countervailing Measures that will work toward eliminating countervailing duty measures between Canada and Chile, cooperate in the WTO, NAFTA and the FTAA process to eliminate anti-dumping measures within all free trade areas. *Id.* at art. M-05. For a review of current Canadian anti-dumping and countervailing duty law, under the Canadian Special Import Measures Act, as it compares to GATT obligations and U.S. trade remedy law, see CASTEL, DE MESTRAL & GRAHAM, *supra* note 355, at 331-391.

⁶⁹⁸ Chile’s association membership with MERCOSUR become more of a reality as Chile’s accession to NAFTA became less of one.

⁶⁹⁹ See Kevin G. Hall, *Central America Looks to Reinvent Itself*, J. COM., July 16, 1997, at 3A.

Chapter 5. A Proposal for a WTO Agreement on Investment

5.1 Introduction

Sir Leon Brittan described international investment liberalization as having the potential to “unleash enormous new opportunities for growth and prosperity in developing and developed countries alike.”⁷⁰⁰ To guarantee that investment is able to flow as Sir Leon contemplates, WTO disciplines obviously need to be in place to ensure facilitation and protection of the same. In order to give background to the evolution of investment as a trade issue, this chapter begins by tracing the history of discussions on international investment and describes how various multilateral, plurilateral, and regional agreements have addressed these issues. For example, the deficiencies of TRIMs and the investment aspects of GATS are briefly examined. Following that, it then examines in some detail the OECD’s approach and where the negotiations on the MAI stand to date. Next, it evaluates those negotiations and recommends removing those stalled negotiations to the WTO for comprehensive inclusion in the world trading system. Finally, proposals for a WTO Investment Agreement are outlined, including terms and principles of the same.

5.2 The Treatment of Investment in International Agreements

The period of the World Wars marked a shift in the nature of international investment. Prior to World War I, most international investment was directed toward unsettled regions with low populations that offered favorable conditions for rapid,

⁷⁰⁰ Sir Leon Brittan, *Investment Liberalization: The Next Great Boost to the World Economy*, TRANSNAT’L CORP., April 1995, at 1.

western-style development.⁷⁰¹ In the post-war period, while private investment continued to flow to these newly-settled areas, governments became more actively involved in policy discussions concerned with harnessing the power of international investment to facilitate the reconstruction of regions decimated by war and to address the problem of chronically underdeveloped regions.⁷⁰² Through policy initiatives such as the Marshall Plan and the Bretton Woods Institutions, governments sought to direct public capital resources strategically in order to enable reconstruction and development.

While public capital could be directed to needy areas, private flows of capital remained highly restricted in the aftermath of the wars. Currency exchanges were severely limited, trade was directly controlled by governments, state monopolies dominated certain sectors, and international payments were required to balance with each trading partner.⁷⁰³ The result was a primitive system that restricted the flow of goods and capital, and thereby impeded economic development.

As a result, the post-war powers addressed the issue of private investment, to accompany their efforts in the other Bretton-Woods institutions on public investment, in the *Havana Charter* and the proposed International Trade Organization. Unfortunately, the ITO's surviving progeny, the GATT, applied only to barriers to trade in goods—leaving aside the important issues related to investment. Nevertheless, investment concepts developed in the *Havana Charter* have substantial bearing on the issues being debated today within the OECD.

⁷⁰¹ See Ragnar Nurkse, *International Investment Today in the Light of Nineteenth-Century Experience*, ECON. J., Dec. 1954, at 750.

⁷⁰² *Id.* at 755-756.

⁷⁰³ See CLAIR WILCOX, A CHARTER FOR WORLD TRADE 12-13 (1949).

5.2(a) The Havana Charter

The United States initially did not consider it necessary to include investment provisions in the charter establishing the ITO.⁷⁰⁴ The U.S. position in 1946, when it published proposals for the institution, was that investment was encompassed by existing treaties of friendship, commerce, and navigation. The United States therefore preferred to proceed with bilateral negotiations to improve the current treaty structure with respect to investment. Another reason the United States was reluctant to include investment in the charter was a concern that “investment provisions negotiated at a multilateral conference might express the lowest common denominator of protection to which any of the participants would be willing to agree...such a watering down of the standards obtainable in commercial treaties would scarcely be acceptable to the United States.”⁷⁰⁵

As the talks proceeded, however, provisions were adopted that addressed economic development, which by necessity forced the inclusion of some language concerning investment. When U.S. business interests complained that the provisions were inadequate because they were too vague, an article explicitly addressing investment was inserted into the text. This article also proved unacceptable because it allowed for too many exceptions. When the talks moved to their final stage in Havana, the investment article was reworked for a third time, strengthening the language encouraging the free flow of capital.

In the final draft of the *Havana Charter*, investment issues are addressed in both Articles 11 and 12 entitled *Means of Promoting Economic Development and Reconstruction* and *International Investment for Economic Development and Reconstruction*.⁷⁰⁶ Article 11 provides some language for investment protection, saying no member “shall take unreasonable or unjustifiable action ... injurious to the rights or

⁷⁰⁴ See U.S. DEP'T STATE, PUB. 2411, PROPOSALS FOR EXPANSION OF WORLD TRADE AND DEVELOPMENT (Commercial Pol'y Series 79, 1946).

⁷⁰⁵ See WILCOX, *supra* note 20, at 146.

⁷⁰⁶ *Havana Charter*, *supra* note 17, at arts. 11-12.

interests of nationals of other members in the enterprise, skills, capital, arts or technology which they have supplied.” It further states that the ITO was supposed to promote investment by making recommendations and supporting additional agreements “to assure just and equitable treatment,” to avoid double taxation, to facilitate an equitable distribution of skills, arts, technology, materials and equipment, with due regard to the needs of all Members. Finally, it assigns the ITO the mission of formulating and promoting the adoption of a general agreement or statement of principles regarding the conduct, practices and treatment of foreign investment.

Article 12 begins with a statement recognizing the value of international investment for development, reconstruction, and social progress, and noting that international flows will be stimulated if countries offer each other opportunities to invest and provide security for existing and future investments. However, Article 12 provides measures protecting the right of members to take appropriate safeguards against interference in internal affairs or national policy, to “determine whether and to what extent and upon what terms it will allow future foreign investment,” to prescribe and give effect on just terms as to the ownership of existing and future investment, to prescribe and give effect to other reasonable requirements with respect to existing and future investments. The first part of Article 12 closes by encouraging members to enter into bilateral or multilateral agreements to promote opportunities and security for investment.

The second part of Article 12 provides the commitments to which members would be bound. These include that “members undertake to provide *reasonable* opportunities for investments *acceptable to them* and *adequate security* for existing and future investments, and to give *due regard* to the desirability of avoiding discrimination as between foreign investments.” The article also provides for further negotiations to lead toward progressive improvement and concludes with a provision stating that “Members shall *promote cooperation* between national and foreign enterprises or investors . . . in cases where such cooperation *appears . . . to be appropriate*.”

Clearly the language emphasized in italics allows substantial room for interpretation. The drafters of the *Havana Charter* were not disturbed by this language, because they intended such interpretation to be handled through a comprehensive dispute settlement mechanism.⁷⁰⁷ Clair Wilcox, one of the participants in the drafting process, observed that “[t]he value of these commitments to American investors will depend...upon the interpretation that is given to such words as ‘adequate,’ ‘just,’ and ‘reasonable’ by the ITO and by the International Court of Justice and upon the character of such detailed agreements as may be concluded under the commitment to negotiate.”⁷⁰⁸

In further support of the Charter, Wilcox observes:

There is thus provided, for the first time, the right to bring before an international tribunal cases involving the treatment of American investments abroad. There is also provided, for the first time, a powerful sanction to insure that mistreatment will not occur ... The investment provisions of the Charter are but a beginning. They contain minimum requirements applying to all the members of the ITO. It is explicitly recognized that the development of particular countries may be promoted through bilateral or multilateral agreements containing tighter commitments and written in more specific terms. Members are therefore required, upon request, to participate in negotiations directed toward the conclusion of such agreements. The ITO, moreover, is authorized to formulate and promote the adoption of an investment code and to recommend and promote agreements designed to stimulate investment by eliminating double taxation and to assure just and equitable treatment to foreign enterprise.⁷⁰⁹

Despite the vague language, Articles 11 and 12 together set out the major investment issues being discussed today, nearly fifty years later. These issues include promoting future investment flows, protecting existing flows, providing transparency in regulation, promoting fairness and due process in treatment, providing MFN treatment,

⁷⁰⁷ See WILCOX, *supra* note 20, at 146-147. For a description of the ITO dispute settlement process, see *infra* at ch. 3.

⁷⁰⁸ *Id.* at 178-9.

⁷⁰⁹ *Id.* at 148.

and planning for future liberalization. The basic concepts of what should be contained in an investment agreement and what factors contribute to private investment flows were already well established in 1948.

Since the *Havana Charter* did not survive, none of these investment-related provisions were implemented. Nevertheless, there remained some interest in developing multilateral mechanisms for improving the flow of investment capital. This interest became manifest in the actions of the Organization for European Economic Cooperation (OEEC), which became the OECD in 1961.

5.2(b) The OECD Codes

The next notable effort to develop some form of a multilateral regime for the treatment of international investment took place within the OECD. In 1961, the members of the OECD adopted two codes intended to liberalize international investment, entitled *Code of Liberalization of Capital Movements* and *Code of Liberalization of Current Invisible Operations*. These codes consisted of a set of legally binding rules that established a plan for the progressive liberalization of capital movements, provided for the right of establishment, and committed to the principle of nondiscrimination.⁷¹⁰ Signatories to the codes committed themselves to pursue these broad principles, but they also were permitted to maintain measures inconsistent with these principles, provided that they notified other members of the nature and extent of any such measures. Liberalization was to take place unilaterally as a result of peer pressure evoked through reviews of regulatory policy.

The codes were revised in 1986 and 1992 to include additional provisions for the right of establishment and cross-border financial services, respectively. Work is under

⁷¹⁰ OECD, *The OECD's legal instruments on international investment and trade in services* (1996), <<http://www.oecd.org/daf/cmismis/rulegame.htm>> [hereinafter *OECD's Legal Instruments*].

way to expand the coverage of the codes to address insurance services and professional services.⁷¹¹ The Codes have resulted in some success in promoting the lifting of country reservations for most capital movements and direct investment in non-sensitive sectors. The remaining reservations apply primarily to real estate acquisitions, selected securities activities, and foreign direct investment in particularly sensitive service industries.⁷¹²

Another device developed by the OECD to encourage improved investment flows was the 1976 Declaration on International Investment and Multinational Enterprises.⁷¹³ The Declaration establishes voluntary guidelines for multinational enterprises, states that member countries shall accord national treatment to foreign-controlled companies, commits members to cooperate in order to avoid imposing conflicting regulatory requirements on multinational enterprises, and encourages members to make transparent any measures pertaining investment incentives and disincentives.⁷¹⁴

The OECD Codes and the Declaration address the major issues at stake in international investment. Taken together, they provide for national treatment of foreign enterprises before and after establishment, subject to existing, stated exceptions; non-discrimination (MFN treatment) among enterprises from different countries; transparency, which includes a requirement to notify the OECD of any inconsistent measures; and an ongoing review process that monitors compliance with commitments and encourages unilateral roll-backs of existing restrictions.⁷¹⁵

⁷¹¹ See *generally Professional Services* (Aug. 27, 1997) <<http://www.oecd.org/daf/cm/s/services/profserv.htm>>.

⁷¹² For a discussion of the reservations remaining among OECD members, see Christopher Melly, *Approaching the Next Frontier for Trade in Services: Liberalization of International Investment*, in INDUSTRY, TRADE, & TECHNOLOGY R., USITC PUB. NO. 2962, at 1-16 (1996).

⁷¹³ See *The Declaration on International Investment and Multinational Enterprises* (June 21, 1976) <<http://www.oecd.org/daf/cm/s/codes/declarat.htm>>. The declaration has the status of a policy commitment.

⁷¹⁴ *OECD's Legal Instruments*, *supra* note 710.

⁷¹⁵ Robert Ley, *Multilateral Rules to Promote the Liberalization of Investment Regimes*, in OECD, *TOWARDS MULTILATERAL INVESTMENT RULES* 71-72 (1996).

These principles have successfully promoted liberalization in international investment among OECD members. Nevertheless, they are subject to some significant deficiencies. Most notably, the OECD instruments do not provide for an effective dispute settlement mechanism, the roll-back provisions are weakly structured so that liberalization may take place only voluntarily and unilaterally, and they do not address some of the new areas, such as performance requirements and the movement of personnel.⁷¹⁶

Despite these weakness, the OECD Codes and the Declaration represent major steps toward the development of a comprehensive, rules-based system for governing international investment. These or similar principles have been incorporated in subsequent trade and regional economic agreements and formed the basis for the OECD negotiations for a Multilateral Agreement on Investment, which are described fully at section 5.3 herein.

5.2(c) The World Trade Organization

The WTO addresses investment issues under two separate agreements, the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS).⁷¹⁷ The TRIMS agreement essentially declares that members may not apply any investment measures that violate the national treatment principle or that impose quantitative restrictions. The agreement provides for notification and elimination of existing nonconforming measures, includes an obligation to provide transparency, and offers recourse to the WTO dispute settlement procedures. TRIMs is limited in that it applies only to selected measures related to trade in *goods*. This leaves

⁷¹⁶ *Id.* at 72-73.

⁷¹⁷ *See generally supra* at ch. 3.

out a number of other trade-related investment restrictions and fails to address the major issues of portfolio investment and investment in service industries.

GATS addresses investment issues more broadly than TRIMS, reflecting the fact that investment represents an inherent component of international trade in services. GATS' definition of trade in services includes services provided through a commercial presence as well as services supplied through the presence of natural persons. The definition then implicitly encompasses foreign direct investment and the movement of natural persons necessary to maintain such investments. For this category of investment, GATS signatories are obliged to accord MFN treatment, market access, and national treatment. In addition, members committed to provide regulatory transparency and to pursue a program of progressive liberalization. Members also have access to the binding dispute settlement mechanism under the WTO.

As the next chapter reflects, GATS has many drawbacks. The definition of commercial presence applies only to foreign direct investment in service industries, leaving out direct investment related to merchandise production, portfolio investment, and other forms of financial, tangible, or intangible assets, such as intellectual property rights and physical assets.⁷¹⁸ Another major weakness is the positive list approach, whereby only those sectors listed are covered by the investment provisions. Others criticize GATS for permitting members to maintain existing nonconforming measures, for relatively weak language on investment protection, and for an absence of provisions on expropriation and compensation.⁷¹⁹ Finally, the GATS permits members to record exemptions to the MFN obligation, which, by allowing countries to apply their

⁷¹⁸ Pierre Sauve, *A First Look at Investment in the Final Act of the Uruguay Round*, J. WORLD TRADE, Oct. 1994, at 9.

⁷¹⁹ *Id.* at 11-13.

commitments in a discriminatory fashion, may substantially reduce the value of these commitments.⁷²⁰

5.2(d) The European Union

As reflected in chapter 4, the European Union treaties define the free flow of regional investment as one of the primary goals of the creation of the single market.⁷²¹ Aside from upcoming monetary union—which will have a profound effect on regional investment flows—the founding Treaty of Rome itself presents a complete economic integration program that provides for the free movement of goods, persons, services, and capital throughout the internal market. Members of the European Union are guaranteed both nondiscrimination and national treatment. Natural persons are guaranteed free movement, as the agreement abolishes any discrimination on the basis of nationality with respect to employment, remuneration and other conditions, and also provides for entry and stay on an unlimited basis. Provisions granting the right of establishment are structured broadly so that they apply to both self-employed persons and organizations, and also provide for mutual recognition of diplomas, certificates and other qualifications. Free movement of capital is provided for regardless of nationality or residency, taxation is to be applied on a national treatment basis and many provisions exist for harmonizing legislation relating to turnover taxes, excise duties and other forms of indirect taxation. Finally, the agreement also provides for an effective dispute settlement mechanism

⁷²⁰ During the first half of the financial services negotiations, the United States took advantage of this provision by scheduling a broad MFN exemption on financial services. For a full discussion of the stages leading up to the interim financial services agreement, see *infra*, chap. 6; James Bedore, *Financial services: An Overview of the World Trade Organization's Negotiations*, in *INDUSTRY, TRADE, AND TECHNOLOGY R.*, USITC PUB. 2942, at 2-12 (USITC ed., 1995).

⁷²¹ See generally *supra* at ch. 4 (discussing EU provisions on investment).

whereby states, legal persons, and natural persons can use the European Court of Justice to resolve any dispute.⁷²²

5.2(e) The North American Free Trade Agreement

NAFTA also addresses investment in considerable detail.⁷²³ It provides a broad, asset-based definition of investment that includes both portfolio and direct investment, it includes provisions for national treatment, nondiscrimination or MFN treatment, liberal capital transfers, full protection and security of investments, and rules applicable to expropriation and compensation.

In addition, some new areas not addressed by the OECD Codes are contained in the NAFTA. For example, performance requirements are covered, movement of persons is addressed by commitments barring nationality requirements for senior managers, and the commitments of the agreement are extended over nonconforming measures at the sub-federal level. NAFTA also establishes a novel investor-state dispute settlement mechanism beginning with consultation and negotiation, followed by arbitration to a panel of three, resulting in a binding enforceable decision. There remains some work to be done, however, as certain areas were carved out of the agreement, including state procurement, subsidies, and grants, and natural persons limitations applicable to board members or employees other than senior managers. Moreover, because of exclusions taken by Canada and Mexico, investors may not dispute either Country's decision to deny the establishment of an investment from a NAFTA investor.⁷²⁴

⁷²² Natural persons generally do not have direct access to the ECJ for purposes of investor-state dispute resolution; however, they may use national courts to enforce their rights and the national courts must defer to the ECJ on all questions of EU law. For a description of the ECJ, see *supra* at ch. 4.

⁷²³ See generally *supra* at ch. 4 (discussing NAFTA provisions on investment); NAFTA, *supra* note 37, at ch. 11.

⁷²⁴ See *id* at art. 1138.

5.2(f) Other Regional Agreements

As discussed in chapter 4, various other regional agreements include provisions related to investment, although to a much lesser extent than those discussed previously. For example, ASEAN's Agreement for the Promotion and Protection of Investment contains nonbinding provisions for nondiscriminatory treatment, free repatriation of funds, no expropriation, and guidelines for dispute settlement and double taxation agreements.⁷²⁵ As amended in 1996, this agreement provides for MFN treatment of all ASEAN investors in the absence of more rigorous bilateral agreements between ASEAN members and creates an investor-state arbitration mechanism for the settlement of disputes. Finally, ASEAN Members are seeking to complete an ASEAN Investment Area which will provide for complete free movement of capital.⁷²⁶

MERCOSUR's founding treaties address investment in vague terms.⁷²⁷ In contrast to provisions relating to trade, those provisions on the movement of capital, movement of persons, and services are not highly advanced. As such, Various member countries could remain free to pursue different policies.⁷²⁸ Recognizing this deficiency, the MERCOSUR countries drafted the Colonia Protocol to apply national treatment and MFN to investors from MERCOSUR states. Although not yet ratified, this protocol is an advanced investment agreement with additional protections beyond national treatment/MFN such as a ban on performance requirements and a limited dispute settlement provision providing for ad hoc investor-state arbitral panels.

⁷²⁵ Bora, *supra* note 565.

⁷²⁶ See *supra* at ch. 4.

⁷²⁷ See *supra* at ch. 4.

⁷²⁸ For example, Argentina has liberalized capital movements, but Brazil has not. U.S. Dep't of State, telegram prepared by U.S. Embassy, Paris, message ref. No. 15133, *OECD: U.S. delegation report. Committee on International Investment and Multinational Enterprises (CIME)* (July 1, 1996), (July 9, 1996).

As befits its voluntary nature, APEC has developed a broad set of nonbinding investment principles.⁷²⁹ These principles include nondiscrimination, national treatment, transparency, investment incentives, performance requirements, expropriation and compensation, remittance and currency convertibility, dispute settlement, movement of persons, and double taxation. The APEC investment principles cover most of the major issues relating to investment, however, the nonbinding status substantially reduces their value.

5.3 OECD Negotiations for an MAI

Organization for Economic Co-operation and Development (OECD) member states initially set forth their interest in the interrelationship between trade and investment as part of the new trade agenda in the 1991 OECD ministerial communique. They sought to examine the feasibility of a comprehensive investment agreement that would build on the 1961 OECD Codes of Liberalization and the 1976 Declaration on International Investment and Multinational Enterprises. The agreement would contain:

- legally binding obligations for all levels of government regarding the liberalization of investor entry into and establishment in a foreign market;
- investment protection once an investor is established; and
- a dispute-settlement mechanism.

In July 1994, the OECD Secretariat set up the following four working groups to look into the issues involved in pursuing negotiation of a Multilateral Agreement on Investment (MAI): Liberalization (Existing and New Disciplines); Investment Protection; Dispute Settlement; and Nonmembers and Institutional Matters. These groups concluded their work in time for the 1995 OECD ministerial meeting in May 1995. As part of their

⁷²⁹ See *supra* at ch. 4.

1995 communique, the ministers committed to the start of negotiations in the OECD aimed at reaching a MAI by the Ministerial meeting of 1997, which would:

provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures; and

be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries, which will be consulted as the negotiations progress.⁷³⁰

MAI negotiators held their first meeting in September 1995.⁷³¹ They agreed to set up groups to flexibly treat different subjects as needed. To date, they have set up 2 drafting groups (DG) and 5 expert groups (EG): DG1-Investment Protection;⁷³² DG2-Treatment of Investors and Investment; EG1-Dispute Settlement and Geographic Scope; EG2-Taxation Issues; EG3-Special Topics; EG4-Institutional Matters; and EG5-Financial Services.⁷³³ No working groups have been formed to cover special topics such as the movement of key personnel, performance requirements, incentives, and technology/research and development. Negotiators have granted the WTO permanent observer status, believing that investment negotiations will at some point move to the WTO, although they have reserved the right to close whatever meetings they regard necessary to WTO observers. Other observers permitted are those countries in the process of joining the OECD whose accession has not yet been formalized.

⁷³⁰ See *MAI, The Original Mandate* (Feb. 13, 1998) <<http://www.oecd.org/daf/cmismai/mandate.htm>>.

⁷³¹ For reports on the ongoing negotiations, see *Report by the MAI Negotiating Group* (May 1996) <<http://www.oecd.org/daf/cmismai/mairap96.htm>>; *Report by the MAI Negotiating Group* (May 1997) <<http://www.oecd.org/daf/cmismai/mairap97.htm>>

⁷³² DG1 will not treat issues of intellectual property rights or protection of rights arising from other agreements.

⁷³³ Negotiators generally feel tax issues should remain part of bilateral tax treaties (with the exception of expropriatory taxes) and not be covered in the MAI.

The structure of the MAI half-way through the two-year negotiating process reflected the priorities of the United States and reveals a certain like-mindedness among other OECD members. One of the most essential elements required to provide comprehensive coverage is a broad definition of investment. Some progress had been made in adopting a definition that would include an asset-based definition, and thereby encompass portfolio investment, direct investment, and other assets, such as intellectual property. However, there remained some unresolved aspects, including those relating to the geographic scope of the agreement.⁷³⁴

The next critical area concerned the obligations taken by signatories with respect to the treatment of investors and investments. Provisions considered included those that provide for national treatment, non-discrimination/MFN treatment, and regulatory transparency obligations applicable both pre- and post-establishment. Nondiscriminatory barriers also have been considered, and mechanisms have been identified to provide for standstill and rollback of measures, and to present any reservations in national schedules. General exceptions to the obligations also had been sketched out, to include national security, public order, international peace and security, and temporary derogation due to balance of payments difficulties. The most difficult issues in the negotiations concerned sub-federal implementation, regional integration, extraterritoriality, a definition of national security, a cultural carve-out, and taxation issues.⁷³⁵

Despite the progress made, however, the case for extending the negotiations was first breached at meetings on March 24-27, 1997. Given the scope and complexity of the negotiations, delegates were not surprised that some issues such as national security, cultural investments, exceptions for regional integration agreements, and the like might not be sufficiently advanced in time for presentation at the May 1997 ministerial.

⁷³⁴ OECD, *A Multilateral Agreement on Investment, Report by the MAI Negotiating Group* (May 1996), <<http://www.oecd.org/daf/cmismairap96.htm>>.

⁷³⁵ U.S. Dep't of State, telegram prepared by U.S. Embassy, Paris, message ref. No. 13246, *OECD Ministerial: DUSTR Lang meets with MAI Negotiating Group Chair Engering* (June 17, 1996) [hereinafter U.S. Dep't of State, *OECD Ministerial*].

Although negotiators agreed to make as much progress as possible leading up to the ministerial, delegations also began to consider seeking an extension of their negotiating mandate until the 1998 ministerial.⁷³⁶

At the April 1998 ministerial, Ministers had yet to complete the MIA. Consequently, they decided to break for a period of assessment and further consultation among the negotiating parties. The Ministers announced that the next meeting of the Negotiating Group would be held in October 1998. In addition, no deadline was set as to the expected completion of the agreement.⁷³⁷ At this time, texts are available on most of the essential elements of the agreement. Many of these texts are inspired by existing bilateral investment treaties and other international economic agreements. These texts include:

- a broad, asset-based definition of investment covering foreign direct investment portfolio investment and other financial investments, and intangible assets, but excluding cross-border trade in services, with MAI disciplines designed to apply to all economic sectors and at all levels of government in the context of a satisfactory scope and balance of commitments;
- non-discriminatory treatment of investors and investments through national treatment and most-favored nation treatment, and rules on transparency;
- additional disciplines, including provisions on performance requirements; privatization, monopolies, and key personnel;
- expropriation and other investment protection provisions;
- a framework for exceptions to MAI disciplines that increases transparency and takes account of economic concerns and political, social and cultural sensitivities;
- elements of a dispute settlement mechanism for state-state and investor-state disputes;

⁷³⁶ U.S. Dep't of State, telegram prepared by U.S. Embassy, Paris, message ref. No. 007145, *OECD: Multilateral Agreement on Investment (MAI) — Negotiators Need More Time to Conclude* (Mar. 28, 1997).

⁷³⁷ OECD, *Ministerial Statement on the Multilateral Agreement on Investment (MAI)*, OECD News Release, (April 28, 1998) <http://www.oecd.org/news_and_events/release/nw98-50a.htm>.

- proposals to address labor and environment issues; and
- annexation of the OECD Guidelines for Multinational Enterprises, and institutional arrangements, including a Parties Group, and accession of non-Members.⁷³⁸

The negotiators spent much of their time exploring solutions to the main political issues. Some consensus, although not unanimous, has arisen surrounding labor and environmental issues. For example, it was recently proposed to add a side-agreement to the MAI that would specifically address labor and the environment.⁷³⁹ These two issues have proved contentious and raise many concerns in non-OECD member countries. Consequently, this may be a prime motivation for moving the negotiations to the WTO. This transfer would allow for a broader mandate with the inclusion of all WTO members in the process. How intellectual property will be treated has yet to be determined. Negotiators also dealt with exceptions on a wide variety of issues including, *inter alia*, national security, measures taken in the context of a regional economic integration organization, and subsidies. In considering proposed exceptions, delegations agreed to be guided by the need to preserve the quality of the agreement and to achieve a satisfactory balance of rights and obligations among the Parties. Negotiators also ensured that the MAI would be compatible with international agreements, including the WTO, the IMF and multilateral environmental agreements.

⁷³⁸ OECD, *Multilateral Agreement on Investment, Report by the Chairman of the Negotiating Group* (April 1998), <<http://www.oecd.org/daf/cmisis/mai/repor98.htm>>.

⁷³⁹ See *Environment and Labour in the MAI*, Chairman's Proposals - March 1998, Reproduced from the Negotiating Text (May 15, 1998) <<http://www.oecd.org/daf/cmisis/mai/labenv.htm>>.

5.4 Bridging from the OECD to the WTO

The OECD has assumed the lead in investment negotiations in part due to tradition. Historically, the OECD has acted as a leader in developing the framework for addressing new international agreements. With respect to investment issues, the OECD has a reasonably solid level of experience. As noted above, international codes established under the auspices of the OECD contributed substantially to the elimination of most restrictions on payments between OECD countries and to the easing of restrictions on capital flows.⁷⁴⁰ In addition, OECD members have a strong interest in investment issues because most investment flows between OECD members. In 1994, OECD members accounted for over 90 percent of global outflows and 80 percent of global inflows of direct investment.⁷⁴¹

So the OECD was the logical body to begin examining international investment liberalization. Through its ongoing work, its members have experience with many investment issues. The organization already has in place a committee structure for analyzing, reporting on, and negotiating investment topics. Subject experts in relevant areas, such as taxation or competition policy, are already on staff. In addition, the membership of the OECD generally have achieved comparable levels of economic development and market liberalization, so they tend to be on a relatively equal footing. These factors make the OECD a logical organization in which to develop an agreement with high standards for investment liberalization and protection. The OECD also is free to present the agreement in any legal form, and any work accomplished by the OECD may ultimately be continued under the auspices of the WTO.⁷⁴²

⁷⁴⁰ Members of the Organization for European Economic Cooperation, which became the OECD in 1961, established the Code of Liberalization of Trade in 1950, which was intended to facilitate the flow of trade and related payments. In 1961, this code was expanded to encompass trade in services and capital movements by the establishment of the Codes of Liberalization of Current Invisible Operations and of Capital Movements. OECD, INTRODUCTION TO THE OECD CODES OF LIBERALIZATION 9-10, 16-18 (1987).

⁷⁴¹ OECD, INTERNATIONAL DIRECT INVESTMENT STATISTICS YEARBOOK, 1995, at 9 (1995).

⁷⁴² William H. Witherell, *Investment, Services, Taxation and Competition*, BUS. ECON., Jan. 1995, at (continued...)

While few would dispute that the OECD is a logical organization in which to commence the theoretical work of an investment accord, the issue of WTO involvement is much more contentious. The highly developed countries of the OECD are very interested in developing a broad, comprehensive, rules-based system for managing international investment issues. However, as with all such agreements, the obligations undertaken by the signatories represent a sacrifice of some kind of control. For example, in order to meet their obligations, countries may be required to adapt domestic regulations or amend their constitutions. To some, such changes may be perceived as a loss of sovereignty. From a political perspective, then, it is essential that the benefits of an agreement be substantial and abundantly clear in order to justify the perceived sacrifice of sovereignty. For this reason, it is argued that an investment agreement must be ambitious; it must provide for broad liberalization and protection of all forms of investment and also afford effective dispute settlement procedures. The general view within the OECD is that the broader membership of the WTO is not ready to accept the high standards of liberalization and investment protection that are necessary objectives of the agreement.⁷⁴³

Others argue that a robust agreement within the OECD is meaningless because most investment issues have already been resolved among OECD countries, leaving the real investment barriers unaddressed. In addition, the OECD represents only 29 countries, while the WTO represents 132 members. For these reasons, some argue that the WTO is the most appropriate forum for an investment accord.

⁷⁴² (...continued)

30.

⁷⁴³ The current U.S. position is to push for a strong agreement within the OECD. At a meeting on May 22, 1996, Deputy USTR Jeffrey Lang and Frans Engering, chair of the MAI negotiating group, agreed that the focus of multilateral negotiations on investment must remain at the OECD rather than the WTO. Recognizing that non-OECD countries must be involved in the process, they also advocated an outreach program with developing countries. However, Engering stated that the MAI agenda is ambitious, indicating that, as a result, only in time (at least two years after completion), would it be feasible to transfer the negotiations to the WTO. U.S. Dep't of State, *OECD Ministerial*, *supra* note 735.

The position of the WTO as an institution is quite different, which reflects the interests of the more numerous, non-OECD members in the organization. According to reports by Frans Engering, chairman of the MAI negotiating group, to Deputy USTR Lang, in 1996, WTO Director General Renato Ruggiero requested of the OECD negotiators the following: 1) to not finish the MAI until negotiations are begun in the WTO, 2) to stop outreach to developing countries because it is splitting the developing world, and 3) to not create a disparate dispute settlement system. Lang presented the U.S. position as being strongly opposed to all three of Ruggiero's points on the grounds that demand for capital is expected to "skyrocket" soon, creating a great need for reasonable standards. Engering said he would not stop outreach because many developing countries were interested and deserved to be informed about the process. Lang stated that both investor-state and state-state dispute settlement mechanisms were necessary elements of the MAI in order to win U.S. support.⁷⁴⁴

The United States and other leading countries appear to be determined to complete the MAI within the OECD before moving the talks into the wider forum of the WTO. Whether this strategy will prove effective at achieving a robust agreement acceptable to non-OECD countries remains to be seen, as there is the very real risk that such countries will be alienated by the process and reject the agreement outright. On the other hand, industry trends toward globalization and rising global demand for investment capital may make the need for an effective rules-based system so great as to overcome other concerns.

5.5 Proposal for a WTO Investment Agreement

In looking at the 50-year period between the *Havana Charter* and the MAI, there is a tendency to declare that very little progress has been made toward establishing an

⁷⁴⁴ *Id.*

international system of rules related to investment. Indeed, many of the issues broached in 1945 remain to be addressed in 1998. Furthermore, like they did during the ITO negotiations, developed countries such as the United States continue to resist a comprehensive multilateral approach to trade and investment.

But many things have changed since Havana. The OECD Codes developed a framework by which investment restrictions could be presented transparently for evaluation, discussion, and, ultimately, liberalization. Subsequent agreements such as the Treaty of Rome and the NAFTA further defined the issues and set standards for the treatment of international investment and investors. The Uruguay Round Agreements extended some of these investment disciplines to its broad membership. Each of these agreements has borrowed from others in pursuing particular priorities, such that the combination of them all represents an iterative learning process that has yielded considerable administrative expertise regarding how to structure and implement an effective agreement.

Meanwhile, political and market forces have evolved to the point where all countries, rich and poor, appreciate the value of foreign investment and seek to encourage it rather than prevent it—this is evidenced by the efforts among developing RIAs, like ASEAN and MERCOSUR, to improve investment liberalization. Enterprises have developed into global players that source materials, manufacture products, and market goods and services all around the world. As a result, both countries and companies stand to benefit significantly from the stability and security that would be derived from an effective international system of rules governing investment. These factors seem to suggest that circumstances in the late 1990's are considerably more favorable for achieving a strong, multilateral agreement on investment than they have ever been previously.

As the foregoing discussion illustrates, international investment issues have been addressed in a number of different fora. Yet despite these efforts, investment issues are

not covered comprehensively, and investment rules are not fully enforceable on a multilateral basis. Accordingly, terms for a comprehensive WTO Agreement on Investment are proposed that would reduce uncertainty and improve the flow of investment capital around the world, thereby enhancing efficiency and promoting global economic growth.⁷⁴⁵

Commercial enterprises in today's world of integrated global markets have many requirements in order to properly service local customers in many countries. These requirements may include sourcing materials, manufacturing or selling products, providing services or earning investment income. Corporations also would like to pursue these activities with minimal distortions from national governments in the form of regulations or taxation.

Governments are not necessarily opposed to free flowing investment, except to the extent that it may threaten their ability to control crucial elements of the society. Such elements include national security, control over critical industries (transportation, telecommunication, financial services, advanced technology), or control over the economy (inflation, capital flight, dependence, debt, foreign exchange). Governments also may be concerned about loss of cultural integrity (language, tradition, religion, ethnicity) due to external forces.

In the context of international investment, the priorities of corporations and governments are often, but not necessarily complementary. As a result, "conflicts will inevitably arise between business enterprises and governments that can lead to inefficiencies and/or misallocations of resources that reduce world welfare and the welfare of individual nations, and that can stunt the business opportunities of individual

⁷⁴⁵ Edward Graham suggests that a mere 5% improvement of in the flow of international investment could result in global savings of \$75 billion. See Edward M. Graham, Trade and Investment at the WTO: Just Do It!, Paper presented at *The Future of the World Trading System*, A Conference hosted by the Institute for International Economics (Apr. 15, 1998).

enterprises.”⁷⁴⁶ To manage such conflicts, a global system of rules needs to be developed that clearly defines rights and obligations as they apply to host governments, donor governments, and corporations. In order to be effective, these rules must subsequently be supported by a strong mechanism for the settlement of disputes.⁷⁴⁷

Within this context, terms for a WTO Agreement on Investment are proposed that not only provide for the liberal investment needed to promote economic efficiency, but also accords sufficient prudential protection of official control. The essential investment elements that such an agreement would address include the movement of capital, national treatment, progressive liberalization, investment protection, and dispute settlement. More specifically, the terms of the Agreement should include:

- National treatment on and after establishment;
- Investors receiving the better of national or MFN treatment, subject to limited sectoral exceptions;
- Free transfers of foreign exchange for all payments associated with an investment. No foreign exchange restrictions or queuing for foreign exchange from the central bank;
- Expropriation based on international law standards, which include prompt, adequate, and effective compensation for a public purpose, in a nondiscriminatory manner and in accordance with due process;
- Access by the investor to binding international arbitration or local courts at the investor’s choice;
- Discipline over performance requirements, i.e., local content, local equity, domestic employment, or export requirements; and
- The right to hire top management of the investor’s choice regardless of nationality.

⁷⁴⁶ C. Fred Bergsten & Edward M. Graham, *Needed: New International Rules for Foreign Direct Investment*, INT’L TRADE J., Fall 1992, at 16.

⁷⁴⁷ *Id.* at 29.

The necessity of a WTO Agreement on Investment is attracting support from the academic and policy-making community. For example, Edward M. Graham argues that with negotiations stalled in the OECD, the time is now right to begin negotiations on the WTO.⁷⁴⁸ Graham provides several observations on why the negotiations should move to the WTO:

- 1) The WTO membership is much larger than that of the OECD, and a number of WTO nations that arguably should have been party to MAI negotiations, but were excluded because they are not OECD member nations, would now be included;
- 2) An agreement on trade and investment belongs as part of the WTO single commitment for substantive reasons, because trade and investment in the globalized economy are highly interlinked;
- 3) An agreement on trade and investment belongs as part of the WTO single commitment for administrative reasons, because such an agreement should be consistent with other obligations of WTO members and subject to the same procedures for dispute settlement and adjudication; and
- 4) The WTO as an institution is far more experienced at the crafting and implementation of binding multilateral agreements and might be able to succeed where the OECD has failed.⁷⁴⁹

Beyond Graham's reasons for removal to the WTO, other problems might arise if WTO Members begin to develop trade-related regimes outside of the WTO. An OECD commitment on investment might span the goods, services, intellectual property distinctions and separate commitments laid out in the WTO Agreements. Conflicts could arise for Members who sign an OECD MAI as to their MFN obligations to non-signatory WTO Members. It is not clear that they would not have to offer the same level of access to their WTO partners as toward their MAI partners. Problems relating to dispute settlement could also arise if a separate multilateral dispute settlement regime began reinterpreting the obligations contained in the WTO agreements as they pertain to the

⁷⁴⁸ See Graham, *supra* note 745, at 1.

⁷⁴⁹ *Id.* at 2-3.

MAI. Therefore, allowing the WTO Appellate Body to consistently interpret the WTO Agreements could maintain the integrity of the ITO vision of a single integrated document on investment issues in all three modalities of trade: goods, services, and intellectual property.

Chapter 6. Proposals for WTO Regulatory Reform

6.1 Introduction

The government is a participant in all economies in some form or another. Governments participate in markets as a consumer, supplier, and regulator. As regulator, governments can effectively control markets as strictly as they desire. Governments can control markets in many ways. They can regulate the prices charged by a firm by specifying precise levels or ranges of prices and by establishing a certain pricing structure. Alternatively, regulators may also control quantity of a product. Finally, regulators can control entry into—and exit out of—a market. By controlling the number of firms in an industry, regulators can have a significant impact on the market's structure and the efficiency of the firms operating in it.

If a market is regulated, as all markets are to some degree, then participants have an incentive to attempt to influence the regulators to provide beneficial outcomes to the regulatory process. Strategic use of such influence can impact entry conditions, market power, and limit the abilities of new competitors.⁷⁵⁰ In the global marketplace, foreign firms have a natural disadvantage. Domestic firms are much more familiar with their domestic regulators and the domestic regulatory process. In addition, domestic firms are more likely to receive favorable treatment over foreign firms in certain instances.

Trade liberalization has significantly reduced border measures, and consequently, activity that can hamper foreign firms is increasingly taking place inside national borders. With the globalization of markets firms are investing in foreign markets and directly competing with domestic firms. As a result, the regulatory structure and zeal within countries can function as a non-border barrier to trade. And while, as the next three

⁷⁵⁰ See THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE PUBLIC PROCESS (Robert A. Rogowsky & Bruce Yandle eds., Federal Trade Commission, 1984).

sections show, government regulation is addressed in a number of international trading agreements, it has never been fully and adequately addressed. Guy de Jonquières recognized that “[a]s the borders come down in the world economy, the repercussions of inadequate or flawed regulation are becoming more immediate and more likely to cross national frontiers.”⁷⁵¹

Regulation and regulatory reform is now rising in importance as trade policy makers focus inside countries in their quest to further liberalize trade. As succinctly stated by Feketekuty, “the need for greater coordination of microeconomic policies has become most visible in a trade context because globalization has transformed domestic laws and regulations into potential trade barriers”.⁷⁵² Modern companies need to “integrate production processes and support services located in many countries into a unified production system, [and] require some uniformity in technologies, standards, business relationships, and support systems, all of which can be affected by government regulations and sectoral policies.”⁷⁵³ In short, the “internationalization of production subjects production decisions to influence by domestic regulatory policy.”⁷⁵⁴ Accordingly, “convergence of domestic policies is therefore required on the grounds of practicality, economic efficiency and competitive fairness.”⁷⁵⁵ However, as fully described below, the present WTO disciplines do not necessarily operate in such a fashion to avoid unfairness in the structuring and implementation of disparate national regulatory systems. This is particularly so by reason of how the GATS currently operates, and as domestic regulations are increasingly coming into play in the context of regulation of services, this Chapter makes a series of proposals to reform the GATS. These proposals are preceded by a full description of how regulations are currently

⁷⁵¹ Guy de Jonquières, *Rules for the Regulations*, FIN. TIMES, Mar. 2, 1998.

⁷⁵² GEZA FEKETEKUTY, THE NEW TRADE AGENDA 4 (Group of Thirty Occasional Paper No. 40, 1992).

⁷⁵³ *Id.* 1.

⁷⁵⁴ *Id.* at 4.

⁷⁵⁵ *Id.*

handled by existing GATT/WTO disciplines and instruments, with reference to reforms that have been introduced by various of the regional arrangements.

6.2 Domestic regulation under the WTO⁷⁵⁶

Domestic regulation takes place at all levels of government, from city councils to the federal government. Trade negotiations, however, are held at the federal level. Given this relationship, governments have generally been reluctant to accept obligations that are implemented below the federal level. Furthermore, regulations differ across countries as well as across regions and sub-regions within countries. Consequently, regulations are quite heterogeneous across nations, and given various government structures and traditions, harmonization even at the federal level can be quite challenging. In the international marketplace, harmonized regulations would enhance the gains achieved by trade liberalization. However, complete harmonization is not likely to occur. Therefore, in the context of the GATT and the WTO, the legal framework of the multilateral trading system allows for domestic regulatory autonomy, but in addition, attempts to minimize the potential for the use of regulations to protect national industries.

Within the WTO Agreements, no legitimate policy goal achieved through regulation is impaired, but rather, the procedures and instruments for adopting such measures is governed. For instance, the GATT requires not what a regulation may contain, but that it be imposed equally on domestic and imported products. Similarly, the GATS establishes a framework for market access in the trade of services, but does not prohibit specific regulations until a country schedules certain commitments. TRIPs, however, represents the major divergence from this mode; TRIPs attempts a certain

⁷⁵⁶ For an in depth discussion of these issues, see Frieder Roessler, *Increasing Market Access Under Regulatory Heterogeneity: The Strategies of the World Trade Organization*, Paper presented at the OECD Trade Committee symposium on Regulatory Reform and International Market Openness (July 1996).

degree of harmonization by imposing standards on what the minimum legal standard must be.

The application of regulations to products/services that are traded fall into four categories: 1) *destination principle*, 2) *origin principle*, 3) *regulatory duplication*, and 4) *regulatory exemption*.⁷⁵⁷ Under the *destination principle* a good (or service) would be exemption from domestic regulation upon exportation, but then be subject to regulation in the importing country. Under the *origin principle*, the good would be regulated by its home government and exempt from the importing country's regulations. Under *regulatory duplication*, the good would be regulated by both jurisdictions and under *regulatory exemption* it would be regulated by neither.

Most trade is governed by the *destination principle*. Fundamentally, this is codified in the national treatment standard of GATT art. III.⁷⁵⁸ The national treatment standard is a minimum standard; member nations may, but do not have to, apply to imported goods regulations that are applied to domestic goods. In addition, treatment is defined as equality of competitive opportunities—whether a regulation falls primarily on the import or domestic product is irrelevant as long as all producers meeting the regulatory requirement have access to the market. Finally, equality of competitive opportunities does not necessarily mean identical regulation, circumstances may exist that requires different regulations to achieve such equality.⁷⁵⁹

As the WTO Appellate Body has recognized in the environmental context, regulatory “autonomy is circumscribed only by the need to respect the requirements of

⁷⁵⁷ *Id.* at 3.

⁷⁵⁸ “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.” GATT art. III ¶4.

⁷⁵⁹ The Appellate Body agreed that the legitimate environmental regulation of imported gasoline may necessarily need to be achieved through different mechanisms than the domestic regulation—the only burden on a WTO Member is to justify that differential treatment. See *generally Reformulated Gasoline*, *supra* note 94.

the [WTO Agreements].”⁷⁶⁰ Theoretically, Members may not impose any regulation that effectively nullifies or impairs negotiated concessions or commitments even if that regulation is consistent with the WTO agreements.⁷⁶¹ WTO members, thus, have the dispute settlement procedures available to them if governments establish trade-distorting regulations; however, this is subject to the very real limits that are shown below to exist in coverage in the GATS.

The national treatment standard of GATT can also be interpreted to guide governments towards efficient regulatory choices. The policy goal that is being achieved must be done so with the least distorting effect on trade.⁷⁶² In addition, the GATT annexes, the TBT and SPS agreements, require that interested parties of other Members be afforded the opportunity to comment on technical regulations and that this commentary be taken into account.⁷⁶³ The GATT require a certain degree of transparency whereby decisions that pertain to trade matters be published.⁷⁶⁴ The TBT and SPS further require that a time interval be provided between the adoption of a new regulation and its effective date of implementation.⁷⁶⁵

Nevertheless, despite comprehensive treatment of the regulation of goods, problems still arise when Members challenge regulation based on fundamental issues of national policy. In addition to the environmental cases already discussed, in the goods

⁷⁶⁰ *Id.* at sec. V.

⁷⁶¹ Members can raise non-violation nullification and impairment claims under art. XXIII(1)(b). However, only four were raised in the context of GATT 1947; and the only one raised under the WTO Agreements was unsuccessful. *See* GATT 1994 art. XXIII:1(b); GATS art. XXIII(3); Japan—Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WTO Doc. No. WT/DS44/R (1998).

⁷⁶² *See* GATS art. VI(4); TBT art. 2(2); SPS, art. 5(6). Several disputes have centered around the improper use of government regulation. *See, e.g.,* EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WTO Doc. No. WT/DS26/AB/R (Jan. 16, 1998) (disallowing EC regulations restricting imports of beef from the United States grown with hormones).

⁷⁶³ *See* TBT art. 2(9); SPS art. 3.

⁷⁶⁴ *See* GATT 1994 art. X; GATS art. III.

⁷⁶⁵ *See* TBT art. 2(12); SPS annex B, para. 2.

context, this problem has most recently erupted in the context of EC-United States trade in beef.⁷⁶⁶ The EC imposed a ban on U.S. imports of beef raised with hormones. Since the SPS Agreement requires that health-based regulations be based on some degree of scientific evidence, and the EC did not so justify its regulation, the United States challenged the ban at the WTO and ostensibly won at the Appellate Body. However, the Appellate Body suggested that the mere performance of rigorous scientific studies of the health problems—and not any specific result arising therefrom—would satisfy the EC's SPS goods obligations. The WTO's focus on form over substance represents the outer limitations of where the current goods' agreements can reach when a Member challenges these types of sensitive public policy choices.

While the treatment of goods is important from the regulation perspective, increasingly it is the providing of services that are the most subject to the negative impact of disparate national regulatory systems. In this respect GATS, without the variety of annexes focusing on the regulatory treatment of services, only uniformly addresses the regulation of services in the broadest of terms in the main agreement.

As detailed below, one of the great deficiencies is that any specific obligations must be contained in the various GATS schedules, which are limited in coverage. Reform of the GATS as proposed below is crucial as the regulation of services at the national level has historically been far more complex and involved than that of goods. With its recent introduction into the multilateral context, the heavily regulated national services markets present a far greater barrier to trade than goods. While goods' regulation has been weaker at the national level, additionally, the GATT Agreements have functioned for fifty years to eradicate the trade barriers that can arise from the national regulation of goods. The GATS has no such history. Accordingly, during the Uruguay Round, services negotiations proceeded very slowly and the higher-regulated markets' negotiations were not completed at all.

⁷⁶⁶ See generally EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, AB-1997-4, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

As the history of GATS in chapter 3 reflects, only two of the five original extended negotiations were completed in the three and a half years since the conclusion of the Uruguay Round. The next two sections provide case studies of the complicated histories of the negotiations in basic telecommunications and financial services, both of which serve to demonstrate the benefit of the proposals set out below to reform the structure of GATS obligations, and related deregulation negotiations.

6.2 Case study 1: Basic Telecommunications

In February 1997, WTO negotiators completed the first of the unfinished GATS negotiations of the Uruguay Round with the signing of the Basic Telecommunications Agreement (BTA).⁷⁶⁷ This section begins by explaining why some countries have liberalized their telecommunications service markets and promoted negotiations intended to place disciplines on international trade in these services. Then it explains the BTA itself in order to determine whether it meets those goals and objectives.

6.2(a) Liberalizing Telecommunications

Enlightened self-interest promoted heavy regulation of the telecommunications service market in the past, and is promoting the deregulation and liberalization of the same market at present. Historically, the government regulated telecommunications because of a public policy motivation that telecommunications is a public good, offering economic and social benefits to the public beyond those delivered directly to individual consumers. Until recently, government regulation also stemmed from recognition that wireline telecommunications networks were “natural monopolies,” characterized by

⁷⁶⁷ Fourth Protocol to the General Agreement on Trade in Services, WTO Doc. WTO/S/L/20 (Apr. 30, 1997). For a general summary of the negotiations, see WTO ANNUAL REPORT 1996, *supra* note 38, at 126-127; WTO ANNUAL REPORT 1997, *supra* note 43, at 122-123.

specialized technology and high barriers to entry. Government, therefore, regulated to maximize direct and indirect benefits, usually by requiring or promoting universal coverage, high service quality, and affordable prices.

The belief that telecommunications is a public good still holds, but technological developments have steadily chipped away the foundation of the natural monopoly argument. In the United States, for example, developments in microwave transmission technology enabled U.S. regulators to introduce competition into the long-distance telecommunications market, and developments in cellular communications and personal communications technology promoted competition in the local loop. Satellite technology, and satellite networks such as those comprising low-earth orbiting satellites, promise to complement existing cellular services and provide viable alternatives to submarine cables used to provide international services. In short, technological progress and the subsequent emergence of new industries reduced the cost of entering the telecommunications market, made by-pass of the preexisting telecommunications network viable, and thereby reduced the applicability of the “natural monopoly” argument.

Technological developments have also enabled a multitude of firms to provide enhanced, or value-added, telecommunications services—ranging from voice mail to Internet services—which add value to telecommunications services beyond the transmission of voice or data signals. The advent of these services created a regulatory dilemma, which in countries such as Austria and Belgium motivated telecommunications authorities to establish boundaries between basic services, essentially voice and data transmission, which would remain the preserve of traditional monopolies, and value-added services that would be provided on a competitive basis. These boundaries became increasingly arbitrary as digital networks replaced analogue networks. In other countries, such as the United Kingdom and New Zealand, telecommunications regulators threw all services open to competition between the preexisting monopolies and new market entrants. This option eliminated the need to establish problematic boundaries between

basic and value-added services, but in many instances resulted in high leased line fees,⁷⁶⁸ discriminatory interconnection policies,⁷⁶⁹ or other anti-competitive practices that may have adversely affected the development and competitiveness of value-added service providers. Still other countries may introduce competition in both infrastructure and services. This approach could create dynamic markets with relatively low service fees and broad service offerings, but regulators also recognize that the approach could promote duplicate, perhaps wasteful, investment.

6.2(b) Factors Driving Liberalization

The appearance of multiple regulatory frameworks, in part, underlies interest in convening global negotiations on telecommunications services. The creation of widely varying regulatory frameworks has increased the complexity of conducting international business and, in certain instances, reduced the transparency of regulatory policies. These factors may have grave implications for virtually all developed countries and many developing countries whose gross domestic product and private sector employment is predominantly rooted in a knowledge-based economy. In large part, the economy itself focuses on the collection, storage, manipulation, analysis, and dissemination of information. To impose uncertainty and inefficiencies on these processes by adding complexities to the regulation of telecommunications is to apply a brake on global economic growth. On another level, countries with relatively higher telecommunications costs and narrower service offerings will see the global competitiveness of their firms, service providers and manufacturers alike, decline.

⁷⁶⁸ Leased lines are lines dedicated to users requiring exclusive or continuous capacity for rapid voice and, principally, data transmission. Because leased lines are one of the integral building blocks of private networks and entities providing value-added services, their availability and pricing significantly influence the competitive position of the lessee.

⁷⁶⁹ Interconnection is the technical interface between two networks, such as that between a private network constructed by private firms and the public switched network operated by the state monopoly. The terms and conditions of interconnection significantly influence the competitive position of the firm seeking connection to the public switched network.

The need to eliminate current trade-distorting practices, and avert future ones, also underlies interest in negotiation. For instance, some developed countries have pushed for telecommunications negotiations because they post chronic deficits on trade in telecommunications services.⁷⁷⁰ Among developed countries, trade can be further distorted if countries with relatively liberal investment climates, like the United States, allow foreign telecommunications monopolies to establish a presence in their markets and subsequently provide international calling services back to the foreign markets. These monopolies, which could by-pass relatively high accounting rates by handling both ends of such calls, could provide international calling services to their home country at far lower prices than competing U.S. firms, which would be obligated to make settlement payments to these monopolies for terminating outbound U.S. calls.

6.2(c) Previous Attempts to Liberalize Telecommunications Trade

The WTO's efforts to liberalize trade in telecommunications services are unprecedented in scope. Prior to the WTO negotiations, trade negotiators usually focused their efforts solely on liberalizing trade in value-added telecommunications services, which account for about 15 percent of global telecommunications services.⁷⁷¹ Basic

⁷⁷⁰ OECD, *SERVICES: STATISTICS ON INTERNATIONAL TRANSACTIONS, 1970-1993*, at 70-73 (1996). The United States continues to post the largest of these deficits by far. From 1991-1996, the United States trade deficit in the telecommunications service account grew from \$3 billion to \$5 billion. For a fuller discussion of U.S. trade in telecommunications services, see USITC, INV. NO. 332-345, PUB. 3015, *RECENT TRENDS IN U.S. SERVICES TRADE 3-70 - 3-76* (1998) [hereinafter USITC, *RECENT TRENDS IN U.S. SERVICES TRADE*]. The deficit principally arises because most calls between the United States and foreign countries originate in the United States. U.S. carriers collect fees from domestic customers for outbound calls and subsequently divide these receipts with foreign carriers according to mutually agreed accounting rates, a practice developed by the International Telecommunications Union late in the nineteenth century. U.S. firms' settlement payments to foreign carriers are recorded as imports in the U.S. balance of payments, whereas receipts from foreign carriers are recorded as exports. Other factors that adversely affect the U.S. trade balance include the average length of calls, which are longer for calls originating in the United States; relatively low international calling prices in the United States, which promote outbound calls; and devaluation of the dollar, which increases the size of settlement payments. See ITU, *WORLD TELECOMMUNICATIONS DEVELOPMENT REPORT 1994*, at 27-29 (1994).

⁷⁷¹ Ambassador Jeffrey M. Lang, Testimony before the U.S. House of Representatives, Subcommittee (continued...)

telecommunications services, accounting for the remainder, fell outside the scope of negotiations.

For example, in the European Union, a directive adopted in 1990 liberalized the market for telecommunications services other than basic voice telephony.⁷⁷² By adopting a complementary framework directive on Open Network Provision (ONP), the EU intended to promote competition in the provision of value-added services by compelling national regulatory authorities to provide value-added service providers with access to the public switched network. In 1993, the EU reached internal agreement on liberalizing domestic and international voice telephony, and by 1998, completed the internal market for trade in telecommunications services.

NAFTA provides a framework of rights and obligations conducive to trade in value-added telecommunications services.⁷⁷³ Because it was included in NAFTA's negative schedule of commitments, basic telecommunications falls outside the scope of chapter 12's provisions on trade in services. Nevertheless, NAFTA assures that value-added service providers will be able to lease lines at flat rates, interconnect private networks and public networks, and use operating protocols of their choice. North American firms will receive the better of MFN or national treatment, and monopolies will be prohibited from anti-competitive practices such as restricting access to the public network and cross-subsidizing; i.e., subsidizing affiliates competing against foreign value-added service providers with revenue derived from the provision of basic services.⁷⁷⁴

⁷⁷¹ (...continued)
on Commerce, Trade, and Hazardous Materials (May 9, 1996).

⁷⁷² See *supra* at ch. 4 (discussing the completion of the EU single market for telecommunications services on January 1, 1998).

⁷⁷³ See *supra* at ch. 4.

⁷⁷⁴ See GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA: AN ASSESSMENT* 74-75 (IIE, 1993); Harry g. Broadman, *International Trade in Services*, 27 INT'L LAWYER 623, 637-644 (1993).

Under the General Agreement on Trade in Services (GATS) negotiated during the Uruguay Round, 58 signatories, including the United States, scheduled commitments on value-added services. Consequently, these countries are obligated to accord foreign firms market access, national treatment, and MFN treatment, subject to exemptions explicitly specified in their national schedules.⁷⁷⁵ Value-added service commitments scheduled by GATS signatories are standstill commitments, which bind the status quo, rather than liberalize trade. Nevertheless, these commitments appear to ensure the continuance of comparatively liberal regulatory environments, reflecting widespread belief that value-added services can be provided on a competitive basis without endangering the public good.

6.2(d) The Basic Telecommunications Agreement

As opposed to value-added services, at the conclusion of the Uruguay Round, the Members decided to proceed with separate negotiations under the GATS toward a Basic Telecommunications Agreement. Accordingly, at Marrakesh, the WTO created a Negotiating Group on Basic Telecommunications (NGBT) mandating the conclusion of talks by April 30, 1996.⁷⁷⁶ Unlike prior scheduling on value-added telecommunications and nearly all other services, members of the NGBT sought actual liberalization of basic telecommunications markets through substantial deregulation of this heavily regulated services industry. Within the NGBT, the United States endeavored to obtain a level of liberalization similar to the U.S. market after passage of the Telecommunications Act of 1996.⁷⁷⁷

⁷⁷⁵ For a fuller discussion of the GATS, see *supra* at ch. 3.

⁷⁷⁶ See Uruguay Round Decision on Negotiations on Basic Telecommunications (Marrakesh, Apr. 15, 1994).

⁷⁷⁷ See Telecommunications Act of 1996, Pub. L. No. 104-104. The Act provides for competition in the local, long distance, and international calling markets, through all telecommunications infrastructure (e.g., wireline, radio-based, and cable television), and for 100 percent indirect ownership of U.S.

(continued...)

In addition to establishing agreement on common regulatory approaches to basic telecommunications, adoption of pro-competitive principles was believed necessary to preserve the meaningfulness of value-added service commitments. GATS, itself, includes a Telecommunications Annex that guarantees access to infrastructure necessary to provide value-added services, but the annex does not impose disciplines in areas such as leased line pricing and interconnection requirements, which, as noted earlier, significantly affect the competitive position of value-added service providers.⁷⁷⁸ Pro-competitive principles include safeguards against anti-competitive practices, including cross-subsidization, among monopolies or other firms with market power; timely and cost-based interconnection under non-discriminatory terms, conditions, rates, and quality; transparent, nondiscriminatory, and competitively neutral obligations to provide universal service; public availability of licensing criteria and reasons for denial; independence of regulators and suppliers of basic telecommunications services; and timely, transparent, and non-discriminatory practices regarding the allocation of scarce resources, such as radio frequencies. Accordingly, the United States and others sought and achieved a non-binding side commitment to promote these pro-competitive principles; whereby 57 of the 69 Members that made commitments to the BTA included, in part or whole, the principles set forth in the Reference Paper.⁷⁷⁹

The ultimate objectives of the NGBT were to benefit telecommunications service suppliers by increasing investment opportunities and establishing competitive markets abroad; benefit telecommunications consumers, by achieving lower prices and broader

⁷⁷⁷ (...continued)
telecommunications firms. Foreign entities may indirectly own 100 percent of U.S. carriers through establishment of a U.S. holding company. There is a limit of 20 percent on direct ownership. *See id.*

⁷⁷⁸ *See* GATS, Annex on Telecommunications.

⁷⁷⁹ *See* WTO, Negotiating Group on Basic Telecommunications, *Reference Paper* (Apr. 24, 1996); *see also* USITC, RECENT TRENDS IN U.S. SERVICES TRADE, *supra* note 770, at 4-13 - 4-14.

service offerings; and increase business opportunities for manufacturers of telecommunications, computer, and aerospace equipment.⁷⁸⁰

Initial offers were due by July 1995, but by November 1995 only 14 draft offers had been submitted. With participation rising to 48 delegations by January 1996, only 34 offers had been submitted by February 1996 and delegations were concerned that many countries had yet to submit offers and many offers needed to be improved, raising the possibility of the United States again refusing to participate in a final agreement as happened with the financial services negotiations in June 1995. Because of insufficient offers by some countries, the negotiations stalled to resume in July 1996. The negotiations continued with 32 of the original 34 countries making revised offers and another 23 countries making new offers. When the original deadline for completion, April 30, 1996, arrived and the negotiations were not yet complete, the WTO Secretariat extended them after the United States indicated that it found a "critical mass" of trade-liberalizing offers lacking among its fifty-two negotiating partners.⁷⁸¹ The extension obligated the NGBT Members to keep their most liberal offers on the table until January 15, 1997, but not to accord foreign firms market access, national treatment, or most-favored-nation (MFN) treatment before then.⁷⁸² Beginning January 15, 1997, for a period of one month, the negotiating Members could make new offers, whether more or less liberal than their current offers, and list MFN exemptions. Nevertheless, the BTA would still enter into force as initially scheduled, on January 1, 1998.⁷⁸³

⁷⁸⁰ Testimony of Ambassador Lang, *supra* note 771.

⁷⁸¹ In the aggregate, over 40 percent of world telecommunications revenues and nearly 34 percent of global telecommunications traffic were not covered by offers acceptable to the United States. See *Statement of Ambassador Charlene Barshefsky, Basic Telecoms Negotiations*, USTR Press Rel. No. 96-40 (April 30, 1996). The global telecommunications market is valued at \$513 billion. See INT'L TELECOMMUNICATIONS UNION (ITU), *WORLD TELECOMMUNICATIONS DEVELOPMENT REPORT 1995*, at A-59 (1995).

⁷⁸² See Council for Trade in Services, *Decision on Commitments in Basic Telecommunications*, WTO Doc. No. S/L/19 (Apr. 30, 1996).

⁷⁸³ For coverage of the extension of the talks, see John Parry & Mark Felsenthal, *Telecommunications: WTO Telecom Talks Near Failure as Last Day Approaches; U.S. Criticizes Offers*, Int'l Trade Daily (BNA) (continued...)

From July 1996 through February 1997, Members submitted sufficiently revised offers to conclude the negotiations by the February deadline. Finally, in February 1997, the Members concluded the agreement with 69 governments (55 offers—the EC is counted as one) committing to market access reform in basic telecommunications. After failing to meet an ambitious entry into force date of January 1, 1998, the Agreement finally entered into force on February 5, 1998.⁷⁸⁴

The seventy-two eventual signatories to the principal agreement represented, in 1997, 93% of the \$600 billion global telecommunications services market.⁷⁸⁵ The scope of the BTA, unless otherwise scheduled in a Member's national schedule, includes: (1) local, long-distance and international services for public and non-public use; (2) provided on a resale or facilities basis; (3) through wireline, cellular or satellite network technology.⁷⁸⁶ Generally, the Members scheduled commitments that would allow foreign ownership or control of some to all telecommunications services, that adopted some or part of the pro-competitive regulatory principles, and that would guarantee certain degrees of market access to foreign telecommunications providers.⁷⁸⁷

⁷⁸³ (...continued)

(May 1, 1996); John Parry & Mark Felsenthal, *Telecom: World Telecom Services Talks Extended as U.S. Takes Dim View of Other Offers*, Int'l Trade Daily (BNA) (May 2, 1996); *Telecommunications: Trade Official Defends Move to Delay World Telecom Pact: Lawmakers Support*, Int'l Trade Daily (BNA) (May 13, 1996).

⁷⁸⁴ *WTO Telecoms Deal Will Ring in the Changes on 5 February 1998*, WTO Doc. Press/87 (Jan. 26, 1998).

⁷⁸⁵ See *id.*; USITC, RECENT TRENDS IN U.S. SERVICES TRADE, *supra* note 770, at 4-1. As the USITC notes in its comments, it is inappropriate to call the BTA one agreement. Generally, the BTA includes the set of obligations contained in several different documents including the Fourth Protocol to the GATS, the Reference Paper, the 55 supplementary schedules of commitments (the EU made one unitary offer), and two notes from the NGBT Chairman on scheduling methodology. See *id.* at 4-4.

⁷⁸⁶ See WTO Group on Basic Telecommunications, *Note from Chairman on Scheduling Basic Telecom Services Commitments*, WTO Doc. No. S/GBT/W/2/Rev.1 (Jan. 16, 1997).

⁷⁸⁷ The types of basic telecommunications covered by the BTA included: (a) Voice telephone services; (b) Packet-switched data transmission services; (c) Circuit-switched data transmission services; (d) Telex services; (e) Telegraph services; (f) Facsimile services; (g) Private leased circuit services; and (h) others including Analog/digital cellular/mobile telephone services, Mobile data services, Paging, Personal communications services, Satellite-based mobile services (incl. e.g. telephony, data, paging, and/or PCS), Fixed satellite services, VSAT services, Gateway earthstation services, Teleconferencing, Video transport, (continued...)

Within two weeks of the BTA going into effect, U.S. telecommunications companies, MCI and AT&T, accused Mexico of violating the agreement with a discriminatory regulatory regime that favors Telmex, the long-distance monopoly in Mexico.⁷⁸⁸ Accordingly, both requested that USTR immediately begin WTO consultations to enforce Mexico's compliance. While whether this dispute will be successful remains to be seen, it is certain that global telecoms companies like AT&T, MCI/Worldcom, British Telecoms and others will continue to insist that their host Member governments continue to enforce the provisions of the BTA through the WTO's dispute settlement system.

6.2(e) Conclusion

While the dispute settlement system is just beginning to flush out the full implications of the BTA, it still might be too early to come to any conclusions as to the effects of the agreement.⁷⁸⁹ However, an observation about the process may be in order. GATS' positive-list approach to the liberalization of the regulation of services is extraordinarily time-consuming and complex. Because of the way GATS is structured around market access and national treatment offers on four modes of supply, effectively the participating countries had to develop eight schedule entries within each of the seven

⁷⁸⁷ (...continued)
and Trunked radio system services. See WTO, *Services and Categories Subject to the Negotiations* (Jan. 1998) <<http://www.wto.org/wto/services/tell1.htm>>. For general assessments of the level of commitments, see USITC, RECENT TRENDS IN U.S. SERVICES TRADE, *supra* note 770, at ch. 4; PATRICK LOW & AADITYA MATTOO, REFORM IN BASIC TELECOMMUNICATIONS AND THE WTO NEGOTIATIONS: THE ASIAN EXPERIENCE (ERAD, WTO, Staff Working Paper ERAD-98-001, Feb. 1998).

⁷⁸⁸ See Henry Tricks, *Mexico: Telecoms Groups Seek WTO Move*, FIN. TIMES, Feb. 10, 1998.

⁷⁸⁹ Indeed, if Bernard Hoekman is correct in his observation that "interpretation of country schedules [will] form the main part of the panel process," thereby increasing the number of cases filed under the BTA by reducing the "scope for one panel finding to have a general impact in terms of interpreting the rules," then the dispute settlement system's fleshing out the BTA may take several years and many disputes to develop a clear picture of these commitments. See Bernard Hoekman, *The General Agreement on Trade in Services*, Paper prepared for presentation at an OECD Workshop on The New World Trading System, Paris (1994).

basic telecommunications services.⁷⁹⁰ The negotiation of BTA was further complicated by the varying degrees of the offers as to the geographic markets and delivery technology. Despite the complexity of the negotiations and two years it took to arrive at an agreement, the BTA was the first of the services negotiations to be completed. As the next section on financial services will show, generally GATS services negotiations have been lengthy and laborious exercises in “protecting” national services markets from foreign access and deregulation. This is the wrong approach to strengthening national economies and furthering contestable market access.

6.3 Case study 2: Financial services

Like the uncompleted negotiations in basic telecommunications, GATS included an annex as a placeholder for a future agreement on the liberalization of financial services, covering banking, insurance, securities, and diversified financial services. After an interim agreement reached in 1995 ended in November of 1997, the Members finally signed a financial services agreement in December 1997.⁷⁹¹

This section first sets forth the problems arising from the over-regulation of financial services. Then, after turning to financial services liberalization efforts on the national and regional levels, it discusses the efforts in the GATS negotiations that finally led up to the Financial Services Agreement (FSA) in 1997.

⁷⁹⁰ See RECENT TRENDS IN U.S. SERVICES TRADE, *supra* note 770, at 4-12.

⁷⁹¹ See Fifth Protocol to the General Agreement on Trade in Services, WTO Doc. No. S/L/45 (Dec. 3, 1997).

6.3(a) The Problem of Regulation

Whenever nations undertake negotiations on financial services they encounter the considerable problem of the regulation of these industries.⁷⁹² Complex regulatory mechanisms inhibit successful trade negotiations because they tend to require many changes to national laws and regulations, meeting resistance from bureaucracies and national legislatures alike.

There is often a difference between developed and emerging economies in regard to regulatory format. For reasons of history, the more developed countries tend to split banking, securities and insurance into separate regulatory formats, while in many lesser-developed nations the central bank has wide regulatory power over all three of these major sectors. Moreover, developed countries broadly concentrate on a financial firm's solvency (i.e., will consumers lose money if a firm goes bankrupt). Regulators in developing countries, conversely, often monitor and intervene in many additional parts of a financial firm's business, often because of the fear that major failures in one part of the system might cause massive systemic harm or failure for the whole national financial edifice.

Representative of developed countries, the United States' financial regulatory system is profoundly complex. The fifty States regulate insurance with effectively no participation from the national government. For banking, national banks are chartered and regulated by the Office of the Comptroller of the Currency, with participation by the Federal Reserve Board and the Treasury. States also charter and regulate state banks. Securities are overseen by combinations of the Securities Exchange Commission and Commodity Futures Trading Commission, with a self-regulatory body overseeing the actual trader participants, and many States also have State securities commissions.

⁷⁹² For a generalized assessment of the extent of financial services regulation (and deregulation) in OECD member countries, see *Regulatory Reform in the Financial Services Industry*, in THE OECD REPORT ON REGULATORY REFORM, VOL. I, SECTORAL STUDIES, at ch. 2 (1997) [hereinafter *Regulatory Reform in the Financial Services Industry*].

Japan's financial regulatory system is centralized, with banking, securities, and insurance all regulated under the purview of the Ministry of Finance. As demonstrated by recent past (and continuing) problems within that system, a centralized approach is no panacea to financial regulatory questions. Japan's banks and insurance companies continue to suffer huge losses because of a failure by the system to effectively regulate the stock market.

Because of the national complexities, national regulatory systems tend to have great effects on negotiations for financial trade liberalization. Negotiators and lawmakers face not merely changes to national laws, but to the effects that the proposed liberalization will bring to the regulatory structure.

As we saw in chapter four, the financial services single-market liberalization of the European Union came with the successful passage of the Second Banking Directive (SBD). This did not attempt to harmonize all EU banking law, but settled for cross-recognition of differing systems and regulation, plus a few high principles for liberalized trade, (e.g., no restrictions on investment from within the Community and the ability to branch anywhere in the Union on a single "passport"). Foreign investors were not permitted to branch from their home countries throughout the Union, but could do so once they had established a subsidiary somewhere within the EU. The same rules applied to the ground-breaking liberalization of EU insurance markets, as codified in the Third Life and Non-Life Insurance Directives which followed. In the securities sector, there was a long delay but a patchwork of liberalization is now permitted. Various financial services regulators from member states now meet regularly in Brussels to compare notes. As already argued, progress on increased and liberalized trade in EU financial services, both through mergers and acquisitions and cross-border trade is slowly progressing, with the oncoming single currency raising the possibility of much faster and greater liberalization.

As discussed in chapter 4, the NAFTA example is fairly similar, but much simpler because only three nations are involved. It is of particular interest precisely because Mexico's economy and financial strength are so different than its two partners. Additionally, the financial markets of the United States and Canada were largely integrated before NAFTA was negotiated. In the field of insurance, for example, many U.S. states treat Canadian insurers as U.S. ones, exempting Canadian firms from many of the prohibitions faced by other foreign insurers. In terms of commercial presence (affiliate trade), NAFTA provides for the phasing out of all investment restrictions on financial institutions. The deadline for insurance is the year 2000. Banking may take a bit longer, depending on some conditions, but Mexico has already shortened the negotiated restrictions and deadlines voluntarily in regard to banking investment.

NAFTA largely does not deal, however, with cross-border trade of financial services. This is due to differing regulatory (and sometimes tax) systems. Mexico has a largely centralized regulatory system. The U.S. system is diverse, as is Canada's, organized in some instances on both a federal and provincial basis. Thus, NAFTA is more liberal than the EU example on a practical basis for affiliate trade, but more restrictive for cross-border trade.

Nevertheless at both the national and regional levels, OECD countries, at least, "have moved their financial systems toward and 'end-point' in which financial flows and prices are determined by market forces and in which financial institutions are able to compete freely in providing financial services and products."⁷⁹³ Yet, greater benefits can be gained from further deregulation of the financial services industry.

⁷⁹³ See *Regulatory Reform in the Financial Services Industry*, *supra* note 792, at 98.

6.3(b) Bringing the Benefits of Deregulation to Trade in Financial Services

Taking advantage of the deregulating mind set of its Members, the WTO embarked on financial services negotiations to ensure that restrictions on foreign participation in the financial services markets would be reduced along with the domestic regulatory barriers.

The goal of the WTO negotiations was to create a rule-based global system for financial services, which could be enforced by the DSU. The negotiations would define precisely whether, for example, a country that counts each installed automatic teller machine as a branch bank would subject those installations to foreign-investment limitations, and whether the United States would extend to foreign banks the newly created rights from 1994 deregulation to offer interstate banking. Moreover, once in place, the system would not permit countries to withdraw commitments to provide specified levels of market access and national treatment to foreign investors without paying compensation.⁷⁹⁴ Thus, financial institutions around the world would have a written, enforceable set of rules for international trade in financial services, and binding commitments to adhere to those rules, giving them a level of certainty and predictability in planning for foreign investment and operations that they never had before.

At the time of the formal ending of the Uruguay Round, the financial services schedules of a number of key countries were inadequate to produce a strong agreement. In the view of some, not enough countries offered sufficiently liberal commitments in financial services to enable those with already fairly open financial services markets, such as the United States, to offer broad access to their markets on an unconditional MFN basis. Importantly, in the last months of the Uruguay Round Negotiations in 1993, the United States proposed a “two-tier” schedule of commitments in banking and securities (but not in the area of insurance), which would have institutionalized within the WTO

⁷⁹⁴ “Progressive liberalization” could take place at any time; countries need not await formal negotiations to lift existing restrictions or liberalize their financial services market.

differing treatment for firms from differing countries in financial services, depending on the treatment U.S. firms received in each country.⁷⁹⁵ This approach was rejected by U.S. trading partners on the grounds that it would destroy the MFN principle.⁷⁹⁶ Thus, the final U.S. offer had only one tier, offering all trading partners the same contract.⁷⁹⁷ In banking and securities, the United States took a broad MFN exemption: existing banking and securities firms had guaranteed protection of existing investments, but liberalization commitments were reserved on a reciprocal basis for new access, additional expansion, or new activities. In insurance, no MFN exemption was taken.⁷⁹⁸

Given the prominence and importance of the financial sector to international trade, the Marrakesh ministers decided to extend the financial services negotiations after the inauguration of the WTO in an attempt to expand and improve trade liberalizing commitments.

⁷⁹⁵ Enforcement of such a provision could require modification of current U.S. law. There is little scope in current law that permits U.S. Federal regulators to treat foreign firms differently from domestic ones, with the exception of the Federal Reserve Board's power to have first approval powers over new bank applicants from a country not already having banks licensed in the United States. Some contend that the retaliatory provisions of Section 301 of the Trade Act could be used to enforce such measures, but it is unclear how such measures would be implemented. Future legislation could, of course, provide for reciprocity provisions. However, provisions for enforcement of reciprocity stipulations for insurance are even more problematic, given that insurance is regulated by the 50 U.S. States.

⁷⁹⁶ See U.S. Dep't of State, telegram prepared by the U.S. Mission, Geneva, message ref. No. 08808, *Informal Group on Financial Services* (Oct. 14, 1994). The MFN principle is strongly held by many U.S. trading partners, because they see it as the only practical way to move forward with trade liberalization in many countries; they also see MFN as the way to benefit from liberalization achieved with many countries. Also, not all countries are able to equally liberalize trade at the same time, so some must lead and encourage others to follow. Precedents include the old GATT and OECD accessions. In both cases a small number of nations committed to a given course of action on an MFN basis, but waited for lengthy periods for a wider consensus to emerge. The U.S. did not formally abandon the two-tier concept until October 1994.

⁷⁹⁷ The United States of America: Schedule of Specific Commitments, at 54-69, WTO Doc. GATS/SC/90 (April 15, 1994).

⁷⁹⁸ The MFN exemption in banking and securities was for 18 months, to be suspended from January-June, 1995, during the extended negotiations. See, e.g., Mickey Kantor, USTR & Sir Leon Brittan, Press Conference in Geneva, Switzerland (December 14, 1993).

Regional Divergence

The EU and the United States had largely negotiated mutually acceptable financial service offers by the end of the Uruguay Round in December 1993. The EU's single-market initiative of the late 1980's and early 1990's had brought very considerable liberalization to the EU financial markets. A GATS agreement on standstill measures, locking in both sides' existing treatment of each other's financial sectors, but with future opportunities for continued liberalization, was broadly acceptable.⁷⁹⁹

While other OECD states generally followed the U.S.' and EU's approach, Japan was an exception. Before the pause in financial services negotiations in December 1993, the Government of Japan was encouraged to clarify its intentions in regard to the liberalization and deregulation of its financial services market. Japan's GATS schedule of commitments included relatively few significant trade limitations, but the United States thought that additional commitments were needed to accommodate deregulation and liberalization of the Japanese financial services sector.⁸⁰⁰ From the U.S. viewpoint, significant obstacles to liberalization included the *keiretsu* system of interlocking company directorates, and an informal system of regulatory practices whereby "administrative advice," perceived as a government mandate, was provided to Japanese firms. Japan's financial markets had grown exponentially in 20 years, but foreign

⁷⁹⁹ See, e.g., U.S. Department of State telegram, message ref. No. 4362, prepared by the U.S. Mission, Geneva. The liberalized EU market became even more attractive with the accession of Sweden, Finland, and Austria in January 1995, which in the course of the GATS negotiations had significantly improved conditions of access and national treatment in their markets.

⁸⁰⁰ The GATS permits governments wide latitude in regulatory procedures and methods, as long as market access and national treatment are maintained. See, e.g., Ambassador Charlene Barshefsky, Deputy USTR, *Report on the United States-Japan Framework for a New Economic Partnership*, Testimony before the House Committee on Foreign Affairs, Subcommittees on Economic Policy and Trade and Asia and the Pacific (July 21, 1993); Ambassador Charlene Barshefsky, Deputy USTR, *Status of the U.S.-Japan Economic Framework*, Testimony before the House Committee on Foreign Affairs, Subcommittees on Economic Policy and Trade and Asia and the Pacific (Oct. 5, 1993); Ambassador Charlene Barshefsky, Deputy USTR, *Status of the U.S. - Japan Economic Framework*, Testimony before the Senate Finance Committee, Subcommittee on International Trade (Nov. 8, 1993).

penetration of financial markets had remained virtually unchanged during the period.⁸⁰¹ The United States and Japan agreed to a series of framework bilateral negotiations to address deregulation and other issues in mid-1993. Separate negotiations for both insurance and other financial services (including investment, pensions, and banking) opened in October 1993. These broke down in February 1994, with insurance bilateral talks re-starting in April and concluding in October 1994. Banking/securities/pensions services talks resumed later and finally concluded in February 1995.⁸⁰² Japan finalized the results of these talks in its July 1995 schedule of commitments.⁸⁰³

In addition, Korea's GATS financial services schedule of commitments contained several of the same problems as Japan's schedule. There were, for example, deregulation problems and economic needs tests.⁸⁰⁴ Korea's WTO financial services schedule of commitments remained contentious to the end; the United States and other developed nations negotiated extensively with Korea at many points.⁸⁰⁵ Korea's final offer of restrictions included bank funding and capital market issues.⁸⁰⁶

The ASEAN member states posed many of the thorniest problems to the financial services negotiations. Although their financial services sectors are relatively immature and small compared to those of the EU, Japan, and Korea, most ASEAN countries had experienced very high economic growth rates throughout much of the 1980's and 1990's.

⁸⁰¹ See, e.g., *Wall Street Shoku: Daiwa*, THE ECONOMIST, Sept. 30, 1995, at 83.

⁸⁰² See OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF THE TREASURY, *Statement of Acting Treasury Secretary Frank Newman: Financial Services Agreement with Japan* (January 10, 1995).

⁸⁰³ See Japan, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/46/Suppl.1 (Jul. 28, 1995).

⁸⁰⁴ Economic needs tests assess the impact of new market entrants on the indigenous industry. Such assessments may result in a negative determination if market entry is considered likely to have a detrimental effect on market structure, profitability, population density, geographic distribution, and job creation.

⁸⁰⁵ See, e.g., U.S. Dep't of State, telegram prepared by U.S. Mission, Geneva, message ref. No. 04691, *GATS Financial Services Bilaterals* (June 16, 1995) [hereinafter U.S. Dep't of State, *GATS*].

⁸⁰⁶ See Republic of Korea, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/48/Suppl.1 (Jul. 28, 1995).

Broadly, the foreign financial services industry viewed these nations as the places where they could expand most immediately and profitably because of its comparative advantages.

By January 1995, all ASEAN governments were leaning towards gradual liberalization of financial services but arguing that the task could not be accomplished immediately.⁸⁰⁷ For example, several ASEAN governments had increased their offers to permit foreigners to control 49-percent equity shares for investments in financial institutions. Additionally, more than one ASEAN state had certain foreign investment limitations written into law or regulation, but had implemented a more liberal policy. The result was a formal GATS offer that guaranteed 49-percent equity holdings for foreign financial services investors, when the reality was that several such investors already held perhaps as much as 80-percent equity investment. Some ASEAN nations solved this problem by formally “grandfathering” existing firms’ current equity limits into their GATS schedules (and limiting new entrants to 49-percent equity limits), but others were unwilling to do this. Also, many ASEAN nations retained economic needs tests for new market entrants, including foreign direct investors. These ASEAN governments insisted they already had too many market participants, including foreign investors. They maintained that too much competition could threaten the profitability and growth of their domestic institutions and thus disrupt the overall market.

By July 1995, several ASEAN nations demonstrated a real willingness to make meaningful, if limited, financial services commitments, including in some cases a willingness to grandfather existing foreign investment shares.⁸⁰⁸ However, in Malaysia’s

⁸⁰⁷ In one nation’s case, the year scheduled for several liberalizations was as far out as 2020. See P.T. Bangsberg, *Pacific Trade Officials to Shed “Defensive Posture,”* J. COM., Sept. 15, 1995, at 3a.

⁸⁰⁸ See revised financial services schedules for the ASEAN member states: Indonesia, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/43/Suppl.1 (July 28, 1995); Malaysia, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/52/Suppl. 1 (July 28, 1995); Philippines, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/70/Suppl. 1 (July 28, 1995); Singapore, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/76/Suppl. (continued...)

case, a major problem remained with respect to forced disinvestment regulations (acquired rights).⁸⁰⁹ In June 1995, Malaysia submitted a newly revised conditional GATS schedule of commitments for insurance. The new Malaysian offer raised the equity limits of foreign insurance investors from 30- to 49-percent equity investment, but also declared that any existing insurance investor who currently retained more than a 49 percent equity share, and who did not divest to that level by 1998, would be forced to divest to the old 30 percent level.⁸¹⁰

This latter restriction proved to have unfortunate side effects on the overall negotiation. The United States immediately indicated to Malaysia that this tactic was inconsistent with the core purpose of the GATS.⁸¹¹ Rather than promoting trade liberalization, the United States argued, Malaysia was attempting to use a multilateral trade agreement to formally enshrine a regressive action in an enforceable document. In any case, Malaysia refused to reconsider its position, and the disinvestment provision remained in its schedule of July 28, 1995.

By the July offers, several Latin American Members' schedules of commitments had significantly improved in terms of liberalizing foreign investment in financial

⁸⁰⁸ (...continued)
1 (July 28, 1995); Thailand, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/85/Suppl. 1 (July 28, 1995).

⁸⁰⁹ Malaysia has long attempted to promote improved economic life for its indigenous Malay (Bumiputra) majority population by reserving portions of economic investment to that section of the population (i.e., insisting on allowing Bumiputra investment in various enterprises, even if at concessionary rates). The natural corollary was that it thereby restricted the investment of other, non-Bumiputra, domestic and international investors. But in the insurance sector, many foreign firms had held more than majority equity interests for decades, largely because they had entered the market early and had more-or-less created the insurance business in Malaysia. Over many years, the Malaysian Government had forced several of these foreign companies to divest their holdings to a 30-percent majority ownership. U.S. Dep't of State, *GATS*, *supra* note 805.

⁸¹⁰ Malaysia, Schedule of Specific Commitments, Supplement 1, at 5, WTO Doc. GATS/SC/52/Suppl.1 (July 28, 1995).

⁸¹¹ U.S. Dep't of State, *GATS*, *supra* note 805.

services.⁸¹² Given the history of cycles of nationalization and privatization in Latin America and elsewhere, many negotiators, including many from Latin America, thought that one of the principal benefits of the financial services negotiations was to lock-in liberalizations on a multilateral basis.⁸¹³

Representing large populations with emerging financial services markets, India, Egypt, and Pakistan, broadly, were able to offer to bind a 49- 51-percent foreign equity participation in several financial services subsectors.⁸¹⁴ These liberalization offers often were limited, however, by economic needs tests and other restrictions on foreign investment. Further, because India's insurance market of India remains a state-owned monopoly, it was unable to offer a commitment to liberalize insurance.⁸¹⁵

⁸¹² See, e.g., Argentina, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/04 (April 15, 1994); Chile, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC18/Suppl.1 (July 28, 1995); Columbia, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/20/Suppl.1 (July 28, 1995); Venezuela, Schedule of Specific Commitments, Supplement 1, WTO Doc. GATS/SC/92/Suppl.1 (July 28, 1995).

⁸¹³ The largest remaining Latin concern by the end of the negotiation was Brazil, which has constitutional and legal restrictions on foreign investment in the financial sector. Although by May 1995 it was notable that the newly elected government was attempting to liberalize Brazil's financial services sector and to make a meaningful GATS commitment, it soon became clear that the political constraints were too great to achieve this by June 30, which was the scheduled end of the negotiation. Significant formal liberalization commitments by Brazil would have to await constitutional and legal reform, which by its nature could not be promised by a date certain. Given Brazil's size, this placed a significant damper on the late stage of the negotiations. See, e.g., U.S. Department of State telegrams, message numbers 10362 dated Dec. 5, 1994, 3022 dated Apr. 12, 1995, and 4365 dated June 8, 1995, all prepared by the U.S. Mission, Geneva.

⁸¹⁴ See generally India, Schedule of Specific Commitments, at 3-7, WTO Doc. GATS/SC/42/Suppl.1 (July 28, 1995); Pakistan, Schedule of Specific Commitments, at 1, 3, 4, 6-7, WTO Doc. GATS/SC/67/Suppl.1 (July 28, 1995); Egypt, Schedule of Specific Commitments, at 2, 3, 7, 11-12, WTO Doc. GATS/SC/30/Suppl.1 (July 28, 1995).

⁸¹⁵ In November 1993, a Government of India-appointed study commission (Moholtra) recommended that private investment and foreign participation in the insurance sector be permitted. This proposal is highly politically sensitive, due principally to the large numbers of people employed in this state sector who fear loss of their jobs. The current government has not yet found it possible to introduce legislation that would permit private investment in India's insurance market, although the national budget of March 1995 moved to create an insurance regulatory agency (previously unneeded due to the nationalized system).

The Interim Agreement

On June 29, 1995, the United States informed the GATS Council in Geneva that it was offering a schedule of commitments with additional broad MFN exemptions. Its final offer for financial services essentially reverted to the level of commitments taken in December 1993 at the end of the Uruguay Round, but now also included (as noted earlier) a broad MFN exemption for insurance as well as for the banking and securities sectors.⁸¹⁶ Thus the U.S. offer, effective June 30, 1995, grandfathered the current activities of foreign firms in the U.S. market. The United States reached this decision on the grounds that the overall set of national schedules did not, *in toto*, provide a level of liberalization sufficient to warrant a broader U.S. commitment that guaranteed entry, expansion or access to new activities.⁸¹⁷ Rather, the United States would continue, on both a bilateral and multilateral basis, to seek commitments to liberalize financial services.

During the month of July, the European Union persuaded negotiating partners other than the United States to leave their most recently tabled schedules of commitments intact, and crafted a short-term interim agreement that would preserve the negotiated schedules until November 1, 1997.⁸¹⁸ During the 2 months following that date, nations would be able to withdraw or revise the commitments they have scheduled. If the agreement survived this process, then on January 1, 1998, WTO parties could agree to

⁸¹⁶ See United States of America, Specific Schedule of Commitments, Supplement 1, at 1, 16, WTO Doc. GATS/SC/90/Suppl.1 (July 28, 1995); United States of America, List of Article II (MFN) Exemptions, Supplement 1, WTO Doc. GATS/EL/90/Suppl.1 (July 28, 1995).

⁸¹⁷ See U.S. Dep't of State telegram, message reference No. 5108, prepared by U.S. Mission, Geneva, June 30, 1995; U.S. Dep't of State telegram reference No. 165936, prepared by Departments of Treasury/State, Washington, D.C., July 11, 1995.

⁸¹⁸ See generally Second Protocol to the General Agreement on Trade in Services, WTO Doc. S/L/11 (July 24, 1995). In addition to this short time frame, a series of additional insurance policies was also built in. For example, since several nations require that the agreement be confirmed by their legislative bodies (e.g., Japan, Philippines), the implementing protocol did not enter into force until June 30, 1996, if all necessary legal approvals are obtained. If some nations are unable to ratify the protocol, all parties, including the United States, had 60 days during which they could modify or withdraw their WTO financial services commitments. This ensured that all partners could be sure that all other partners ratified the document before it takes effect. In short, the interim regime was only in place from August 1, 1996 until November 1, 1997 before further negotiation was required.

accept irrevocable MFN commitments.⁸¹⁹ Since the irrevocable provision was central to achieving the predictability and certainty necessary for future negotiation, this would constitute the beginning of a more lasting WTO financial services regime.⁸²⁰ The idea was that by 1998, a number of major countries (e.g., India and Brazil) could be able to substantively improve their schedules of commitments, perhaps motivating the United States to consider removing its MFN exemption.⁸²¹

The Financial Services Agreement

The interim agreement would last until December 31, 1997, during the last 60 days of which (from November 1, 1997), signatories could improve, modify, or withdraw their concessions. Indeed, throughout 1997, the signatories continued to improve their offers and others joined the negotiations. Finally, on December 12, 1997, 56 improved offers, with the United States offering complete MFN, concluded the financial services negotiations.⁸²²

⁸¹⁹ Nations could not withdraw or regress on their schedules of commitments without paying compensation; they could only further liberalize their markets.

⁸²⁰ Indeed, the WTO Committee on Trade in Financial Services continuously referred to the regime in place until December 31, 1997, as the "interim" financial services agreement.

⁸²¹ U.S. Dep't of State telegram, message reference No. 5812, prepared by the U.S. Mission, Geneva, July 26, 1995; *Financial services deal sidelines the U.S.*, FIN. TIMES, July 27, 1995, at 5. Some U.S. observers argued that the impasse was a positive outcome since the United States can, if it so desires, strike bilateral agreements with, or take unilateral actions against, trading partners that deny market access or national treatment to U.S. financial institutions. See *U.S. pulls plug on WTO financial services talks, takes MFN exemption*, INSIDE U.S. TRADE, June 30, 1995, at 1. Nevertheless, the U.S. action was seen by many as inimical to the infant WTO's standing and signaled a loss of U.S. leadership after nearly nine years of negotiations. Many believed that this action, coupled with the ability of other WTO members to put together an interim agreement without the active help of the United States, could have adverse effects on U.S. interests.

⁸²² See Fifth Protocol to the General Agreement on Trade in Services, WTO Doc. S/L/45 (Dec. 3, 1997). In addition to the previous interim commitments, 102 governments, out of the over 130 Members, have made financial services commitments under the Fifth Protocol to the GATS. The new agreement will enter into force by March 1, 1999 at the latest. See generally, *Successful Conclusion of the WTO's Financial Services Negotiations*, WTO Doc. Press/86 (Dec. 15, 1997); *U.S. Signs WTO Financial Services Pact with MFN Exemption on Malaysia*, INSIDE U.S. TRADE, Special Report, Dec. 15, 1997.

With 56 of the original 102 participants making improved offers, the WTO successfully achieved an FSA covering 95% of the world's financial services markets. In contrast to the July 1995 agreement, the United States only maintained one broad MFN exemption designed specifically to target Malaysia's refusal to allow 100% foreign ownership of insurance firms (the Malaysian law requires divestiture by foreign owners of insurance firms).

Notably, for Japan, the FSA brought the 1996 bilateral US-Japan agreement on insurance reform—which clarified the previously discussed 1994 agreement—under the auspices of the multilateral WTO and its dispute settlement system.⁸²³ Elsewhere in Asia, the advances were not as significant because any offers made in the WTO were limited by the stage of deregulation each Member had achieved—many were unwilling to offer foreign firms more deregulated access than they offered their domestic firms.⁸²⁴ Although, without an agreement by the ASEAN Members to move toward full foreign ownership in the financial services sectors, the FSA may not have been concluded.⁸²⁵ The European Union, some Eastern European countries, and, to an extent, Latin American countries were able to make broader offers than their Asian counterparts precisely because those economies' domestic reforms have progressed further.

The FSA essentially covers three broad sectors of regulation, including banking, securities, and insurance services. In banking and securities, 60 Members will allow foreign banks to establish domestic banks, while 45 will allow foreign securities firms to operate in their markets. Of those Members, 35 will allow 100% ownership of those

⁸²³ See *Japan Includes Bilateral Insurance commitments in WTO Agreement*, INSIDE U.S. TRADE, *Special Report*, Dec. 15, 1997.

⁸²⁴ During the next year, USTR Ambassador Charlene Barshefsky has indicated that the United States will continue to pressure several countries—including Singapore, the Philippines, Indonesia and Korea—to improve their offers. Significantly, the United States wants Korea to commit within the WTO to the reforms recently required by the IMF as part of its bailout package.

⁸²⁵ Coincidentally, as was discussed in chapter 4, the ASEAN Members completed the first round of regional services trade liberalization the same week as the FSA was concluded—while deeper financial services deregulation within ASEAN is scheduled to begin in late 1998. See *supra*, at ch. 4.

banks, with 37 offering the same to securities dealers. 52 countries offered broad market access to all insurance sectors, while an additional 14 offered increased access to sub-sectors of particular interest to United States insurance firms.

6.3(d) Conclusion

With 95% of the world's financial services market covered by the FSA, it can hardly be considered a failure at any level. However, like the Basic Telecommunications Agreement, the FSA took a number of years longer to achieve than the rest of the Uruguay Round—the FSA was not signed until nearly four years after the end of Uruguay Round. While thus far successful outcomes have arisen from two of the sectoral services negotiations, the task of completing similar talks on the variety of regulatory service barriers remaining in the Members' countries seems daunting at this pace. This result strongly suggests the restructuring of the GATS, as proposed below.

6.4 Proposals to Reform National Regulation of Markets—Reforming GATS

While, as described above, the need to reform national regulation systems extends to both goods and services, it has become increasingly clear to policy-makers that regulatory reform efforts most immediately need to take place in the context of restructuring the GATS. Noting that the GATS “provides guarantees over a much wider field of regulation and the law than the GATT,” WTO Director General Renato Ruggiero recently stated that:

I believe that the pace of liberalization in services will be far greater than it was in goods, because the economic cost of protecting inefficient services is even more evident than the cost of protectionism in the goods sector. Propelled by its own logic, regulatory reform and liberalization will accelerate - *and the GATS will*

provide the means to make this a coherent and cooperative process."⁸²⁶
(Emphasis added).

However, Ruggiero immediately went on to list a series of deficiencies in the present GATS which require it being reformed, with "the most obvious deficiency [being] the volume and quality of national commitments: the sectoral coverage of many schedules is small and many of the commitments which do exist are subject to important limitations."⁸²⁷

Indeed, as we have seen above, only a limited number of highly regulated services industries have, thus far, become the subject of the WTO disciplines under GATS. Further, as the above two case studies on the BTA and FSA negotiations demonstrate, the pace of deregulation will not accelerate anytime soon if the current GATS methodology is maintained. Moreover, there is strong merit in the argument that the WTO BTA and FSA agreements would not have happened but for the integration of the European market in those areas "clearing the way and providing motivation for the highly successful negotiations" in the same.⁸²⁸ Accordingly, following are a number of reforms to the GATS which will implement strong regulatory reform measures.

6.4(a) Proposal: List It or Leave It

The GATS has systemic deficiencies as nothing in it compels members to schedule commitments by mode of supply. Accordingly, the existing distinction between generally applicable sets of disciplines, and those that are voluntary, must be eliminated. It is proposed that specific commitments for all modes of supply must be scheduled in all

⁸²⁶ WTO Director-General Renato Ruggiero, *Towards GATS 2000 - A European Strategy*, Address to the Conference on Trade in Services (June 2, 1998) <<http://www.wto.org/wto/speeches/press101.htm>>.

⁸²⁷ *Id.*

⁸²⁸ *Id.*

national sectors and subsectors, with a universal national treatment obligation applying to the same, i.e. the adoption of a horizontal commitment to regulatory liberalization, not sectoral.

The existing “request-offer” modality for the scheduling of commitments under the GATS creates a sub-optimal combination of very limited undertakings, with a plethora of exceptions. As stated by Bernard Hoekman, the “*hybrid approach to scheduling* (i.e. a positive list of commitments requiring the negative listing of non-conforming measures to be maintained) yields a mostly unsatisfactory outcome from a transparency point of view.”⁸²⁹ (Emphasis in original) Moreover, this “*a la carte approach to liberalization* foreseen under the GATS’ hybrid approach to scheduling allows countries to schedule commitments whilst maintaining significant degrees of regulatory discretion (i.e. as potential departures from otherwise bound non-discriminatory undertakings.”⁸³⁰ (Emphasis in original). Indeed many countries have exempted their service sectors from GATS simply by not listing them on their schedule of commitments. Under the GATS, WTO members are permitted to select which of their service industries would be covered by GATS rules, and for sectors that were placed on a schedule of commitments, many countries agreed only to bind their current practices. Therefore, as presently structured, it is very difficult to ascertain elements of a country’s services regime in sectors for which a country has not scheduled specific commitments.

The justification for the positive list approach has rapidly diminished with the developments at the institutional levels of the WTO and regional organizations. Hoekman argues that the positive list approach arose in large part because of concerns by developing countries—who were originally against the inclusion of trade in services in the Uruguay Round—that they did not have the necessary administrative resources to

⁸²⁹ Bernard Hoekman, The General Agreement on Trade in Services, Paper Prepared for Presentation at an OECD Workshop on the New World Trading System (Paris, Apr. 25-26, 1994), *reprinted in* JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 921 (1995) [hereinafter Hoekman, *GATS*].

⁸³⁰ *Id.*

determine which of their national regulations to maintain and which to offer in GATS negotiations.⁸³¹ This rationale was developed in the midst of the Uruguay Round and has since been eclipsed by the advent of the institutional powers of the WTO Secretariat (and its outreach to developing Members) and the growth of regional forums where services liberalization efforts outstrips that offered in the GATS. Whether it be APEC, ASEAN, MERCOSUR, the FTAA parties, or EU “outreach” countries, as shown in chapter 4, most of the developing world’s WTO Members are already liberalizing trade in services—the administrative work is already being done. Moreover, the EU and United States are always willing to identify market access barriers in all of their trading partners in their annual reports.

Therefore, it is proposed that the positive list approach of the GATS should be abandoned and substituted with a negative list approach. In order to see the benefits of a negative list approach, one only needs to look at the scope of accomplishments in either the EU or ANZCERTA—and the potential for NAFTA. On the other hand, one only needs to look as far as the successful-but-tedious approaches to financial services and telecommunications liberalization, the slow moving professional services negotiations, and the failed maritime and air transport efforts to see the inherent problems of a positive list approach. The transparency benefits alone—Members would understand that everything not listed is covered—would greatly improve the slow process of removing these barriers. Moreover, once identified, either internally or by another WTO Member, a Member would have to either list its barrier or take action to remove it, for fear of dispute settlement actions.

Ruggiero recognized the merit of this proposal, when he recently stated that members “should consider the need for improvement in the architecture of the GATS itself,” asking “[c]an we afford to continue this sector-by-sector approach to domestic regulation, which is such a fundamentally important issue for so many services? The

⁸³¹ See Hoekman, *GATS*, *supra* note 829.

question governments must ask themselves is whether they should move to a horizontal approach.”⁸³²

Indeed, a horizontal approach as proposed above would help cure the fact that so many regulated areas that lie outside the present GATS, such as: maritime, air transport, professional services, courier services, environmental or testing/certification services, and those sectors traditionally subject to monopoly or exclusive rights, such as energy and postal services, to name a few. Such an approach would “tilt [service] negotiations in favor of liberalization by assuming that every sector is liberalized unless certain reservations are raised by WTO members”⁸³³ This view is also consistent with the approach of Sir Leon Brittan, who, when recently addressing the question of new services negotiations stated: “I hope that the next round will focus overwhelmingly on market access. No sector will be excluded.”⁸³⁴

6.4(b) Proposal: Require effects over form.

Under its present formulation, GATS compliance is achieved not through the implementation of structural changes to remove the effects of disparate national regulatory systems, but merely by ensuring that the commitments that are made do not conflict with the limited way that the terms “market access” and “domestic regulation” are currently defined in the GATS. For example, although identified as one of the three commitments for each mode of supply, “market access” is not specifically defined under the GATS—as such, countries merely schedule the various laws that purport to offer

⁸³² Ruggiero, *GATS 2000*, *supra* note 826.

⁸³³ Speech, Peter Collins, Deputy Assistant Trade Representative for Services and Investments, as quoted in *Inside U.S. Trade*- June 19, 1998, at 6.

⁸³⁴ Vice-President of the European Commission, Sir Leon Brittan, *European Objectives for Services Worldwide: How the WTO Can Help* (June 2, 1998) <<http://gats-info.eu.int/gats-info/g2000.htm>>.

market access, they do not commit directly to any particular outcome.⁸³⁵ While this may not remain a substantial problem under a new negative list approach, it is proposed that the market access article, GATS XVI, should be amended. Currently, Article XVI sets out only a “closed list of in principle prohibited measures,” which will “frequently reflect a country’s regulatory regime.”⁸³⁶ Fundamentally, as Hoekman observes, Presently, Article XVI focuses on the “*form* of the measures, not their *effect*.”⁸³⁷

Instead, it is proposed that Article XVI should be restructured to provide for an effects-based definition of market access. As such, it should include an affirmative list of commitments as to the effects of market access, setting forth examples of the types of measures that should be undertaken to achieve those results. Form, however, may remain necessary as to prohibited practices, and as such, could remain part of article XVI.

Article VI relating to Domestic Regulations would require amending consistent with the amendment to Article XVI, to move away from form-related obligations to effect/value-related undertakings. A careful review of Article VI commitments show that the same are significantly procedural, in the sense that they focus on such elements as objectivity and transparency of application and criteria, and how the same are handled from an administrative/governmental manner. While Article VI (4) (b) and (c) do have provisions that are more effect/value in nature (i.e., providing, respectively, that regulations are not to be more burdensome than necessary to ensure the quality of the

⁸³⁵ In order to present a DSU complaint for violations to the effects of market access, a country would have to proceed under GATS laborious art. XXIII and establish the expectation of benefits arising from the market access commitments in the national schedules. GATS art. XXIII. Instead, with an affirmative obligation to produce effects, Members would not have to show a link between the specific commitment and the injury, only the injury of non-contestability.

⁸³⁶ Hoekman, *GATS*, *supra* note 829.

⁸³⁷ *Id.* Ironically, the current wording of Article XVI gives other Members a justification for a complaint to the WTO “independent of the degree of the contestability of the regulated market.” *Id.* While this idea of automatic injury may have worked with GATT tariff obligations under GATT XXIII for violation of obligations, it does not hold under the GATS. Since market access measures are so broad, if a country can be complained against for scheduling a market access commitment regardless of its effect, it may be unwilling to schedule it. Instead, either a negative list approach or a general positive effects market access commitment could be used only in cases where there was actual restraints on contestability.

service, and, in the case of licencing procedures, not in them selves a restriction on the supply of the service), overall Article VI provisions may result in little actual restructuring. Accordingly, Article VI, as with an amended Article XVI, would also need to adopt affirmative undertakings to positively deliver on the contestability commitments consistent with the intrusive, “market-restrictive” undertakings set out in the Reference Paper on Procompetitive Regulatory Principles developed by the Negotiating Group on Basic Telecommunications.⁸³⁸ Unlike other GATS-related requirements which identify limited commitments, the affirmative obligations in the Reference Paper provide for:

- interconnection to be ensured under nondiscriminatory terms and conditions;
- competitively neutral universal service requirements;
- safeguards against anticompetitive practices by major suppliers, including cross-subsidization;
- independent regulators;
- transparent licencing criteria; and
- non-discriminatory allocation of scarce resources, including frequencies, numbers, and rights of way.

These principles are designed precisely to guarantee the *effect*, or value, of market access commitments, not their *form*, and must be considered ground-breaking in the multilateral context. They are also precisely the type of commitments necessary to implement the contestability proposals set out in the next chapter, and should be expanded cover all elements of a domestic economy which are not otherwise excluded, as provided for above. However, while immensely valuable as an overall precedent in the multilateral context, the immediate impact of the Reference Paper is limited in the BTA context, as in February 1997, only 57 of the 69 governments involved scheduled commitments on the procompetitive principles.⁸³⁹ This demonstrates the need for this approached to be mandated, rather than be voluntary.

⁸³⁸ NGBT, *Reference Paper* (Apr. 24, 1996) <<http://www.wto.org/wto/services/tel23.htm>>.

⁸³⁹ See USITC, *Recent Trends in U.S. Services Trade*, *supra* note 770, at 4-14.

6.5 Conclusion

Given the evolution of deeper integration of international economic systems, there is the need to be able to remove the effects of distorting national regulatory systems. This is most required in the area of services; however, the way that the GATS is presently structured, removing of such distortions is by no means assured. With either the negative list or affirmative market access commitment approaches, GATS may be able to cure some of its structural defects. Namely, the costs to developing countries of negative lists may be substantially reduced if developing countries only had to schedule market access effects limitations and not specific protectionist measures. Further, for the developed world, the high costs of negotiating access to their own deregulated markets could be reduced because Members would no longer have to proceed with the mammoth efforts of sector-by-sector negotiations.

It is proposed that the above suggested reforms be taken up in the year 2000 when, as stated, the WTO again takes up the negotiation on liberalization of trade in services. This will also be the ideal time to finalize disciplines in the three areas which were deliberately deferred in the Uruguay Round - safeguards, subsidies and government procurement. Negotiators are still working on these, and have agreed on a deadline of July 1999 for the work on safeguards. But, as Ruggiero recently acknowledged: "it seems clear that work on subsidies and government procurement will not be completed before the start of the broader negotiations, and therefore will probably become a part of it."⁸⁴⁰ New sectors not envisioned during the Uruguay Round will also need to be addressed during the broader negotiations. Like the ITA's focus on tariffs for high technology goods, services negotiations will need to address cross-border electronic commerce as it pertains to services as part of the broader effort to protect electronic commerce from regulation at all levels.⁸⁴¹

⁸⁴⁰ Ruggiero, *GATS 2000*, *supra* note 826.

⁸⁴¹ See *supra* at ch. 3 (discussing the Geneva Ministerial's statement on electronic commerce and the
(continued...)

⁸⁴¹ (...continued)
WTO's study of its effects on trade).

Chapter 7. Proposal for a WTO Agreement on Competition Policy

7.1 Introduction

Several noted scholars already have observed the shifting trade paradigm towards closer international economic integration.⁸⁴² As noted earlier, the comparatively narrow focus of the GATT/WTO is inadequate to deal with the dimensions of borderless commerce today. Postwar trade integration attempts have achieved, at most, “shallow integration,” which is characterized by the removal of border barriers on goods, services, capital, and extension of national treatment to foreign firms, while preserving domestic policies.⁸⁴³ But with the increasing globalization of the economy, shallow integration leaves exposed differences in domestic policies that prevent full market integration. As discussed, relaxation of border barriers on manufactured and agricultural goods has increased awareness of internal barriers, which are inadequately addressed, if at all. Thus, differences in worldwide competition policy and other domestic laws affecting market access have the potential to increase international conflict and tension under the new trade paradigm as demonstrated by the *Kodak/Fuji* case.

Previous attempts to address internal market access barriers on a multilateral level have been either unsuccessful or of limited consequence. Although a number of bilateral agreements have shown promise, most are limited in scope. Certain regional agreements, particularly the EU and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), show promise, others vary in their effectiveness in opening markets, and under certain conditions actually may increase market barriers to nonmember countries. Moreover, the success of regional agreements like the EU and

⁸⁴² See Eleanor Fox, *Toward World Antitrust and Market Access*, 91 THE AMERICAN JOURNAL OF INTERNATIONAL LAW (1997), Bernard Hoekman, *Trade and Competition Policy in the WTO System* (CPER Discussion Paper No. 1501, 1996), Robert Z. Lawrence, *Toward Globally Contestable Markets*, in MARKET ACCESS AFTER THE URUGUAY ROUND 25 (OECD ed., 1996); GEZA FEKETEKUTY, THE NEW TRADE AGENDA 5 (Group of Thirty Paper Occasional Paper No. 40, 1992); Michael Hart, *What's Next: Negotiating Rules for a Global Economy*, in NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALIZING WORLD ECONOMY 221 (OECD ed., 1995).

⁸⁴³ See Lawrence, *supra* note 842.

ANZCERTA in reducing internal market barriers may be due in large part to the presence of conditions within those markets not existing elsewhere.

More recently, however, a number of proposals have been put forth and have generated considerable interest in the international community. A number of these call for a multilateral approach, characterized by consensus on rules of behavior and an international oversight and enforcement body. Other recent proposals have adopted a comparably watered-down approach, emphasizing gradual evolution towards the multilateral ideal and, in the short term, building on the success of existing bilateral and regional agreements. There is a lack of consensus on which proposed approach, if any, constitutes the “best” approach.

This section begins by reviewing the competitive aspects of the current multilateral system with particular attention paid to restrictive practices that are and are not addressed by the WTO and other multilateral agreements. Various efforts to establish competition policy in an international framework are then examined. Several regional agreements are reviewed as well as actions taken by the United States. Following that, recent approaches to international competition policy from codes with supranational authorities to recommendations of cooperation and positive comity are categorized and discussed, together with a review of anti-dumping reform proposals.

Finally, a proposal is offered, as set out in Annex 7-1, that moves towards completing the vision of Cordell Hull and further ensuring the contestability of international markets. The proposal is inspired by the *Havana Charter*, but also draws upon other agreements and protocols. A simple and straightforward WTO *Agreement on Competition Policy* is proposed that seeks to address well recognized anti-competitive behavior across borders - - while preserving national systems in place, and ensuring that reasonable interpretation by governments of its national law will not be overturned in the WTO dispute process.

7.2 Competitive aspects of the GATT/WTO

As discussed, the GATT historically focused on market access through the reduction of trade barriers at the border and the concept of non-discrimination among trading partners. Reducing barriers lowers the costs of entry for foreign producers and the “binding” of tariffs reduces uncertainty in international trade. In addition, GATT members can contest measures that seek to nullify or impair such bindings.

The GATT article most directly related to competition policy is Article VI—Anti-dumping and Countervailing Duties. This is the only GATT provision that allows government measures (antidumping duties) to offset alleged private anti-competitive behavior (dumping). Although enforced by governments, these actions are initiated by private parties against other private parties seeking government imposed restrictions that are GATT-legal. However, these laws are structured to protect industry and not competition.⁸⁴⁴

As detailed below, private party actions against anti-competitive behavior are not available directly under the WTO. Firms that pursue anti-competitive actions need government approval and support (e.g., antitrust exemptions and trade restrictions). Currently, if a member government wants to challenge the anti-competitive behavior occurring in another member’s jurisdiction, then the WTO dispute settlement process can be used, to the extent that the present codes permit. There are two paths that governments can follow today: direct “violation” complaints or “non-violation” complaint—actions by a Member that nullify or impair an existing concession.⁸⁴⁵

In competition policy regarding goods, violation complaints could arise in connection with certain provisions of the GATT including Article III (national treatment), Article XVII (state-trading enterprises), and Article XI (quantitative restrictions). Article

⁸⁴⁴ Bernard M. Hoekman & Petros C. Mavriodis, *Competition, Competition Policy and the GATT*, 17 WORLD ECONOMY 126 (1994).

⁸⁴⁵ *Id.* at 129.

XVII gives contracting parties the right to establish state-owned enterprises or permit exclusive privileges. However, such entities must conform to national treatment obligations. Article XI is relevant to competition policy because quantitative restrictions limit market access, but are enforced by governments. This article obliges non-discrimination of foreign products. Consequently, violation complaints generally hinge on the issue of nondiscrimination regardless of the Article under which an action is challenged to occur. Private anti-competitive behavior does not violate GATT provisions.

Similar to violation complaints, private business practices that do not involve the government are not subject to non-violation complaints.⁸⁴⁶ Furthermore, restrictive business practices that have extraterritorial effects are not subject to non-violation complaints. That is because non-violation complaints are based on negotiated tariff concessions and export concessions are not negotiated in the GATT. Consequently, non-violation complaints apply only to practices that deny market access opportunities in a domestic market.

In a wide ranging dispute over market access, the United States pursued a non-violation complaint that attempted to remedy alleged restrictive business practices in Japan. Specifically, in the *Kodak/Fuji* case, the United States claimed that the Japanese Government (JG) for a period greater than 30 years inhibited the distribution and sale of imported consumer photographic film and paper.⁸⁴⁷ The United States alleged that: 1) distribution measures by the JP facilitated a market that excluded imported photographic film and paper products from traditional distribution channels; 2) restrictions on large retail stores hamper the distribution of imported photographic film and paper; and 3)

⁸⁴⁶ Non-violation complaints against offending actions must meet the following conditions: 1) the measure is applied by a government, 2) it must alter the competitive conditions established by an agreed tariff binding, and 3) it could not have been reasonably anticipated at the time the tariff concessions were negotiated. Non-violation complaints also do not have the same remedies available to the complaining Member as those under violation complaints. *Id.* at 140.

⁸⁴⁷ See Japan - Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WTO Doc. WT/DS44/R (Mar. 31, 1998).

imports of photographic film and paper are disadvantaged by restrictions on sales promotion techniques. The United States alleged that these measures, individually and collectively, nullified and impaired benefits accruing to the United States within the meaning of GATT XXIII:1(b) and that they are inconsistent with GATT III:4.

In a comprehensive panel report, the WTO dismissed all the U.S. allegations.⁸⁴⁸ In particular, the panel found that the Japanese measures cited did not nullify or impair benefits to the United States within the meaning of GATT Article XXIII:1(b), or accorded the United States less favor within the meaning of GATT Article III:4. Consequently, the United States was unsuccessful in pursuing the only international remedy for private restrictive business practices outside its borders. This dispute points to the difficulty governments will have seeking relief within the current WTO system concerning alleged anti-competitive behavior occurring within borders of their trading partners.

Hoekman and Mavroidis make the following observations concerning competition policy and the limited reach of GATT/WTO to resolve such conflicts:

- The GATT/WTO itself does not directly address competition policy;
- Private restrictive business practices that are not supported by a government cannot be attacked as either a direct violation of the GATT/WTO, nor contested by a non-violation complaint;
- The GATT/WTO is limited to government behavior that affects the conditions of competition in domestic markets only, and;
- The GATT/WTO does not prohibit non-discriminatory regulations that restrict market access.⁸⁴⁹

7.2(a) Restrictive practices and the GATT/WTO

⁸⁴⁸ *Id.*

⁸⁴⁹ See Hoekman & Mavroidis, *supra* note 844, 848, at 145-47.

As Professor John Jackson points out, “the international law rules generally apply only to nations, not to individual citizens or business firms.”⁸⁵⁰ Certain GATT clauses, particularly those concerned with fair market access such as non-discrimination, most favored nation, transparency, and national treatment, may address certain restrictive business practices, provided that the practices involve the government. Restrictive business practices, however, may be state or private-sponsored, and as detailed below, the current GATT does not adequately address government-sponsored restraints to trade, and does not address to any degree private restraints of trade. Accordingly, the following discussion highlights those government and private business practices that raise competitive concerns and why such restraints are addressed by the proposed WTO Agreement on Competition Policy.

Government Restraints

In theory, several existing GATT provisions may address certain government-sponsored restrictive business practices. For example, cartels supported by discriminatory government regulations may be subject to complaints under Article III (non-discrimination), restrictive importation and distribution arrangements may be subject to complaints under Article XVII (state owned enterprises or enterprises with special privileges), and more aggressive use of non-violation complaints under Article XXIII.⁸⁵¹ The principal limitations of the current options for addressing restrictive business practices under GATT are that they appear to require active government involvement, standards for review are not well-defined, and in some cases, new interpretations of GATT rules may be required to address restrictive business practices in any meaningful way. Moreover, as pointed out by Prof. Petersmann, “[o]n the whole, the obligations

⁸⁵⁰ John H. Jackson, *The World Trade Organization, Dispute Settlement, and Codes of Conduct*, in THE NEW GATT, *supra* note 26, at 211.

⁸⁵¹ See Hoekman & Mavroidis, *supra* note 844, 848 at 143.

under Article XVII are easy to circumvent through restrictive business practices and seem to have remained rather ineffective.”⁸⁵²

Professor Janow identifies several broad categories of government action (or inaction) that can restrict foreign market access, including discriminatory antitrust laws, government tolerance of anti-competitive activities and failure to enforce antitrust laws, antitrust exemptions resulting in foreclosure (particularly those overlooking the existence of cartels), preferential industrial policies incorporating subsidizing instruments as preferential tax policies, financial assistance, or antitrust exemptions, anti-competitive government procurement practices, and discriminatory regulations.⁸⁵³ None of these practices are addressed in the current GATT.

Private Restraints

The current GATT does not address private restraints to trade at all. Several broad categories of private restrictive business practices of international concern include horizontal agreements (particularly cartels), abuse of dominant position in a market to achieve foreclosure, prevent entry, or influence prices, and the use of anti-competitive (as opposed to efficiency-enhancing) vertical restraints. In addition, merger activities of private firms often raise international competitive issues, particularly if such consolidation involves a firm or firms with some measure of market power.⁸⁵⁴ Although all industrialized countries have antitrust and competition laws to address these practices,

⁸⁵² Ernst-Ulrich Petersmann, *Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System*, 49 *AUSSENWIRTSCHAFT* 231 (1994).

⁸⁵³ See Merit E. Janow, *Public and Private Restraints that Limit Access to Markets*, in *MARKET ACCESS AFTER THE URUGUAY ROUND* 101 (OECD ed., 1996).

⁸⁵⁴ For detailed discussions of private market access barriers in the context of international trade, see SCHERER, *supra*, note 856; Janow, *supra* note 853; Heinz Hauser & Rainer E. Schoene, *Is There a Need for International Competition Rules?* 49 *AUSSENWIRTSCHAFT* 205 (September 1994).

cross-border enforcement is limited and there are significant differences in the goals, institutions, and operational aspects of enforcement between countries.

The extent to which private restraints to trade exist and flourish in international commerce depends on the effectiveness and “reach” of national competition policies, as well as the interaction of national policies between nations. The objectives and institutions of competition policy, however, vary significantly between countries, and within countries, over time.⁸⁵⁵ For example, competition policy may be used to increase economic integration, protect competitors, or limit concentration of economic power. Conversely, the goals of competition policy may be consumer welfare and economic efficiency. Operationally, different goals imply different methods of analysis and different criteria for decision making. Enforcement practices vary significantly across nations, as well. The U.S. enforcement process relies on a mixture of private treble damage and governmental action, with the U.S. Department of Justice and the Federal Trade Commission capable of bringing injunctive suits. In contrast, most other developed nations enforce antitrust laws through an administrative process, with little to no reliance on private sector actions or criminal penalties. Such differences lead to limitations on cross border enforcement and cooperations and thus the existence of competition policy concerns on an international scale.

Without a doubt, horizontal agreements involving cartels evoke the greatest concern of all private restrictive business practices. Scherer illustrates how domestic and international cartels can be, and have been, used to influence a nation's terms of trade, enhance domestic profits, influence trading patterns, and how they may lead to

⁸⁵⁵ See ROGER ALAN BONER & REINALD KRUEGER, *THE BASICS OF ANTITRUST POLICY: A REVIEW OF TEN NATIONS AND THE EUROPEAN COMMUNITY* (World Bank Technical Paper No. 160, 1991) (for a comparison of antitrust and competition laws across nations); see also, Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM L. & POL'Y J. 59 (1995); Naoaki Okatani, *Regulations on Bid Rigging in Japan, the United States, and Europe*, 4 PAC. RIM L. & POL'Y J. 249 (1995).

“dumping” in third markets.⁸⁵⁶ Most industrialized countries' competition laws recognize the harmful consumer effects of cartelization and, at a minimum, treat price fixing as a *per se* offense.

Unfortunately, the fact that cartels exist and remain an international concern indicates that all countries do not practice effective cartel enforcement and that there are differences in cartel enforcement across nations. For example, all nations permit exemptions to their cartel laws, although to varying degrees.⁸⁵⁷ Nations that are more liberal with cartel exemptions permit cartelization in instances of severe economic recession or depression or when industries are undergoing rationalization. This is seen in some EC countries, where collaboration also may be permitted for market integration or related goals. Such activities, particularly given the likely lack of any procompetitive benefits, arouse genuine international concern. In short, in many of the major industrialized jurisdictions, the remedies and/or enforcement record are so ineffectual that it can be questioned whether the fundamental cartel rules are generally observed.⁸⁵⁸

Despite the uniform *per se* stance against domestic cartels, most developed countries, including the United States, permit export cartels, which are formed expressly for the purpose of engaging in export trade. Export cartels authorize firms to engage in collaborative activities for exportation, when such activities are prohibited if practiced in the domestic market. Export cartels are anathema to many observers since the costs of

⁸⁵⁶ F.M. SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 43 (1994).

⁸⁵⁷ Boner and Kreuger state that “[a]s a tool of competition policy, cartelization has been practiced infrequently in the United States, more often in Germany, and to a greater degree in open, export-oriented economies such as Japan, Korea, the United Kingdom, France, Australia, and Sweden. ...Consequently, an administrative mechanism ... for sanctioning cooperative agreements is an important part of the enforcement process in these countries.” BONER & KREUGER, *supra* note 855, at 90.

⁸⁵⁸ Abbott B. Lipsky, Jr., *Deterring Cartel Behavior: Harmonies and Disharmonies, Problems and Solutions*, 60 ANTITRUST L.J. 564 (1991).

cartelization are borne by foreign consumers while the benefits are enjoyed domestically. On a global scale, the losses may considerably outweigh the domestic gains.⁸⁵⁹

In the United States, the Webb-Pomerene Export Trade Act of 1918 permits independent exporting firms to cooperate by setting uniform prices, establishing volume quotas, and allocating overseas markets, provided they are registered with the Federal Trade Commission.⁸⁶⁰ The only U.S. restriction on registered export cartel market behavior is that they must not restrain domestic commerce or otherwise have domestic anti-competitive effects. Similar export cartel allowances exist in most industrialized nations, including Japan and EU nations, although not all countries require that domestic commerce not be adversely affected.⁸⁶¹

Critics of export cartels are concerned not only with the adverse welfare effects on foreign nations and the world as a whole. Professor Victor, arguing that the Webb Act has been a “dismal failure,” notes that while the Act was designed to help small exporters compete more effectively with larger foreign producers, the beneficiaries appear instead to have been firms in concentrated industries.⁸⁶² Export cartels also raise the risk of foreign retaliatory actions and thus create or aggravate trade tension.^{863,864}

⁸⁵⁹ Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, 4 PAC. RIM L. & POL’Y J. 93 (1995), at 129 discusses the economic welfare effects of export cartels, noting that costs to importing nations likely outweigh benefits to exporting nations, resulting in a net global welfare loss. He also notes that export cartel activity may stimulate retaliatory actions by importing nations.

⁸⁶⁰ See *id.*; and A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571 (1991). In their defense, it should be noted that export cartels may be used to centralize market-related costs and achieve efficiencies.

⁸⁶¹ See Immenga, *supra* note 859 (noting that the legislative intent of export cartel laws in Germany, the EU and Japan are similar to that of the U.S. Webb-Pomerene Act, but that effective administration of the laws depends on the enforcement of competition rules in each nation, which differs markedly among the nations, particularly Japan).

⁸⁶² Victor, *supra* note 860, at 573.

⁸⁶³ Under current laws, importing nations that are harmed by export cartels have little effective recourse. While most industrialized countries except for Japan follow the “effects” doctrine, which allows for extraterritorial application of domestic antitrust laws when actions of foreign firms have adverse domestic effects, in practice cooperation and consultation limitations between antitrust enforcement

(continued...)

Abuses by firms with market power, or dominant positions, in their respective markets, are also of considerable concern around the globe, although the extent to which such practices are tolerated and the manner in which such abuses are addressed varies significantly across nations. The subject is complicated by differences of opinion on the definition of dominance and the widespread practice of assessing the legality of such actions on a *rule of reason*,⁸⁶⁵ rather than *per se* basis, in order not to unduly limit practices that are efficiency-enhancing. For example, in most EC countries, restrictive business practices are typically considered a *per se* offense provided the firm has market power.⁸⁶⁶ In the United States, many such practices may be assessed under a *rule of reason*. Remedies also differ across nations, with some nations choosing to control market structure and to limit market power through rationalization and deconsolidation. An alternative is to focus on controlling the conduct of dominant firms through regulation or other form of government involvement or oversight.

Across nations, even less consensus exists with regard to the anti-competitive effect of vertical restraints to trade. Vertical restraints include refusals to deal, foreclosure of market access, exclusive dealing, exclusive distribution, tying arrangements, and resale price maintenance. In the United States, vertical restraints are

⁸⁶³ (...continued)

authorities of different nations limit the utility of this course of action. See Immenga, *supra* note 859.

⁸⁶⁴ A number of empirical studies have shown that export cartel cooperation has resulted in increased export volume and reduced export prices, suggesting that the export associations enhance export efficiency rather than exercise market power abroad. In addition, the incidence and nature of export cartel activity has declined and changed considerably from the 1920s and 1930s, when it was estimated that international cartels accounted for almost half of international trade. International cooperative activity today is more likely to take the form of strategic alliances such as joint ventures and cooperative research and development and marketing programs. Such activities may well be pro-competitive rather than anti-competitive, and overdeterrence of such activities may actually hinder efficiency and technology advancement. See, e.g., Andrew R. Dick, *Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting?*, in RESEARCH IN LAW AND ECONOMICS 89 (1992); Andrew R. Dick, *The Competitive Consequences of Japan's Export Cartel Associations*, 6 J. JAPANESE & INT'L ECON. 275 (1992); and Immenga, *supra* note 859, at 127.

⁸⁶⁵ A *rule of reason* analysis weighs the procompetitive benefits of an alleged practices against its anti-competitive effects.

⁸⁶⁶ See BONER & KRUEGER, *supra* note 855, at 63.

judged under a *rule of reason* analysis. In general, U.S. treatment of vertical restrictions has been more relaxed than that in the EU, principally due to the growing acceptance of efficiency-enhancing explanations for such firm behavior in the United States. Boner and Krueger note that legal treatment of vertical restraints in Germany is even more lax than in the United States, where "the prohibition against non-price vertical restraints is not strongly enforced, and these are effectively legal and widely used."⁸⁶⁷ They also note that while Japan prohibits certain vertical restraints under a *per se* standard, many others are legal.⁸⁶⁸ The EC tends to be more restrictive as to vertical restraints, particularly those that work against the goal of market integration, such as territorial restraints and price discrimination.⁸⁶⁹

Controls on horizontal mergers came earlier in the United States than in other developed nations, and it is generally acknowledged that U.S. merger policy has been considerably more stringent than that in the EU or other industrial nations. However, it is also the case that changes in the U.S. Merger Guidelines made during the late 1980s and early 1990s reflect scholarly advances in industrial organization recognizing the importance of entry conditions, contestability, import competition and potential efficiencies from consolidation.⁸⁷⁰ Recognition of these advances has not taken place in the EU sufficiently to result in a similar result there, with merger decisions in those countries more heavily influenced by the traditional market concentration and structure concerns. EU merger law also reflects a greater emphasis on allowing businesses to acquire economies of scale through merger than on the potential adverse effects of such combinations on competition, and the EU goal of market integration.⁸⁷¹

⁸⁶⁷ *Id.* at 61.

⁸⁶⁸ *Id.*; see also Jiro Tamura, *Foreign Firm Access to Japanese Distribution Systems: Trends in Japanese Antitrust Enforcement*, 4 PAC. RIM L. & POL'Y J. 267 (1995).

⁸⁶⁹ See BONER & KRUEGER, *supra* note 855, at 63.

⁸⁷⁰ See U.S. Department of Justice and Federal Trade Commission, *Merger Guidelines* (April 1992).

⁸⁷¹ For a discussion of EC merger policy, see Barry E. Hawk, *EC Merger Control*, Paper presented at the ABA and IBA International Symposium on Competition Law and Trade Policy (June 22, 1994) (on file (continued...))

In addition to these ideological concerns, there are procedural differences in how the different nations conduct merger review and enforcement. There is, therefore, large potential for interjurisdictional conflict in international mergers due to differences in national rules on merger control and approval under current law.⁸⁷²

7.2(b) Dumping and subsidies under the GATT/WTO

Obviously, abuse of market power is not limited to domestic commerce, it can also occur in international trade as well. A primary concern to importing countries is predatory pricing by foreign firms, i.e., selling at very low prices initially to drive competitors from the market then raising prices after capturing the market. If the intent of foreign firms is predatory, then countries would want to prevent that behavior. However, international price discrimination (where the home market price is higher than the export price), whether predatory or not, has been now defined as dumping. The evolution of antidumping laws and practice in the United States is described below as a case study as to how the GATT/WTO disciplines have been incorporated into a national system, and is an example of a policy that began to prevent anti-competitive behavior by foreign entities and has evolved into a means for private entities to seek relief from “unfair” import competition.⁸⁷³

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⁸⁷¹ (...continued)
with the author).

⁸⁷² See also BONER & KRUEGER, *supra* note 855, at 68.

⁸⁷³ For further discussion of these issues, see ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT (J. Michael Finger ed., 1993) [hereinafter ANTIDUMPING]; CONGRESSIONAL BUDGET OFFICE (CBO), HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING-DUTY POLICY (1994).

In the United States, regulation of unfair imports began as extensions of antitrust law. In fact, the first statute, Section 73 of the Wilson Tariff Act of 1894, was passed to extend the scope of the Sherman Antitrust Act to imports by prohibiting actions by entities engaged in importing whose intention was to restrain trade or raise the U.S. price of an imported article. This statute was a criminal statute that provided for fines, imprisonment, or both and injured parties could sue for treble damages.

The next significant statute to address dumping were sections 800-801 of the Revenue Act of 1916 (commonly referred to as the Antidumping Act of 1916). This law prohibited the importation of goods at a price substantially below the "actual market value" in the producing country or countries in which the goods were commonly exported, providing there was the intent to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition. This statute is a criminal statute that has provisions for fines and/or imprisonment, and injured parties could sue for treble damages.⁸⁷⁴

Section 73 of the Wilson Tariff Act stemmed from antitrust principles in that it aimed to prevent restraints of trade and free competition, and resulting higher prices to consumers. The Antidumping Act of 1916 also refers to restraint and monopolization of trade, but does not make reference to higher prices for consumers. This Act does, however, seem to target predatory pricing in international trade. A common feature of both of these laws is that they were criminal statutes, where violations were tried in court. As a result they were strictly interpreted and convictions were difficult.

Shortly after World War I, the United States enacted the Emergency Tariff Act of 1921, which the Antidumping Act of 1921 was part. This Act stemmed from national

⁸⁷⁴ This statute is still part of the U.S. code and was successfully used for the first time against an EU steel company. Subsequent to that outcome, the EU has lodged a dispute in the WTO alleging that this statute is inconsistent with the Antidumping Code. See United States - Anti-dumping Act of 1916, Request for Consultations from the European Communities, WTO Doc. WT/DS136/1, G/L/247, G/ADP/D11/1 (June 24, 1998).

security and protectionist pressures. Several fears emerged after the war. It was believed that Germany and other European countries had amassed huge stockpiles of goods due to the cessation of trade during the war and that they would dump their excess supplies on the world market. In addition, domestic industries rose up to fill the gaps caused by the reduction in imports, thus raising their fears that imports would soon displace their domestic sales.

The 1921 law made substantial changes to previous legislation. This law changed dumping violations from criminal offenses tried in court, to violations adjudicated administratively by the Department of the Treasury. Consequently, the remedy for dumping changed from fines and imprisonment to the imposition of antidumping duties equal to the difference between the “fair” price and the “dumped” price. The law also introduced the use of a “constructed value” for prices when few or no foreign prices exist. Finally, the law eliminated the need to show intent to destroy, injure or prevent the establishment of an industry. The existence of injury or the likelihood of injury was sufficient.

The U.S. dumping statutes remained unchanged for several decades. The original GATT agreement in 1947 contained an exception allowing for antidumping (and countervailing) duty laws subject to certain restrictions. Dumping remained an uncontroversial issue in early GATT negotiations and did not surface as a point of contention until the Kennedy Round. As tariffs were lowered by several rounds of GATT negotiations, dumping laws started to be used around the world. This led to the adoption in the Kennedy Round of the Agreement on the Implementation of Article VI, commonly referred to as the Antidumping Code.

The next significant change in the U.S. antidumping statute was with the enactment of the Trade Act of 1974. The most notable change was to make selling exports below cost another form of dumping. This was accomplished by requiring the Treasury to disregard any sales made in substantial quantities for extended periods of

time at prices below average total cost of production when calculating average home market prices. This controversial provision of U.S. law became an issue, along with others, in the next round of trade negotiations, the Tokyo Round. The Tokyo Round resulted in modifying the Antidumping Code and the drafting of a Subsidies Code.

Following the Tokyo Round, the United States enacted the Trade Agreements Act of 1979. This legislation repealed the Antidumping Act of 1921 and new antidumping (and countervailing) duty laws were written to conform with the revised GATT codes.⁸⁷⁵ This law shortened the statutory deadlines for investigations, transferred the responsibility of investigating and determining margins to the U.S. Department of Commerce,⁸⁷⁶ and gave Commerce the ability to use the “best information available” if a foreign firm does not cooperate in providing Commerce with information it deems necessary.

During the 1980s, Congress passed two trade bills that modified U.S. trade laws. The Trade and Tariff Act of 1984 required that in its injury determination, the U.S. International Trade Commission (USITC) cumulate the imports of all countries subject to investigation if they compete with each other and with the domestic like product. The Omnibus Trade and Competitiveness Act of 1988 extends dumping (and countervailing) orders to component parts, slightly modified products, and products assembled in third countries.

As in past trade negotiations, antidumping (and countervailing) duty laws were the source of much contention in the Uruguay Round trade negotiations. The completion of the Uruguay Round produced new Antidumping and Countervailing Codes that made several modifications to the previous codes. The provisions in the new Codes include subjecting antidumping determinations to the new dispute settlement process established,

⁸⁷⁵ The new laws were enacted as Title VII of the Tariff Act of 1930.

⁸⁷⁶ The U.S. International Trade Commission was given the task of determining whether unfair imports injured a domestic industry in 1954.

and requiring automatic termination of orders after five years unless a likelihood of continued harm can be shown if the order is lifted (the so-called sunset provision). The new Codes also affect the methodology used in calculating margins, explicitly allow for the cumulation of imports from various countries, set new levels for *de minimis* margins and negligible imports, and adds the margin to the list of factors that must be considered in determining injury. In addition, the new Codes address "best information available" issues, explicitly allow the sampling of firms, increase transparency requirements, and stipulate that countries provide for some sort of independent review of a country's administrative antidumping (and countervailing duty) actions.⁸⁷⁷

In the United States, antitrust predated antidumping and, at least initially, antidumping laws were mere extensions of antitrust laws with shared underlying goals and principles.⁸⁷⁸ However, the early link between antitrust and antidumping policy in the United States was severed relatively quickly, and significant differences now exist in the goals and principles underlying the two bodies of law.⁸⁷⁹ The two sets of law now have fundamentally different objectives: antitrust promotes consumer welfare, maximization of competition, and economic efficiency. U.S. courts encourage aggressive pricing and are skeptical toward predation theories. In contrast, antidumping laws aim to promote fairness rather than efficiency, protect industries rather than consumers, and discourage aggressive pricing.

⁸⁷⁷ For a thorough review of the Uruguay Round implementing legislation in the United States as it pertains to U.S. Antidumping law, see Michael Y. Chung, *U.S. Antidumping Laws: A Look at the New Legislation*, 20 N.C. J. INT'L L. & COM. REG. 495 (1995).

⁸⁷⁸ Finger observes that early U.S. antidumping laws were extensions of U.S. antitrust laws but that increasing political pressure for import restrictions led to the antidumping laws as they exist today. ANTIDUMPING, *supra* note 873; see also CBO, *supra* note 873; ANNE O. KRUEGER, AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING (1995); Michael Leidy, *Antidumping: Solution or Problems in the 1990s?*, in INTERNATIONAL TRADE POLICIES: THE URUGUAY ROUND AND BEYOND (IMF ed., 1994).

⁸⁷⁹ For a comparison of the goals of antitrust and antidumping policy in the United States, see A. Paul Victor & Mark Friedman, *Antidumping and Antitrust: Pricing Schizophrenia?*, Paper presented at the ABA and IBA International Symposium on Competition Law and Trade Policy (June 22, 1994) (on file with the author).

Given their explicit sanction in the Uruguay Round Agreements, antidumping and countervailing duty actions are likely to remain an important safeguard for WTO members. In addition, many countries are implementing new antidumping regimes, many modeled after the system adopted in the United States. As can be seen by the history of the trade law statutes in the United States, the intent of antidumping law has shifted from a weapon against international predatory pricing and other anti-competitive behavior, to a means of providing relief to domestic industries from international price competition.

7.3 Overview of International Competition Policy Efforts

The need for international agreement on competition policy issues has been recognized for at least the past 50 years. Beginning with the *Havana Charter*, numerous attempts to carve out some degree of consensus on these matters have been undertaken through a variety of efforts. To date, multilateral agreements have been least successful in accomplishing international competition policy objectives, in part because they have tended to focus on rules of market behavior rather than procedure and cooperation among nations, and because of concerns about national sovereignty. On the other hand, competition policy has been addressed to varying degrees in some regional trade agreements, and bilateral efforts regarding competition policy are generally limited in scope and effect, but some have stood the test of time and have succeeded in enhancing cooperation. Finally, U.S. unilateral actions to shape international competition have generated considerable criticism in the international trade community. These various approaches are examined in turn below.

7.3(a) Havana Charter/International Trade Organization

The purpose of the *Havana Charter* was concisely summarized by Clair Wilcox shortly after it was drafted:

It is the central purpose of the *Havana Charter* to contribute to the improvement of living standards all around the world by promoting the expansion of international trade on a basis of multilateralism and non-discrimination, by fostering stability in production and employment, and by encouraging the economic development of [lesser developed] ... areas. It will be the purpose of the International Trade Organization, which is established in the *Charter*, to substitute cooperation for conflict, in international commerce, in industrial stabilization, and in economic development, by providing a medium through which nations may regularly consult with one another concerning the international consequences of national policies.⁸⁸⁰

In particular, Chapter Five of the *Havana Charter*, "Restrictive Business Practices," addressed competition policy concerns directly and begins by stating:

Each member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

(*Havana Charter*, Chapter V, Article 46)

Chapter Five and the establishment of the ITO clearly were integral to the overall objectives embodied in the *Havana Charter*. Even with the relatively early levels of understanding about competitive effects of certain business practices that existed in the 1940s relative to today, this Chapter recognized that competitive restraints in domestic markets are closely related to international trade restrictions. As articulated by Cordell Hull, anti-competitive and monopolistic arrangements will not survive within an

⁸⁸⁰ WILCOX, *supra* note 20, at 53.

economy if not protected from outside competition by tariffs and quotas; similarly, international monopoly cannot survive if not protected from domestic competition. Accordingly, under Chapter Five of the Charter, ITO members would agree to the enumeration of certain restrictive business practices with such practices being judged by their influence on the volume of trade and industrial activity, rather than by their form.⁸⁸¹ Specifically, Article 46, paragraph 3 prohibits the following practices:

- a) fixing prices, terms or conditions to be observed in dealing with others in the purchase sale or lease of any product;
- b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
- c) discriminating against particular enterprises;
- d) limiting production or fixing production quotas;
- e) preventing by agreement the developing or application of technology or invention whether patented or unpatented;
- f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subjects of such grants; and
- g) any similar practices which the Organization may declare, by majority of two-thirds of the Members present and voting, to be restrictive business practices.⁸⁸²

The debate over adoption of Chapter Five was a precursor to today's concerns. Chapter Five of the *Charter* was criticized by some for going too far and by others for not going far enough. It was berated for failing to outlaw international cartels *per se* and for its perceived weak enforcement abilities. On the other hand, it was condemned for restricting the freedom of domestic businesses and for having the potential for

⁸⁸¹ *Id.* at 105.

⁸⁸² *Havana Charter*, *supra* note 17, at art. 46

overreaching national jurisdiction. In addition, Article 46 of the *Havana Charter* in its final form is considerably open-ended and may have been interpreted as overly hostile to commercial enterprises. Given these considerations, it is not surprising that the Charter failed to gain the support of the U.S. business and legal community, nor is it surprising that it generated fears of supranationality among potential member nations.⁸⁸³

While the function of the ITO was to carry out the Charter as a whole and to serve as an international center for information related to trade, in terms of the provisions governing restrictive business practices, the ITO would serve the purpose of an international arbiter and mediator upon complaint by a member, and would conduct investigations, hold hearings, and, if necessary, request and recommend corrective actions.

7.3(b) World Trade Organization

At the WTO's Singapore Ministerial in December 1996, trade ministers established a Working Group on the Interaction between Trade and Competition Policy in order to gain a better understanding on the issues surrounding restrictive business practices and international trade. This group was given two years to study the issue. To date the group has moved slowly and controversy has arisen over the scope and goals of the group. In particular, many delegations have sought to steer the group towards a debate over antidumping measure and away from restrictive business practices that impair market access, and little progress has been made in it to this point.⁸⁸⁴ The proposed WTO Competition Policy Agreement detailed below seeks to address major

⁸⁸³ Although the antitrust provisions of the *Havana Charter* were not adopted, they did form the basis for antitrust law in Germany enacted following World War II, and also some basis for the development of EU antitrust law.

⁸⁸⁴ Alan Wm. Wolff, *WTO Dispute Settlement and the Particular Problem of Trade and Competition Policy*, paper presented at the Conference on Dispute Resolution in the World Trade Organization (June 24, 1998) at 3 et seq. (on file with the author).

points of difference between members of the Committee, it being suggested that the Committee move soon to consider such proposals in anticipation of the next round of negotiations.

7.3(c) OECD and United Nations

The OECD has also participated in the debate on restrictive business practices in the international market. In 1967, the OECD produced its first guidelines on competition policy when it established procedures for coordination of information exchange and notification when enforcement activity of one member state affected another member state. These guidelines were revised in 1979 and in 1986. The current guidelines are divided into two parts, one addressing notification, exchange of information and coordination of action, and the other addressing consultation and conciliation. The guidelines also contain an appendix of guiding principles.⁸⁸⁵

The OECD recommends that when member states initiate an investigation under its competition laws, and if that investigation affects the interests of another member state, that notification should be given to that member, in advance if possible. In addition, member states should seek to coordinate their actions, insofar as they deal with restrictive business practices in international trade. Member states should also cooperate in developing mutually satisfactory and beneficial measures for dealing with restrictive business practices in international trade. The OECD also recommends that member states enter into consultations when requested and strive to address the issues that may arise including remedial action, if necessary.

In the 1970s, issues arose in the United Nations concerning the behavior of multinational firms. The task fell to UNCTAD (United Nations Conference on Trade and Development) to negotiate a set of principles and rules for the control of restrictive business practices. The restrictive business practices rules were adopted by UNCTAD in

⁸⁸⁵ OECD C(86)44(Final) (1986).

early 1980 and endorsed by the U.N. General Assembly later that year.⁸⁸⁶ The rules that were adopted were not legally binding and compliance was voluntary. Moreover, at no time did the negotiations envision an international investigative/enforcement agency or international court.

Two activities sprang from the adoption of the U.N. Code. A group of experts operating within the context of UNCTAD was established to provide a forum for consultations and discussions among states for implementing the Code. In addition, the group was authorized to undertake studies on restrictive business practices. However, this group was not to act like a tribunal or pass judgement on the activities of entities falling under the purview of the Code. The Code further provides for consultation among states on a formal basis if an issue concerning control of restrictive business practices arises.

7.3(d) European Union

The Treaty of Rome, which created the European Economic Community in 1958, contains competition policy provisions in Articles 85 and 86.⁸⁸⁷ The role of competition policy in the Treaty is to integrate the markets of Member States, i.e. using competition, monopoly, and merger legislation to prevent anti-competitive practices used by Member States and to deter use of restrictive business practices by companies. Competition policy within the EU takes the place of the more traditional safeguards of RIA's such as antidumping and countervailing duties (although such measures are allowed against non-EU trading partners).

⁸⁸⁶ SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES OF Rules, UN Doc TD/RBP/10 (1980).

⁸⁸⁷ See *supra* ch. 4 (section discussing EU competition policy); Claus Dieter Ehlermann, *supra* note 900 (discussing the *Treaty of Rome*, and the extension of EC competition policy to EFTA, EEA, and Central European neighbors).

As discussed in Chapter Four, the Treaty of Rome established a supranational authority within the European Commission to deal with competition policy concerns—Directorate General IV (DG IV). DG IV, free of political oversight, regulates mergers, oversees subsidy policies, and examines other competition policy issues within all Member States. In the EU, larger multinational firms are regulated by the supranational authority while member states oversee smaller firms. The EU has gradually extended its internal approach to competition policy to its relations with trading partners. For example, the EU requires that competition rules be inserted into international trade agreements. The EU also insists that its EFTA partners apply identical competition rules and that they be implemented by a “supranational” surveillance authority modeled on the EU Commission, governed by an independent “EFTA Court.” These rules also have extended to Central and East European neighbors, and thus, concern state monopolies as well as the traditional anti-competitive concerns.

While it may appear as though the Treaty of Rome could serve as a model for future multilateral agreements on competition policy, one should be cautious about such conclusions. First, it must be noted that the EU was formed for the primary purpose of economic integration and that competition policy oversight was a secondary concern. Whether such impetus for economic integration would exist at a broader multinational level remains to be seen. Second, a number of concerns have been raised about the agreement's competition policy provisions, including concerns about the ultimate authority of DG IV and the difficulty of appeal and due process under DG IV challenges, tension between DG IV and competition authorities in Brussels, and the suspicion that DG IV competition policy has not kept up to date with paradigm shifts in antitrust thinking in the United States in the 1980s.

7.3(e) Australia/New Zealand

The 1990 ANZCERTA agreement between Australia and New Zealand represents perhaps the most far-reaching competition policy agreement as part of a trade liberalization effort.⁸⁸⁸ The agreement called for abandoning the antidumping remedies between the two countries and relying instead on competition rules regarding predatory pricing. Although the circumstances surrounding the ANZCERTA agreement are somewhat unique, the agreement does not involve the degree of supranationality and surrender of sovereignty that is seen in the Treaty of Rome, so the prospects that ANZCERTA could provide a model for more widespread cooperation are more promising than is the case of the EU model.

7.3(f) The Americas

Within the Americas there have been several different approaches to incorporating aspects of an international competition policy within the various regional trading agreements. Briefly, NAFTA, while far reaching in many aspects, falls short on the issue of cross-border competition policy. MERCOSUR, on the other hand, has adopted a formal protocol on competition policy that proscribes anti-competitive behavior in the region. As part of the negotiating process for the FTAA, a formal negotiating group on competition policy has been established. And the recent bilateral free trade agreement between Canada and Chile will eliminate antidumping as a trade relief measure.

Like most regional trade agreements, NAFTA's primary objectives are liberalization of trade, investment, and services flows.⁸⁸⁹ NAFTA addresses competition policy concerns in Chapter 15, which requires member countries to "adopt or maintain measures to proscribe anti-competitive business conduct and to take appropriate action

⁸⁸⁸ See *supra* at ch. 4; Graeme A. Thomson, *Trade and Competition Policy Linkages: Some Ideas on a Framework for the Future*, in OECD, *NEW DIMENSIONS OF MARKET ACCESS*, *supra* note 903, at 139, 142; Mina & Gibbons, *supra* note 898, at 29.

⁸⁸⁹ See *supra* at ch. 4.

with respect thereto.”⁸⁹⁰ NAFTA also established the Free Trade Commission, composed of cabinet-level representatives of the member states, to administer the agreement and resolve disputes. NAFTA members must agree to replace judicial review of antidumping determinations with binding binational panel review. Although NAFTA does not prohibit antidumping actions between members, and there has been some discussion to replace antidumping and countervailing duty laws within the free trade area with competition laws, however, they have not been fruitful.⁸⁹¹

As noted earlier, MERCOSUR has adopted a protocol on competition policy—the Protocol of the Defense of Competition.⁸⁹² This protocol focuses on anti-competitive practices that impact trade among its members. In particular, this protocol lists practices that are prohibited and they include price fixing, market division, tying, market manipulation, among others. In addition, it established an intergovernmental committee (Committee for the Defense of Competition (CDC)) to decide by consensus whether violations have occurred or not. Under this protocol, parties must first use national authorities before bringing a claim before the CDC. It is noteworthy that this protocol provides MERCOSUR member countries access to the competition authorities of other member countries with an appellate procedure to an intergovernmental committee.

At the Second Summit of the Americas, the FTAA governments established nine negotiating groups under an overall Trade Negotiations Committee.⁸⁹³ One of the nine negotiating groups is tasked with examining competition policy. In addition to its participation in the FTAA process, Canada has initiated talks with Brazil for a MERCOSUR-Canada free trade agreement and in December 1996 Canada signed a free

⁸⁹⁰ NAFTA, *supra* note 37, at art. 1501 (Competition Law).

⁸⁹¹ See Gary N. Horlick & Eleanor C. Shea, *Dumping the Final Barriers*, LEGAL TIMES, Mar. 20, 1995, at 21.

⁸⁹² See *supra* at ch. 4.

⁸⁹³ See *supra* at ch. 4.

trade agreement with Chile that is similar to NAFTA in scope but takes one prominent step of eliminating antidumping actions between the two countries on a progressive basis.

7.3(f) U.S. Bilateral Efforts

The United States has entered into a series of bridge agreements with its major trading partners (US-Germany,⁸⁹⁴ US-Australia,⁸⁹⁵ US-Canada,⁸⁹⁶ US-EC⁸⁹⁷) on issues of discovery, cooperation, and enforcement. These agreements were designed to provide a vehicle for dispute resolution, enhance cooperation between national antitrust authorities, and facilitate discovery in transnational antitrust disputes. They typically provide for rules regarding definition of terms, cooperation, information exchange, confidentiality, and non-interference.

Several of these agreements came about because of conflicts that arose between the subject countries in international antitrust disputes.⁸⁹⁸ For example, in 1976 the United States signed an agreement with Germany stemming from disputes over multinational oil company litigation. Similarly, in 1982 the United States entered into an agreement with Australia largely due to conflicts that arose between the two countries during antitrust litigation involving Westinghouse Corporation and producers of uranium

⁸⁹⁴ Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.-F.R.G., 27 U.S.T. 1956, *reprinted in* 4 Trade Reg. Reports (CCH) ¶ 13,501.

⁸⁹⁵ Agreement Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austl., T.I.A.S. No. 10365, *reprinted in* 4 Trade Reg. Reports (CCH) ¶ 13,502.

⁸⁹⁶ Memorandum of Understanding as to Notification, Consultation, and Cooperation, with Respect to the Application of National Antitrust Laws, March 9, 1984, U.S.-Can., *reprinted in* 4 Trade Reg. Reports (CCH) ¶ 13,503.

⁸⁹⁷ Agreement Regarding the Application of Their Competition Laws, September 23, 1991, U.S.-Eur. Commission, *reprinted in* 4 Trade Regulation Reports (CCH) ¶ 13,504; Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, June 4, 1998, U.S.-EC, *available at* <<http://www.usdoj.gov/atr/public/international/docs/1781.htm>>.

⁸⁹⁸ See GEORGE MINA & PAUL GIBBONS, TRADE AND COMPETITION POLICY: A SURVEY OF THE ISSUES (Int'l Trade Research Paper Series, 1995).

in Australia and other countries in the 1970s and 1980s. During the Westinghouse litigation against uranium producers, the Australian government passed legislation to prevent the exchange of documents and information on the Australian producers for proceedings in the United States. These conflicts raised awareness of need for agreement on issues of cooperation and coordination.

Somewhat in contrast to the agreements that came about because of conflicts, the 1991 U.S.-EC Agreement on the Application of Competition Law represented a proactive, forward-thinking, prospective agreement. It is considered a template for further progress "not only for its notification, consultations, and restraints provisions, but particularly for the parties' agreement to consider active assistance to one another in their enforcement activities. Such mutual undertakings to (sympathetically) consider giving active assistance is known as positive comity."⁸⁹⁹ While the agreement is perceived as a significant forward movement, there exists some sentiment in the EU that it would have been preferable to have forged an international treaty between the two powers rather than an administrative agreement.⁹⁰⁰ Of particular concern to some observers is the article of the agreement protecting the confidentiality rules of each of the Parties involved. While in some cases, exchange of confidential information has taken place with the permission of the firms involved, the perception is that limits on exchange of confidential information impede cooperation.⁹⁰¹

In June 1998, the United States and the EU signed another agreement on the application of positive comity principles in the enforcement of their competition laws.⁹⁰²

⁸⁹⁹ Eleanor M. Fox, *Competition Policy and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. AND POL'Y J. 1, 7 (1995).

⁹⁰⁰ See Claus Dieter Ehlermann, *The Role of Competition Policy in a Global Economy*, in OECD, NEW DIMENSIONS OF MARKET ACCESS, *supra* note 903, at 119, 121.

⁹⁰¹ See *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules* (Report by the Group of Experts) report adopted by the European Commission (July, 1995).

⁹⁰² In June 1998, Canada and the EC also entered into a competition policy cooperation agreement. See *Draft Agreement Between The European Communities and The Government of Canada Regarding the* (continued...)

This agreement outlines procedures under which one government requests the other government to use its own antitrust laws to address anti-competitive conduct that affects the requesting government. While the 1991 U.S.-EC agreement contains a provision allowing either side to ask the other to take antitrust enforcement action against actions that harm the requesting party's interests, this new agreement adds a presumption that positive comity will be used in certain situations, and details each party's responsibilities. It should be noted that this agreement does not apply to merger enforcement, nor does it provide for the exchange of confidential business information unless consent from the source of the information has been obtained.

The U.S.-Japan Structural Imperatives Initiative (SII) was initiated to address a number of U.S. market access concerns in Japan, including Japanese saving and investment, land policy, distribution systems, exclusive business practices, including *keiretsu* relationships and pricing practices, with special focus on the restrictive practices of Japanese enterprises.⁹⁰³ SII was negotiated from 1989 to 1990 and implemented through 1993. The principal U.S. concerns under SII were that Japan agree to increase the effectiveness and enforcement of the Antimonopoly law. Actions taken included increasing enforcement at the Japan Fair Trade Commission, increasing prosecution of criminal and private damage actions, increasing penalties under Japanese antitrust laws, reducing antitrust exemptions, and issuing new antitrust guidelines.

⁹⁰² (...continued)

Application of Their Competition Laws (June 1998)

<<http://europa.eu.int/en/comm/dg04/interna/en/dftcanada.htm>>.

⁹⁰³ See Mitsuo Matsushita, *Harmonization of Competition Laws Through Bilateral Trade Negotiations: The Japanese Experience*, in NEW DIMENSIONS OF MARKET ACCESS IN A GLOBAL ECONOMY (OECD ed., 1995) [hereinafter OECD, NEW DIMENSIONS OF MARKET ACCESS].

7.3(g) U.S. Unilateral Action

Unilateral action by the United States to address international competition concerns have evoked considerable controversy and animosity.⁹⁰⁴ The U.S. government primarily uses Section 301 of the Trade Act of 1974, as amended, to address market access.⁹⁰⁵ Notwithstanding the considerable controversy generated by the use Section 301, it is worth considering whether such unilateral action has proven effective in addressing international competition policy issues, and whether unilateral actions are likely to become the international competition policy vehicle of the future.

Section 301 authorizes the United States Trade Representative (USTR) to retaliate in instances in which U.S. exporters are denied foreign market access by curtailing foreign market access to the U.S. market. Retaliation may occur in instances in which the denial of U.S. access to foreign markets is identified as unjustified, unreasonable, and/or discriminatory. When denial of market access stems from a competition policy concern, Section 301 requires that the practice be found to be unreasonable, as the definition of unreasonable includes denial of equal market opportunities and government tolerance of domestic anti-competitive business practices. While the U.S. Department of Justice is involved in the reviewal of Section 301 cases, along with the USTR, the standards that apply to the determination under Section 301 are considerably more lax than those that apply to U.S. domestic antitrust proceedings. Super 301 and Special 301 were added to the law in 1988. Super 301 and Special 301 require the USTR to identify specific countries and practices that pose special market barriers to the United States. International criticism of U.S. Section 301 use revolves around concerns that U.S. antitrust policy will be used under Section 301 to aid exporters and their private interests.

⁹⁰⁴ "Zealous extraterritorial enforcement of U.S. antitrust law by U.S. plaintiffs and U.S. courts has been widely identified as a source of international tension." Fox, *supra* note 899, at 18. See also KRUEGER, *supra* note 878.

⁹⁰⁵ An overview of U.S. unilateral trade actions is contained in J. Michael Finger & K. C. Fung, *Can Competition Policy Control 301?*, 39 *AUSSENWIRTSCHAFT* 379 (September 1994).

The use of unilateral measures such as Section 301 by the United States has generated considerable criticism from the international community.⁹⁰⁶ Section 301 is perceived as coercive and threatening by foreign nations. In addition, since 301 is activated in the United States by private parties with business interests in foreign countries, fears exist that 301 will be used to serve private interests and become nothing more than institutionalized protectionism.

Despite these concerns, some observe that Section 301 provides a more effective process than GATT/WTO for addressing closed foreign markets and that 301 not only should be made more effective, but that other countries should adopt 301 laws, leading to an international dispute settlement process based on national 301 laws.⁹⁰⁷ The concern here is that GATT/WTO has simply not been effective in opening closed foreign markets or mediating disputes concerning the same. Professors Finger and Fung are relatively open to this notion, noting that “the overwhelming larger proportion of 301 outcomes have been multilateral liberalizations,” rather than outcomes preferential to the United States.⁹⁰⁸ They conclude that competition policy is not an antidote to the use of Section 301, but that Section 301 has been a “success” for the United States, and that an international dispute settlement process based on national Section 301 laws holds some promise. “As systemic concerns and abiding by agreed international norms seem to have little force today, to preserve the economic benefits of the present international system it may be necessary to regress to a more primitive political and legal system.”⁹⁰⁹

7.4 Recent Proposals for International Competition Policy

⁹⁰⁶ See Fox, *supra* note 899; KRUEGER, *supra* note 878; AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1992).

⁹⁰⁷ I. M. DESTLER, AMERICAN TRADE POLITICS (2d ed. 1992).

⁹⁰⁸ Finger & Fung, *supra* note 905, at 380.

⁹⁰⁹ *Id.* at 381.

Even before the conclusion of the Uruguay Round, discussions were underway to begin to formulate a road map for the new trade agenda. Intensification of such efforts has been seen in the short time following ratification of the Uruguay Round Agreements, accelerated perhaps by the commitment of the OECD to proceed with work on the issues of market contestability and the impact of domestic policies on international activity. Several proposals for advancing competition policies have been released by the OECD, the EU and APEC, among others. In addition, a number of involved academics and practitioners have formulated recommendations and proposals on competition policy and related issues. These proposals can be grouped into three categories: 1) an international antitrust system with a supranational enforcement agency; 2) a harmonization of antitrust laws across nations including cooperation through "positive comity"; and 3) proposals to reform the current antidumping regime.

7.4(a) International Antitrust System

Several proposals have suggested the adoption of a an international competition policy regime to regulate anti-competitive behavior. A few of the more prominent proposals are examined below.

The Draft International Antitrust Code

From 1991 to 1993, an independent International Antitrust Working Group met to produce The Draft International Antitrust Code as a GATT-MTO Plurilateral Agreement.⁹¹⁰ The "Munich Code," as it has come to be termed, harkens back to

⁹¹⁰ The International Antitrust Code Working Group had the following members: Josef Drexel, Wolfgang Fikentscher, Eleanor M. Fox, Andreas Fuchs, Andreas Heinemann, Ulrich Immenga, Hans Peter Kuns-Hallstein, Ernst-Ulrich Petersmann, Walter R. Schlupe, Akira Shoda, Stanislaw J. Soltysinski, and Lawrence A. Sullivan.

Chapter V of the *Havana Charter*.⁹¹¹ It is based on the belief that competition law must be addressed by a comprehensive international competition law code. It is also grounded in the belief that international competition policy rules should be integrated into the GATT/WTO as a plurilateral agreement perhaps involving a more limited membership than the GATT/WTO's multilateral trade agreements, which apply to all WTO members. The strong adherence to the GATT as the appropriate vehicle for the Munich Code is due to a belief on the part of the authors that there is an historic basis for addressing antitrust issues in the GATT, due to the existence of the *Havana Charter*. The Munich Code, therefore, relies heavily on the GATT remedial system for enforcement.⁹¹²

The Munich Code is based on five broad principles:

- (1) Existence and application of substantive national laws to resolve international disputes;
- (2) national treatment;
- (3) minimum standards for national laws;
- (4) Inquiry and enforcement carried out by an international body (the International Antitrust Authority as a GATT Agency); and
- (5) the restriction of the international antitrust law to cross-border situations.

The Code does not address antidumping and other unfair trade practices in any meaningful way, although the belief that inconsistencies and "protectionist biases" of GATT's current "unfair trade rules" should eventually be dealt with in an international antitrust code.⁹¹³

⁹¹¹ For a discussion of the background and objectives of the Munich Code, see Wolfgang Fikentscher, *Competition Rules for Private Agents in the GATT/WTO System*, 49 *AUSSENWIRTSCHAFT* 281 (1994).

⁹¹² See *Draft International Antitrust Code*, in *Antitrust & Trade Reg. Rep.* (BNA Special Supplement) No. 1628 (Aug. 19, 1993) [hereinafter *Draft International Antitrust Code*].

⁹¹³ *Id.* at S-4.

Part Two of the General Provisions and Basic Principles of the Munich Code identifies specific business practices that are condemned, under the categories of horizontal restraints, vertical restraints, intellectual property restraints, and inducing illegal restraints. Part Two includes a general prohibition on all international, import, and export cartels, certain refusals to deal, and certain vertical restraints which are presumed to be anti-competitive.⁹¹⁴ Part Three of the Code provides a detailed set of rules dealing with mergers and control of concentration. Part Four addresses practices that constitute abuse of a dominant position, and the remainder of the draft agreement deals with remedies and enforcement.

The Munich Code as published reflects the views of the majority of its authors. Certain minority members preferred a more minimalist approach, however, permitting a wider berth for differences in national laws, and centered on the adoption of fifteen general principles only.⁹¹⁵ Six of these are “consensus principles” to be adopted into national laws. The six principles, by comparison to the General Agreement, are far more general, calling only for strict anti-cartel and market access rules, prior international notification of all export collaboration, denial of a sovereign compulsion device, national treatment, recognition of certain collaboration rights on efficiency and technology-enhancing endeavors, and harmonization and accommodation of national predation and antidumping rules. In contrast to the majority view, the minority view only condemns cartels and does not mention specific practices resulting in vertical or dominant power abuses, except within the general context of market access.

The remaining eight principles in the minority view address enforcement and procedural issues. Contracting nations would be required to enforce national laws in other jurisdictions when adverse cross-border effects result. The enforcement and

⁹¹⁴ The list of specified condemned practices in Part Two of the Munich Code goes well beyond current antitrust law in a number of likely member countries, particularly the United States. For example, the Munich Code would impose a *per se* prohibition on certain vertical restraints that under current U.S. law, are assessed by courts under a *rule of reason* analysis. *See id.*

⁹¹⁵ *Id.* at S-7.

oversight of consensus principles would be conducted by the International Antitrust Authority (IAA), which, upon request by an injured nation, would investigate allegations of anti-competitive conduct and would have the power to enforce a remedy on the injuring nation. The IAA also would develop common merger notification and approval procedures, as well as provide consultation and information gathering. The goal of the minority view of the Munich Code, thus, is to

[C]omprise the minimal, market-opening, world-integrating agreement, functioning largely as national systems bridged by consensus principles enforced in national courts. By breaking down frontiers and enlarging the vision of national authorities, they would shrink the purview of extraterritoriality as a shield for anti-competitive conduct and substitute as a touchstone the common interests of the community of contracting nations.⁹¹⁶

Communication to the EU Council

In a communication to the EU Council, Sir Leon Brittan and Karl Van Miert emphasize the multilateral aspects of competition rules.⁹¹⁷ In particular, they note that many countries have implemented competition policies, but that these policies lack the instruments to apply their domestic rules to anti-competitive practices with international aspects. Moreover, many countries lack the means to obtain relevant information outside of their jurisdiction. Consequently, Sir Leon Brittan and Karl Van Miert contend that a multilateral framework is necessary to enforce competition rules.⁹¹⁸ Such a framework should be considered:

1. As part of a strategy on market access;
2. To avoid conflicts of law and jurisdiction and to promote the convergence of competition laws;

⁹¹⁶ *Id.* at S-9.

⁹¹⁷ See Sir Leon Brittan & Karel Van Miert, *Towards an International Framework of Competition Rules*, Communication to the EU Council (June 17, 1996).

⁹¹⁸ *Id.* at 3.

3. To reinforce the EU's own competition policy enforcement efforts; and
4. To strengthen the trading system by enhancing the commitment to competition policy enforcement.⁹¹⁹

This framework would be carried out under the auspices of the WTO and build on prior commitments and rely on existing intergovernmental procedures. They first propose that Members commit to assuring the existence of domestic competition structures. In conjunction, Members would also identify a core of common principles and work towards their adoption at the international level. WTO members should further develop provisions on notification, information exchange, and cooperation. Finally, they maintain that the WTO's dispute settlement procedures could be adapted to the specifics of competition policy and applied in a progressive way.⁹²⁰

Sir Leon Brittan and Karl Van Miert note that their proposal for a framework of competition rules would complement current trade law and create a new instrument to combat anti-competitive behavior. The WTO instrument that they envision would apply to governments and not be self-executing or have direct effect. It would be more general than, for example, EU law and its emphasis in the first part of its development would be on procedural obligations.⁹²¹

Professor Frederic M. Scherer

A fairly detailed proposal set forth by Prof. Frederic M. Scherer calls for a wide-reaching, but gradually-implemented approach to international competition policy.⁹²² He proposes establishing an International Competition Policy Office (ICPO) under the

⁹¹⁹ *Id.* at 3-4.

⁹²⁰ *Id.* at 10-11.

⁹²¹ *Id.* at 13.

⁹²² See SCHERER *supra* note 856, at 91-97.

auspices of the WTO. Over a seven year period, the ICPO would gradually assume investigative and enforcement responsibilities for a range of competitive concerns. The ICPO initially would perform information and registration activities, followed by responsibility for complaints about relatively noncontroversial anti-competitive business practices; IPCO functions related to business practices about which national law differs would come at a later date, presumably by which time member nations would have reached some consensus understanding. For example, within a year of ratification of the IPCO, all international cartels would be required to be registered, and the ICPO would be authorized to investigate and make recommendations responding to complaints about alleged monopolistic practices. Actual prohibition of import and export cartels would not take place until five years following ratification. The ICPO would not undertake to investigate complaints about alleged abuses of dominant market position or merger and consolidation until seven years after its inception. Prof. Scherer states that this approach “recognizes individual nations' perceived need for exceptions and respects national sovereignty while moving as far as seems feasible toward eliminating avoidable restraints upon international competition.”⁹²³

7.4(b) Harmonization, Cooperation and Positive Comity

Several proposals stress the need for further harmonization, cooperation, and positive comity among nations before an international regime of some sort can be established. Since many countries do not even have competition laws and those that do emphasize different aspects to varying degrees, many proposals start with cooperation first, before moving towards a more comprehensive agreement.

OECD Interim Report on Convergence of Competition Policy

⁹²³ *Id.* at 92.

In June, 1994 the OECD's Committee on Competition Law and Policy presented the Interim Report on Convergence of Competition Policy at the OECD Ministerial Meeting, representing the views of OECD antitrust enforcement officials.⁹²⁴ The report follows a different approach than the Munich Code by emphasizing the importance of convergence in underlying principles, policy objectives, and enforcement, rather than uniformity of law and institutions. In particular, it stresses the importance of convergence on critical antitrust definitions and methods of analysis such as market definition, analysis of entry barriers, methods used to assess efficiencies and technological change.⁹²⁵ As such, the report recommendations reflect the practical and operational perspective of the report authors, composed of antitrust enforcement officials. An annex to the report identifies areas where convergence has already been achieved and the report itself identifies the following areas for future convergence: competition law coverage, non-price vertical restraints, abuse of dominant position, and merger review.⁹²⁶

EU Report on Competition Policy in the New Trade Order

In July 1995, a set of recommendations for improving international cooperation on competition policy was adopted and released by the European Commission (EC).⁹²⁷ In this report, the EC advocates a gradual, "building block approach" to international cooperation. The report was produced by a group of independent experts and several EC officials participating in a non-official capacity ("The Group").⁹²⁸ The Group rejects the

⁹²⁴ The OECD report is included as an appendix to Bernard J. Phillips, *Comments on the Draft International Antitrust Code*, 49 *AUSSENWIRTSCHAFT* 327, 334 (1994).

⁹²⁵ *Id.*

⁹²⁶ *Id.*

⁹²⁷ See GROUP OF EXPERTS, EUROPEAN COMMISSION, *COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING INTERNATIONAL COOPERATION AND RULES* (1995).

⁹²⁸ The independent experts included Ulrich Immenga, Frederic Jenny, and Ernst-Ulrich Petersmann. The European Commission officials contributing in a non-official capacity included Claus-Dieter Ehlermann, Jean-Francois Pons (DG IV), Roderick Abbott (DG I), Francois Lamoureux, Jean-Francois
(continued...)

immediate establishment of an international competition code, such as that envisioned in the Munich Code, as unrealistic and unattainable in the short or medium term, due primarily to the divergence of national antitrust laws. Rather, short and medium term efforts should focus on ensuring that as many countries as possible have in place adequate competition laws, extension of the network of bilateral cooperation agreements, and enhancements in the scope of existing agreements, particularly with respect to exchange of confidential information. Bilateral agreements are but a first step, however. The main recommendation of The Group is the gradual construction of a plurilateral agreement based on a set of substantive common rules, the principle of positive comity, and a dispute settlement procedure. A set of core nations would agree on a list of core minimum principles to be included in national laws. Gradually, the number of countries included in the agreement would expand, as would the types of disciplines covered by the common rules. The Group is hopeful that the initial list of common rules would include, at a minimum, a *per se* prohibition on horizontal cartels, including export cartels, and a *rule of reason* standard on vertical restrictions. The plurilateral agreement would involve the establishment of an international entity to oversee the implementation of the agreement and to perform dispute settlement functions.

Like the Munich Code, the EC recommendations do not address antidumping policy and the conflicts it creates with international competition policy. Compared to the Munich Code, however, the EC recommendations represent a significantly pared-down plan and in many respects, simply an invitation for the principle nations to come together and commence a dialogue on how international cooperation on competition policy can best be achieved. The Group avoids making specific recommendations on business practices to be condemned as well as the appropriate forum for pursuing the plurilateral arrangements.

⁹²⁸ (...continued)

Marchipont (DG III), and Alexis Jacquemin (Forward Studies Unit).

The Third Report of the Eminent Persons Group to the leaders of APEC makes a number of recommendations concerning antidumping and competition policy, in the interest of accelerating the liberalization of trade under the APEC agreement.⁹²⁹ The APEC statement reflects a voluntary approach to competition and market access concerns rather than application of legal rules. To address antidumping concerns, the group encourages a strong, official commitment to address the problem of antidumping, recognition of the interests of consumers and downstream industries in carrying out antidumping policies, involvement of national competition policy agencies in assessing the consequences of antidumping orders, and discouragement of frivolous antidumping actions.

Recommendations made with respect to competition policy are fairly general, including the need to develop a dispute resolution process, identification and elimination of differences among national competition rules, particularly among countries that are developing rules now, and harmonization of competition and trade policy, i.e., antidumping rules.

Professor Eleanor M. Fox

Prof. Eleanor Fox argues for a cosmopolitan framework for international competition policy that focuses on procedures and comity.⁹³⁰ By cosmopolitan, she means concern for the interests of the entire community without regard to nationality, while recognizing the role of national governments to act in the best interests of their own citizens.⁹³¹ She does not advocate negotiating a common set of antitrust rules or even

⁹²⁹ See IMPLEMENTING THE APEC VISION, THIRD REPORT OF THE EMINENT PERSONS GROUP (August 1995).

⁹³⁰ See, Eleanor M. Fox, *International Antitrust: Against Minimum Rules; for Cosmopolitan Principles*, unpublished paper, Nov. 1997 (on file with the author).

⁹³¹ See *id.*

minimum rules that may lead to a more complete set of world substantive rules.

Alternatively, Prof. Fox suggests that a multilateral agreement should incorporate the following:

1. Nations should have and enforce antitrust laws.
2. Nations should enforce their laws without discrimination as to nationality.
3. National law enforcement should account for global impacts, not just national impacts.
4. For transparency, application of any non-competition criteria ... should be clearly stated, and the conduct or transaction should first be analyzed separately under competition criteria.
5. Nations should refrain from ordering relief that is unreasonably extraterritorial.
6. As in TRIPs, ... there should be opportunity for harmed nations to complain to domestic authorities, and there should be cooperation in discovery and enforcement.
7. Nations should recognize the subject matter jurisdiction of all nations over transactions and conduct that directly threaten their citizens with antitrust harm.
8. Where the harm is to a nation's exports and the challenged conduct and the directly harmed consumers are in the importing nation ("internal market harm"), the law of the importing nation should apply--wherever suit is brought--as long as the importing nation has an antitrust law and that law is non-parochial.
9. The importing nation should be obliged to provide an accessible litigation system and the safeguards of due process, as recourse for harmed nations and persons (as in TRIPs). If this rule is violated, the harmed nation or person may sue in its own country; but still, in internal market situations, the applicable law would be the law of the importing country.
10. Dispute resolution should be limited to provable breaches of these obligations This limitation would be possible because the system would have built-in self-help mechanisms at national level.⁹³²

⁹³² See *id.* at 3-4.

Prof. Fox advocates a minimalist approach and has questioned the need for highly articulated international competition law. In her view, the appealing simplicity of a single set of worldwide rules is outweighed by the complexity of enforcement and adjudication in a worldwide system and the dangerous potential that such a system would result in a costly, bloated bureaucracy.

Edward M. Graham and J. David Richardson

Graham and Richardson propose multilateral action in several market access areas, which generally focus on contestability and rationalization.⁹³³ In particular, Graham and Richardson suggest concentrating on:

- 1) National treatment for local affiliates of foreign firms;
- 2) International control of cartels and cartel-like behavior;
- 3) Enlargement of WTO consultative procedures;
- 4) Mergers and acquisitions notification; and
- 5) safeguards for declining industries.⁹³⁴

On national treatment, they advocate an agreement within the WTO agreements that endorses full, unqualified national treatment to foreign controlled firms; and on cartels, they advocate a WTO agreement that would ban most cartels. Graham and Richardson propose expanding WTO consultation procedures to include a broader number of practices that impede exports or investment and require that such consultations be mandatory. They propose that mergers and acquisitions that have international effects have a mandatory reporting requirement to the WTO. Finally, they advocate a

⁹³³ EDWARD M. GRAHAM AND J. DAVID RICHARDSON, COMPETITION POLICIES FOR THE GLOBAL ECONOMY (1997).

⁹³⁴ *Id.* at 52.

competition policy safeguard agreement to mitigate downsizing and rationalization pressures that come with increasing competition.

7.4(c) Antidumping Reform

In lieu of an independent competition policy regime, many proposals are aimed at reforming the antidumping regime now in place. In general, proposals for reforming antidumping laws fall into two categories: 1) repeal of Article IV of the GATT and a prohibition of national antidumping laws;⁹³⁵ and 2) the cumulative application of national antidumping and competition laws. The latter course of action would require some degree of harmonization of the goals of antitrust and antidumping rules. Proposals in this regard have been advanced by Profs. Bernard Hoekman and Petros Mavroidis, Prof. Patrick Messerlin, Prof. Hanns Ullrich, and Prof. Mitsuo Matsushita.

Profs. Hoekman and Mavroidis suggest that antidumping petitions trigger an assessment of the degree of contestability and the existence of market power in subject foreign and domestic markets.⁹³⁶ The assessment would be conducted by competition authorities in exporting and importing countries in order to determine the underlying source of alleged injury. If the foreign market is contestable, this would imply that alleged dumping does not harm competition. Therefore, a necessary condition for obtaining antidumping relief would be an absence of contestability, or the existence of

⁹³⁵ Most observers agree that this option would be very difficult to achieve, given the importance of the antidumping entitlement to protected industries. See Victor & Friedman, *supra* note 879. They examine whether there is any potential for nations to replace their antidumping laws with antitrust or competition laws, noting that while this has occurred within the EU and ANZCERTA, and may be under consideration within NAFTA, most other regional agreements do not limit the availability of antidumping cases within the trade zone. They also note that efforts by the U.S. Department of Justice and Federal Trade Commission to incorporate a U.S. Robinson Patman-type meeting competition defense to antidumping, or to in other ways inject competition policy into trade proceedings, have been unsuccessful.

⁹³⁶ See Bernard M. Hoekman & Petros C. Mavroidis, *Antitrust-based Remedies and Dumping in International Trade*, Paper presented at the Fifth Global Contributions Seminar (1994) (on file with the author).

entry or exit barriers, in the home market of the exporting firm. Their proposal has the advantage of not requiring harmonization of national competition or antidumping rules, although it would require cooperation between involved nations and between competition and trade policy officials.⁹³⁷

Prof. Messerlin asks how antidumping laws could be constrained by competition rules, and argues for a minimalist approach.⁹³⁸ He advocates a sequential approach, in which antidumping petitions and remedies would be subject to *ex post* antitrust review to address underlying anti-competitive conduct leading to the dumping or anti-competitive consequences of the dumping decision. He argues that this approach has a number of advantages over simultaneous enforcement of antidumping and antitrust rules. Presumably, *ex post* enforcement of competition rules with respect to antidumping actions would result in changes in *ex ante* firm behavior.

An alternative approach articulated by Professor Ullrich would involve application of antitrust laws *ex ante* to limit the instances of dumping that occur.⁹³⁹ For example, to the extent that the existence of market barriers gives rise to international geographic price discrimination, the elimination of those barriers through proper and consistent application

⁹³⁷ Harry First makes a similar proposal. He suggests that countries with minimal market barriers should be less subject, or exempt, from antidumping actions of other countries, since the unfairness of dumping is based on the notion that the dumping country enjoys some advantage permitting its exporters to underprice abroad and make up the difference domestically. In instances in which it can be determined that such advantage does not exist, First argues that it is reasonable to assume that the dumping, to the extent it occurs, has legitimate business reasons. See Harry First, Comments, *in* THE PRINCEVILLE DIALOGUE AND RELATED PAPERS ON ANTITRUST 28 (National Press Club, 1995) [hereinafter THE PRINCEVILLE DIALOGUE].

⁹³⁸ See Patrick A. Messerlin, *Should Antidumping Rules be Replaced by National or International Competition Laws?*, 49 AUSSENWIRTSCHAFT 351, 362 (1994).

⁹³⁹ See Hanns Ullrich, Comments, *in* THE PRINCEVILLE DIALOGUE, *supra* note 937, at 19.

of antitrust laws could reduce opportunities for dumping.⁹⁴⁰ Of course, this option would require extensive international cooperation and coordination of antitrust laws.

Prof. Matsushita identifies three options for reform of antidumping laws: 1) repeal of antidumping law and replacement with antitrust law; 2) convergence of antitrust laws to eliminate restrictive business practices in exporting countries; and 3) revive past efforts to involve both antitrust and antidumping enforcement agencies in the review of antidumping petitions and remedies.⁹⁴¹ Matsushita suggests that the second and third options may be pursued in the short term, perhaps eventually leading to option one.

7.4(d) Shortcomings of Recent Proposals

The various proposals put forth above have failed to take hold for a variety of reasons. First and for most is the issue of national sovereignty. National governments are unwilling to surrender authority over such a far reaching part of their economic systems to a supranational institution with broad powers of investigation and adjudication. Most industrialized nations have mature competition systems that fundamentally strive towards the same goals of economic efficiency and enhanced consumer welfare, but each system varies in its legal interpretations. Consequently, it is unlikely that a comprehensive competition code that also envisions a supranational administering body having overly intrusive authority would ever be adopted.

Similarly, proposals that stress harmonization, cooperation, and positive comity are unlikely to help world markets achieve contestability, and thus, provide access on a

⁹⁴⁰ Similarly, Clayton Yeutter, former United States Trade Representative, argued that at least some of the price-related disputes that generate antidumping cases would disappear if competition policies in WTO member nations were more comprehensive, more demanding, and more vigorously enforced. See Clayton Yeutter, *International Trade in the Aftermath of the Uruguay Round—A Policy Overview*, Remarks before the ABA and IBA International Symposium on Competition Law and Trade Policy (June 22, 1994).

⁹⁴¹ See Mitsuo Matsushita, *A Critical Review of the Enforcement of Antidumping Laws: In the Context of Competition Policy*, in *THE PRINCEVILLE DIALOGUE*, *supra* note 937, at 67.

truly global scale. Harmonization of national laws is not likely, since countries with long established regimes are probably unwilling to significantly change their current law. Cooperation and positive comity are well underway among countries with mature competition systems, but some of the more contentious areas of market access are in countries that may not even have a competition systems in place.

Finally, several proposals suggest that the current antidumping regime be reformed to incorporate competition policy principles. These proposals would only get at one area of concern of a competition regime--predatory pricing. In addition, antidumping has been one of the most contentious aspects of multilateral trade negotiations and it is highly unlikely that current agreements in place will be significantly altered to incorporate principles of antitrust enforcement. Consequently, in the next section a proposal is offered that attempts to overcome many of the obstacles faced by other proposals such as those discussed above.

7.5 Proposal: A WTO Agreement on Competition Policy

At its core, the proposed *WTO Agreement on Competition Policy*, as detailed in Annex 7-1, seeks to establish adherence to disciplines to address well recognized anti-competitive practices, while minimizing intrusion upon national sovereignty. In short, this approach is designed to overcome a major stumbling block to the adoption of many previous international competition policy agreements—especially those that created supranational authorities with investigative and adjudicating powers.

The proposed Agreement draws upon the *Havana Charter* as well as other agreements and protocols that have dealt with competition policy. As stated in Article 2 of the proposed Agreement, its fundamental purpose is “prevent, on the part of private or public enterprises, business practices affecting international trade that restrain

competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade.”

In summary, the proposed Agreement seeks to generate wide acceptance by the following:

- It does not affect current national systems in place, as long as they satisfy the obligations of the agreement. However, it does require WTO Member countries to establish systems that address restrictive business practices which would be accessible to WTO Member firms for adjudication of prohibited practices;
- National systems must address core principles, however these are within well accepted international norms;
- As a prerequisite to further action, nationals of one Member who wish to complain about the practices within another Member’s country must first request action of the latter; and
- If the aggrieved party is unsatisfied with the outcome in the national system, it has the opportunity to appeal that outcome, through its government, to the WTO Dispute Settlement Body; however, the DSB has limits on its reach.

7.5(a) Comparison to Other Competition Regimes and Proposals

As described above, throughout the world there are few examples of international competition systems at work. The only true international system arose from the Treaty of Rome and the formation of the European Economic Community. The EU is unique in how it deals with private anti-competitive behavior across its internal borders. The EU has a supranational body that oversees competition policy throughout the EU and has the authority to alter firm behavior or proposed actions. Similarly, Australia and New Zealand have integrated their competition policies to foster economic activity. Finally, the United States, with its long history of domestic antitrust enforcement, has through various means attempted to achieve greater market access in foreign markets.

Clearly, a supranational competition system with its own enforcement body, such as exists in the EU or has been proposed by various scholars, is highly unlikely to be agreed to by WTO members. For example, the Draft International Antitrust Code creates an International Antitrust Authority as a GATT agency to carry out investigations and enforcement. Prof. Scherer's proposal creates an International Competition Policy Office that would eventually have investigative and enforcement responsibilities over a range of anticompetitive practices. Similarly, the *Havana Charter* envisioned that the ITO would have supranational responsibilities. The proposal presented here is distinguished from these proposals because a central tenet of this proposal is that it relies on national systems in the first instance of adjudication. Under this proposal a supranational body is not needed for all aspects of an investigation/appeal.

Since countries such as the United States and members of the EU are unlikely to change their national law to conform to an international competition code, this proposal rests upon a set of core principles. These principles are outlined in Article 4 of the proposed Agreement. While other proposals have argued for core principles as well, they probably would not receive widespread support in the WTO context. For example, the *Havana Charter* enumerated six principles, but had an open-ended option to add further prohibitions, which, as noted earlier, may have been interpreted as overly hostile to business interests. MERCOSUR's Protocol on the Defense of Competition provides for seventeen prohibited practices, a number of which, while meritorious, may not be described as core principles. For example, Article 6 lists such prohibited practices as those which "destroy, render useless or accumulate raw materials, intermediate or finished goods, as well as to destroy, render useless or obstruct the functioning of equipment designed to produce, transport or distribute them" (para. XV), or which "abandon, cause to be abandoned or destroy crops and plantations without just cause" (para. XVI).⁹⁴²

⁹⁴² See *infra*, at ch. 4.

Moreover, the Draft International Antitrust Code has three parts containing eleven articles prohibiting a variety of prohibited activities, several of which are far too detailed for a WTO negotiating environment. On the contrary, the proposal herein contains nine core principles that are widely recognized as being restrictive in commerce. Also, the proposed agreement does not dictate to national governments how their competition systems combat this type of behavior, only that a system be in place and that it be accessible to foreign entities for adjudication.

Finally, a novel aspect of this proposal is the procedure by which disputes are settled once they are elevated to the multilateral level. Other proposals examined earlier are either overreaching or not specific in how international disputes would be settled. For example, the *Havana Charter*, the Draft International Antitrust Code, and Scherer's proposal rely on supranational bodies to mediate international disputes. Sir Leon Brittan and Karl Van Miert, Prof. Fox, and Graham and Richardson, on the other hand, are less specific on this point. The immediate proposal relies exclusively on the new Dispute Settlement Understanding (DSU) negotiated in the Uruguay Round. Furthermore, it follows the only other procedures in the GATT by which private entities participate in WTO disputes. Specifically, article 17 of the current Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 provides a guide to the procedures in this proposed Agreement. Private entities first seek relief in national systems, then if that outcome is unsatisfactory, those entities, through their national government, seek resolution through the DSU.

7.5(b) Detail of Key Provisions of the Proposed Agreement

A contentious point concerning international competition codes or agreements is what, if any, system will be favored in the final outcome. That is, will the approach of the U.S. system, the EU system, or some other system be favored? Both the U.S. and EU systems have the same objectives of enhancing consumer welfare in a competitive

economy, but certain aspects of these systems differ. For example, Section 1 of the U.S. Sherman Act and Article 85 of the Treaty of Rome have significantly different scopes, goals and operative frameworks. EU rules on vertical practices are generally more restrictive than U.S. law due to territorial restrictions on intra-brand competition that may interfere with market integration goals. In addition, the EU notion of “competition” is broader than that of the U.S. law, and includes social goals. There are also fundamental differences in the underlying scope of Article 86 of the Treaty of Rome and Section 2 of the Sherman Act. Compared to Section 2, Article 86 has a broader, more regulatory reach. It does not make the efficiency exception, focuses more on exploitative behavior, and reflects concerns over fairness to smaller firms rather than competition in general.⁹⁴³

A key aspect of the proposed Agreement in Annex 7-1 that addresses this concern over competing systems is contained in Article 5. Article 5.1 requires WTO Members to:

take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure that

- (a) private and public commercial enterprises do not engage in practices that are specified in Article 4 and have the effect indicated in Article 2, and
- (b) it has in place, or will establish, appropriate administering authorities to carry out the Members responsibilities herein.

Consequently, countries with systems in place that address the concerns of Articles 2 and 4 of the proposed Agreement will have satisfied their obligations under Article 5.

Similarly, another key facet is specified in Article 6.2, which states:

Each Member shall afford adequate opportunity for representations to be made by the citizens, corporate or otherwise, of another Member to the Member's

⁹⁴³ For comparisons of U.S. antitrust and EU competition law, see Joseph F. Winterscheid, *Section 1/Article 85: A Comparative Overview*, Paper presented at the ABA and IBA International Symposium on Competition Law and Trade Policy (June 22, 1994) (on file with the author); Thomas E. Kauper, *Article 86 of the Treaty of Rome and Section 2 of the Sherman Act: A Brief Comparison*, Paper presented at the ABA and IBA International Symposium on Competition Law and Trade Policy (June 22, 1994) (on file with the author).

authorities established as contemplated under Article 5.1(b) with respect to any matter affecting the operation of this agreement, including, without limitation, to request adjudication of a complaint before the same alleging a violation of the Agreement.

Hence, the proposed Agreement requires that adjudication of disputes *first* begins within the national system where the alleged anti-competitive behavior is taking place. Only once that avenue has been exhausted can the dispute can be elevated to the multilateral level.

Under the proposed Agreement, major industrialized nations with mature competition systems would currently satisfy their obligations under this agreement. In particular, countries such as the United States, the EU (and its major member countries), Canada, and Australia/New Zealand would currently satisfy their obligations under the proposed Agreement. Other WTO members would be required to establish a viable competition policy regime that prohibits practices outline in Article 4 of the proposed Agreement and provides access to the system by foreign firms, the obligations under the Agreement could be fulfilled without the need to establish an overly expensive, burdensome bureaucracy.

The listing of prohibited practices is set out in Article 4 of the proposed Agreement. As mentioned, it enumerates nine core principles which are found not only in major developed nation systems, but also are found in many smaller, lesser-developed countries, as reflected in the fact that many are consistent with the MERCOSUR agreement—which makes it far more likely that the proposed Agreement would attract wide-spread acceptance.

What distinguishes this proposal is that it brings restrictive business practices under the Dispute Settlement Understanding of the WTO. The proposed Agreement provides a vehicle for foreign firms/governments to resolve disputes if they are unsatisfied with outcomes resulting from adjudication at the national level. Bringing the core principles of Article 4 under the WTO DSU while minimizing intrusion upon

national systems is a fundamental contribution of this proposal. Specifically, the appeal process to the WTO is accomplished by patterning Article 6 of the proposed Agreement after the procedure outlined in Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Under Article 6.3, provision is made to request consultations, but only following final action at the national level.⁹⁴⁴ Only if consultations prove unsuccessful would Article 6.4 permit the matter to be referred to the Dispute Settlement Body (DSB), the process to commence action before the same being set out in Article 6.5.

Key guidelines as to how the WTO dispute panel would handle complaints are found in Article 6.6:

“In examining the matter referred to in paragraph 6.5:

- (a) in its assessment of the facts of the matter, the panel shall determine whether the responding Members authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (b) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”

Article 6.6 is obviously designed to ensure that a reasonable interpretation by governments of its national law will not be overturned by WTO panels. While this provision continues to attract controversy in its original use as the procedure to handle

⁹⁴⁴ Obviously a “default” mechanism needs to exist in the event that a Member was unwilling or unable to take “final action” on a complaint, or indeed to establish the necessary authorities at all, as required under Article 5.1(b). Accordingly, Article 6.3 provides that if a Member has not taken such action within 18 months of the filing of a complaint, then final action will be deemed to have been taken. This is obviously a somewhat an arbitrary approach, but it does recognize that some default mechanism would have to be built into any final WTO agreement.

anti-dumping complaints before the WTO, it may serve as a useful mechanism in the competition policy context, as, unlike anti-dumping procedures, there is no equivalent history of the latter disciplines being handled in the GATT/WTO context. Accordingly, some modality would need to be found to give some comfort to both developed and developing countries alike that good-faith attempts to enforce the Agreement will be met with WTO judicial sympathy. For this reason, if the proposed Article 6.6 procedure is not used, some other “safety mechanism” to avoid overly-deep WTO review intrusion into national markets will need to be crafted.

7.6 Conclusion

It is clear that in today’s increasingly integrated markets, competition policy disciplines must be introduced into the WTO context. It is correct that in the earlier GATT there were real limits on the ability for the GATT system to deal with restraints on trade cases. However, Professor Mitsuo Matsushita keenly observes that “now that the trend in advanced countries is toward deregulation of economy and the number of restrictive business practices initiated will decrease, a future task in the WTO/GATT should be to formulate a scheme for competition policy to be incorporated in the WTO/GATT system in some way.”⁹⁴⁵

The above proposed Agreement is a modest attempt at such a scheme. It seeks to strike a necessary balance of ensuring that well recognized private restraints can be adequately addressed by foreign nationals, while remaining sensitive to sovereignty concerns. Any final WTO agreement will need to have creative provisions to deal with these issues, particularly as fact-finding in competition policy cases often requires in-depth domestic investigations where very confidential corporate, and even para-statal, information and data needs to be disclosed in order for an informed decision to be made.

⁹⁴⁵ Mitsuo Matsushita, *Restrictive Business Practices and the WTO/GATT Dispute Settlement Process*, in INT’L TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 79, at 359, 373.

Even in domestic contexts, this information is often only provided under court-order, and then subject to strict national regimes on information protection. While these realities make even the proposed Agreement extremely difficult to negotiate in the WTO context, it does not negate the overriding need for such an agreement to be so concluded.

Chapter 8. Unifying the WTO: A Proposal to Ensure International Contestable Markets

8.1 Introduction

The *Havana Charter* can be distinguished from all multilateral agreements that followed it in two significant ways. As previously addressed, it encompassed virtually the full array of trade issues including goods, services, investment, and restrictive business practices. In all these areas, it contained obligations on permissible and impermissible government interferences with market access—governments were allowed to use tariffs and required to enforce a competition policy—governments were prohibited from using quotas or discriminating against any goods or services or investments of any other ITO Member.

The second accomplishment of the *Havana Charter* was the fact of its unified constitutional form. The simplicity of the original agreement was that it was actually, six agreements in one—six agreements (covering goods, services and other disciplines), in one integrated document and administered by a single International Trade Organization. On the surface, the WTO Agreements replicate that structure: governments sign on to the “package” of agreements and cannot pick and choose their favorites; a single dispute settlement system with the possibility of appeal handles all disputes; the WTO institutions provide for the framework to further consult about trade barriers. Substantive coverage is equally broad, including: tariffs, quotas, non-tariff barriers such as SPS standards, services, investment measures, and intellectual property.

However, the WTO 1995 is still inferior to the ITO 1948. Planners of the multilateral trade system in the late 1940's—United States planners in particular—envisioned that the ITO would oversee additional economic issues that arose from the 1948 UN Conference on Trade and Employment held in Havana, Cuba. As

discussed, topics envisioned broached trade-related subjects such as commodity policies, restrictive business practices, and labor standards.⁹⁴⁶ As the ITO was never established, these topics have found their way into the multilateral system—whether the GATT, other UN system agencies, the OECD, and so on—in a piecemeal fashion if at all, rather than the structured venue originally intended under the ITO.⁹⁴⁷ Moreover, the institutions created by the WTO Agreements do not wield the same powers as those envisioned for the ITO. And finally, the ITO planners envisioned a true multilateral organization that could bridge the gaps between market and non-market economies to govern trade between *all* nations. While the WTO certainly represents a majority of the nations of the world; it does not yet represent major population centers such as China or Russia. Until it encompasses the sectoral scope of the ITO, and the multilateralism of the ITO, the WTO will still be in the shadow of its stillborn ancestor.

Chapter 4's analysis of those RIAs that have attempted broader market access guarantees than the multilateral system shows that the WTO system does not permit potential entrants to fully contest domestic markets. At its heart, the most advanced and developed WTO agreement, the GATT, was simply not designed to provide effective, or contestable, market access to foreign goods, in an era of deeper integration of international markets. The GATT was designed fifty years ago to facilitate tariff reduction negotiations. As such, it identifies tariffs (and subsidies) as the only legitimate forms of protectionism, and then provides measures that will guarantee that reducing those tariffs will provide the optimal effect for the multilateral system (MFN provides that the tariff negotiating rounds work and rewards membership; national treatment

⁹⁴⁶ See, e.g., *Havana Charter*, *supra* note 17, at chap. V (Restrictive Business Practices) and chap. VI (Inter-Governmental Commodity Agreements).

⁹⁴⁷ See, e.g., *Set of Multilateral Agreed Equitable Principles and Rules*, U.N. Doc. TD/RBP/10 (1980) (Restrictive Business Practices).

ensures that tariff reductions will not be offset by less transparent post-border measures).⁹⁴⁸

While it is true that, once tariffs reach zero the system still remains in place to guarantee that Members will continue to reap the benefits of zero tariffs. However, such a system cannot encompass either the myriad internal methods Members will develop to protect their economies, or the varied and inconsistent regulatory regimes that give rise to economic inefficiencies.

Implicit in the *Havana Charter* proposal is the idea that government actions in the domestic market can affect the international movement of goods, capital, and services. The idea driving the negotiations was that governments should obligate themselves to not only providing MFN and national treatment to the goods and nationals of other Members, but to constructing a domestic economy without access barriers (e.g., through the obligations on restrictive business practices to investment protection).

Cordell Hull's original 1919 proposal was for an international organization that would deal with "all international trade methods, practices, and policies which in their *effects* are calculated to create destructive commercial controversies...and to formulate agreements with respect to them."⁹⁴⁹ By his focus on the effects of policies, and not merely the formulation of those policies, Hull contemplated a system that would address those measures of a post-border, internal nature. By 1945, Clair Wilcox, a U.S. delegate to Havana, would write that it would "be the purpose of the International Trade Organization, which is established in the *Charter*, to...provid[e] a medium through which nations may regularly consult one another concerning *the international consequences of national policies*."⁹⁵⁰

⁹⁴⁸ Nevertheless, national treatment is granted to all imported goods and not simply bound ones.

⁹⁴⁹ HULL, *supra* note 1, at 82.

⁹⁵⁰ WILCOX, *supra* note 20.

The need for the WTO to be able to deal with these post-border policies in a comprehensive fashion has now become imperative due to the dynamics of integrated global markets. As previously cited by Feketekuty, “the need for greater coordination of microeconomic policies has become most visible in a trade context because globalization has transformed domestic laws and regulations into potential trade barriers.”⁹⁵¹ Modern companies need to “integrate production processes and support services located in many countries into a unified production system, [and] require some uniformity in technologies, standards, business relationships, and support systems, all of which can be affected by government regulations and sectoral policies.”⁹⁵² In short, the “internationalization of production subjects production decisions to influence by domestic regulatory policy”; accordingly, a “convergence of domestic policies is therefore required on the grounds of practicality, economic efficiency and competitive fairness.”⁹⁵³

As presently structured, the GATT/WTO system is unable to serve as the vehicle to achieve the convergence that Feketekuty contemplates, and needs to be reformed as proposed in this and preceding chapters.

Structurally, while the system may have a breadth of substantive coverage, it remains disparate and incoherent. GATS, GATT, and TRIPs sit along side each other, and are not integrated under a unified constitutional structure with single rules for disputes (there are a variety of causes of action). Instead, they exist as a loosely organized confederation of obligations. This system is further complicated by the GATS which contains two sets of obligations, general ones that apply to all measures, and specific that apply only to those service sectors that are listed in a member country’s schedule.

⁹⁵¹ GEZA FEKETEKUTY, THE NEW TRADE AGENDA 5 (Group of Thirty Paper Occasional Paper No. 40, 1992).

⁹⁵² *Id.* at 1.

⁹⁵³ *Id.* at 4.

The WTO system has evolved whereby the GATT and GATS instruments operate independently of each other, using inconsistent disciplines. Bernard Hoekman observed at the onset of the GATS, that “the architecture of the GATS...differs significantly from that of the GATT.”⁹⁵⁴ Given the increasing economic interdependence of national markets, a unified set of integrated disciplines must be extracted from the core agreements, particularly since there is an ever-decreasing distinction among the transfer of goods, services, and investment in this radically transforming era of borderless, digital/cyber transactions. It is proposed that this new set of integrated disciplines be comprehensive, and incorporate a new overarching obligation of members to establish markets that not are truly contestable.

Scholars such as Sylvia Ostry agree with Feketekuty’s assessment that the future multilateral trade agenda must deal with this core issue of “convergence of national policies,” particularly those of competition and regulatory policies.⁹⁵⁵ Ostry concurs that “[o]ne way of capturing this convergence of policies is through the overall concept of “contestability.”⁹⁵⁶

Indeed, as Edward Graham has recently written, “it is thus argued that international market contestability should be the main goal of trade policy.”⁹⁵⁷ He concurs that appropriate multilateral investment and competition regimes significantly assist the achievement of this objective, and together with Prof. Robert Z. Lawrence, has advanced an approach to measure the extent to which international markets are contestable:

A ‘contestable’ market is one that, by definition, is characterized by very low barriers to entry by new sellers. In particular, if a market is fully contestable, there would be no substantial barriers to entry by foreign firms, whether entry is

⁹⁵⁴ Hoekman, *supra* note 829, at 922.

⁹⁵⁵ SYLVIA OSTRY, *THE POST-COLD WAR TRADING SYSTEM: WHO’S ON FIRST* 233 (1997).

⁹⁵⁶ *Id.*

⁹⁵⁷ Edward M. Graham, *Contestability, Competition, and Investment in the New World Trade Order*, in *TRADE STRATEGIES FOR A NEW ERA* 204, 206 (Geza Feketekuty & Bruce Stokes, eds., 1998).

achieved via export from their home nations (or third nations) or via foreign direct investment.⁹⁵⁸

In offering this definition, Graham and Lawrence state that they claim “few” rather than “no” entry barriers because, even if a market is contestable, foreign firms seeking to enter the market might face certain transaction costs that are not faced by local firms (e.g. costs associated with obtaining local market information that is unknown by foreigners but commonly known by locals).⁹⁵⁹

Certainly, as the recent panel decision in Japan - Photographic Film illustrates, the WTO Agreements do not presently guarantee contestability of markets.⁹⁶⁰ In that case, according to Kodak, the Japanese market for film is organized to prevent access to foreign competitors of Fuji. According to the WTO panel, and probably rightly so, this, in and of itself, is not cognizable as a violation of any GATT obligation of Japan. Yet, assuming that Kodak’s factual assessment is correct and something more than consumer preference is preventing it from successfully competing, the Japanese film market cannot be considered contestable.

While it has been agreed by many scholars and policy-makers that “contestability” should indeed become a main goal of trade policy, specific proposals need to be set out to achieve this goal. Accordingly, it is here proposed that the existing approach of the GATT/WTO be unified to facilitate and implement this objective, in

⁹⁵⁸ See Edward M. Graham & Robert Z. Lawrence, *Measuring the International Contestability of Markets*, 30 J. World Trade 1, 5 (1996).

⁹⁵⁹ Id.

⁹⁶⁰ See Japan - Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WTO Doc. WT/DS44/R (Mar. 31, 1998). As already discussed, the panel in that case effectively found that the United States did not establish as required under GATT XXIII(1)(b) that its benefits were being nullified or impaired by some action of the Japanese government that was not a violation of the GATT agreement. For a description of the arguments of the parties, see Mitsuo Matsushita, *Restrictive Business Practices and the WTO/GATT Dispute Settlement Process*, in INT’L TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 79, at 359, 366.

conjunction with new multilateral investment agreement, a reformed GATS, and a competition regime as proposed earlier herein.

8.2 Proposed: a Unifying Commitment to Contestable Markets

*World trade policy is no longer focused simply on dismantling barriers around national markets. Increasingly, it aims to set the terms on which global competition operates. Effective market regulation is more and more becoming a prerequisite of multilateral liberalization.*⁹⁶¹

Generally, other than the substantive commitments in TRIPs, the design of the *current* WTO Agreements is to protect the balance of concessions negotiated in each country's market access commitments (either in tariff bindings or in GATS schedules).⁹⁶² It does not guarantee effective market regulation providing contestable market access. GATT and the various side agreements on trade in goods (i.e., SPS and TBT) fundamentally provide that tariffs are the only acceptable means of protectionism allowed and the expectations of benefits arising from lower bindings should be guaranteed through limits on other means of discrimination (either at the border or inside the border through: national treatment, quotas, standards, valuation).

Under the current system, "there can be no objectively reasonable expectation that a Member will arrange its existing and therefore known internal trade laws to protect another member's private actors in its markets...[t]hus there is no violation of the good

⁹⁶¹ Guy de Jonquières, *Success Brings New Challenges*, FIN. TIMES, May 18, 1998, at 1.

⁹⁶² Indeed, the primary cause of action available to injured parties was the nullification and impairment claim, which Prof. Frieder Roessler argues, was designed to "ensure that the negotiated balance of concessions was maintained even in situations that could not be foreseen and that could consequently not be defined." Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in INT'L TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 79, at 125, 127.

faith protection of legitimate expectations when the interests of private actors are not protected.”⁹⁶³

As newer agreements come into existence such as TRIPs (which does not protect the balance of concessions but actually protects substantive rights of individuals), and a future investment agreement (which would promote access to foreign capital), together with an international agreement on competition rules, the underlying purpose of the WTO Agreements needs to be reformulated. The constitution of the multilateral trading system should not be limited to providing rules that protect the expectations of negotiations that lower permissible protectionist measures. Instead, the WTO Agreements should be amended to include a new overarching principal commitment to *contestable market access* for the goods, services, capital and ideas of the other Members’ nationals.

Under this proposal, Members would obligate themselves not only to national treatment and MFN, but to positively reshape their economies, if necessary, to eliminate non-natural impediments to effective foreign participation in domestic markets—to obligate themselves to effective market regulation. Such an overarching principle would recognize contestable market access as the goal, and then define the limits of a government’s role in providing that access: from eliminating quotas and reducing tariffs to guaranteeing that domestic firms will not engage in anticompetitive behavior designed to reduce foreign firms’ access.

In many ways, this proposal adopts the approach of the original GATT agreement and the commercial chapter of the *Havana Charter*. Both recognized that free trade in goods was the goal. GATT identified the optimal method of reducing barriers by isolating tariffs as the preferred form of discrimination through the Rounds process and

⁹⁶³ Cottier & Schefer argue that non-violation complaints were designed to protect the legitimate expectations of negotiating members as to changes in the legal regime of the Contracting Parties that would nullify or impair benefits received; and conclude that they were an equitable, as opposed to legal, remedy for countries and no longer necessary under more modern international legal theories. Thomas Cottier and Krista N. Schefer, *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past Present and Future*, in INT’L TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 79, at 145, 182.

using other measures such as national treatment to ensure that no other protectionist measures would replace those newly reduced tariffs as barriers to access for those goods.

The immediate proposal builds on that method by replacing the reduction of tariffs with the unified reduction of all discrimination resulting from domestic governmental actions (or failures) in managing and developing a contestable economy.

A system centered on that purpose could more easily accommodate and control the degree and speed of global convergence of national policies, by providing a framework principle for possibly appropriate "trade and..." subjects, such as culture and the environment. In recognition of extremely sensitive domestic policy/political concerns, countries could limit access to their markets on the basis of such very limited enumerated sovereign policy goals. More explicit than GATT XX (or GATS XIV) exceptions, such a list could specifically define those issue areas where Members retain full legislative autonomy in regulating their markets, despite the general obligation of access, with the burden on the injured party to show how its market access has been unjustifiably denied. Further, the newer issue areas could update the Art. XX general exceptions that were designed in the 1940's to specifically include environmental, labor, health, safety, cultural and general consumer issues.⁹⁶⁴ Such a list would accompany the general market access obligation and cover the range of market access guarantees specified in the GATT, and its sub-agreements, TRIPs, and GATS.⁹⁶⁵

Clearly, a system would need to be put into place to prevent abuses of such exceptions. Instead of relying exclusively on the panelists to determine whether a claimed

⁹⁶⁴ Indeed, Canada recently hosted a conference on the potential for injecting a cultural exception into the WTO Agreements so that Members could legitimately protect their domestic cultural industries. See Rosanna Tamburri, *Canada Expected to Promote Pact Curbing U.S.'s Cultural Exports*, WALL ST. J., June 29, 1998.

⁹⁶⁵ While Art. XX type exceptions are listed elsewhere in the Agreements, they do not necessarily use the same language, and it is not clear that they provide the same sovereignty protections.

exception is really a disguised restriction on trade,⁹⁶⁶ an Exceptions Agreement could provide specific rules of interpretation for the panels. When measures are explicitly trade related or involve extraterritorial behavior, such an agreement could provide express rules of interpretation creating default burdens in favor of purely domestic regulation and generally against extraterritorial measures unless otherwise allowed by other international organizations.⁹⁶⁷

WTO Members, armed with general market access commitments, could look to the overall effects of cumulative measures by another Member and find that it was violating the purpose of the WTO Agreement's contestable market access clause. Like the European Court of Justice's invocation of the intent of creating a single market justification, the dispute panels and the Appellate Body hearing such a complaint could overcome the difficulty of finding any one measure in violation and the problem of determining whether benefits, *accruing from the agreements*, were nullified or impaired as a result of the action. Instead, the panels could simply determine that market access was being denied to a Member's goods, services, capital or ideas. Unless the defending Member could show that it was otherwise entitled to provide less access (either because of lesser commitments under GATS or TRIPs or GATT or some other agreement or because of an enumerated policy exception), it would be found in violation.⁹⁶⁸ If a guilty

⁹⁶⁶ See *Reformulated Gasoline*, *supra* note 53. For the most part, panels have not intruded on sovereign policy choices, instead focusing on whether the measure was really a disguised restriction on trade.

⁹⁶⁷ This particularly could avoid the problem of the "trade and" subjects where there is global agreement on the proper remedies. For example, Members could unilaterally deny market access to goods and services violating international standards and norms (as defined by the treaty pursuant to other international organizations such as the ILO, or the United Nations) and be presumed to be free from retaliation under the dispute settlement system. While, if Members acted extraterritorially pursuant to domestic policy norms (that have not yet attained international standards level), their acts could be targeted as disguised trade barriers with the burden on them to prove otherwise.

⁹⁶⁸ Note that this is some ways was the approach adopted regarding goods in the interim panel report in the United States - Shrimp Turtle dispute. In that case, in interpreting the United States' legitimate use of a GATT Art. XX exception, the panel found that if the measure violated the purpose of the multilateral trading system (namely economic development through reduced barriers to trade) as defined by the preamble of the WTO Agreement, it could not even be justified under Art. XX. See United States - Import
(continued...)

Member found itself unable to comply, it could pay some form of compensation in the form of less access to other Member economies.

Although this would place a greater burden on the dispute settlement system to ferret out the seemingly infinite market barriers within the Members' economies, such an approach would take advantage of the Uruguay Round's greatest success, the Dispute Settlement Understanding. Further, although private access to the DSU may have some advantages, with constant challenges to Member sovereignty (through attacks on their legislation), only other Member governments should be allowed to bring cases challenging the level of market contestability provided by another WTO Member.⁹⁶⁹

When Members seek to address the violations of the substantive agreements (GATT, GATS & TRIPs), before utilizing the DSU, they must assert a claim under a cause of action developed in the 1920's for the bilateral predecessors to the GATT and amended in the 1990's for the GATS and TRIPs. When a particular action by a Member violates provisions in each of the three substantive agreements, this divergence creates procedural confusion as to the availability of the DSU. Cottier and Schefer recommend replacing the antiquated GATT causes of action with the more modern iteration in the GATS, because by "doing away with diverging concepts in [the] agreements, it would contribute to the overall consistency of the WTO system."⁹⁷⁰ Of course, the *Havana Charter*'s dispute settlement system already recognized the potential for divergence and

⁹⁶⁸ (...continued)

Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, WTO Doc. WT/DS58/R, at ¶¶ 7.41-7.44. (May 15, 1998). Since the Appellate Body will likely find this interpretation overly broad, a substantive agreement on the purpose of the system should instead be negotiated.

⁹⁶⁹ If an investment agreement were concluded, investor-State disputes would have to necessarily be adjudicated under a separate (possibly parallel) system of rules designed to compensate the investor and not force the Member to comply lest Members feel overly sovereignty challenged by mere individuals. It would seem that under existing proposals for the MAI, investment would be defined rather broadly and include areas already governed by the WTO Agreements such as financial services (GATS), intellectual property (TRIPs), and professional services (GATS, proposed). Therefore, as previously argued, the WTO Appellate Body would sit atop both investor-state disputes and other DSU disputes so that consistent interpretations of those obligations would result.

⁹⁷⁰ See Cottier & Schefer, *supra* note 963, at 181.

accordingly provided a single cause of action for all claims under the Charter, irrespective of the substantive sector of disagreement.⁹⁷¹

In many ways, such an approach builds on the success of common market initiatives in Regional Integration Agreements (RIAs) as best exemplified by the European Union. However, because it does not seek harmonization as a goal, it does not need supranational authorities for implementation.

Constitutionally, this overarching commitment to contestable market access, and the accompanying exceptions agreement, would join national treatment and most-favored nation—two central tenets that provide for more than the mere protection of tariff bindings. A chapeau of three commitments, national treatment, MFN, and contestable market access, would be placed into the WTO Agreement, itself, and sit above all WTO disciplines. Additionally, instead of conforming the causes of actions under the substantive agreements, as proposed by Cottier & Schefer, a single cause of action should be incorporated into the chapeau agreement. By extracting and elevating national treatment, MFN principles, and the causes of action to the WTO Agreement, the WTO system could surpass the unified structure envisioned at Havana, as shown in figure 8-1.

⁹⁷¹ Indeed, unsuccessful proposals for the Havana Charter would have eliminated the concept of “nullification and impairment” for a violation claim, and instead, replaced it with a firmer legal obligation.

Figure 8-1: Proposed Amended WTO Agreement

PROPOSED AMENDED WTO AGREEMENT Contestable Market Access National Treatment Most-Favored Nation Exceptions Cause of Action					
Substantive Agreements			Investment Agreement	Competition Policy Agreement	TPRM
GATT	GATS	TRIPs			
					DSU

As the figure reflects, the proposed agreements for investment and competition policy could likewise be incorporated into the cross-disciplinary annexes underneath the WTO Agreement. Additionally, this proposal would not eliminate the need for the specific substantive agreements, the GATT, the GATS and TRIPs. These agreements and their binding commitments would remain to provide specific obligations for the more traditional barriers to international trade (e.g., border measures, customs charges, natural persons rules). However, the core principles would be removed to the WTO Agreement. These agreements would remain as positive baseline commitments for WTO membership. Further, a safe haven from contestable market access complaints would be available for legislation made pursuant to a GATT commitment. If the parties so desired in certain sectors or types of legislation/regulation, they could expressly commit less than contestable market access in these substantive agreements.

The proposal goes beyond the constitutional structure intended for the ITO under the *Havana Charter*. The contestable market access provision would create the presumption of contestability and focus the system on the effects of market regulation,

thus reshaping it toward effective market regulation.⁹⁷² However, the ITO was obviously created at a time before technology had blurred the distinction between goods and services, or by virtue of digital/cyber capabilities, had brought about unified trade and investments transactions transparent to national borders. The proposals set out above seek to recognize these still-evolving international economic dynamics by ensuring that, as far as sovereign sensitivity will allow, transactions in this new economy will be based on effective market contestability, free as possible from internal market distortions, within a comprehensive and integrated rules-based environment.

⁹⁷² Of course, reforms of the current multilateral trading system should not be limited to implementing new disciplines to ensure contestability only, as even this seminal objective/approach does not reach other national practices which distort both trade and investment flows, i.e. harmful tax regimes employing artificially low effective tax rates to attract international capital and business activities, or the use of tax credits/deductions to reimburse for bribery. These types of non-contestability distortions also need to be addressed by new disciplines, perhaps using approaches analogous to subsidy-related instruments, i.e. prescribing the use of arrangements which unnaturally benefit either the government (artificial tax regimes), or the private sector (tax credits for bribery). While there has been some progress in the OECD on these issues, it is proposed that disciplines relating to these arrangements also be introduced onto the new multilateral agenda as soon as possible. Like it allows for the substantive agreements on GATT, GATS, and TRIPS and the procedural agreements of the DSU, the new Investment code, and the Agreement on Competition Policy, an unifying contestable market commitment could more easily allow the integration of these other types of disciplines as they arise on the horizon as possible barriers to the free flow of goods, ideas, capital and services.

Chapter 9. Conclusions

With the integration of the WTO Agreements into a stronger constitutional structure, the international trading system will finally surpass the ideal set forth by Cordell Hull and first attempted in the *Havana Charter*. The new world trading system proposed by this work would provide not only the breadth of coverage necessary to confront today's barriers to international contestability, but the institutional and constitutional robustness to accommodate the next fifty year's barriers.

Cordell Hull, as set out in Chapter 2, envisioned a system that would take into account not only the form of international barriers, but the effects of those barriers. While, as discussed, the *Havana Charter* did not succeed, a multilateral system did arise over the past 50 years. As discussed, in Chapter 3, that system was substantially corrected during the Uruguay Round especially with the creation of the DSU and TRIPs. However, as later developed, some major gaps remain.

Beginning with the European Coal and Steel Community, regional integration agreements began where the *Havana Charter* failed—to attempt borderless markets. However, the mechanisms developed by RIAs surpassed anything envisioned in the 1940's. The European Union exemplifies those efforts. The EU undertook liberalization in not only the trade in goods and services by eliminating tariffs, but immediately set out attacking other barriers including competition policy, intellectual property, regulations, and investment. Moreover, early on, the EU founders realized the importance of a strong dispute settlement system relying on a unifying premise of the single market. Only with the advent of the WTO Appellate Body has the world trading system achieved anything approaching the European Court of Justice.

RIAs that did not seek the degree of market integration as Europe also educate the proposals brought out in this work. ANZCERTA underscores the importance of negative list liberalization in the services market where all markets are covered by the agreement unless voluntary withheld by either Member government. This negative list approach has

led to a rapid reduction in the number of exempted markets by either New Zealand or Australia. Elsewhere in the Pacific, APEC also emphasizes the importance of voluntary liberalization whereby the degree of liberalization can occur much quicker if countries actively commit to reducing their own barriers on an open basis. APEC's success in implementing the ITA initiative also suggests that RIAs will still serve a role in a more comprehensive multilateral system. ASEAN and MERCOSUR additionally demonstrate the positive effects liberalization can have on developing countries. In particular, MERCOSUR also developed a viable competition policy arrangement for a RIA of countries with little prior competition policy enforcement. Finally, NAFTA serves as an example of a viable investment protection regime without the creation of a supranational authority like the EU.

Drawing from both the experiences of the multilateral system and the regional efforts, the four proposals outlined in Chapters 5-8 attempt to complete the Cordell Hull vision for a world trading system. Although going beyond the mechanisms envisioned in the first half of this century, these four proposals would significantly enhance the welfare of nations by raising the possible "maximum practicable degree of freedom in international trade."⁹⁷³

The proposal to bring an investment code to the WTO borrows on the success of both the EU and NAFTA in pursuing free trade in capital as well as goods. Those RIAs have been successful in part because of the ability of the investors to bring their capital directly to the Member countries. The original *Havana Charter* would have provided some degree of investment protection but not to the extent sought today. Moreover, the proposal set out in Chapter 5 argues that bringing an investment agreement into the WTO as opposed to other intergovernmental organizations like the OECD takes advantage of the institutions built during the Uruguay Round and avoids the conflicts that could arise from diverging obligations under two separate treaty regimes.

⁹⁷³ HULL, *supra* note 1, at 75.

While, as discussed in Chapter 3, the Uruguay Round was able to bring services trade into the multilateral regime with the development of the GATS, it brought a flawed agreement. GATS positive list approach, as demonstrated by the basic telecommunications and financial services negotiations, is fundamentally time-consuming and difficult to achieve. At the Millennium Round, Chapter 6 proposes that the negative list, instead be adopted—Members should negotiate to protect their services markets, not to liberalize them. Further, since services trade is far more hindered by government regulations than goods trade, the structure of GATS obligations should be shifted from the current prohibited measures paradigm to an effects-based one. Faced with the myriad regulations available for protecting a services market, governments can often protect their markets in non-transparent ways with government regulations that are not expressly prohibited by GATS. Therefore, the GATS should be restructured in the line of pro-competitive principles from the BTA to include obligations to provide competitive services markets.

Since Cordell Hull's 1908 recognition that "trusts are entrenched behind the walls of the protective tariff," scholars have known that competition policy is fundamentally linked to international trade.⁹⁷⁴ Firms can take advantage of the lack of competition policy in many countries to protect their markets, not through government action, but through private restraints. Members of the world trading system must undertake to provide laws that regulate anticompetitive private firm behavior. While some have suggested an approach similar to the EU with a Draft International Antitrust Code and others have suggested curbing anticompetitive behavior with AD/CVD policy, the proposal described in Chapter 7, and set out in Annex 7-1, takes the middle ground first suggested by the *Havana Charter*. Members of the WTO would undertake to legislate certain minimum transparent competition laws and provide an enforcement authority. Aggrieved foreign firms could take advantage of those national authorities to pursue their competition complaints. If not satisfied, those foreign firms could return to their national

⁹⁷⁴ 42 CONG. REC. 3519 (1908) (Statement of Cordell Hull).

governments to pursue a WTO complaint that the other WTO Member has not fulfilled its obligation to provide an adequate competition policy.

Finally, while the Uruguay Round created new substantive areas of coverage by expanding the multilateral system to services and intellectual property, and created an institutional center in the WTO to manage the three treaty regimes, the DSU and the TPRM, it did nothing to centralize those fundamental obligations of international trade. The WTO still lacks a constitutional purpose similar to the Treaty of Rome's single market concept. The proposal at Chapter 8 to remove the national treatment and MFN obligations to the WTO Agreement itself and add a overall contestability commitment to the other two primary obligations would create this fundamental constitutional purpose. Moreover, the proposal would remove both the causes of action and the exceptions to the WTO Agreement itself, thereby removing any uncertainty that may arise from the conflicting GATT, GATS and TRIPs obligations.

In conclusion, the underlying thesis of this work is that the GATT/WTO system continues to have many of the so-called birth defects built in at the beginning of its evolution. While the Uruguay Round was able to cure some of these, what remain are both substantive and constitutional deficiencies. These need to be removed to ensure that the world trade system has a set of comprehensive and integrated disciplines that address today's world of increasing international economic interdependence. This work offers a series of proposals which, if adopted, would assist the WTO in responding to this dictate, and remain relevant for the next fifty years.

Annex 7-1: Proposed WTO Agreement on Competition Policy

PROPOSED WTO AGREEMENT ON COMPETITION POLICY

Members,

Considering that Ministers agreed in the Singapore Declaration to "establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework";

Desiring to promote the expansion and progressive liberalization of world trade and to facilitate competition across international frontiers so as to increase the economic growth of all trading partners, while ensuring free competition;

Recognizing that certain competition measures can cause trade-restrictive and distorting effects;

Hereby *agree* as follows:

Article 1

Scope and Definition

- 1.1 This Agreement applies to competition measures related to trade in goods and services.
- 1.2 For purposes of this Agreement:
 - (a) the term "public commercial enterprises" means
 - (i) agencies of governments in so far as they are engaged in trade, and
 - (ii) trading enterprises mainly or wholly owned by public authority, provided the same has effective control over or assumes responsibility for the enterprises.
 - (b) The term "private commercial enterprises" means all commercial enterprises other than public commercial enterprises.

Article 2

Purpose

- 2.1 Members agree to prevent, on the part of private or public enterprises, business practices affecting international trade that restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade.

Article 3

Exceptions

- 3.1 All exceptions under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall apply, as appropriate, to the provisions of this Agreement.

Article 4

Prohibited Practices

4.1 Members agree, without limiting Article 2, that complaints regarding any of the practices listed in this Article will initially be subject to investigation in accordance with Article 6.2, whenever the alleged practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises.

4.2 Members agree that the practices referred to in paragraph 1 of this Article include:

- (a) to fix, impose or practice, directly or indirectly, in collaboration with competitors or individually, in any form, the prices and conditions of the purchase or sale of goods, the providing of services or production;
- (b) to divide up the markets of finished or semifinished goods or services, or the supply source of raw materials and intermediate products.
- (c) to limit or prevent access of new enterprises to the market;
- (d) to agree on prices or advantages which may affect competition in public bids;
- (e) to prevent the access of competitors to raw materials, investment goods or technologies, as well as to distribution channels;
- (f) to subordinate buying or selling to the condition of not using or acquiring, selling or supplying goods or services which are produced, processed, distributed or marketed by a third party;
- (g) predatory pricing, i.e., to sell merchandise at low prices with the intent of driving out competitors;
- (h) to reject, without good reason, the sale of goods or the supply of services; and
- (l) to manipulate the market in order to impose prices.

Article 5

Implementation and Notification

5.1 Members agree to take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure that:

- (a) private and public commercial enterprises do not engage in practices that are specified in Article 4 and have the effect indicated in Article 2, and
- (b) it has in place, or will establish, appropriate administering authorities to carry out the Members responsibilities herein.

5.2 Members agree to cooperate with each other for the purpose of making more effective within their respective jurisdictions any remedial measures taken in furtherance of the objectives of this Agreement.

5.3 Members agree to keep the Committee on Trade and Competition informed of any decision to participate in any such cooperative action and of any remedial measures taken.

Article 6

National Adjudication, Consultation and Dispute Settlement

6.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

6.2 Each Member shall afford adequate opportunity for representations to be made by the citizens, corporate or otherwise, of another Member to the Members authorities established as contemplated under Article 5.1 (b) with respect to any matter affecting the operation of this Agreement, including, without limitation, to request adjudication of a complaint before the same alleging a violation of this Agreement.

6.3 If, following final action having been taken the authorities of a Member on a complaint filed pursuant to Article 6.2, any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation. For the purposes of this Agreement final action will be deemed to have taken by said authorities of the same have failed to notify the complaining party in writing of the outcome same within one and a half years of the filing of a complaint under Article 6.2.

6.4 If the Member that requested consultations considers that the consultations pursuant to Article 6.3 have failed to achieve a mutually agreed solution to remedy the alleged anticompetitive behavior, it may refer the matter to the Dispute Settlement Body ("DSB").

6.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (a) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and
- (b) the facts made available in conformity with appropriate domestic procedures to the authorities of the Member before whom a complaint was filed pursuant to Article 6.2.

6.6 In examining the matter referred to in Article 6.5:

- (a) in its assessment of the facts of the matter, the panel shall determine whether the responding Members authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (b) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

6.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.