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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

Agriculture is one of the few economic sectors which has its own agreement within the WTO.¹ Other than the broad WTO distinction between goods and services, all other WTO provisions are neutral as to the economic sector involved. Agriculture is therefore unique. However understanding agriculture is central to understanding the WTO.

Agriculture has given rise to a high number of disputes. Ironically the two most famous agricultural disputes, *EC - Bananas III* and *EC - Hormones*, were not brought on the basis of the *Agreement on Agriculture* but on the GATT 1994 and GATS for bananas and on the *Agreement on the Application of Sanitary and Phytosanitary Measures or SPS Agreement* for hormones. The first big dispute to examine the *Agreement on Agriculture* was, in fact, the *FSC* case which was about a general tax scheme in the United States which favoured exporters.

Recently there have been two cases on the *Agreement on Agriculture* which are of utmost importance and which are dealt with in this module: the *Canada - Dairy* case and the *Chile - Price Band System* case. Like many dispute cases both these cases only look at specific parts of the *Agreement on Agriculture*. This module, on the other hand, looks at the broad provisions of the *Agreement on Agriculture* as well as the specific issues which were decided in all the cases which have examined the interpretation of the provisions of the *Agreement on Agriculture*.

Overall this module examines both the agricultural sector specific provisions in the *Agreement on Agriculture* and the general WTO rules in a number of other WTO Agreements which can impact agricultural trade.

The reader of this module should, on completion, be able to understand the main legal provisions affecting trade in agricultural products. Where technical terms have been used simple explanations of them have been provided.

¹ The only other sector specific agreement is the *Agreement on Trade in Civil Aircraft*. This Agreement is, however, only a plurilateral and not a multilateral Agreement.

1. AGRICULTURE IN THE WTO

Agriculture has traditionally benefited from special arrangements which sheltered it from the full impact of GATT disciplines. Even today, in the WTO agricultural policies are covered by a separate agreement that, to a degree, still shelters it from generally applicable rules.

A variety of political, social, economic and cultural arguments are used to justify this special treatment. The main justification is the need to guarantee, over time, stable food supplies in a world of fluctuating harvests and potential famines.

The scope of the traditional agricultural “exception” was to some extent limited by the Uruguay Round agreements; WTO Members agreed upon a set of principles and disciplines that were designed to help liberalize international trade in agricultural products.

The Uruguay Round achieved two things in relation to agriculture. It introduced specific disciplines on market access, domestic support and export subsidies. At the same time it took away the “fig leaf” behind which agriculture had been hiding from the full force of general GATT disciplines.

The *Agreement on Agriculture* seeks to reduce restrictions on trade in agricultural products by introducing disciplines to:

- increase market access;
- reduce domestic support measures;
- reduce subsidized exports.

This Module examines each of the three disciplines in turn and the other provisions of the *Agreement on Agriculture*.

Other WTO agreements also discipline trade in agricultural products. Those with the biggest impact on trade in agricultural products are: the GATT 1994; the *Agreement on Safeguards* or the *Safeguards Agreement*; the *Agreement on Import Licensing Procedures* or the *Import Licensing Agreement*; the *Agreement on the Application of Sanitary and Phytosanitary Measures* or the *SPS Agreement*; the *Agreement on Technical Barriers to Trade* or the *TBT Agreement* and, the *Agreement on Trade Related Aspects of Intellectual Property Rights* or the *TRIPs Agreement*.

These agreements, along with the *Agreement on Subsidies and Countervailing Measures* or the *SCM Agreement* and the *Agreement on Implementation of Article VI of the GATT 1994* or the *Antidumping Agreement* are also briefly examined.

2. THE AGREEMENT ON AGRICULTURE

Objectives

On completion of this section, the reader should be able to describe the main disciplines that were introduced by the *Agreement on Agriculture* on trade in agricultural products and, in particular, the provisions of the *Agreement on Agriculture* on market access, domestic support and export subsidies.

2.1 Introduction

The *Agreement on Agriculture* is one of the key agreements within the WTO system. Its importance is reflected by its presence as the first Agreement annexed to the Marrakesh Agreement establishing the WTO.

The *Agreement on Agriculture* is fairly short, with only 21 Articles and 5 Annexes. The 21 Articles are rather surprisingly divided into 13 Chapters. This form of the *Agreement on Agriculture* probably reflects the sensitivity of the sector and the difficulty in achieving agreement among WTO Members.

The specific agricultural commitments made by WTO Members are not found in the *Agreement on Agriculture*, but in Article II “Country Schedules” of the GATT 1994. Both the *Agreement on Agriculture* and the Country Schedules must be examined together to understand a WTO Member’s commitments on agriculture.

The *Agreement on Agriculture* applies to agricultural products. Agricultural products are defined in Annex 1 of the *Agreement on Agriculture*. This definition makes reference to the Harmonized System of product classification. In practice, agricultural products are those within Chapters 1 to 24 of the Harmonized System less fish and fish products, as well as some specific products which come from the soil. Forestry products are not included.

The definition of agricultural product covers not only basic agricultural products such as wheat, milk and live animals, but the products derived from them such as bread, butter, oil and meat, as well as all processed agricultural products such as chocolate, yoghurt and sausages. The coverage also includes wines, spirits and tobacco products, fibres such as cotton, wool and silk, and raw animal skins destined for leather production.

The *Agreement on Agriculture* has three main parts: Part III on market access; Part IV on domestic support (subsidies) and Part V on export subsidies. Each of these parts are examined in turn.

2.2 Market Access

2.2.1 Introduction

Market access simply means the right which exporters have to access a foreign market. The WTO agreements allow WTO Members to protect their markets. In practice “market access” refers to the ways in which that protection can be implemented. In the WTO framework it is a legalistic term indicating the government-imposed conditions under which a product may enter a country and be released for free circulation within that country under normal conditions.

The specific border measures to protect markets allowed under the *Agreement on Agriculture* are *tariffs* and *tariff rate quotas*. A tariff is a duty or tax. Although there are several different forms of tariffs,² the major ones used in agriculture are *ad valorem* (calculated as a percentage of the value of the goods), *specific* (a unit tax based on quantity) and *mixed* (a combination of these two). A tariff rate quota is a specific volume (quota) at which a product can enter a market at a tariff rate which is different (lower) than the over-quota tariff.

*A **tariff** is a trade barrier that takes the form of a government tax imposed on goods (usually imports and occasionally on exports) when they cross borders. Like internal taxes, a tariff generates revenue for the government of the importing country.*

*A **tariff rate quota** is a quantity of imports or exports within which a lower tariff applies. A higher tariff applies above the volume of the quota (the over-quota tariff).*

General or specific border measures affecting agricultural products may be adopted under other WTO agreements such as the *SPS* or the *TBT Agreements*.

2.2.2 Tariffication

Prior to the Uruguay Round, border protection for agricultural products was not always in the form of tariffs. In addition to tariffs, other non-tariff border measures were applied. A core element of the Uruguay Round negotiations was the agreement to convert these other types of border protection mechanisms into tariffs. This process was called “*tariffication*”.

***Tariffication** is the process of conversion of all non-tariff market protection measures into the tariff equivalent. The tariff equivalent to a non-tariff barrier is the difference between the average domestic price and the average world market price.*

² Others include compound tariffs (*ad valorem plus specific*), technical tariffs (e.g. based on sugar, alcohol, etc. content), seasonal tariffs and alternative tariffs.

The process of tariffication is not straightforward. Economists argue as to the appropriate methodology. In theory it is simple. The tariff equivalent of a non-tariff border measure is the difference between the world market price and the domestic market price for any specific product.

However, it is not easy to determine what is the world market or domestic market price, how these prices should be measured and over what period should the measurement take place. It is also not clear to what extent geographic and transport costs should be taken into consideration.

Article 4 of the *Agreement on Agriculture* on market access gives no guidance as to how this process of tariffication should have been undertaken or how Member's schedules of concessions in this area had to be established. It merely sets out that WTO Members must not revert to those border measures which had to be converted into ordinary customs duties. All the details of how market access should be improved were set out in a provisional document entitled "Modalities for the Establishment of Specific Binding Commitments under the Reform Programme".³ It was agreed among negotiators that the legal status of this document should end with the conclusion of the Round.

The first step required for all Uruguay Round signatories, including the least developed countries, was to tariffify all of the agricultural tariff lines by converting all non-tariff border measures to simple tariff equivalents (*ad valorem* or *specific* or both). The second step to be followed was tariff reduction, for which the Modalities Agreement provided different rules according to product type (e.g. previously bound or unbound)⁴ and economic grouping (e.g. developed, least developed). The Modalities Agreement set minimum tariff reduction requirements at two levels – the level of individual tariff lines and the overall averages for all agricultural products – to be implemented over a six-year implementation period commencing in 1995. The "tariffication formula" requires the developed countries to reduce tariffs for all agricultural products on average by 36 per cent from the base tariff rate with a minimum reduction of 15 per cent per tariff line over a six year period (for the developing countries by two-thirds of that applying to the developed countries over the 10 year implementation period).

In practice, during the Uruguay Round countries made their own calculations of the tariffs resulting from tariffication and inscribed them in their draft country schedules. If another WTO Member did not object to the figures placed in the draft schedules, by the conclusion of the Uruguay Round agreements on 15 April 1994, the draft figures were incorporated into the final country schedules. Once the Uruguay Round was concluded, the "*Country Schedules*" became fixed.

³ *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993, hereafter "the Modalities Agreement".

⁴ Different rules were provided for products with duties that were already bound prior to the Uruguay Round Agreement and products with duties that were unbound. For the former, tariff reductions were applied to the bound rate. For the latter, tariff reductions were applied to the normally applicable rate (or a tariff equivalent) in September 1986. In the case of products subject to unbound ordinary customs duties, developing countries had the flexibility to offer ceiling bindings on these products.

*A **Country Schedule** is a list of specific commitments to provide market access and national treatment for the products on the terms and conditions specified in the schedule.⁵*

Many exporting developing countries, which did not, or were not able to undertake detailed examinations of the drafts, found themselves faced with prohibitively high tariffs on the products which they intended to export. Because of the use of a reference period when the difference between the world market price and the domestic price was wide, tariffication, in many cases, resulted in high tariffs anyway. In addition, some WTO Members set lower tariffs on raw materials and higher tariffs on processed agricultural products so as to protect domestic processing industries. These three “side effects” of tariffication are known as “*dirty tariffication*”, “*tariff peaks*” and “*tariff escalation*”.

However, most of the principal agricultural exporting Members considered that, even if the process of tariffication resulted in high tariffs, the benefits of fixing tariffs and removing variable levies outweighed the disadvantages.

*“**Dirty tariffication**” is the use, during the tariffication process, of artificially-high domestic prices and artificially-low world market prices in order to set a particular tariff at a level higher than it should be.*

*“**Tariff peaks**” are considered to be rates set higher than the rates across the same product group or product sector. For some products, which governments consider “sensitive”, tariff rates remain very high.⁶*

*If a country wants to protect its processing or manufacturing industry, it can set low tariffs on the imported raw materials used by the industry (cutting the industry’s costs) and set higher tariffs on finished products to protect the goods produced by its domestic processing industry. This is known as “**tariff escalation**”.*

The tariffs agreed at the end of the negotiations were then included in each WTO Member’s Country Schedule. The legal status of a WTO Member’s Schedule of Concessions was addressed by the Appellate Body in the *EC – Computer Equipment* case, where it was held that:

(...) a Schedule is (...) an integral part of the GATT 1994 (...) Therefore, the concessions provided for in that Schedule are part of the terms of the treaty.

⁵ However, it should be noted that for trade in goods, the national treatment obligations exists even in the absence of commitments made in the Country Schedule; for trade in services, the national treatment obligation only exists for these services for which the national treatment commitments were made in the Country Schedule.

⁶ No clear definition of a “tariff peak” exists in the agricultural sector. In the Tokyo Round for industrial products it was considered that “tariff peaks” are rates set at over 15 per cent.

As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.⁷

In the *Canada – Dairy* dispute, the Appellate Body also recognized that:

(...) although Canada's commitment on fluid milk was made unilaterally, both Canada and the United States understood that this commitment represented a continuation by Canada of current access opportunities (...).⁸

The Appellate Body in the *Korea – Dairy* case insisted on the fact that the WTO agreements are “one treaty” and therefore all provisions (including the Country Schedules) ought to be interpreted harmoniously and in an effective manner, in order to ensure that no clause or provision is reduced to “inutility”.⁹

The Panel Report in the *Korea – Various Measures on Beef* dispute proceeded to a determination of the obligations of the Republic of Korea under “the WTO Agreement as a whole” with regard to each measure and concluded:

Korea's Schedule does not constitute an exception to other GATT provisions, but rather qualifies Korea's obligations under the WTO Agreement.¹⁰

2.2.3 The Prohibition of Non-tariff Measures

Article 4.2 of the *Agreement on Agriculture* prohibits the use of agriculture-specific non-tariff measures. In particular, Article 4.2 of the *Agreement on Agriculture* provides that:

Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.

Article 4.2 of the *Agreement on Agriculture* has been clarified by the *Chile – Price Band System* dispute.

⁷ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (“EC – Computer Equipment”), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998 para. 11.

⁸ Appellate Body Report, *Canada – Measures Affecting the Importation of Dairy Products* (“Canada – Dairy”), WT/DS103/AB/R and Corr.1, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, para. 139.

⁹ Appellate Body Report, *Korea – Definitive Safeguard Measure on Import of Certain Dairy Products* (“Korea – Dairy”), WT/DS98/AB/R, adopted 12 January 2000, para. 81.

¹⁰ Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (“Korea – Various Measures on Beef”), WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, para. 526.

The Appellate Body in the *Chile – Price Band System* dispute noted that:

Article 4.2 of the Agreement on Agriculture should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision - particularly in the light of the fact that most of the other obligations in the Agreement on Agriculture and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present. As used in Article 4.2, this temporal connotation relates to the date by which Members had to convert measures covered by Article 4.2 into ordinary customs duties, as well as to the date from which Members had to refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2. The conversion into ordinary customs duties of measures within the meaning of Article 4.2 began during the Uruguay Round multilateral trade negotiations, because ordinary customs duties that were to “compensate” for and replace converted border measures were to be recorded in Members’ draft WTO Schedules by the conclusion of those negotiations. These draft Schedules, in turn, had to be verified before the signing of the WTO Agreement on 15 April 1994. Thereafter, there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates. Moreover, as of the date of entry into force of the WTO Agreement on 1 January 1995, Members are required not to “maintain, revert to, or resort to” measures covered by Article 4.2 of the Agreement on Agriculture.¹¹

If Article 4.2 were to read “any measures of the kind which are required to be converted”, this would imply that if a Member -for whatever reason- had failed, by the end of the Uruguay Round negotiations, to convert a measure within the meaning of Article 4.2, it could, even today, replace that measure with ordinary customs duties in excess of bound tariff rates. But, as Chile and Argentina have agreed, this is clearly not so. It seems to us that Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round - but were not converted- could not be maintained, by virtue of that Article, from the date of the entry into force of the WTO Agreement on 1 January 1995.¹²

The Panel and the Appellate Body in the *Chile – Price Band System* dispute did not think that the provisions of Article 4.2 of the *Agreement on Agriculture* should be read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round. In particular, the Appellate Body stated that:

The wording of footnote 1 to the Agreement on Agriculture confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of “measures of the kind which have been required to be converted”, and which Members must not maintain, revert to, or resort to, from the date

¹¹ Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System)*, WT/DS207/AB/R, adopted 23 October 2002, para. 206.

¹² Appellate Body Report, *Chile – Price Band System*, para. 207.

of the entry into force of the WTO Agreement. Specifically, and as both participants agree, the use of the word “include” in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be “measures of the kind which have been required to be converted” that were not specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were actually converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.¹³

Furthermore, the Appellate Body in the *Chile – Price Band System* dispute noted that:

(...) Article 4.2 not only prohibits “similar border measures” from being applied to some products, or to some shipments of some products with low transaction values, or the imposition of duties on some products in an amount beyond the level of a bound tariff rate. Article 4.2 prohibits the application of such “similar border measures” to all products in all cases.¹⁴

Therefore, the most important commitment undertaken by WTO Members in the market access area during the Uruguay Round was the comprehensive tariffication of all border measures.

The non-tariff border measures which were required to be converted into tariffs are set out in a footnote to Article 4 of the *Agreement on Agriculture*. They include:

- quantitative import restrictions;
- minimum import prices;
- variable import levies;
- discretionary import licensing;
- voluntary export restraints, and
- non-tariff measures maintained through state trading enterprises.

*A **quantitative restriction** limits (or puts a quota on) the amount of a particular commodity that can be imported or exported over a given period.¹⁵*

*The **minimum import price** is fixed on the basis of the most favourable market price for each marketing year.*

¹³ Appellate Body Report, *Chile – Price Band System*, para. 209.

¹⁴ Appellate Body Report, *Chile – Price Band System*, para. 260.

¹⁵ Article XI of the GATT 1994 prescribes the use of quantitative restrictions, subject to the specified exceptions listed therein.

Variable import levies are complex systems of import surcharge. They are aimed at ensuring that the price of a product in the domestic market remains unchanged regardless of price fluctuations in exporting countries.

Discretionary import licensing is the requirement to obtain a permit to import a product. This normally involves an administrative procedure requiring the submission of an application or other documentation to the relevant administrative body as a condition for importing.¹⁶

Through **voluntary export restraints**, a country agrees to limit its exports to another country to an agreed maximum within a certain period.¹⁷

Agricultural state trading enterprises are enterprises which have been granted exclusive or special rights, or privileges that are not available to commercial firms, thus distorting trade in a competitive market.

The prohibition of border protection measures other than tariffs is absolute. All border measures other than “normal customs duties” are no longer permitted.¹⁸

In the *Chile – Price Band System* dispute, Chile had argued that the obligations in Article 4.2 only relate to *non-tariff* barriers, whereas “the PBS only covers the payment of *customs duties*”.

The Panel and the Appellate Body rejected this position. The Appellate Body found that:

Thus, the obligation in Article 4.2 not to “maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties” applies from the date of the entry into force of the WTO Agreement - regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round. The mere fact that no trading partner of a Member singled out a specific “measure of the kind” by the end of the Uruguay Round by requesting that it be converted into ordinary customs duties, does not mean that such a measure enjoys immunity from challenge in WTO dispute settlement. The obligation “not [to] maintain” such measures underscores that Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the WTO Agreement.

(...) Chile’s price band system is a measure “similar” to “variable import levies” or “minimum import prices” within the meaning of Article 4.2 and footnote 1 of the Agreement on Agriculture. In other words, the fact that the

¹⁶ The WTO Agreement on Import Licensing Procedures.

¹⁷ The WTO Agreement on Safeguards prohibits voluntary import restraints.

¹⁸ Although Article XI:2(c) of the GATT 1994 continues to permit non-tariff import restrictions on fisheries products, it is now inoperative as regards agricultural products because it is superseded by the Agreement on Agriculture.

duties that result from the application of Chile's price band system take the same form as "ordinary customs duties" does not imply that the underlying measure is consistent with Article 4.2 of the Agreement on Agriculture.¹⁹

However, Article 4.2 of the *Agreement on Agriculture* does not prevent the use of non-tariff import restrictions consistent with the provisions of the GATT 1994 or other WTO agreements which are applicable to general trade in goods (industrial or agricultural). Such trade-restrictive measures include those maintained under the balance-of-payment provisions (Article XIX of the GATT 1994), general exceptions (Article XX of the GATT 1994), the *SPS Agreement*, the *TBT Agreement*, or other general, non-specific WTO provisions.

Annex 5 to the *Agreement on Agriculture* provides a major exception with respect to the general tariffication requirement. Under this provision, the obligation to convert protective measures into customs duties was deferred by six years for certain products and in particular rice.²⁰ The exception no longer applies.

2.2.4 Tariff Modification

Once tariffs are negotiated, WTO Members agree to "bind" those tariffs. This means that WTO Members are not normally allowed to impose import duties in excess of the "bound" tariffs inscribed in each country's Schedule of Concessions.

The bound level of tariffs can be changed in accordance with the procedure set out in Article XXVIII of the GATT 1994. As WTO Members are allowed to apply a lower tariff than the bound level, Article XXVIII is only invoked when a WTO Member wants to raise the tariff so as to increase market protection.

A WTO Member may modify or withdraw a concession in a Schedule either by agreement with the affected countries, or unilaterally. The exporting WTO Members which might be affected by the modification or withdrawal of the binding of the tariff have certain rights of negotiation and compensation. In addition, according to Article XXVIII:2, the WTO Member changing the tariff must endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that previously applicable. This means that if a tariff is raised, some compensation must be given in another sector (i.e., by lowering another tariff) so as to allow a rebalancing of the levels of trade concessions.

¹⁹ *Appellate Body Report, Chile – Price Band System, para. 279.*

²⁰ *This clause was commonly known as the "rice clause" because it was drawn up specifically to allow certain countries, in particular Japan and the Republic of Korea, temporarily to exempt the measures applicable to rice imports from any tariffication obligation. However, paragraph 4 of the Annex stipulates that if as part of the negotiations set out in Article 20 of the Agreement on Agriculture, a WTO Member wishes to continue to apply the special treatment, such Member shall confer additional and acceptable concessions as determined in that negotiation.*

2.2.5 Tariff Reductions

WTO Members agreed in the Uruguay Round that once the tariffs were fixed, they would agree to reduce these tariffs over time, i.e., over six to ten years starting on the date of the coming into effect of the Marrakesh Agreement in 1995. The tariff reductions were fixed at the time of the conclusion of the Uruguay Round and are also set out in each WTO Member's Country Schedule.

- Developed country Members agreed to reduce, over a six-year period beginning in 1995, their tariffs on agricultural products by 36 per cent on average, with a minimum cut of 15 per cent for any product.
- For developing countries, the cuts are 24 and 10 per cent respectively, to be implemented over ten years.
- Least-developed country Members were required to bind all agricultural tariffs, but not to undertake tariff reductions.

The *Agreement on Agriculture* is an initial attempt at reforming agricultural trade. WTO Members agreed that the negotiations on agricultural trade reform would continue and set a date for the recommencement of those negotiations. The negotiations began in 2000 and have now been incorporated into the Doha Development Round of negotiations.

2.2.6 Minimum Market Access

It was foreseen that the high tariff levels resulting from the tariffication process could turn out to be more protective than their non-tariff "predecessors". Negotiators recognized that the use of the 1986 to 1988 reference period would result in prohibitively high tariffs. These high tariffs were likely to disrupt existing trade.

WTO Members were therefore obliged to ensure that a certain amount of domestic consumption would continue to be supplied by imports. All WTO Members agreed to open up their markets to imports for at least 3 per cent of the domestic consumption in 1995, and for 5 per cent by 2000.²¹

The maintenance of existing trade levels was ensured by means of current access quotas. In addition, minimum access commitments were created to allow new import opportunities for products previously covered by a non-tariff barrier. Both these commitments were administered through the establishment of "*tariff-rate quotas*" (TRQs).²²

²¹ *The Agreement on Agriculture is to be implemented over a six-year period.*

²² *From an economic perspective, TRQs are preferable to quotas because under certain conditions they cause less distortion to trade flows by allowing for trade above a fixed quantity ceiling. Additional benefits of the tariffication process include more transparency in the application of border measures. The bound tariffs and TRQs resulting from this process now provide a sound basis in future Rounds from which to negotiate further tariff reductions or increased TRQ import opportunities.*

A tariff-rate quota (TRQ) is a two-levelled tariff whereby the tariff rate charged depends on the volume of imports. A lower (in-quota) tariff is charged on imports within the quota volume. A higher (over-quota) tariff is charged on imports in excess of the quota volume.

The value of a quota volume, and the in-quota and over-quota tariffs are defined in each WTO Member's tariff schedules. In a given period, a lower in-quota tariff is applied to the first number of units of imports and a higher over-quota tariff is applied to all subsequent imports.²³

Tariff quotas are not considered quantitative restrictions because, at least in theory, they do not limit import quantities. One may always import by paying the over-quota tariff.

TRQs usually generate a "quota rent". In fact, the right to import within the quota results in a profit over and above the profit available in normal trade. This "extra" profit results from the fact that the protected market price is usually higher than the world market price. The necessity to administer the TRQs is a consequence of the fact that the demand to trade within the quota is often greater than the supply. The allocation of the TRQs among supply countries and the distribution of licences to the quota to traders determine who gets the benefit of this quota rent or super profit.

Quota rent is a profit which results from the difference between the domestic price and the world price inclusive of the in-quota tariff.

2.2.7 TRQ Administration

The administration of TRQs is of vital importance in that it may heavily affect trade by exporting countries. Quota administration has a real impact on trade, as it determines whether a product exported from one country can gain access to the market of another country at the lower, within-quota tariff.

There are two major sources of rules: the rules governing the administration of import restrictions and the possible country allocation of the TRQ (external administration); and the rules governing the import licensing procedures used to administer the TRQs and to allocate them to traders (internal administration).

The first set of rules on the external administration of TRQs are contained in Article XIII of the GATT 1994. The second set of rules on internal administration are dictated by the *Agreement on Import Licensing Procedures*. The two provisions are described in the relevant parts of this module.

²³ The terms "tariff quota" and "tariff-rate quota" are used in literature interchangeably. Technically, tariff quota, a more accurate description, includes specific tariffs, while tariff-rate quota normally excludes them.

38 WTO Members currently have a combined total of 1,379 tariff-rate quotas in their commitments. Of the total, 562 are scheduled to increase over the relevant implementation period, 812 to remain unchanged and five to decrease in quantity.

2.2.8 Special Safeguard Measures

In spite of the market access obligations contained in the *Agreement on Agriculture*, special safeguard measures may be introduced in respect of those products for which non-tariff measures have been converted into ordinary customs duties and have been “labelled” with the symbol “SSG” in WTO Members’ Country Schedules.

Other safeguard measures are available under the WTO Agreements, namely the provisions of Article XIX on the “Emergency Action on Imports of Particular Products” of the GATT 1994, and the rules of the *Agreement on Safeguards*. These mechanisms are described in the relevant parts of this module.

With respect to special safeguard measures, the relevant provision is Article 5 of the *Agreement on Agriculture*. Article 5 allows the imposition of an additional customs duty, over and above the bound customs duty (or tariffed duty), when the imported product does not reach a predetermined “trigger” price, or where the volume of imports passes a “trigger” volume.

This means that WTO Members may raise their duties on agricultural products even when the more stringent requirements of Article XIX and the *Agreement on Safeguards* are not met. This provision is very detailed and must be interpreted strictly to ensure that WTO Members do not abuse their right to invoke exceptions.

The use of the special safeguards provided by Article 5 of the *Agreement on Agriculture* requires two preconditions which are set out in the first part of subparagraph 1:

- tariffication (i.e., the conversion into ordinary customs duties of non-tariff border measures) of the products to which the special safeguard is to apply;
- designation of the product in question with the symbol “SSG” in the WTO Member’s Article II Country Schedule the GATT 1994.

If these two preconditions are met, a WTO Member may invoke the special safeguard clause, according to Article 5.1(a) and 5.1(b) of the *Agreement on Agriculture*, where either:

- the volume of imports of that product exceeds a trigger level which relates to the existing market access opportunity as set out in Article 5.4; or

- the price of the imports of that product, as determined on the basis of the c.i.f. import price of the shipment concerned falls below a trigger price equal to the average 1986-1988 reference price for the product concerned.

There are therefore two alternative grounds for invoking the special safeguard provision: surges in the volume of imports and falling import prices. However, not every rise in the volume or every fall in the price of imports entitles countries to resort to Article 5. In each case, there are set threshold levels, which are called “volume triggers” or “price triggers”.

Article 5.8 of the *Agreement on Agriculture* provides that:

Where measures are taken in conformity with paragraphs 1 through 7 above, Members undertake not to have recourse, in respect of such measures, to the provisions of paragraphs 1(a) and 3 of Article XIX of the GATT 1994 or paragraph 2 of Article 8 of the Agreement on Safeguards.

Thus, a WTO Member may choose between the special safeguard measures under Article 5 of the *Agreement on Agriculture* or the general safeguards under the GATT 1994 Article XIX in accordance with the implementation requirements of the *Agreement on Safeguards*. However, if a WTO Member chooses to introduce special safeguards, it cannot have recourse to general safeguard measures.

The special safeguards provisions for agriculture differ from the general safeguards. In agriculture, unlike with normal safeguards:

- higher safeguard duties can be triggered automatically when import volumes rise above a certain level, or if prices fall below a certain level; and
- it is not necessary to demonstrate that serious injury is being caused to the domestic industry.

The special agricultural safeguards can only be used on products that were tariffied. These amount to less than 20 per cent of all agricultural products. But they cannot be used on imports within the tariff quotas, and they can only be used if the WTO Member reserved the right to do so in its Schedule of agricultural commitments. This might explain why, in practice, the special agricultural safeguards have been used only in relatively few cases.

The two special safeguards mechanisms (i.e., price and volume safeguards) may not be invoked concurrently. They are available to WTO Members for use for the duration of the agricultural reform process²⁴ as determined under Article 20 of the *Agreement on Agriculture*. The *Agreement on Agriculture* does not specify how long the reform process will (or should) last.

²⁴ See Article 5.9 of the *Agreement on Agriculture*.

38 WTO Members currently have reserved the right to use a combined total of 6,072 special safeguards on agricultural products.

2.2.8.1 Import Price Trigger

The price safeguard provisions are set out in Articles 5.1 (b) and 5.5 of the *Agriculture Agreement*. Article 5.1(b) provides specific conditions for special safeguard provisions related to price in addition to the two general conditions of Article 5.1. If the market entry price (expressed in terms of domestic currency) falls below a trigger price, the provisions of Article 5.5 come into play and an additional duty may be applicable to the shipment in question.

The Appellate Body in the *EC – Poultry* case clarified the interpretation of the terms of Article 5.1(b):

In the light of our construction of the preceding phrase “the price at which imports of the product may enter the customs territory of the Member granting the concession”, we conclude that the phrase “as determined on the basis of the c.i.f. import price of the shipment concerned” in Article 5.1(b) refers simply to the c.i.f. price without customs duties and taxes. There is no definition of the term “c.i.f. import price” in the Agreement on Agriculture or in any of the other covered agreements. However, in customary usage in international trade, the c.i.f. import price does not include any taxes, customs duties, or other charges that may be imposed on a product by a Member upon entry into its customs territory. We think it significant also that ordinary customs duties are not mentioned as a component of the relevant import price in the text of Article 5.1(b). Article 5.1(b) does not state that the relevant import price is “the c.i.f. price plus ordinary customs duties”. Accordingly, to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there.²⁵

To satisfy the specific conditions, it is necessary to determine the price at which the product enters the customs territory. The text of Article 5.1(b) gives no exact measure of the market entry price. It merely provides that it is to be “determined on the basis of the c.i.f. import price”. Article 5.1(b) defines the price of the product on which price safeguards are triggered as “equal to the average 1986 to 1988 reference price for the product concerned”.

The amount of permissible additional duty in price-triggered cases depends on the degree to which the actual import price falls below the trigger price. Article 5.5 provides a formula which enables the importing country to progressively increase its additional duties in proportion to the extent of price decline.

²⁵ Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products (“EC – Poultry”)*, WT/DS69/AB/R, adopted 23 July 1998, para. 146.

2.2.8.2 Import Volume Trigger

As with price safeguards, volume special safeguards have their legal basis in Article 5 of the *Agreement on Agriculture*. Article 5.1(a) provides that a special additional duty may be imposed if the annual volume of imports of the product exceeds a trigger level. Article 5.4 provides that the “volume trigger level” is to be calculated on the basis of imports as a percentage of domestic consumption (last three years of available data), a figure referred to as “market access opportunities”. This figure gives a base trigger level.

In broad terms, the higher the share of imports in domestic production, the lower the trigger level. For example, where the shares of imports is less than 10 per cent of domestic consumption for the three preceding years, the base trigger amount is set at 125 per cent. In contrast, where the shares are greater than 30 per cent, the base trigger level is 105 per cent.²⁶

2.2.9 Dispute Settlement

In the dispute EC – Poultry (WT/DS69)²⁷ Brazil complained about the allocation of an EC tariff-rate quota for frozen poultry meat and the use by the EC of a special safeguard measure under the Agreement on Agriculture. The dispute involved the interpretation of the EC’s tariff schedule and its relationship with a separate bilateral agreement between the EC and Brazil, which provided for a global annual duty-free tariff-rate quota for frozen poultry meat. Brazil argued that as a result of the agreement, the tariff-rate quota should be allocated exclusively to Brazil and not shared on an MFN basis with other WTO Members. The WTO Panel found, and the Appellate Body upheld, the Panel’s finding that the agreement was not part of WTO law and therefore could not be applied directly as law in WTO dispute resolution. Further, the Appellate Body interpreted the relevant EC Tariff Schedule. As the EC was bound by its tariff schedule which provided for MFN non-discriminatory treatment, Brazil could not seek preferential treatment on the basis of tariff concessions negotiated bilaterally. The Appellate Body also found that the EC’s administration of this tariff quota did not violate the WTO Agreement on Import Licensing Procedures. Finally, the Appellate Body interpreted the special safeguard provision in Article 5 of the Agreement on Agriculture. It decided that the calculation of the import price, which determines whether to apply the special safeguard measure, must not include custom duties. It further found that the EC could not use representative price to determine the c.i.f. import price of an individual shipment.

The Panel in Chile – Price Band System (WT/DS207)²⁸ examined a complaint brought by Argentina concerning Chile’s price band system, which imposed

²⁶ Article 5.4(a)-(c) of the *Agreement on Agriculture*.

²⁷ *European Communities – Measures Affecting the Importation of Certain Poultry Products (“EC – Poultry”)*, Panel Report, WT/DS69/R, adopted 23 July 1998, as modified by the Appellate Body Report, WT/DS69/AB/R.

²⁸ *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (“Chile – Price Band System”)*, WT/DS207/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207/AB/R.

variable tariffs on imports of wheat, wheat flour, edible vegetable oils and sugar. Under the Chilean price band system, additional duties were imposed on imported commodities if market prices in “markets of concern to Chile” fell below an administratively-administered price band. Chile argued that the scope of application of Article 4.2 was limited to measures which had actually been converted or requested to be converted into customs duties during the Uruguay Round - which had not happened in the case of price band systems. The Appellate Body did not agree with this view. It found that the scope of the measures covered by Article 4.2 was not limited to those described by Chile, but that the language of Article 4.2 was intended to cover a broad category of measures. The Appellate Body found support for its interpretation in Article 5.1 and footnote 1 to Art. 4.2. The Appellate Body addressed the question whether the PBS was a border measure similar to a “variable import levy” and “minimum import prices” within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. In order to determine “similarity,” the Appellate Body used what it called an empirical approach: do two or more things have likeness or resemblance sufficient to be similar to each other? It then compared the Chilean PBS with the two measures and noted similar features as to a lack of transparency and the possible effect of impeding the transmission of international price developments to the domestic market. Though recognizing certain dissimilarities, the Appellate Body regarded the similarities to be “sufficient” to qualify the PBS as a “similar border measure” within the meaning of footnote 1 to Article 4.2. Therefore, the WTO Appellate Body upheld the Panel’s finding that Chile’s price band system is a border measure that is similar to variable import levies and minimum import prices.

2.3 Test Your Understanding

1. **How does the Agreement on Agriculture seek to reduce restrictions on market access in agricultural products? What products are covered by the Agreement on Agriculture?**
2. **What are non-tariff barriers and tariffs? Why was it necessary to convert non-tariff barriers into tariffs?**
3. **What is “tariffication”? Please, define tariff peaks and tariff escalation.**
4. **What is a “Country Schedule”?**
5. **What is the obligation under Article 4.2 of the Agreement on Agriculture? Give examples of non-tariff measures.**
6. **How does a tariff-rate quota differ from a tariff? What are the principal methods of TRQ administration?**
7. **What “emergency” actions can a WTO Member apply to protect against increased imports of particular products? Distinguish between general and special safeguards.**
8. **What are the two types of special safeguards measures? What conditions *must be satisfied* for a WTO Member to invoke the provisions on special safeguards measures?**

3. AGRICULTURAL SUBSIDIES

3.1 Introduction

The *Agreement on Agriculture* seeks to ensure that agricultural trade is not distorted through the use of subsidies.

Agricultural support measures are classified as belonging to two major groups:

- domestic support and general support; and
- export subsidies.

One of the main features of the *Agreement on Agriculture* is to allow WTO Members to use subsidies in derogation from the SCM Agreement. A key objective of the *Agreement on Agriculture* is also to discipline and reduce all subsidies, while at the same time leaving scope for governments to design effective agricultural policies.

Export subsidies are regulated by means of Articles 8, 9, 10 and 11. Domestic subsidies are regulated by means of Articles 6 and 7 along with Annexes 2, 3 and 4.

3.2 Domestic Support

In WTO non-legal terminology, domestic subsidies to agricultural products are identified by special “boxes” which are given the colours of traffic lights: “Green” meaning permitted because they have no, or minimal, distortive effect on trade; “Amber” meaning possibly legal or illegal because of their trade-distortive nature; and “Blue” meaning possibly trade-distorting but permitted as the measures are linked to production limitation programmes.²⁹

3.2.1 “Amber Box” Measures

All domestic support measures which do not correspond to the exceptional arrangements known as the “Green” and “Blue” boxes, are considered to distort production and trade and therefore fall into the “Amber Box” category. “Green Box” measures are set out in Annex 2 to the *Agreement on Agriculture*. “Blue Box” measures are defined in Article 6.5.

“Amber Box” support measures are not prohibited but are subject to reduction commitments.

3.2.1.1 Reduction Commitments

The domestic support reduction commitments of each WTO Member are

²⁹ *The colours are not mentioned in the legal texts.*

contained in Section I, Part IV of its Schedules of Concessions. In the Uruguay Round, WTO Members undertook to discipline trade-distorting domestic support to agriculture by capping it at 1986-88 average levels, and reducing it by 20 per cent over six years up to 2000 for developed country Members or by 13 per cent over 10 years up to 2004 for developing country Members.

Domestic support reduction concerns total agriculture spending and not commodity-by-commodity reductions. In other words, WTO Members have not undertaken to reduce the support granted to each product or product category by 20 per cent. Thus, under the *Agreement on Agriculture*, WTO Members which save on subsidies in one agricultural sector can increase domestic subsidies in another sector so long as the total subsidization does not exceed the overall ceiling on subsidisation to which a WTO Member has committed itself in the country schedule.

The maximum levels of domestic support are bound in the WTO, and 30 WTO Members have made commitments to reduce their trade-distorting domestic supports in the “Amber Box”.³⁰

In the case of WTO Members with no scheduled reduction commitments, the level of domestic support not covered by one or another of the exception categories must not exceed the specified *de minimis* levels (5 per cent of the value of production for developed countries and 10 per cent of the value of production for developing countries).

Least developed countries are not required to make any reductions.

Part IV of a WTO Member’s Schedule of Commitments lists its Annual Bound Commitment Levels for each of the years of the implementation period (which ended in 2000), and the Final Bound Commitment Level for all subsequent years. The Commitments take the form of reductions in the Total Aggregate Measurement of Support (AMS). A WTO Member is in compliance with its domestic support reduction commitments in any year if its Current Total AMS does not exceed the corresponding Commitment Level.

3.2.1.2 Aggregate Measurement of Support

The reduction commitments are expressed in terms of an aggregate measure of support which combines estimated support levels from all non-exempt policies for all commodities into one overall spending.

The “*Aggregate Measurement of Support*” (AMS) was developed to quantify trade-distorting support. Rules for calculating the AMS are shown in Annex3.

Aggregate Measurement of Support is a monetary expression of the size of annual transfers provided for a specific agricultural product in favour of the →

³⁰ See more information on <http://www.wto.org>, “Trade topics”, “Agriculture”, “Domestic support in agriculture”.

producers of that product, or non-product-specific support provided in favour of agricultural producers in general.

Even though the reduction commitments are applicable generally over all agricultural commodities, the calculation of AMS is made on the basis of the spending on specific commodities during a reference period. The two basic criteria for valuing support are its effect on prices and its cost to the government. Both budgetary outlays (i.e., the money spent by governments to support a product) and revenue foregone by governments or their agents, whether at national or sub-national level, are included in the AMS calculation.

Annex 3 of the *Agreement on Agriculture* provides that three types of support are to be included in the calculation:

- market price support measures, the most important type of non exempt measures can be provided either through administered prices (involving transfers from consumers) or through certain types of direct payments from governments, and is calculated on the basis of the gap between a fixed external reference price³¹ and the applied domestic administered price multiplied by the quantity of production eligible to receive the applied administered price;
- non-exempt direct payments and other subsidies that are dependent on a price gap, and are calculated by using either the price gap multiplied by the volume of production concerned, or by using budgetary outlays;
- any other subsidy not exempted from the reduction commitments. Non-product-specific support is calculated separately for each individual product and is included in the Total AMS only if it exceeds the applicable *de minimis* level.

The Appellate Body in the *Korea - Various Measures on Beef* dispute confirmed that the AMS calculation rules contained in Annex 3 of the *Agreement on Agriculture* are directly linked to Article 6 of the *Agreement on Agriculture*.³²

3.2.1.3 Total Aggregate Measurement of Support

Having calculated the AMS by product, the next step is to calculate the “*Total Aggregate Measurement of Support*”.

³¹ Fixed external reference price is the actual price used in the base period (1986-1988) for determining payment rates. As the use of the qualifying term “fixed” indicates, the external reference price, once determined for the base period, remains an unchanging reference price against which the size of the price gap in the calculation of the Current Total AMS would be made throughout the implementation period. The problem of inflation in some countries would lead them to violation of their WTO commitments although in real terms they might still be within the limits of their commitment levels. This problem of “excessive rate of inflation” was taken into account during the review process. Article 18.4 of the *Agreement on Agriculture* provides that, “Members shall give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments”.

³² Appellate Body Report, *Korea – Measures affecting imports of fresh, chilled and frozen beef* (“*Korea – Various Measures on Beef*”), WT/DS161/AB/R and WT/DS169/AB/R, adopted 10 January 2001, para. 46.

Total Aggregate Measurement of Support is the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all AMS and equivalent measurement of support (EMS) for agricultural products.

Part IV of the Schedules of Commitments specifies each WTO Member's Annual Bound Commitments, which are constituted by a Base Total AMS (support provided during the base period 1986-88), a Current Total AMS (commitments during any year of the implementation period) and its Final Bound Commitments, which is the continuation of the Current Total AMS in all years after the end of the implementation period.

In any year of the implementation period, the Current Total AMS value of non-exempt measures must not exceed the scheduled Total AMS limit as specified in each WTO Member's Schedule for that year. In other words, domestic support exceeding the reduction commitments levels is prohibited.

3.2.1.4 Equivalent Measurement of Support

Rules for calculating the "Equivalent Measurement of Support" (EMS) are set out in Annex 4 of the *Agreement on Agriculture*. These rules are used when it is not practicable to calculate a product-specific AMS by using the methodology set out in Annex 3.

Equivalent measurement of support is a fall-back concept employed when AMS cannot be used. It is defined as the annual level of support, expressed in monetary terms, provided to producers of a specific agricultural product through the application of one or more support measures, which cannot be calculated in accordance to the AMS methodology.

For example, this can be the case for market price support measures which cannot be calculated by applying the AMS method, because no external reference price can be determined. In that case, an equivalent measurement of support will be calculated.

3.2.2 Exempted Measures

Domestic support measures which are exempted from reduction commitments are defined in Article 6 and in Annex 2 of the *Agreement on Agriculture*. Exempted measures are excluded from the AMS calculation.

WTO Members must claim and justify the benefit of the exemption. In the absence of such a claim, all domestic support programmes are automatically considered as "Amber Box" measures and counted in the calculation of the WTO Member's total AMS. In other words, whatever support is not specifically excluded from reduction commitments is presumed to be included.

Any measure not shown to satisfy the conditions for exemption under Annex 2 or Article 6 of the *Agreement on Agriculture* is required to be included in the calculation of the current total AMS for the year in question³³.

3.2.2.1 “Green Box” Exemption

Annex 2 of the *Agreement on Agriculture* sets out general criteria and conditions for exemption to the commitment to reduce domestic subsidies. Measures which fall within the terms of Annex 2 are known as the “Green Box”. “Green Box” support measures are considered economically neutral. Therefore, the WTO does not impose any financial limitation to this type of domestic support.

The subsidies falling under this category are non-actionable (in other words, immune from challenge) by virtue of Article 13 of the *Agreement on Agriculture* (the Due Restraint or “peace clause” provision). In particular, the domestic support measures that fully conform to the provisions of Annex 2 to the *Agreement on Agriculture* are considered non-actionable subsidies for purposes of countervailing duties during the implementation period of the *Agreement on Agriculture* (defined, for purposes of the “peace clause”, as the nine-year period commencing in 1995).

The fundamental requirement to qualify for a “Green Box” exemption is that support measures should have no, or at most minimal, distorting effects on trade or production.

Accordingly, all measures for which exemption is claimed must conform to the following basic “general” criteria:

- the support must be provided through a publicly funded government programme, not involving a transfer from consumers and;
- the support may not have the effect of providing price support to producers.

Annex 2 provides a non-exhaustive list of domestic support measures for which WTO Members may claim exemption from reduction commitments. Depending on the nature of the particular policy under consideration, the support measure must further fulfil policy-specific criteria set out in detail in the Annex.

- General applicable government programmes

First of all, there are government programmes which provide services or benefits to agriculture or the rural community.³⁴ They include pest and disease controls, support for training and information, infrastructure (such as, water, electricity supply, etc.) or research programmes. To guarantee the economic neutrality of this aid, it is added that these programmes do not involve direct payments to producers or processors.

³³ Article 7.2 (a) of the *Agreement on Agriculture*.

³⁴ Para. 2 of Annex 2.

- Domestic food aid programmes

A second type of aid is made up of domestic food aid programmes for people in need, provided that products are brought from producers “at market prices”.³⁵ Aid for public storage of agricultural products for food security purposes is classified in the same group.³⁶

- Direct payments

A third category of “Green Box” aid is represented by direct payments. The *Agreement on Agriculture* permits an unlimited number of different forms of direct payments made to agricultural producers to be exempted from reduction commitments. A first series of direct payments consists of aid for developing agricultural structures: retirement programmes, granted on conditions that the land is no longer in use within three years following the granting of aid;³⁷ aid encouraging producers to cease their activities permanently or to change over to non-agricultural activities, provided that the producers totally and permanently retire from production;³⁸ or investment aid for producers undergoing “objectively demonstrated structural disadvantages”.³⁹

De-coupled income support measures (i.e., measures which are not related to current levels of production or prices) are also classified in the “Green Box”. In order to benefit from this possibility, the amounts paid shall not be related to the quantities produced or the process charged and, eligibility for this type of aid must be determined by criteria that are not directly related to production such as income or status of a producer.⁴⁰ When this support takes the form of income insurance, it can be classified in the “Green Box” provided that it is granted to a producer who has suffered an income loss which exceeds, in a given year, 30 per cent of average gross income and that this aid does not compensate for more than 70 per cent of the income loss.⁴¹

- Environmental aid and regional assistance

Environmental aid and regional assistance for farmers in disadvantaged regions is included in the “Green Box”. Each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity, considered as disadvantaged on the basis of neutral and objective criteria clearly spelt out in law or regulation and indicating that the region’s difficulties arise out of more than temporary circumstances.⁴² The amount of payment for environmental aid should correspond to the extra costs involved in complying with government programmes of environmental protection.⁴³

³⁵ Para. 4 of Annex 2.

³⁶ Para. 3 of Annex 2.

³⁷ Para. 10 of Annex 2.

³⁸ Para. 9 of Annex 2.

³⁹ Para. 11 of Annex 2.

⁴⁰ Para. 6 of Annex 2.

⁴¹ Para. 7 of Annex 2.

⁴² Para. 13 of Annex 2.

⁴³ Para. 12 of Annex 2.

- Relief from natural disasters

Payments for relief from natural disasters are also included in the “Green Box”. These payments are allowed only if producers show a production loss that exceeds 30 per cent of the average of production and will compensate for not more than the total cost of replacing production loss.

Article 7.1 of the *Agreement on Agriculture* provides that WTO Members are under an obligation to ensure that all “Green Box” measures are maintained in conformity with the conditions set out under Annex 2. Any measure not shown to satisfy the conditions for exemption is required, under Article 7.2 of the *Agreement on Agriculture*, to be included in the calculation of the current total AMS for the year in question.

3.2.2.2 “Blue Box” Measures

The “Blue Box” exemption category is contained in Article 6.5 of the *Agreement on Agriculture*. It covers any support measure that would normally be in the “Amber Box”, but which is placed in the “Blue Box” if the support also requires farmers to limit their production.

Therefore, Article 6.5 of the *Agreement on Agriculture* exempts from reduction commitments certain direct payments to farmers which are tied to production-limiting programmes.

The following criteria must be fulfilled:

- payments are directly paid out from the government budget to the producers;
- payments are conditional upon some form of production-limiting requirement imposed on the recipient of the support, which include:
- payments based on fixed area and yields, or
- payments made on 85 per cent or less of the base level of production;
- livestock payments made on a fixed number of head.

At present, there are no limits on spending for “Blue Box” subsidies.

“Blue Box” subsidies are considered to be possibly trade-distorting but permitted under the *Agreement on Agriculture*. This means that they are not immune from challenge through WTO dispute settlement proceedings or under unilateral and multilateral remedies.⁴⁴

3.2.2.3 Developmental Measures

Article 6.2 of the *Agreement on Agriculture* exempts from reduction commitments measures of assistance designed to encourage agricultural and

⁴⁴ However, this challenge is subject to certain conditions. Note the provisions of Article 13 “Due Restraint” of the *Agreement on Agriculture*. See Section “Peace Clause” of this Module.

rural development, which are an integral part of the development programmes of developing countries.

Developmental measures are:

- investment subsidies which are generally available to agriculture in developing countries;
- agricultural input subsidies generally available to low-income or resource-poor producers;
- domestic support to producers to encourage diversification from growing illicit narcotic crops.

3.2.2.4 De Minimis Support

WTO Members are not obliged to include *de minimis* support in their Current Total AMS.

De minimis support is defined as:

- product-specific domestic support not exceeding 5 per cent of the WTO Member's total value of production of the agricultural product in question during the relevant year;
- non-product-specific domestic support which is less than 5 per cent of the value of the WTO Member's total agricultural production.

In the case of developing countries, the *de minimis* threshold is 10 per cent.⁴⁵

3.2.3 Notification Obligations

Article 18.2 of the *Agreement on Agriculture* requires WTO Members to notify the WTO Committee on Agriculture the extent of their domestic support measures for review by the Agriculture Committee.

This obligation requires a listing of all measures that fit into the exemption categories and the Current Total AMS, calculated by each WTO Member in accordance with Annex 3 of the *Agreement on Agriculture*.

When a WTO Member without such scheduled commitments has support measures which are not covered by one or more of the exempt categories, a notification must be made showing that such non-exempt support is within the relevant *de minimis* levels.⁴⁶

WTO Members are required to notify on an annual basis, except for least-developed country Members which are only required to notify every two years.

⁴⁵ Article 6.4 of the *Agreement on Agriculture*.

⁴⁶ Article 18.3 of the *Agreement on Agriculture* which states that notification shall contain details as set out in Article 6 or in Annex 2 to this Agreement.

Developing countries can also request the Committee on Agriculture to set aside the annual notification requirement for measures other than those falling into the “Green Box”, developmental and “Blue Box” categories.

In addition to the annual notification obligations, all WTO Members must notify any modifications of existing measures or any introduction of new measures in the exempt categories.

The Committee on Agriculture oversees the implementation of WTO Members’ reduction commitments on the basis of the notifications submitted.

3.3 Export Subsidies

3.3.1 *Agricultural Export Subsidies*

Export subsidies are special incentives provided by governments to encourage increased foreign sales.

These subsidies, which are contingent on export performance, may take the form of:

- cash payments;
- disposal of government stocks at below-market prices;
- subsidies financed by producers or processors as a result of government actions such as assessments;
- marketing subsidies;
- transportation and freight subsidies; and
- subsidies for commodities contingent on their incorporation in exported products.

The GATT 1994 Article XVI on subsidies allowed the GATT contracting parties to subsidize the export of primary agricultural products if they did not result in the exporting country having more than an equitable share of world trade.

Article 3 of the *WTO Agreement on Subsidies and Countervailing Measures* or the *SCM Agreement* now prohibits all subsidies on exports of agricultural products except as provided for in the *Agreement on Agriculture*.

The *Agreement on Agriculture* does not contain any definition of the term “subsidy”.

To determine whether an export support measure does in fact constitute a “subsidy” subject to the disciplines of the *Agreement on Agriculture*, the Appellate Body, in its report in the *Canada - Dairy* case,⁴⁷ referred to the definition of a subsidy contained in Part I of the *SCM Agreement*.

⁴⁷ Appellate Body Report, *Canada – Measures Affecting the Importation of Dairy Products* (“*Canada – Dairy*”), *WT/DS103/AB/R and Corr.1, WT/DS/113/AB/R and Corr.1*, adopted 27 October 1999, para. 85.

Under the *Agreement on Subsidies and Countervailing Measures* a subsidy exists if:

- there is a financial contribution by a government or any public body within the territory of a Member;
- there is any form of income or price support in the sense of Article XVI of the GATT 1994;
- a benefit is thereby conferred.⁴⁸

In the *Canada - Dairy* report, the Appellate Body confirmed that to determine whether a subsidy exists within the meaning of the *Agreement on Agriculture*, it must be shown that all the constituent components of a subsidy as defined by the *SCM Agreement* exist.

Article 1.1 of the SCM Agreement, arises where the grantor makes a “financial contribution” which confers a “benefit” on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace.⁴⁹

The same approach can be found in the *US - FSC* Panel Report:

Article 1 of the SCM Agreement, which defines the term “subsidy” for the purposes of the SCM Agreement, represents highly relevant context for the interpretation of the word “subsidy” within the meaning of the Agreement on Agriculture, as it is the only article in the WTO Agreement that provides a definition of that term. This is not of course to say that the definition of “subsidy” in the SCM Agreement, which applies “[f]or the purpose of this [i.e., the SCM] Agreement”, is directly applicable to the Agreement on Agriculture.⁵⁰

However, care should be taken in relation to that part of the definition of subsidies which refers to a financial contribution by a government. Firstly a financial contribution does not necessarily mean a payment of monies. It covers a wide variety of benefits. Secondly a subsidy can exist even where the benefit is granted not directly by the government but by virtue of government action.

In the *Canada - Dairy* dispute the Appellate Body in its third report found that milk farmers were subsidizing milk exports by selling milk at a low price as their main costs were covered by the domestic milk support system which was imposed by virtue of a government action.

It falls now to consider the role of the Canadian government in financing payments made on the sale of CEM [the “unsubsidised, freely sold, milk for

⁴⁸ Article 1 of the SCM Agreement.

⁴⁹ Appellate Body Report, *Canada – Dairy*, para. 87.

⁵⁰ Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations” (“US – FSC”)*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, para. 7.150.

export]. We have agreed with the Panel that a significant percentage of producers are likely to finance sales of CEM at below the costs of production as a result of the participation in the domestic market. Canadian “government action” controls virtually every aspect of domestic milk supply and management. In particular, government agencies fix the price of domestic milk that renders it highly remunerative to producers. Government action also controls the supply of domestic milk through quota, thereby protecting the administered price. The imposition by government of financial penalties that divert CEM into the domestic market is another element of the government control over the supply of milk. Further, the degree of government control over the domestic market is emphasised by the fact that government pools, allocates and distributes revenues to producers from all domestic sales. Finally governmental action also protects the domestic market from import competition through tariffs.

In our view, the effect of these different governmental actions is to secure a highly remunerative price for sales of domestic milk by producers. In turn, it is due to this price that a significant proportion of producers covers [sic] their fixed costs in the domestic market and, as a result, has [sic] the resources profitably to sell export milk at prices that are below the costs of production.

Accordingly, we agree with the Panel that “government action” in the domestic market plays a critical part in the “financing” of payments made by a significant percentage of producers on the sale of CEM. As such, we agree with the Panel that payments made through the supply of CEM at below the COP [cost of production] standard are financed by virtue of government action. We also agree with the Panel that Canada failed to establish the contrary, pursuant to Article 10.3 of the Agreement on Agriculture.⁵¹

Article 8 the *Agreement on Agriculture* prohibits WTO Members from granting export subsidies that do not conform with the *Agreement on Agriculture* and the commitments in their Schedules.

3.3.2 List of Export Subsidies in the Agreement on Agriculture

Article 9 sets out the sort of export subsidies which WTO Members are obliged to reduce in accordance with their Country Schedules:

- direct export subsidies;
- government exports of non-commercial stocks at a price lower than comparable prices for such goods on the domestic market;
- export payments financed by virtue of government action, including payments financed by a levy on the product;
- subsidies to reduce the cost of marketing exports, including cost of handling, upgrading and other processing costs and, costs of international transport and freight;

⁵¹ Appellate Body Report, *Canada – Measures Affecting the Importation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and United States (“Canada – Dairy (21.5)(II)”)*, WT/DS103AB/RW2 and WT/DS113AB/RW2, adopted 20 December 2002, paras. 144, 145, 146.

- internal transport and freight charges on terms more favourable than for domestic shipments, if provided or mandated by government and,
- subsidies on agricultural products contingent on their incorporation in export products.

In the *Canada - Dairy* dispute, a considerable amount of interpretative guidance is offered with respect to the provisions of sub-paragraphs (a) and (c) of Article 9.1 of the Agreement on Agriculture.

With respect to the requirement of Article 9.1(a) of the *Agreement on Agriculture* that direct subsidies be provided by governments or their agencies, the Appellate Body argued that a “payment-in-kind” is only one of the forms in which “direct subsidies” may be granted. Article 9.1(a) applies to “direct subsidies”, including “direct subsidies” granted in the form of “payments-in-kind”.

The Appellate Body indicated that “payments” and “payments-in-kind” denote a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the mere fact that a “payment-in-kind” has been made provides no indication as to the economic value of the transfer effected.

A “payment-in-kind” may be made in exchange for full or partial consideration, or it may be made gratuitously. A “subsidy” involves a transfer of economic resources from the grantor to the recipient for less than full consideration. Therefore, where the recipient gives full consideration in return for a “payment-in-kind”, there can be no subsidy for the recipient is paying market rates for what it receives.

The Appellate Body ruled that the mere fact that a “payment-in-kind” has been made does not by itself imply that a “subsidy” (direct or otherwise) has been granted. The conferral of a “benefit” does not necessarily constitute a “payment-in-kind”, and a “payment-in-kind” is not necessarily a “direct subsidy”.

With respect to the requirement of Article 9.1(c) of the *Agreement on Agriculture* that payments be made and be contingent on the export of the agricultural product, *Canada - Dairy* dealt with the issue of whether the term “payment” in Article 9.1(c) should be deemed to include “payment-in-kind”.

The Appellate Body ruled that the term “payment” under Article 9.1(c) is intended to include “payments-in-kind”, that is payments made in forms other than money, including revenue foregone. In particular, the Appellate Body upheld the Panel’s finding that the provision of milk at discounted prices (below market-rates) to processors for export under Canada’s Special Milk Classes 5(d) and 5(e) constitutes “payments”, in a form other than money, within the meaning of Article 9.1(c).

The Appellate Body argued that if goods are supplied to an enterprise at a

reduced price (i.e., below market-rates), payments are in effect made to the recipient of the portion of the price that is not charged. Instead of receiving a monetary payment equal to the revenue foregone, the recipient is paid in the form of goods or services. But as far as the recipient is concerned, the economic value of the transfer is precisely the same.

Article 3.3 states that a WTO Member may not provide export subsidies listed in Article 9.1 in respect of the agricultural products or groups of products in excess of the commitments specified in Section II of Part VI of its Schedule. The reduction commitments are shown in the Schedules of WTO Members on a product-specific basis.

3.3.3 Commitments on Agricultural Export Subsidies

In Section II of Part VI of the Schedules maximum annual expenditure and volume levels are established for twenty-three different product categories, such as wheat, coarse grains, sugar, beef, butter, cheese and oilseeds.

The volume and budgetary outlay commitments for each product or group of products specified in a WTO Member's schedule are individually binding. The reduction commitments on "incorporated products" (last item in the Article 9 list) are expressed in terms of budgetary outlays only. Article 3.3 also prohibits WTO Members from providing export subsidies for products not specified in the Schedule.

Under Article 9.2(a) of the *Agreement on Agriculture*, each WTO Member must specify in its Schedule of Commitments the maximum level of budgetary outlay and the maximum quantity exported by product on an annual basis. The export subsidy commitments relate to both the amount of money spent and the quantity exported.

- or a six-year implementation period, developed country Members are required to reduce their expenditure on export subsidies by 36 per cent below the levels in the 1986-1990 base period, and to reduce the quantities benefiting from export subsidies by 21 per cent.
- developing country Members are required to cut by 14 per cent with respect to volumes over 10 years, and 24 per cent with respect to budgetary outlays over the same period.
- least developed country Members are not required to undertake any reduction commitments.

WTO Members were given a certain degree of flexibility with regard to their export commitments. Article 9.2(b) allowed, during the implementation period, a WTO Member to exceed its commitments in any given year by up to 3 per cent of expenditures and 1.75 per cent of the exported quantities, provided that it does not exceed the overall commitments over the entire implementation period.

Therefore, when quantities or budgetary outlays were not used in a given year, WTO Members could use them later on, provided however, that the cumulative amounts that would have resulted from compliance with the annual commitment levels were not exceeded. This is known as the “roll-over” principle.

As in the case of domestic subsidies, export subsidies are subject to Article 13 of the *Agreement on Agriculture*, which limits the types of action that can be taken during the implementation period. For the purposes of Article 13 of the *Agreement on Agriculture* the implementation period is defined as nine years and is considered to expire at the end of 2003.

Developing countries may, during the implementation period, make use of a special and differential treatment provision of the *Agreement on Agriculture* (Article 9.4) which allows them to grant marketing cost subsidies and internal transport subsidies, provided that these are not applied in a manner that would circumvent export subsidy reduction commitments.

25 Members have export subsidy reduction commitments specified in their Schedules, with a total of 428 individual reduction commitments.

3.3.4 Notification of Export Subsidies and Compliance with the Commitments

Each year, WTO Members are required to notify the WTO Committee on Agriculture concerning their volume of subsidized exports, their expenditures on export subsidies, and the volume of un-subsidized exports, by commodity, as specified in the country schedules.

Under the export subsidy provisions it is not possible to know if a Member has or has not complied with its commitments. Article 18 provides for the review of the implementation of commitments by the WTO Committee on Agriculture. WTO Members are required to report “at such intervals as shall be determined” on how they have complied with the *Agreement on Agriculture*.

3.3.5 Anti-circumvention Provision

Article 10 contains various provisions designed to prevent circumvention of the export subsidy commitments. According to Article 10, not only export subsidies can “threaten to lead to circumvention” of WTO Member commitments. “Non-commercial transactions” could also be used to circumvent these commitments.

Article 10.1 prohibits WTO Members from applying subsidies of a type not listed in Article 9.1. This prohibition appears to apply to both scheduled and unscheduled products. Article 10.1 refers in particular to food aid or export credits.

Article 10.2 provides that WTO Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes.

Article 10.4, covering food aid, specifies that WTO Members must ensure that:

- the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;
- that international food aid transactions are carried out in accordance with the FAO “Principles of Surplus Disposal and Consultative Obligations” and,
- such aid be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

Article 10.3 provides that any WTO Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has in fact been granted in respect of the quantity of exports in question. This provision has been the subject of extensive litigation in *Canada - Dairy*.

With respect to the export subsidization part of the claim, the complaining Member; therefore, is relieved of its burden, under the usual rules, to establish a prima facie case of export subsidization of the excess quantity, provided that this Member has established the quantitative part of the claim [i.e. can show that the exporting Member has exported more than the quantity commitments in its country schedule].

... However, the complaining Member is not required to lead in the presentation of evidence to panels, and it might well succeed in its claim even if it presents no evidence – should the responding Member fail to meet its legal burden to establish that no export subsidy has been granted with respect to the excess quantity.⁵²

This means that in relation to the anti-circumvention provisions of Article 10.3 of the *Agreement on Agriculture* the complaining Member must merely show that the exports of a particular agricultural product exceed the quantity commitments in the country schedule and claim that these excess quantities are subsidized. It is up to the defending Member to establish that they are not subsidized.

As a further means of avoiding circumvention of the export subsidy commitments, Article 11 restricts the export subsidy on a processed product to the amount that would be payable on the basic product.

⁵² Appellate Body Report, *Canada – Measures Affecting the Importation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and United States (“Canada – Dairy (21.5)(II)”)*, WT/DS103AB/RW2 and WT/DS113AB/RW2, adopted 20 December 2002, para. 75.

3.4 Dispute Settlement

The Korea - Various Measures on Beef (WT/DS161 and WT/DS169)⁵³ dispute is the only case concerning the interpretation of the provisions of the Agreement on Agriculture on domestic support. The United States and Australia challenged two types of measures affecting imports of beef to the Republic of Korea. First, the complainants alleged that the support granted by the Republic of Korea to its beef industry exceeded its reduction commitments, in breach of Articles 3, 6 and 7 of the Agreement on Agriculture. Second, the Republic of Korea maintained a separate retail distribution channel for imported beef under a “dual retail system”, which required foreign beef to be sold under a separate display, in breach of the GATT 1994 Article III:4 and not exempted under the GATT 1994 Article XX. On the first point, the dispute centered around its calculation of its AMS, based on a methodology set out in its Schedules rather than on the provisions of Annex 3. The Panel noted that the calculation methods set out in Annex 3 were “so intrinsic to the calculation of the AMS that any analysis that ignores those provisions would render substantial portions of the text of the Agreement on Agriculture meaningless.” The Appellate Body upheld the decision of the Panel on this point, noting that AMS was required to be calculated in accordance with Annex 3, rather than the methodology specified in the Republic of Korea’s Schedules. But there was insufficient information to determine whether it had in fact exceeded the annual commitment level inconsistently with Articles 3.2 and 6. Second, regarding the country’s dual retail system, the Appellate Body confirmed that this system constituted differential and less favourable treatment in violation of the non-discrimination principle in Article III:4 of the GATT 1994. The Appellate Body further considered that the measure was not “necessary” to secure compliance with consumer protection laws within the meaning of Article XX(d) the GATT 1994. In this respect, the Appellate Body developed a new “balancing test”, relating the degree of trade restriction to the degree of contribution to the regulatory goal.

The most important disputes in the area of agricultural export subsidies arose from the claim by the United States and New Zealand against Canada’s subsidised exports of milk and by the EC against the United States “Foreign Sales Corporation” Scheme.

The Canada – Dairy dispute (WT/DS103 and WT/DS 113)⁵⁴ concerned Canada’s milk market organization, which allowed domestic dairy processors to buy milk for export at lower prices than the milk destined for the domestic

⁵³ Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (“Korea – Various Measures on Beef”), WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R.

⁵⁴ Canada – Measures Affecting the Importation of Dairy Products (“Canada – Dairy”), WT/DS103/R and WT/DS/113/R, adopted 17 May 1999, WT/DS103/AB/R and WT/DS/113/AB/R, adopted 23 October 1999, Canada – Dairy (21.5), Recourse to Article 21.5 of the DSU, WT/DS103/RW and WT/DS113/RW, adopted 11 July 1999, WT/DS103/AB/RW and WT/DS103/AB/RW, adopted 3 December 2001, Canada – Dairy (21.5)(II), Second Recourse to Article 21.5 of the DSU, WT/DS103/RW2 and WT/DS113/RW2, adopted 26 July 2002, WT/DS103/AB/RW2 and WT/DS113/AB/RW2, adopted 20 December 2002.

market. In 1999, both a WTO panel and the Appellate Body decided that the provision of milk destined for export to processors of dairy products at a government mandated discounted price constituted an export subsidy and therefore was inconsistent with Articles 3, 8, 9 and 10 of the Agreement on Agriculture. Canada was found to be exporting subsidized milk in excess of its commitment levels and thereby acting inconsistently with the Agreement on Agriculture. In response to the Panel and Appellate Body reports, Canada introduced a new “commercial export milk” scheme. This reform allowed milk farmers and dairy processors to freely set the price to be paid for milk destined for export. The United States and New Zealand claimed that this reform did not bring Canada’s export subsidy system into conformity with its WTO obligations. In January 2001, the United States and New Zealand launched non-compliance WTO dispute settlement proceedings. The Panel in July 2001 agreed with the complainants that Canada’s new system continued to provide an export subsidy, as the price paid for export milk was below the price received for domestic milk. Canada appealed the ruling. In December 2001, the Appellate Body reversed the Panel’s findings, that the supply of CEM by domestic milk producers to domestic dairy processors involved “payments” on the export of milk “that are financed by virtue of governmental action” under Article 9.1(c) of the Agreement on Agriculture. Therefore, the Appellate Body was unable to complete the analysis of the claims made by New Zealand and the United States under Articles 9.1(c) or 10.1 of the Agreement on Agriculture, or the claim made by the United States under Article 3.1 of the SCM Agreement. The United States and New Zealand then requested the establishment of another WTO panel to review the new Canadian system in the light of the second Appellate Body Report. In July 2002, the Panel concluded that Canada was continuing to provide illegal export subsidies to Canadian dairy processors by virtue of the fact that the cost of milk production was covered by the sale of milk to the domestic market at a government mandated price and the sales price of the milk destined for export was below the true cost of production. In December 2002, the Appellate Body upheld the Panel’s findings.

The history of the US - FSC case (WT/DS108)⁵⁵ dates back to 1971 to the Domestic International Sales Corporation (DISC) scheme, which was held to be an illegal export subsidy by a GATT panel in 1976.⁵⁶ The United States replaced the DISC scheme with the FSC scheme in 1984. In November 1997 the EC complained that the FSC scheme was inconsistent with United States obligations under, inter alia, Article 3.1(a) and Article 3.1(b) of the SCM Agreement, by granting subsidies contingent in law upon export performance and the use of domestic over imported goods and, under Articles 3 and 8 in conjunction with Articles 9.1(d), 10.1, and 10.3 of the Agreement on Agriculture, by granting export subsidies to agricultural goods in excess of its reduction commitments. A FSC is a shell company of a United States corporation established in a tax haven (more than 90 per cent are in the Virgin Islands, Barbados and Guam) whose aim is to serve as a vehicle for

⁵⁵ United States – Tax Treatment for “Foreign Sales Corporations (“US – FSC”), WT/DS108/R, adopted 8 October 1999, WT/DS108/AB, adopted 24 February 2000, US – FSC (21.5), Recourse to Article 21.5 of the DSU, WT/DS108/RW, adopted 20 August 2001, WT/DS108/AB/RW, adopted 14 January 2000.

⁵⁶ GATT Panel Report, United States Tax Legislation (DISC), L/4422 - 23S/98, adopted in December 1981.

United States exports and in this way reduce the domestic tax payable under normal export arrangements by 15 per cent to 30 per cent. The Panel found the FSC to constitute an illegal export subsidy under both the Subsidies Agreement and (in relation to agricultural products) the Agreement on Agriculture. The United States appealed the Panel Ruling, but the Appellate Body confirmed the panel findings on the illegality of the FSC scheme. The Appellate Body concluded that the unlimited nature of the FSC subsidies meant that there was a threat of circumvention, so the United States had acted inconsistently with Article 10.1. In order to comply with the WTO ruling, the United States introduced the FSC Replacement Act (ETI Act). The ETI Act, however, did not modify the substance of the export subsidy scheme and as a result, the EC launched a further action on compliance. The WTO compliance panel examining the ETI Act found that it also constituted a prohibited export subsidy under WTO rules. The United States appealed but the WTO Appellate Body once more confirmed the panel findings.

4. OTHER PROVISIONS OF THE AGREEMENT ON AGRICULTURE

4.1 Export Restrictions

The *Agreement on Agriculture* requires WTO Members considering instituting new export prohibition restrictions on foodstuffs to do so in accordance with Article XI:2(a) of the GATT 1994. In particular:

- to give due consideration to the effects of such restrictions on importing Members' food security;
- to give notice as far in advance as practicable to the Committee on Agriculture, including the measure's nature and duration and, consult upon request, with any other Member having a substantial interest as an importer regarding the measure in question and, on request, give it necessary information.

According to Article 12 of the *Agreement on Agriculture*, this rule applies to developing countries only in so far as they are net exporters of the foodstuff in questions.

4.2 "Peace Clause"

A specific provision, Article 13 of the *Agreement on Agriculture* entitled "Due Restraint" (better known as the "peace clause"), establishes special rules regarding legal actions in relation to subsidies for agricultural products. This provision is valid during the implementation period specified in the *Agreement on Agriculture* ("for the purposes of Article 13 the nine-year period commencing in 1995" - until 1 January 2004).

The idea is for all WTO Members to show due restraint before initiating either domestic market trade defence instruments or WTO dispute settlement proceedings against agricultural subsidies.

Export subsidies which are in full conformity with the *Agreement on Agriculture* are not prohibited by the *SCM Agreement*, although they remain countervailable. Domestic supports which are in full conformity with the *Agreement on Agriculture* are not actionable multilaterally, although they also may be subject to countervailing duties. Finally, domestic supports within the "Green box" of the *Agreement on Agriculture* are not actionable multilaterally nor are they subject to countervailing measures. After the implementation period, the *SCM Agreement* shall apply to subsidies for agricultural products subject to the provisions of the *Agreement on Agriculture*, as set forth in its Article 21.

The “peace clause” excepts certain subsidies from action under the *Agreement on Subsidies and Countervailing Measures*.

- Firstly, the Annex 2 domestic subsidies which are supposed to be non-distorting subsidies such as those on research and pest and disease control are non-actionable for countervailing duty purposes.
- Secondly, domestic subsidies which comply with Article 6 of the Agreement on Agriculture are exempt from countervailing duties only where there is no injury and due restraint has been exercised.
- Thirdly, domestic subsidies to specific commodities which exceed the 1992 level are not protected by the “peace clause”. This limited protection must be contrasted to the way in which Aggregate Measurement of Support (AMS) is calculated. Article 13 refers to a commodity by commodity comparison whereas the AMS commitments are on an industry wide basis.

However, export subsidies are not protected if there is proof of injury and due restraint has been shown. In this case a WTO Member can take unilateral or multilateral action against such support measures.

Article 13 essentially provides that subsidies which fully comply with the terms of the *Agreement on Agriculture* will be given limited protection against countervailing actions and non-violation claims in dispute settlement. Before actions can be taken there must be proof of, or the threat of injury and, due restraint must be shown. The expression “due restraint” is not defined in the *Agreement on Agriculture*.

Under the terms of Article 13 an importing WTO Member is not precluded from taking action against subsidies once injury is shown and due restraint has been exercised. If the exporting WTO Member challenges the legality of the subsidies under the *Agreement on Agriculture*, the only effective remedy is to seek adjudication in the WTO.

4.3 Resolving Disputes

In the case of disputes involving provisions of the *Agreement on Agriculture*, the general WTO dispute settlement procedures apply. The provisions of Articles XXII and XXIII of the GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement. The *Agreement on Agriculture* also provides for certain mechanisms that can be used by WTO Members to address their concerns without recourse to the dispute settlement procedures.

The review process of the Committee on Agriculture provides a forum for discussion and consultation. This process is based on a notification procedure and on a provision of Article 18.6 allowing any WTO Member to raise at any time any matter relevant to the implementation of the commitments under the

reform programme as set out in the *Agreement on Agriculture*.

The use of instruments under the auspices of the Committee on Agriculture does not however, prevent any WTO Member from seeking formal dispute settlement at any time.

4.4 Continuation Clause and Final Provisions

The commitments taken under the *Agreement on Agriculture* and within the WTO Members' schedules are part of an ongoing process. During the Uruguay Round, WTO Members agreed to hold further negotiations on agriculture commencing one year before the end of the six-year implementation period. Article 20 of the *Agreement on Agriculture* provides that negotiations should take into account:

- the experience from implementing the reduction commitments;
- the effects of the reduction commitments on world trade in agriculture;
- non-trade concerns, special and differential treatment to developing-country Members and, the objective to establish a fair and market-oriented agricultural trading system, as well as the other objectives and concerns mentioned in the preamble to this Agreement; and
- what further commitments are necessary to achieve the above mentioned long-term objectives.

Article 21 stipulates that the GATT 1994 agreements and other agreements listed in Annex 1A to the WTO Agreement “shall apply subject to the provisions” of the *Agreement on Agriculture*. In other words, in the event of conflict between the *Agreement on Agriculture* and another agreement, it is the *Agreement on Agriculture* that takes precedence.

4.5 Test Your Understanding

1. **Where are the major provisions on domestic support in the Agreement on agriculture?**
2. **What measures are covered by the “Amber Box”? What is the “aggregate measurement of support”?**
3. **Are the domestic support levels bound? If so, are there reduction commitments? Do the reduction commitments somehow differ according to the country?**
4. **Are all domestic support measures subject to reduction commitments? If not, what domestic support measures are excluded from the AMS calculation? Please state the relevant provisions of the Agreement on Agriculture.**

- 5. What is the fundamental requirement of the “Green Box” exemption? Give examples of “Green Box” measures.**
- 6. What is the definition of a “Blue Box” measure? What are the conditions? What are the other exemptions?**
- 7. Why is it important for a WTO Member to notify its domestic support measures?**
- 8. How do export subsidies differ from domestic support measures. Why are they distinguished in the WTO Agreements? Which WTO Agreements are relevant to the determination of export subsidies?**
- 9. Please give examples of export subsidies under the Agreement on Agriculture. What are the commitments of WTO Members on agricultural export subsidies? Explain the “roll over” mechanism. Is it necessary to notify export subsidies?**
- 10. Explain the mechanism of the anti-circumvention provision.**
- 11. Give a brief overview of WTO disputes on agricultural export subsidies.**
- 12. What are the requirements of the Agreement on Agriculture for WTO Members to adopt export restrictions?**
- 13. What is the effect of the “peace clause”? Is a WTO Member precluded from taking action against subsidies once injury is shown and “due restraint” has been exercised?**
- 14. Does dispute resolution under the Agreement on Agriculture differ from general WTO dispute settlement procedures? What is the role, if any, of the WTO Committee on Agriculture in dispute settlement?**

5. OTHER WTO AGREEMENTS RELEVANT TO AGRICULTURE

Objectives

On completion of this section, the reader will be able:

- to identify other WTO Agreements relevant to Agriculture;
- to analyse the importance of their provisions for trade in agricultural products.

5.1 Agriculture in the GATT

Agricultural products are “goods” for the purposes of the GATT 1994. There is therefore no *a priori* exclusion of agriculture from the GATT 1994.

Other than the country schedules established within the GATT 1994 Article II, the basic principles of the GATT 1994 of most relevance to agriculture are: the General Most-Favoured-Nation Treatment of Article I; the General Elimination of Quantitative Restrictions of Article XI; the Non-discriminatory Administration of Quantitative Restrictions of Article XIII and General Exceptions of Article XX.

This section, examines the GATT 1994 provisions relevant to trade in agricultural commodities.

5.1.1 Article I of the GATT 1994 on the “Most-Favoured-Nation Treatment”

The Contracting Parties of the GATT 1947 were bound to accord to the products of other contracting parties treatment no less favourable than that accorded to products of any other country.

WTO Members have entered into similar commitments, under the GATT 1994 (Article I) for trade in goods. It consists of the commitment by a WTO Member to accord **immediately** and **unconditionally** to any other WTO Member all the advantages it would accord to any other country.

The Most-Favoured-Nation clause applies to:

- “any advantage, favour, privilege or immunity” accorded by a WTO Member to a product originating in or destined for any other country;
- products, whether or not subject to a tariff binding during trade negotiations;
- imports and exports, and in connexion with imports or exports and international transfers of funds (current payments).

The MFN clause does not prohibit the establishment of a customs union or free-trade area between trading partners. Article XXIV of the GATT 1994 determined what conditions must be met so as to establish customs unions and free trade areas.

The Decision of 28 November 1979 called the “Enabling Clause”, on differential and more favourable treatment, reciprocity and, fuller participation of developing countries, is also an exemption from the MFN clause. WTO Members may accord differential and more favourable treatment to developing countries, without according such treatment to other WTO Members. The Enabling Clause applies under the Generalized System of Preferences and regional arrangements entered into amongst developing country Members. The decision of the WTO General Council of 15 June 1999 allows developing countries to extend these exceptions to least-developed countries.

In addition to the free-trade agreements and the Generalized System of Preferences exceptions, in exceptional circumstances, the WTO Ministerial Conference can grant waivers of MFN or other WTO obligations. The Ministerial Conference can do so by consensus or with approval of a three-fourths majority of WTO Members.

Waivers of WTO obligations are governed by Article IX:3 of the WTO Agreement, and by the Understanding on Respect of Waivers of Obligations under the GATT 1994.

5.1.2 Article XI of the GATT 1994 on the “General Elimination of Quantitative Restrictions”

Although the GATT 1994 aims to liberalize international trade, it also recognises that countries may wish to protect their industries from foreign competition. The GATT 1994 urges them to keep such protection at reasonable levels and to use tariffs as the means of protection. The principle of protection by tariffs is reinforced by the provisions prohibiting WTO Members from using quantitative restrictions on imports (Article XI). The rule is subject to a number of specified exceptions.

Paragraph 1 of the GATT 1994 Article XI states the basic principle:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The Panel in the *Japan-Semi-conductor* dispute noted that:

(...) This wording was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.⁵⁷

The Panel in *India - Quantitative Restrictions* stated:

The text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions “other than duties, taxes or other charges”. The scope of the term “restriction” is also broad, as seen in its ordinary meaning, which is “a limitation on action, a limiting condition or regulation.⁵⁸

The *EC - Bananas II* Panel Report found that a tariff quota is not per se a restriction, even if the over-quota tariff is prohibitively high.⁵⁹

The legal status of the measure is not decisive. In the case of non-mandatory measures the *Japan - Semi-Conductor* Panel Report identified two essential criteria:

- first, there should be reasonable grounds to believe that sufficient incentives or disincentives existed for such measures to take effect;
- secondly, the operation of the measures should be essentially dependent on government action or intervention.⁶⁰

Article XI:2 lists three exceptions to the principle in paragraph 1:

- export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member;
- import and export prohibitions or restrictions necessary to the application of standards, or regulations for the classification, grading or marketing of commodities in international trade;
- import restrictions instituted as a part of the management of domestic agricultural production and marketing.

There is no exception to Article XI:1 based purely on the social or economic purpose of the measure. Article XI protects expectations of WTO Members as to competitive conditions, not trade volumes. Therefore, in the context of disputes proceedings under Article XXIII, the presumption that a measure

⁵⁷ Panel Report, *Japan – Trade in Semi-Conductors* (“*Japan – Semi-Conductors*”), BISD 35S/116, adopted 4 May 1989, para. 104.

⁵⁸ Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“*India – Quantitative Restrictions*”), WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, para. 5.128.

⁵⁹ Panel Report, *EEC – Import regime for bananas* (“*EC – Bananas II*”), DS38/R, 1994 (unadopted).

⁶⁰ Panel Report, *Japan – Trade in Semi-Conductors* (“*Japan – Semi-Conductors*”), BISD 35S/116, adopted 4 May 1989, para. 106.

inconsistent with Article XI had nullified or impaired a benefit accruing under that provision stands irrespective of arguments concerning trade volumes. It follows that the inconsistency itself does not depend on such arguments. However, where the measures are indirect or non-explicit their existence may in practice depend on evidence of this kind. It will be necessary to prove the causal connexion between the low level of trade and the contested measure.

5.1.3 Article XIII of the GATT 1994 on the “Non-discriminatory Administration of Quantitative Restrictions”

Article XIII relates to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions - the general ban on quotas and other non-tariff restrictions contained in Article XI.

Article XIII is an application to specific situations of the general principle stated in Article I of the GATT 1994, which prohibits discrimination between the products of different foreign countries.

According to the Panel Report in the *EC - Bananas II* case, Article XIII does not apply to the internal allocations of a quota between importers, provided that each of them is free to import from any source.⁶¹

The application of the rules to tariff quotas is illustrated by the *EC - Bananas III* case:

Article XIII:5 provides that the provisions of Article XIII apply to “tariff quotas”. The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.⁶²

Article XIII:2 provides that, if a WTO Member wishes to allocate a quota or a tariff rate quota among supplying countries, it must be done according to certain rules. The fundamental rule (or in WTO terms the “chapeau” of Article XIII:2) is that the allocation has to reflect as closely as possible the trade patterns which would occur in the absence of the market access restriction.

When a WTO Member decides to allocate a quota among supplying countries, agreement with respect to the allocation of shares may be sought with all other WTO Members having a substantial interest in supplying the product. If this method is not reasonably practicable, the WTO Members having a substantial interest in supplying the product must be allocated shares based

⁶¹ Panel Report, *EEC – Import regime for bananas (“EC – Bananas II”)*, DS38/R, 1994 (unadopted), para. 141.

⁶² Decision by the Arbitrators (DSU Art. 22.6) in *European Communities – Regime for the importation, sale, and distribution of bananas*, WT/DS27/ARB, adopted 9 April 1999, para. 5.9.

upon the proportions they have supplied, during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade. No conditions or formalities may be imposed which would prevent any contracting party from utilizing fully the share.

In the *EC - Bananas III* case, the Panel observed:

In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime. In interpreting the terms of Article XIII, it is important to keep their context in mind.⁶³

The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on their use in Article XI), they are to be used in the least trade-distorting manner possible.⁶⁴

Article XIII:2(d) was also interpreted by the Panel in *EC – Bananas III* case:

The terms of Article XIII:2(d) make clear that the combined use of agreements and unilateral allocations to Members with substantial interests is not permitted. The text of Article XIII:2(d) provides that where the first “method”, i.e., agreement, is not reasonably practicable, then an allocation must be made. Thus, in the absence of agreements with all Members having a substantial interest in supplying the product, the Member applying the restriction must allocate shares in accordance with the rules of Article XIII:2(d), second sentence. In the absence of this rule, the Member allocating shares could reach agreements with some Members having a substantial interest in supplying the product that discriminated against other Members having a substantial interest supplying the product, even if those other Members objected to the shares they were to be allocated.⁶⁵

The Appellate Body in the *EC – Bananas III* case observed, as regards WTO Members not having a substantial interest:

On the first issue raised by the European Communities, we conclude that the Panel found correctly that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with the requirements of Article XIII:1 of the GATT 1994.⁶⁶

⁶³ Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Complaint by Ecuador (“EC – Bananas III (Ecuador)”)*, WT/DS27/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, para. 7.68.

⁶⁴ Panel Report, *EC – Bananas III (Ecuador)*, para. 7.68.

⁶⁵ Panel Report, *EC – Bananas III (Ecuador)*, para. 7.81.

⁶⁶ Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas (“EC – Bananas III”)*, WT/DS27/AB/R, adopted 25 September 1997, para. 162.

The calculation of shares must be based on the total imports from WTO Members and non-Members having a substantial interest in the product in question.

In the *EC – Poultry* case the Panel held that Article XIII applies to TRQs no matter what their origin. Thus even if a TRQ is opened as a form of compensation to another Member for another trade barrier (in this case as compensation for the EC’s oilseeds regime) the non-discrimination provisions of Article XIII apply.

In *EC – Poultry*, Brazil argued that the TRQ was opened to compensate them for a breach of the oilseeds commitment by the EC and wanted the whole TRQ to itself. It was observed by the Panel that the shares calculated for WTO Members on the basis of what they might be expected to obtain in the absence of a restriction “do not necessarily determine which Members are permitted to participate in the actual allocation of licences, particularly in an ‘others’ category”.⁶⁷ The Panel also stated that WTO Members are entitled (but not obliged) to allow non-WTO Members to participate in the allocation. It would also be inconsistent with Article XIII to consider special factors in respect of one WTO Member only.

Article 4 of the *Agreement on Agriculture* does not derogate from the obligations of Article XIII.

5.1.4 Article XX of the GATT 1994 on the “General Exceptions”

General exceptions to the rules of the GATT 1994 are provided by Article XX thereof. In particular, WTO Members cannot be prevented from adopting or enforcing measures necessary to protect, among the others, public morals; human, animal or plant life or health; national treasures of artistic, historic or archaeological value; exhaustible natural resources.

Article XX exceptions apply to all GATT obligations.⁶⁸

Article XX consists of a general introductory clause (commonly referred to as the “chapeau”) and ten individual “general exceptions” to GATT, set out in paragraphs (a) to (j).

The chapeau of Article XX states that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination →

⁶⁷ Panel Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* (“*EC – Poultry*”), WT/DS69/R, adopted 23 July 1998, as modified by the Appellate Body Report, para. 235.

⁶⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“*US – Gasoline*”), WT/DS2/AB/R, adopted 20 May 1996, sec. IV.

between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures...

The three standards are clearly identified in the chapeau:

- arbitrary discrimination;
- unjustifiable discrimination;
- disguised restriction.

Article XX has been closely examined by the WTO Panel and Appellate Body in the *US - Shrimp* dispute.⁶⁹

The Appellate Body indicated in *US - Shrimp* that in order to justify a measure under Article XX, the measure at issue must not only come under one or another of the particular exceptions (paragraphs (a) to (j)) listed under Article XX; it must also satisfy the requirements imposed by the chapeau of Article XX. Therefore, the analysis is two-tiered:

- first, provisional justification by reason of characterization of the measure under the paragraph of Article XX;
- second, further appraisal of the application of the same measure under the introductory clauses in the chapeau of Article XX.⁷⁰

The “least inconsistent measure” principle has been identified in both the chapeau and some of the individual paragraphs of Article XX. This principle has been examined by a number of GATT panels and by WTO Panel and Appellate Body experts in several major disputes.

Several paragraphs of Article XX are particularly relevant to trade in agricultural products.

Article XX(a) of the GATT 1994 creates an exception for measures “*necessary to protect public morals*”. There is no authoritative guidance on the scope of this exception as the issue has never come before a GATT or WTO panel. However, the possibility to involve this exception in relation to labour standards is currently being discussed.

National measures “*necessary to protect human, animal or plant life or health*” are permitted by Article XX(b) of the GATT 1994. WTO Members have the right to determine the level of health protection that they consider appropriate. Countries may adopt measures forbidding or restricting the sale or distribution of goods that have been produced by objectionable process and productions methods.

⁶⁹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*US – Shrimp*”), WT/DS58/AB/R, adopted 6 November 1998.

⁷⁰ Appellate Body Report, *US – Shrimp*, para. 119 and Appellate Body Report, *US – Gasoline*, sec. IV.

The elaboration of rules for the application of paragraph (b) is one of the objectives of the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures*. Article 2.4 of the *SPS Agreement* provides that measures which comply with the “relevant provisions” of the *SPS Agreement* are presumed to satisfy Article XX(b). Furthermore, many of the national measures relevant to this exception constitute technical regulations as defined by the *TBT Agreement*.

Article XX(d) of the GATT 1994 permits Members to take measures necessary to secure compliance with laws or regulations which are not consistent with the provisions of the GATT 1994, including those relating to customs enforcement, the enforcement of monopolies operated under Article II:4 and Article XVII of the GATT 1994, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

Article XX(g) of the GATT 1994 creates an exception for measures relating to the conservation of exhaustible natural resources if they are made effective in conjunction with restrictions on domestic production or consumption. For instance, WTO panels have found that fish stocks and clean air constitute “exhaustible natural resources”.⁷¹

Article XX(h) of the GATT 1994 creates an exception in favour of obligations under intergovernmental commodity agreements.

Article XX(i) of the GATT 1994 permits restrictions on export of domestic materials necessary to insure essential quantities of such materials to a domestic processing industry during periods when their price is held below the world price as part of a governmental stabilization plan. However, such restrictions may not operate to increase the exports of or the protection afforded to that industry, and may not depart from the non-discrimination provisions of the GATT 1994.

The GATT 1994 Article XX(j) permits action to be taken when it is essential to the acquisition or distribution of products in general or local short supply, provided that it is recognised that all WTO Members are entitled to an equitable share of the international supply of such products, and that any such measures are discontinued as soon as the conditions giving rise to them have ceased to exist.

5.1.5 Dispute Settlement

In both Tuna-Dolphin panel decisions⁷² (each unadopted) the panels found the United States embargoes on foreign tuna to violate, inter alia, Article XI



⁷¹ GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98 (1989), para. 4.4, Panel Report, *US – Gasoline*, sec. III.B.

⁷² *United States – Restrictions on Imports of Tuna (“US – Tuna (I)”)*, DS21/R – 39S/155, 3 September 1991 and *United States – Restrictions on Imports of Tuna (“US – Tuna (II)”)*, DS29/R – 33S/839, 16 June 1994.

of the GATT 1994, and not to benefit from the exemption under Article XX of the GATT 1994. The 1991 panel found that the United States measures did not qualify for an exemption under Article XX of the GATT because that provision did not permit the protection of animals outside the territory of the state adopting the relevant measure. Furthermore, the United States measures were not “necessary” within the meaning of Article XX(b) of the GATT insofar as the goal sought to be protected by the United States might have been addressed through other means. The United States linked the maximum “incidental” dolphin-taking rate which Mexico had to meet during a particular period (in order to be able to export tuna to the United States) to the rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether at a given point of time, their policies met the US standards. The 1994 panel left open the possibilities that Article XX of GATT could permit the protection of animals extraterritorially, but found that the United States measures did not qualify for exemption under Article XX because they were designed not to achieve environmental goals directly, but to coerce other governments into adopting specific environmental policies.

The US – Shrimp (WT/DS58)⁷³ dispute concerned a prohibition imposed by the United States on the importation of certain shrimp and shrimp products under section of 609 of Public Law 101-162 (“Section 609”). Section 609 prohibited importation to the United States of shrimp harvested with technology that may adversely affect certain sea turtles. This prohibition was a result of the United States regulations requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices (“TEDs”) or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting. These regulations were modified so as to require the use of approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling would interact with sea turtles, with certain limited exceptions. The Panel found, and the Appellate Body upheld the finding, that the United States measure was unjustified within the meaning of the chapeau of Article XX of the GATT 1994, and therefore did not qualify for any exception from the prohibition of art. XI. The Appellate Body noted that the measure had to be “primarily aimed” both at the conservation of an exhaustible natural resource and at rendering affective the restrictions on domestic production or consumption. It found that the scope of the United States measure was fairly precisely focused on shrimp fishing that threatened turtles and was designed to influence countries to adopt specific programmes to protect them. The Appellate Body emphasized the distinction between the measures in question, and the way these measures were applied. The first was to be dealt with under the individual paragraphs of Article XX, and the latter under the chapeau. Thus, it was concluded that the United States measure, while qualifying for provisional justification under Article XX(g), failed to meet the requirements of the chapeau of Article XX, and therefore, was not justified under Article XX of the GATT 1994. In January 2000, Malaysia launched non-compliance WTO dispute settlement proceedings. However, the compliance Panel concluded that the United States has made a prima facie

⁷³ United States – Import Prohibition of Certain Shrimp and Shrimp Products (“US – Shrimp”), WT/DS58/R, adopted 15 May 1998, WT/DS58/AB/R, adopted 12 October 1998.

case that Section 609 applied in a manner that no longer constituted means of unjustifiable or arbitrary discrimination, as was identified by the Appellate Body in its Report.

In the Korea – Various Measures on Beef case (WT/DS161 and WT/DS169)⁷⁴ the United States and Australia challenged two types of measures affecting imports of beef to the Republic of Korea. The complainants alleged that the Republic of Korea maintained a separate retail distribution channel for imported beef under a “dual retail system”, which required foreign beef to be sold under a separate display, in breach of the GATT 1994 Article III:4 and not exempted under the GATT 1994 Article XX. On this point, the Appellate Body confirmed that this system constituted differential and less favourable treatment in violation of the non-discrimination principle in the GATT 1994 Article III:4. The Appellate Body further considered that the measure was not “necessary” to secure compliance with consumer protection laws within the meaning of GATT Article XX(d). In this respect, the Appellate Body developed a new “balancing test”, relating the degree of trade restriction to the degree of contribution to the regulatory goal. Therefore, the Appellate Body Report in Korea – Various Measures on Beef endorsed the Panels finding that a requirement that imposed that domestic beef be sold in separate shops was not necessary to prevent deception regarding origin since a reasonable, less-trade restrictive alternative existed in the form of conventional anti-fraud measures.

5.2 GATS and Agriculture

5.2.1 Introduction

Somewhat surprisingly, the General Agreement on Trade in Services can also apply to the trade in agricultural goods. This is the conclusion on the basis of the findings of the Appellate Body in the *EC – Bananas III* case.⁷⁵

In *EC – Bananas III* the European Communities argued that the GATS did not apply to the EC import licensing procedures because they were “not measures ‘affecting trade in services’ within the meaning of Article I:1 of the GATS”.⁷⁶ The Panel found that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.⁷⁷

⁷⁴ Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (“Korea – Various Measures on Beef”), WT/DS161/R and WT/DS169/R adopted 31 July 2000, WT/DS161/AB/R and WT/DS169/AB/R, adopted 11 December 2000.

⁷⁵ EC – Regime for the Importation, Sale, and Distribution of Bananas (“EC – Bananas III”) WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, adopted 22 May 1997, WT/DS27/AB/R, adopted 9 September 1997.

⁷⁶ Appellate Body Report, European Communities – Regime for the Importation, Sale, and Distribution of Bananas (“EC – Bananas III”), WT/DS27/AB/R, adopted 25 September 1997, para. 218.

⁷⁷ Panel Report, European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Complaint by Ecuador (“EC – Bananas III (Ecuador)”), WT/DS27/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, para. 7.286.

In addressing this issue, the Appellate Body noted that:

“(...) Article I:1 of the GATS provides that “[t]his Agreement applies to measures by Members affecting trade in services”. In our view, the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word “affecting” implies a measure that has “an effect on”, which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term “affecting” in the context of Article III of the GATT is wider in scope than such terms as “regulating” or “governing”.

(...) Article I:3(b) of the GATS provides that “‘services’ includes any service in any sector except services supplied in the exercise of governmental authority” (emphasis added), and that Article XXVIII(b) of the GATS provides that the “‘supply of a service’ includes the production, distribution, marketing, sale and delivery of a service”. There is nothing at all in these provisions to suggest a limited scope of application for the GATS. We also agree that Article XXVIII(c) of the GATS does not narrow “the meaning of the term ‘affecting’ to ‘in respect of’.”⁷⁸

The second issue addressed by the Appellate Body in the *EC – Bananas III* case was whether the GATS and the GATT 1994 are mutually exclusive agreements.

The Appellate Body agreed with the Panel that the EC banana import licensing procedures were subject to both the GATT 1994 and the GATS, and that the GATT 1994 and the GATS may overlap in application to a particular measure. In particular, the Appellate Body noted:

“The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, inter alia, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the

⁷⁸ Appellate Body Report, *EC – Bananas III*, para. 220.

*supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.*⁷⁹

The GATS is an opt-in system. The general principles of the GATS are set out in a series of Articles much like the GATT covering Most Favoured Nation and national treatment. These general principles apply to different services sectors to the extent that a WTO Member chooses to be bound by them. Thus, if a WTO Member refuses to have these principles apply to any service sector then they have no impact. If however, a WTO Member chooses to allow competition from foreign service suppliers in a specific sector then the principles do apply. WTO Members also mix and choose. In other words, WTO Members can provide that there should be competition between national and third country service providers subject to certain restrictions. Any restrictions must be set out in the Country Schedule.

5.2.2 The Bananas Case

The European Community has established a complex system for the allocation of the right to import bananas within a TRQ. The object of the licensing system was to spread entitlement to the licences among as many operators in the bananas marketing chain from producers to distributors as possible.

One category of licence holders were the banana ripeners and distributors. The EC's GATS country schedule sets out no restrictions on the provision of distribution services. In other words, this service sector is subject to the full force of the non-discrimination provisions of the GATS in Article XVII on National Treatment and Article II on Most-Favoured-Nation Treatment.

The European Communities appealed the Panel's finding:

“... that the obligation contained in Article II:1 of GATS to extend “treatment no less favourable” should be interpreted in casu to require providing no less favourable conditions of competition.”

The critical issue was whether Article II:1 of the GATS applies only to *de jure*, or formal, discrimination or whether it applies also to *de facto* discrimination.

The Appellate Body explained:

“The GATS negotiators chose to use different language in Article II and Article XVII of the GATS in expressing the obligation to provide “treatment



⁷⁹ Appellate Body Report, EC – Bananas III, para. 221.

no less favourable”. The question naturally arises: if the GATS negotiators intended that “treatment no less favourable” should have exactly the same meaning in Articles II and XVII of the GATS, why did they not repeat paragraphs 2 and 3 of Article XVII in Article II? But that is not the question here. The question here is the meaning of “treatment no less favourable” with respect to the MFN obligation in Article II of the GATS. There is more than one way of writing a de facto non-discrimination provision. Article XVII of the GATS is merely one of many provisions in the WTO Agreement that require the obligation of providing “treatment no less favourable”. The possibility that the two Articles may not have exactly the same meaning does not imply that the intention of the drafters of the GATS was that a de jure, or formal, standard should apply in Article II of the GATS. If that were the intention, why does Article II not say as much? The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination. Moreover, if Article II was not applicable to de facto discrimination, it would not be difficult — and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods — to devise discriminatory measures aimed at circumventing the basic purpose of that Article.

For these reasons, we conclude that “treatment no less favourable” in Article II:1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination. We should make it clear that we do not limit our conclusion to this case. We have some difficulty in understanding why the Panel stated that its interpretation of Article II of the GATS applied “in casu”.⁸⁰

The European Communities argued that the EC licensing system for bananas was not discriminatory under Articles II and XVII of the GATS, because the various aspects of the system, including the operator category rules, the activity function rules and the special hurricane licence rules, “pursue entirely legitimate policies” and “are not inherently discriminatory in design or effect”.⁸¹

The Appellate Body did not agree with this argument:

“We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the “aims and effects” of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT 1994 context, the “aims and effects” theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations “should not be applied to imported or domestic products so as to afford protection to domestic production”. There is no comparable provision in the GATS.”⁸²

The Appellate Body did not agree with the European Communities that the aims and effects of the operator category system were relevant in determining whether or not that system modified the conditions of competition between

⁸⁰ Appellate Body Report, EC – Bananas III, paras. 233, 234.

⁸¹ Appellate Body Report, EC – Bananas III, para. 240.

⁸² Appellate Body Report, EC – Bananas III, para. 241.

service suppliers of EC origin and service suppliers of third-country origin. In particular, it upheld the finding of the Panel and stated:

“Based on the evidence before it, the Panel concluded “that most of the suppliers of Complainants’ origin are classified in Category A for the vast majority of their past marketing of bananas, and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas”.⁸³ We see no reason to go behind these factual conclusions of the Panel.

We concur, therefore, with the Panel’s conclusion that “the allocation to Category B operators of 30 per cent of the licences allowing for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants’ origin and is therefore inconsistent with the requirement of Article XVII of GATS”.⁸⁴ We also concur with the Panel’s conclusion that the allocation to Category B operators of 30 per cent of the licences for importing third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with the requirements of Article II of the GATS.”⁸⁵

The Appellate Body also noted the Panel’s factual finding that “most of the service suppliers of Complainants’ origin will usually be able to claim reference quantities only for primary importation, and possibly for customs clearance, but not for the performance of ripening activities”.⁸⁶ Given these factual findings, the Appellate Body found:

“(…) no reason to reverse the Panel’s legal conclusion that the allocation to ripeners of a certain proportion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favourable conditions of competition for like service suppliers of Complainants’ origin, and is therefore inconsistent with the requirements of Article XVII of GATS.”⁸⁷

The importance of this finding is that WTO Members cannot design rules in such a way that they will discriminate in favour of nationals while formally respecting the rules on non-discrimination. However, this only applies where the WTO Member in question has made commitments in that service sector.

5.3 The Agreement on Safeguards

5.3.1 General Safeguard Measures⁸⁸

⁸³ Panel Report, EC – Bananas III, para. 7.334.

⁸⁴ Panel Report, EC – Bananas III, para. 7.341.

⁸⁵ Appellate Body Report, EC – Bananas III, paras. 243, 244.

⁸⁶ Panel Report, EC – Bananas III, para. 7.362.

⁸⁷ Appellate Body Report, EC – Bananas III, para. 246.

⁸⁸ Special Safeguard Measures under Article 5 of the Agreement on Agriculture are discussed in Section 2 “Market Access” of this Module..

A WTO Member may restrict imports of a product temporarily if its domestic industry is injured or threatened with injury caused by a surge in imports. The injury, however, has to be serious.

Safeguard measures are “emergency” actions designed to protect a domestic industry against increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member’s domestic industry.

“Safeguard measures” may result in the imposition of quantitative import restrictions or in a tariff increase above bound rates.

The WTO Appellate Body has described such action as an “extraordinary remedy”,⁸⁹ the purpose of which is to address urgent situations where a domestic industry needs temporary measures to adjust to altered conditions of competition brought by increased imports.

Safeguard measures were previously available only under the GATT 1994 Article XIX, entitled “Emergency Action on Imports of Particular Products”. The *WTO Agreement on Safeguards* established specific rules for the application of safeguard measures. The guiding principles are that:

- such measures must be temporary;
- they may be imposed only when imports are found to cause, or threaten to cause serious injury to a competing domestic industry;
- they must be applied on a non-selective (i.e., most-favoured-nation) basis;
- they must be progressively liberalized while in effect; and
- the WTO Member imposing them must pay compensation to the WTO Members whose trade is affected.

The *Agreement on Safeguards* also stipulates that WTO Members should not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.

Article 2(1) of the *Agreement on Safeguards* provides that:

“A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, under such conditions as to cause, or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

⁸⁹ Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (“Argentina – Footwear”), WT/DS121/AB/R, adopted 12 January 2000.

Should the safeguard measure result in loss of trade for certain WTO Members, the WTO Member applying the safeguard measure must compensate for the loss of the concession or suffer counter-withdrawals of concession under paragraph 3 of the GATT 1994 Article XIX and Article 8 of the *Agreement on Safeguards*.

The safeguard measure may only be applied following a public investigation and reasoned evaluation of the problem. If the safeguard measure is the introduction of a quantitative restriction, that quota becomes in effect subject to the provisions of the GATT 1994 Article XIII.⁹⁰

The GATT 1994 Article XIX:2 allows provisional measures to be imposed in critical circumstances where delay would cause damage that would be difficult to repair. Such measures may take the form of tariff increases only, and may be kept in place for a maximum of 200 days. In addition, the period of application of any provisional measure must be included in the total period of application of a safeguard measure.

The safeguard measure itself may only remain in place for a maximum of four years unless formally renewed following the normal investigative procedure. In the GATT 1994 Article XIX safeguard measures apply to all products subject to the GATT 1994 including all agricultural and food products.

5.3.2 Dispute Settlement

Several disputes regarding safeguards measures have been referred to the WTO dispute settlement mechanism. A description is provided in this section.

The Korea – Dairy (WT/DS98)⁹¹ case arose out of the imposition by the Republic of Korea of definitive safeguard measures in the form of a quantitative restriction on imports of dairy products. The EC challenged the safeguard measures before the WTO under the GATT 1994 Article XIX:1(a) and Articles 2.1, 4.2(a), 4.2(b), 5.1 and 12(1) to (3) of the Agreement on Safeguards. The Panel found and the Appellate Body upheld that the definitive safeguard measure was imposed inconsistently with the provisions of Article 4.2(a) of the Agreement on Safeguards. The Appellate Body also upheld the Panel's finding that the first sentence of Article 5.1 of the Agreement on Safeguards imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment.

The US – Wheat Gluten (WT/DS166)⁹² case arose from of the imposition by the United States of definitive safeguard measures on imports of wheat gluten,

⁹⁰ On the administration and allocation of quotas.

⁹¹ Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (“Korea – Dairy”), WT/DS98/R, adopted 21 June 1999, WT/DS98/AB/R, adopted 14 December 1999.

⁹² United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the EC (“US – Wheat Gluten”), WT/DS166/R, adopted 31 July 2000, WT/DS166/AB/R, adopted 22 December 2000.

in the form of a quantitative restriction. The safeguard measure excluded imports from Canada due to its partnership status under NAFTA. The EC challenged the safeguard measures before the WTO under the GATT 1994 Article XIX, and Articles 2, 4.2, 8 and 12 of the Agreement on Safeguards. The Appellate Body interpreted the “causal link” requirement for the imposition of safeguard measures as meaning that increased imports need not be the sole cause of injury. In other words, a safeguard measure could lawfully be imposed even when several factors could cause the injury, so long as increased imports is one of the causative factors. The United States was found to be in violation of Article 4.2 of the Agreement on Safeguards, because its authorities failed to take into account certain “relevant factors” in their investigation. The Appellate Body specified that national authorities conducting safeguard investigations were obliged to consider all relevant factors, regardless of whether they had been clearly raised by the parties to the dispute. The Appellate Body also found that the United States, having included Canada in its safeguard investigation, could not exclude Canada from its safeguard measure, requiring correspondence between the investigation and the measures applied.

In the US – Lamb (WT/DS177 and WT/DS178)⁹³ dispute, Australia and New Zealand challenged the United States safeguard measure, in the form of a tariff rate quota, on imports of fresh, chilled and frozen lamb meat under the GATT 1994 Article XIX, and Article 4 of the Agreement on Safeguards. The Panel and the Appellate Body confirmed the requirement, under Article XIX:1(a) of the GATT 1994, for a finding of causation by “unforeseen developments”. This decision broke new ground by rejecting the United States approach to including upstream products in “like products” for purposes of determining the domestic industry in a safeguards action. The Appellate Body focused on the characteristics of products, not production processes, for determining like products. If followed in Article III jurisprudence, this approach would confirm the product-process distinction, at least in determining likeness of products, that has been the subject of some debate in the trade and environment field. The Appellate Body confirmed earlier statements regarding the standard of review in safeguards cases, requiring that the administering authority consider all relevant factors and provide a reasoned and adequate explanation of their decision. While this is not intended to be a de novo review, the examination of the reasoning and adequacy may be quite extensive. Finally, the Appellate Body found that the United States approach to causation of serious injury did not ipso facto satisfy the requirements of Article 4.2(b) of the Safeguards Agreement. Completing the analysis, the Appellate Body found that the US had not adequately separated other causes of serious injury from increased imports, as required by Article 4.2(b). The Panel found and the Appellate Body upheld the finding that the United States had acted inconsistently with Article 2.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards and with Article XIX:1(a) of the GATT 1994 by failing to demonstrate as a matter of fact the existence of “unforeseen developments”.

⁹³ US – Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia (“US – Lamb”), WT/DS177/R and WT/DS178/R, adopted 21 December 2000, WT/DS177/AB/R and WT/DS178/AB/R, adopted 1 May 2001.

5.4 The Agreement on Import Licensing Procedures

5.4.1 *Import Licensing Procedures*

In heavily regulated agricultural markets trade is generally administered through licences, both for import and export purposes. The key provisions regulating import licensing are to be found in the *Agreement on Import Licensing Procedures*.

The *Agreement on Import Licensing Procedures* provides that import licensing should be simple, transparent and predictable. For example, the agreement requires governments to publish sufficient information for traders to know how and why the licences are granted. It also describes how countries should notify the WTO when new import licensing procedures or changes to existing procedures are introduced.

There are two basic licensing procedures: automatic and non-automatic. Automatic licenses do not normally present any problem as they are mainly a trade monitoring device. The criteria are set out in Article 2 of the *Licensing Agreement*. The licences must not have the effect of distorting trade.

With regard to non-automatic licences, the Agreement minimizes the importers' burden in applying for licences, so that the administrative work does not in itself restrict or distort imports. The *Agreement on Import Licensing Procedures* says the agencies handling licensing should not normally take more than 30 days to deal with an application - 60 days when all applications are considered at the same time.⁹⁴

Import licensing is defined as the administrative procedures used for the operation of import licensing regimes requiring the submission of an application, or other documentation, to the relevant administrative body as a prior condition for importation into the customs territory of the importing country.⁹⁵

With respect to TRQ administration, the *Licensing Agreement* identifies seven principal methods of TRQ administration. WTO Members are required to notify the WTO of whether and how the tariff quotas listed in their tariff schedules are administered. The seven principal methods are:

- First-come, first-served allocations: no shares are allocated to importers and imports are permitted entry at the in-quota tariff rates until such a time as the tariff quota is filled. Then the higher tariff automatically applies. The physical importation of the goods determines the order and hence the applicable tariff.

⁹⁴ Article 3.5(f) of the *Agreement on Import Licensing Procedures*.

⁹⁵ Article 1.1 of the *Agreement on Import Licensing Procedures*.

- Applied tariffs: no shares are allocated to importers. Imports of the products concerned are allowed into the customs territory in unlimited quantities at the in-quota tariff rate or below.
- Licences on demand: importers' shares are generally allocated, or licences issued, in relation to quantities demanded and often prior to the commencement of the period during which the physical importation is to take place;⁹⁶
- Administering through state trading enterprises: import shares are allocated entirely or mainly to state trading entities which import the product concerned (or have direct control of imports undertaken by intermediaries).
- Auctioning: importers' shares are allocated, or licences issued, largely on the basis of an auctioning or competitive bid system. The GATT compatibility of auctioning systems has been questioned.
- Import licensing according to historical shares: importers' shares are allocated, or licences issued, mainly in relation to past imports of the product concerned;
- Other criteria or mixed systems: administration methods which do not clearly fall within any of the above categories or administration methods involving a combination of the methods as set out above with no one method being dominant.⁹⁷

In *EC – Poultry*⁹⁸ the Appellate Body found:

“The preamble to the Licensing Agreement stresses that the Agreement aims at ensuring that import licensing procedures “are not utilized in a manner contrary to the principles and obligations of GATT 1994” and are “implemented in a transparent and predictable manner”. Moreover, Articles 1.2 and 3.2 make it clear that the Licensing Agreement is also concerned with, among other things, preventing trade distortions that may be caused by licensing procedures. It follows that wherever an import licensing regime is applied, these requirements must be observed. The requirement to prevent trade distortion found in Articles 1.2 and 3.2 of the Licensing Agreement refers to any trade distortion that may be caused by the introduction or operation of licensing procedures, and is not necessarily limited to that part of trade to which the licensing procedures themselves apply. There may be situations where the operation of licensing procedures, in fact, have restrictive or distortive effects on that part of trade that is not strictly subject to those procedures.”⁹⁹

⁹⁶ This includes methods involving licences issued on a first-come, first-served basis and those systems where licence requests are reduced pro rata where they exceed available quantities.

⁹⁷ See WTO background paper “Tariff quota administration methods and tariff quota fill”, G/AG/NG/S/7.

⁹⁸ *European Communities – Measures Affecting the Importation of Certain Poultry Products*, (“EC – Poultry”), WT/DS69/R, adopted 12 March 1998, WT/DS69/AB/R, adopted 13 July 1999.

⁹⁹ Appellate Body Report, *EC – Poultry*, para. 121.

5.4.2 Dispute Settlement

The EC – Bananas dispute has a long and complex history, involving both GATT and WTO dispute settlement.¹⁰⁰ In April 1996, Ecuador, Guatemala, Honduras, Mexico and the United States requested the establishment of a panel to examine the EC regime for the importation, sale and distribution of bananas established by Council Regulation 404/93.¹⁰¹ The WTO Panel ruled that the EU bananas import regime violated WTO obligations under the GATT, the General Agreement on Trade in Services and the Agreement on Import Licensing Procedures. In relation to the Agreement on Import Licensing Procedures the Panel in EC – Bananas III found that this Agreement applies to licensing procedures for tariff quotas. The Appellate Body upheld this finding as well as the Panel's finding that both Article 1.3 of the Licensing Agreement and Article X:3(a) of the GATT 1994 apply to the EC import licensing procedures.

In EC – Poultry (WT/DS69)¹⁰² Brazil complained about the allocation of an EC tariff-rate quota for frozen poultry meat and the use by the EC of a special safeguard measure under the Agreement on Agriculture. The dispute involved the interpretation of the EC's tariff schedule and its relationship with a separate bilateral agreement between the EC and Brazil, which provided for a global annual duty-free tariff-rate quota for frozen poultry meat. Brazil argued that as a result of the agreement, the tariff-rate quota should be allocated exclusively to Brazil and not shared on an MFN basis with other WTO Members. The WTO Appellate Body found that the agreement was not part of WTO law and therefore could not be applied directly as law in WTO dispute resolution. Instead, the Appellate Body interpreted the relevant EC tariff schedule. As the EC was bound by its tariff schedule which provided for MFN non-discriminatory treatment, Brazil could not seek preferential treatment on the basis of tariff concessions negotiated bilaterally. The Appellate Body further found that the EC's administration of this tariff quota did not violate the WTO Import Licensing Agreement.

¹⁰⁰ GATT Panel Report, EEC - Members States Import Regimes for Bananas ("EC – Bananas I"), DS32/R, adopted on 19 May 1993; GATT Panel Report, EEC – Import Regime for Bananas ("EC – Bananas II"), DS38/R, adopted on 11 February 1994; Panel Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III"), WT/DS27/R/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R; European Communities - Regime for the Importation, Sale and Distribution of Bananas ("Recourse to Article 21.5 by Ecuador"), ("EC – Bananas (21.5)"), WT/DS27/RW/ECU, adopted 12 April 1999, European Communities - Regime for the Importation, Sale and Distribution of Bananas ("Recourse to Article 21.5 by European Communities"), ("EC – Bananas (21.5)"), WT/DS27/RW/EEC, adopted 12 April 1999, Decision by the Arbitrators ("Recourse to Arbitration by the EC under Article 22.6"), WT/DS27/ARB, adopted 9 April 1999, Decision by the Arbitrators ("Recourse to Arbitration by the EC under Article 22.6"), WT/DS27/ARB/ECU, adopted 24 March 2000.

¹⁰¹ Council Regulation 404/93 on the common organization of the market in bananas. OJ L 47, 25 February 1993, pp. 1-11.

¹⁰² EC – Poultry, WT/DS69/R and WT/DS69/AB/R.

5.5 SPS and TBT Agreements

5.5.1 *The SPS Agreement and Food Safety*

Countries require that both domestically produced and imported goods should satisfy certain minimum levels of quality, health and safety standards. These standards are particularly important with respect to agricultural, food and health products. Food standards may facilitate trade by alleviating consumer fears about imported products. But they can also act as trade barriers when different standards exist in different countries.

Article 14 of the *Agreement on Agriculture* provides that:

Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.

The *SPS Agreement* is the most important of the WTO agreements addressing food safety. This Agreement recognizes the fact that different WTO Members may wish to maintain different levels of protection, but ultimately aims at reducing such differences to a minimum by urging WTO Members to adopt scientifically based international standards.

Food safety was not an unknown issue in international law prior to the *SPS Agreement*. A number of international organizations have been established to regulate problems of diseases and food standards.

Article XX(b) of the GATT 1947 already covered sanitary and phytosanitary measures impeding trade. Under the GATT 1994 Article XX, WTO Members may introduce measures that are necessary to protect human, animal or plant life or health so long as such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Article XX of the GATT 1994, while providing a general exception that allows WTO Members to take unilateral action to protect health, qualifies that exception by requiring that those measures do not discriminate.¹⁰³

The *SPS Agreement* supplements Article XX(b) of the GATT 1994. However, unlike the rules governing the GATT 1994, the *SPS Agreement* goes beyond the general principle of non-discrimination and provides a system that confers upon WTO Members specific rights and obligations relating to SPS measures. The key to the *SPS Agreement* is the right of WTO Members to set the health and safety standards they deem appropriate, but to do so in a way which least hinders trade.

The *SPS Agreement* defines sanitary and phytosanitary standards broadly.

¹⁰³ However, to be justified under Article XX the discrimination may not be arbitrary or unjustifiable.

The basic system of the *SPS Agreement* is simple. WTO Members remain free to set whatever human, plant and animal health and food safety standards they deem appropriate. The *SPS Agreement* recognizes the right of countries to take measures they consider necessary to protect plant, animal and human life and health. In exercising this right, however, countries must ensure that the measures are:

- scientifically justified;
- based on an assessment of risks and no more than necessary;
- not arbitrarily or unjustifiable and,
- not constituting a disguised restriction on trade.¹⁰⁴

The emphasis of the *SPS Agreement* is on scientific justification, risk assessment and consistency of approach for the determination of national measures.

Article 4 of the *SPS Agreement* provides that WTO Members must accept the SPS measures of other WTO Members as equivalent, even if these measures differ from their own or from those used by other WTO Members trading in the same product. However, the basic condition is that the measure achieves the importing Member's appropriate level of sanitary protection.

Equivalence is a mechanism for minimizing barriers to trade by treating different standards as having a similar effect while allowing them to remain intact and in effect.

The *SPS Agreement* also provides a major impetus for international harmonization by recognizing the standards, recommendations and guidelines established by the Codex Alimentarius Commission on Food Safety Matters¹⁰⁵ as reference points for international trade, and also by encouraging countries to use international standards whenever possible.

The *SPS Agreement* increases the transparency of sanitary and phytosanitary measures. Countries must establish SPS measures on the basis of an appropriate assessment of the actual risks involved, and, if requested, make known what factors they took into consideration, the assessment procedures they used and the level of risk they determined to be acceptable.

5.5.2 Agreement on Technical Barriers to Trade

The *Agreement on Technical Barriers to Trade* (hereinafter the *TBT Agreement*) is concerned with three topics:

- preparation, adoption and application of technical regulations and standards;

¹⁰⁴ Article 2 of the *SPS Agreement*.

¹⁰⁵ As well as the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention. See Article 3.4 of the *SPS Agreement*.

- assessment of conformity;
- information and assistance.

The *TBT Agreement* covers all products, including industrial and agricultural products, but not measures subject to the *SPS Agreement*. The *SPS Agreement* and the *TBT Agreement* exclude each other from their scope.

The *TBT Agreement* accords to WTO Members a high degree of flexibility in the preparation, adoption and application of their national technical regulations. However, WTO Members' regulatory flexibility is limited by Article 2.2:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective...”

The “legitimate objectives” identified in the *TBT Agreement* are the prevention of deceptive practices, the protection of human health and safety, of animal or plant life or health, and of the environment and national security.

Although the *SPS Agreement* and the *TBT Agreement* are similar in a number of ways, their substantive provisions are different.

Both agreements direct WTO Members to use international standards, but under the *SPS Agreement*, WTO Members are compelled to use these standards unless they can show a specific scientific justification based on an assessment of the possible risk. In contrast, WTO Members may set TBT measures that deviate from international standards for other reasons, including technological difficulties or geographical issues.

Furthermore, SPS measures may only be applied to “*the extent necessary to protect human, animal or plant life or health, based on scientific principles and not maintained without sufficient scientific evidence*”,¹⁰⁶ whilst TBT measures may be applied and maintained for other reasons, including national security or to prevent deceptive practices.¹⁰⁷

5.5.3 *Dispute Settlement*

An increasing number of disputes concerning SPS and TBT issues have been referred to the WTO. Some of the decisions have had a strong impact on the interpretation of the rules and principles of the *SPS Agreement* and *TBT Agreement*. Brief descriptions of four major WTO disputes are given below:

¹⁰⁶ See the *SPS Agreement*, Article 2, para. 2.

¹⁰⁷ See the *TBT Agreement*, Article 2, para 2.

The EC - Hormones dispute (WT/DS26 and WT/DS48)¹⁰⁸ concerned certain EC measures that banned the sale of beef derived from cattle that had been given growth hormones. The United States and Canada contested the ban, arguing that it violated the SPS Agreement. The EC measures banning hormone treated beef were found to be in violation of the SPS Agreement, because these measures were not based on a risk assessment as required by Article 5.1 of the SPS Agreement. It was also found that the precautionary principle, although represented in Article 5.7 of the SPS Agreement, did not override any stated obligations, especially not Articles 5.1 and 5.2. These Panel's findings were upheld by the Appellate Body. The Panel found and the Appellate Body upheld the determination that the EC had failed to conduct a risk assessment that satisfied its obligations under Article 5 of the SPS Agreement; and The Appellate Body further stated that the EC by maintaining, without justification under Article 3.3 of the SPS Agreement, SPS measures which were not based on existing international standards, acted inconsistently with Article 3.1 of the SPS Agreement. Finally, both the Panel and the Appellate Body found that the EC measures were inconsistent with Article 5.5, which strives to avoid arbitrary or unjustifiable distinctions in the levels of sanitary protection set by Members, when such distinctions can inhibit international trade.

The Australia - Salmon dispute concerned an import prohibition on uncooked salmon from certain parts of the northern Pacific Ocean (WT/DS18).¹⁰⁹ In 1975, Australia imposed an import restriction which provided that fresh chilled and frozen salmon could only be imported to Australia if it had first been heat-treated. In 1995, Canada requested consultations over the matter and argued that the import restriction was a violation of Australia's obligations under both the GATT 1994 and the SPS Agreement and that the measure nullified or impaired benefits that Canada had bargained for in the Uruguay Round. First, the Panel then the Appellate found Australia to be in violation of Article 5.5 of the Agreement. The Appellate Body took into account various "warning signals" that led to the conclusion that the Australian import restriction was, in reality, a disguised restriction on trade and therefore a violation of Article 5.5 of the SPS Agreement. These included: the fact that Australia limited its import ban to salmon, while at the same time tolerating imports of herring used as bait, and live ornamental finfish, both of which posed an equal or greater risk of spreading disease to the very domestic stocks that the salmon ban ostensibly protected; and the absence of any controls on the internal movement of the salmon products when compared with the import prohibition on ocean-caught Pacific salmon.

The Japan – Agricultural Products II case concerned the standards for different varieties of fruits (WT/DS76).¹¹⁰ The United States argued that a Japanese import restriction on certain types of fresh fruit was in violation of the SPS Agreement, especially Articles 2.2 and 5.6. The measures in dispute generally →

¹⁰⁸ EC – Measures Concerning Meat and Meat Products (“EC – Hormones”), WT/DS26/R/USA, adopted 18 August 1997, WT/DS48/AB/R, adopted 16 January 1998.

¹⁰⁹ Australia – Measures Affecting Importation of Salmon (“Australian – Salmon”), WT/DS18/R, adopted 12 June 1998, WT/DS18/AB/R, adopted 20 October, 1998.

¹¹⁰ Japan – Measures Affecting Agricultural Products (“Japan – Agricultural Products II”), WT/DS76/R, adopted 27 October 1998, WT/DS76/AB/R, adopted 22 February, 1999.

prohibited any imports of fresh apricots, cherries, plums, pears, quince, peaches, apples and walnuts originating from the continental United States because they were potential hosts for the codling moth. This moth, although common in the United States, is a pest of “quarantine-level” significance for Japan. The Japanese import restriction contained an exemption from the import ban on a variety-by-variety basis. This exemption provided that the efficiency of quarantine treatment for each variety of these agricultural products had to be tested before these products could be imported into Japan. These tests could take up to two years. The Panel first found that Japan had violated Article 7 of the SPS Agreement by failing to publish its testing requirements. The Japanese Government had simply “made available” the testing guidelines, while Article 7 and Annex B oblige WTO Members to “publish promptly” all SPS measures. In February 1999, the WTO Appellate Body essentially upheld the Panel’s findings. The Appellate Body concluded that the Japanese requirement of varietal testing for some of the products was not based on science. It was therefore found to be in violation of the SPS Agreement. For apricots, pears, plums and quince the Appellate Body found that Japan had failed to conduct a proper risk assessment and, therefore, was in violation of Article 5.1 of the SPS Agreement.

5.6 Dumping and Anti-dumping Measures in Agriculture

If products are exported at a price lower than the price normally charged on the home market of the exporter, the exporter is considered to be “dumping” the product and may be injuring the domestic industry of the importing country.

***Dumping** can be defined as the sale of products for export at a price lower than production costs or less than “normal value”, where normal value means the price at which those same products are sold on the “home” or exporting market.*

The GATT 1994 allows WTO Members to impose anti-dumping duties on dumped imports, provided that such imports are causing, or threatening to cause injury to a domestic industry. Special procedures must be followed by national authorities in deciding whether to impose such measures. An anti-dumping measure usually consist of duties imposed on top of the normal applicable import duty. An anti-dumping duty may not exceed the level of the margin of dumping.

The applicable rules are found in the GATT 1994 Article VI, and in the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (otherwise know as the “*Anti-Dumping Agreement*”).

Unlike subsidies, which are subject to restrictions under the GATT 1994 and the *SCM Agreement*, there is no outright prohibition on dumping. However, paragraph 1 of the GATT 1994 Article VI states that WTO Members:

“... recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.”

However, there is no obligation on the country from which the dumped products are exported to take restraining action against its exporters.

Anti-dumping duties are imposed on dumped imports when dumping is causing material injury to the domestic industry in the importing WTO Member, in order to offset the price difference or the margin of dumping. The prices need to be compared at the same level of trade, normally at the ex-factory level. This usually requires considerable adjustments to reflect the actual transaction price.

***Anti-dumping action** means charging extra import duty on the specific product from the particular exporting country in order to bring its price closer to the “normal value” and to remove the injury to domestic industry in the importing country.*

A central requirement under the GATT 1994 and the *Anti-Dumping Agreement* is that anti-dumping action can only be taken to offset dumping that is causing material injury to the domestic industry producing the like product in the domestic market of the importing WTO Member. Instead of imposing additional duties, the investigating authorities in the importing WTO Member can accept a price undertaking from the exporter to raise its prices.

There is nothing in the *Agreement on Agriculture* which exempts agricultural products from the application of the GATT 1994 Article VI and the *Anti-Dumping Agreement*.

5.7 Subsidies and Countervailing Measures

Subsidies are government contributions to enterprises often granted on the condition that goods are exported or to encourage exports. The *WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)* governs the use of the WTO right to seek the withdrawal of the subsidy or the removal of its adverse effects. The affected WTO Member can launch its own investigation and ultimately charge extra duty (“countervailing duty”) on subsidized imports that are found to be hurting domestic producers.

Article VI:3 of the GATT 1994 defines the term “countervailing duties”:

“The term **countervailing duty** shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly



*or indirectly, upon the manufacture, production or exports of any merchandise”.*¹¹¹

The definition of subsidies under the *SCM Agreement* contains three basic elements:

- a financial contribution;
- by a government or any public body within the territory of a Member,
- which confers a benefit.

All three elements must be satisfied in order for a subsidy to exist.

The *SCM Agreement* defines three categories of subsidies: prohibited, actionable and non-actionable.¹¹²

***Prohibited subsidies** are subsidies that require recipients to meet certain export targets, or to use domestic goods instead of imported goods.*¹¹³

***Actionable subsidies** are subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods (“local content subsidies”).*

In this category the complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted.

Part V of the *SCM Agreement* provides that WTO Members may resort to countervailing duties to counteract the effects of two categories of subsidies: prohibited and actionable.

It applies to agricultural goods as well as industrial products, except when the subsidies conform to the *Agreement on Agriculture*. Article 13 of the *Agreement on Agriculture* establishes that, during the implementation period specified in that Agreement (until 1 January 2004), special rules regarding subsidies for agricultural products are to be applied.

The provisions of the *Agreement on Subsidies and Countervailing Measures* firmly state that issues of agricultural subsidies are subject primary to the *Agreement on Agriculture* and only secondary to the *SCM Agreement*. Thus:

¹¹¹ This definition has been reproduced under Footnote 36 of the *SCM Agreement*.

¹¹² Non-actionable subsidies are non-specific subsidies, or specific subsidies for research and pre-competitive development activity, assistance to disadvantaged regions, or certain types of assistance for adapting existing facilities to new environmental laws or regulations. Under the provision of Article 31 of the *SCM Agreement*, the category of non-actionable subsidies ended as of the year 2000.

¹¹³ A detailed list of export subsidies is annexed to the *SCM Agreement* (Annex I).

- Export subsidies which are in full conformity with the *Agreement on Agriculture* are not prohibited by the *SCM Agreement*, although they remain countervailable, that is, a countervailing duty can be charged by the importing country if damage is proved.¹¹⁴
- Domestic support measures which are in full conformity with the *Agreement on Agriculture* are not actionable multilaterally, i.e. through the WTO dispute settlement procedures, although they also may be subject to unilateral countervailing duties on proof of injury and causation.
- Finally, domestic support measures which fall under the “Green box” of the *Agreement on Agriculture* are not actionable multilaterally nor can they be subject to unilateral countervailing measures. After the implementation period, the *SCM Agreement* will apply to subsidies for agricultural products subject to the provisions of the *Agreement on Agriculture*, as set forth in its Article 21.

5.8 TRIPs and Agriculture

The *TRIPs Agreement* includes three elements relating to agriculture:

- geographical indications (Arts. 22-24);
- patent protection of agricultural chemical products (Arts. 70.8 and 70.9);
- plant variety protection (Art. 27.3(b)).

Market access for agricultural products is closely linked to the issues of product differentiation and food specificity.

Product differentiation is an important feature of market competition. It benefits consumers because they are offered more choice and more information on product quality. It also benefits producers, who are able to develop quality products and are free from unfair or misleading competition in markets that import their products.

Food specificity can be determined by reference to geographical indications. Historically, products from particular places were more marketable than similar products from other places because of a particular quality trait. The quality difference was a result of either natural geographical advantages, such as climate and geology, or processing techniques peculiar to the specific place. With time, these geographical place names became associated with particular products or types of product.

The WTO *Agreement on Trade Related Aspects of Intellectual Property Rights* (the *TRIPs Agreement*) provides for the protection of geographical indications.

Geographical indications are defined in Article 22.1 of the *TRIPs Agreement* as:

“... indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

Under the *TRIPs Agreement*, for a geographical indication to be protected as such, it needs only to be “an indication”, not necessarily the name of a geographical place on earth. This “indication” has to identify goods as originating in the territory of a particular WTO Member, whether the name of the country itself, a region or a locality of that territory.

Under the *TRIPs Agreement*, all geographical indications concerning all goods must be protected against misuse such as to mislead the public or constitute an act of unfair competition.¹¹⁵ For wines and spirits the level of protection is higher and is not conditional on whether the public is misled or if their use constitutes unfair competition.¹¹⁶

Article 22 of the *TRIPs Agreement* establishes a minimum standard of protection for all geographical indications.

Article 22.2 states that WTO Members shall provide the legal means for interested parties to prevent:

- a) *“the use of any means in the designation or presentation of a good, that indicates or suggests that the good originates in a geographical area, other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;”¹¹⁷*
- b) *any use which constitute an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).”*

The *TRIPs Agreement* does not specify the legal means to protect geographical indications. Each WTO Member is free to choose the most appropriate method.

The additional protection for wines and spirits encompasses three main elements:

- providing the legal means for interested parties to prevent the use of a geographical indication identifying wine and spirits not originating in the place indicated by the geographical indication;
- refusing or invalidating the registration of a trademark for wines or spirits which contains or consists of a geographical indication

¹¹⁴ However, the requirement to exercise “due restraint” should be taken into account. See also section “Peace Clause” of this Module.

¹¹⁵ Article 22 of *TRIPs* “Protection of geographical indications”.

¹¹⁶ Article 23 of *TRIPs* “Additional protection for geographical indications for wines and spirits”.

¹¹⁷ For example, the use of symbols such as the Eiffel Tower or the Statue of Liberty to infer an association of origin would fall within this prohibition.

identifying wines or spirits, respectively at the request of an interested party;

- calling WTO Members for negotiations aimed at increasing protection for individual geographical indications for wines and spirits.

Under Article 23.1, the use of a geographical indication identifying a wine or spirit not originating in the place indicated by the geographical indication is prohibited, even where the true origin of the wine or spirit is indicated or the geographical indication is used in a translation or accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like. It is not necessary to show that the public might be misled or that the use constitutes an act of unfair competition. In the case of wines and spirits, protection becomes objective and automatic. Thus, these provisions give geographical indications for wines and spirits stronger protection than that provided in Article 22 for all products.

According to Articles 23.3 and 23.4 of the *TRIPs Agreement*, geographical indications for wines have an extra-additional protection. This extra-additional protection has two components:

- the need to accord protection for each geographical indication for wines in the case of homonymous indications; and
- the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in the jurisdictions of those WTO Members participating in the system.

5.9 Test Your Understanding

1. Why are certain provisions of the GATT 1994 relevant for trade in agricultural products?
2. What is the “most-favoured-nation” treatment provision? What national measures are targeted by the MFN clause? What are the waivers to Article I?
3. What is the basic principle of the GATT 1994 Article XI? What are quantitative restrictions? What are the exceptions to this principle?
4. How does the GATT 1994 Article XIII complement the GATT 1994 Article XI? What is the fundamental rule for the allocation of tariff quotas shares?
5. Is a WTO Member entitled to adopt any measure it deems necessary to protect human, animal or plant life or health? What are the other justifications for the adoption of trade-restrictive measures? Please illustrate your answers with the relevant case law.
6. What WTO provisions are relevant to sanitary and phytosanitary measures? What are sanitary and phytosanitary measures?

- 7. Is a WTO Member free to set whatever human, plant and animal health and safety standards it considers appropriate to their domestic circumstances? If so, are there any conditions? Define the principle of equivalence.**
- 8. Why is the TBT Agreement relevant to agriculture? How does the TBT Agreement differ from the SPS Agreement? Illustrate your answers by references to the relevant case law.**
- 9. What is dumping? What are the applicable WTO provisions? Explain what measures a WTO Member can adopt to protect its market from dumped imports.**
- 10. What are the three categories of subsidies defined in the SCM Agreement? Define countervailing duty. Does Article 13 of the Agreement on Agriculture affect a WTO Member's right to apply countervailing measures on agricultural products?**
- 11. What provisions of the TRIPs Agreement are relevant to agriculture? Define geographical indications. How many levels of protection does the TRIPs Agreement offer?**

6. AGRICULTURE AND DEVELOPING COUNTRIES

Objectives

On completion of this section, the reader should be able:

- **to appreciate how the Agreement on Agriculture takes into account the special interests and needs of developing country Members and least-developed country Members;**
- **to list the other WTO Agreements which take into account WTO developing country Members' and least-developed country Members' special needs in relation to agricultural products.**

Developing countries account for about a quarter of world exports, and for about the same percentage of imports. Most of the exports are agricultural products. Therefore, the provisions of the *Agreement on Agriculture* are of particular significance for developing countries.

One of the major issues in multilateral trade negotiations is the extent to which the rights and obligations of developing countries should differ from those of developed countries and how this should be achieved.

The term Special and Differential Treatment (SDT) refers to the set of provisions in trade agreements which have been negotiated to grant developing country exports preferential access to markets of developed countries. Special and Differential Treatment provides longer timeframes and lower levels of obligations for developing countries for adherence to the rules.

Special and differential treatment measures are provisions of the WTO Agreements which give developing countries special rights and which give developed countries the possibility to treat developing countries more favourably than other WTO Members.

6.1 The Agreement on Agriculture and Developing Countries

The preamble of the *Agreement on Agriculture* provides that special and differential treatment for developing countries was “an integral element” of the negotiations resulting in the Agreement. The preamble further recognizes the potentially more precarious position of least-developed and net food-importing developing countries with regard to their security of food supply.

The preamble of the *Agreement on Agriculture* notes two other goals affecting developing country Members:

- greater market access in developed country markets for agricultural products of particular interest to developing country Members (including liberalization of trade in tropical agricultural products);

- greater market access in developed country markets for products important to the diversification of production from the growing of illicit narcotic crops.

To address the concerns raised in the preamble, the *Agreement on Agriculture* permits developing country Members to undertake reform commitments on schedules different from (and more favourable than) those required of developed countries. Such commitments involve:

- *Waiver tariffication*
The elimination of non-tariff barriers, by converting quotas and other quantitative import restrictions to tariffs.
- *Lower reduction obligations*
Special and Differential Treatment measures in the *Agreement on Agriculture* took the form of lower reduction rates to be applied to fixed base period values of trade-distorting domestic supports (covered by Total Aggregate Measurement of Support), tariffs and export subsidies - which was two-thirds for the developing countries of the levels required for the developed countries in each of these three areas. No reductions were required for least-developed countries.
- *Longer implementation period*
The developing countries are given a longer period (10 years, 1995-2004) to implement various reduction provisions, compared to six years for the developed countries.

6.1.1 Market Access

Developing countries were required to reduce tariffs, on average, by 24 per cent over the implementation period, versus 36 per cent for developed countries.

Similarly, while minimum cuts for each tariff line were set at 10 per cent for developing countries, for developed countries the requirement was 15 per cent

Article 4.2 of the *Agreement on Agriculture* generally proscribes the use of border measures which have been required to be converted into ordinary customs duties. Annex 5 to the *Agreement on Agriculture*, regarding special treatment with respect to Article 4.2, contains a separate Section B to address market access where a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member is involved.¹¹⁸

Under Section B, the border measure otherwise prohibited by Article 4.2 may be applied by a developing country Member to an agricultural product if the conditions of Section A (paragraphs 1(a) – 1(d)) are met, and minimum access

¹¹⁸ However, special treatment was also accorded to some developed countries, e.g. Japan and the Republic of Korea.

opportunities for that product are gradually increased as provided under paragraph 7(a), and appropriate market access opportunities are provided for other agricultural products (paragraph 7(b)).

Finally, Annex 5 acknowledges that any customs duties to be applied to the relevant developing country primary agricultural products are subject to any special and differential treatment accorded to developing countries under the *Agreement on Agriculture*.

6.1.2 Domestic Support Commitments

On domestic support measures, there are additional Special and Differential Treatment provisions besides the lower reduction rate for Total AMS:

- The *de minimis* threshold, which exempted from inclusion in the AMS calculations those trade-distorting support measures that accounted for 10 per cent or less of the total value of production, as against a threshold of 5 per cent for developed countries.
- The exemption from reduction commitments of two types of support measures that are sometimes referred to as rural development measures: investment subsidies which are generally available to agriculture and agricultural input subsidies generally available to low-income or resource-poor producers.

On border protection, the option for the developing countries and least developed countries to offer ceiling bindings (where these were not bound previously) is important. An additional advantage of this option was that minimum import access commitments were not required.

6.1.3 Export Subsidy Commitments

The WTO Members' budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, should not be greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. For developing countries these percentages are 76 per cent and 86 per cent, respectively.

During the implementation period, Article 9.4 of the *Agreement on Agriculture* stipulates that developing countries are not required to undertake commitments in respect of a number of export subsidies listed in the Agreement.

As regards export competition, in addition to lower reduction rates, there was an exemption from reductions of subsidies given to marketing and internal transport and freight costs on the export of agricultural products.

Also on export subsidies, Article 12 of the *Agreement on Agriculture, Disciplines on Export Prohibitions and Restrictions*, exempts developing countries, other than a net-exporter of a specific foodstuff, from provisions contained therein on introducing export prohibitions and restrictions.

Reduction rates (%) required in the Agreement on Agriculture

Reform areas	Developed	Developing	Least-Developed
Market access			
Simple average tariff	36	24	0
Minimum reduction per tariff line	15	10	0
Domestic support			
Total Aggregate Measurement of Support (AMS)	20	13.3	0
Export subsidy			
Value of expenditure on subsidies	36	24	0
Quantity of subsidized exports	21	14	0

6.1.4 Notification Obligations and Technical Assistance

In a way, fewer notification obligations (i.e., the number as well as the frequency of notifications) is a form of SDT as the preparation of the notifications involves considerable resources.

While there was no general commitment to provide technical assistance to help with the implementation of the *Agreement on Agriculture*, the *Decision on Measures Concerning the Possible Negative Effects on LDCs and NFIDCs*¹¹⁹ provides for access to financing facilities in the event of difficulties arising in financing food imports, commitments on food aid availability, as well as requiring full consideration to be given to requests for technical and financial assistance to improve agricultural productivity and infrastructure in the least-developed countries and net food-importing countries covered by this *Decision*.

6.2 Other WTO Agreements and Developing Countries

6.2.1 The Agreement on the Application of Sanitary and Phytosanitary Measures

In the *Agreement on the Application of Sanitary and Phytosanitary Measures* there is a longer time frame for developing countries to implement the provisions related to measures affecting imports (until 2000 for least developed countries, and until 1997 for other developing countries if justified because of

¹¹⁹ *Decision on Measures Concerning the Possible Negative effects of the Reform Programme on the Least-Developed and Net Food-Importing Developing Countries, Uruguay Round Agreement.*

lack of technical expertise and resources).¹²⁰ Developing countries are given a longer time period to comply with new SPS measures introduced in their export markets, where there is scope for their phased introduction. Finally, technical assistance is provided for developing countries to comply with SPS requirements.

6.2.2 *The Agreement on Technical Barriers to Trade*

The *Agreement on Technical Barriers to Trade* recognizes the needs of developing countries and provides a longer time frame for the implementation of the agreement (*Articles 12.4; 12.8*) and technical assistance (*Articles 10.6; 11; 12.7*). These provisions are similar to the above measures in the *SPS Agreement*.

6.2.3 *The Agreement on Subsidies and Countervailing Measures*

Article 13 of the *Agreement on Agriculture*, (on “*Due Restraint*”, provides for certain derogations from the rules of the *Agreement on Subsidies and Countervailing Measures* for agricultural products, but only for the implementation period of the *Agreement on Agriculture*. The *SCM Agreement* has one section (Part IV) devoted to developing countries. As a Special and Differential Treatment, some developing countries are exempted from restrictions on export subsidies (*Article 27 (a)*) while others are given an eight-year transition period to phase out their export subsidies (*Article 27.3*). In general, these Special and Differential Treatment provisions allow for a longer time frame and fewer obligations.

6.2.4 *The Anti-dumping Agreement*

The *Anti-dumping Agreement* contains a special article addressing developing country Members. Article 15 recognizes that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under the Agreement. Before the application of antidumping duties that “would affect the essential interests” of developing country Members, the possibilities for constructive remedies available under the Agreement should be explored.

6.2.5 *The Agreement on Safeguards*

Article 13 of the *Agreement on Agriculture* does not mention derogation from the rules of the *Agreement on Safeguards* - which means that these rules apply to agricultural products as well. The two main Special and Differential Treatment provisions in the *Safeguards Agreement* are that imports originating from developing countries are exempt from safeguard measures under certain conditions (*Article 9.1*) and that these countries could extend the period for the application of safeguard and countervailing measures (*Article 9.2*).

¹²⁰ *Article 14 of the Agreement on the Application of Sanitary and Phytosanitary Measures.*

6.3 Test your Understanding

- 1. What is special and differential treatment?**
- 2. How does the Preamble of the Agreement on Agriculture take into account the needs of developing countries?**
- 3. Are the reduction commitments of WTO developing countries Members subject to special and differential treatment?**
- 4. What are the special and differential treatment provisions in relation to domestic support commitments and to export subsidy commitments?**
- 5. List the other WTO Agreements which take into account WTO developing country Members' special needs in relation to agricultural products.**

7. CASE STUDIES

Case 1

Happyland has banned the imports of all pork meat from Merryland in order to protect its citizens from the possible threat of DPS-contaminated meat (the so-called “dancing pig syndrome”). In fact, there have been several cases of DPS in the country of Merryland. It is not scientifically established that meat from a DPS-infected pig is unfit for consumption or dangerous to human health. Moreover, no tests have been developed yet to trace DPS-contaminated meat. Both Happyland and Merryland are WTO Members.

Question: What are the legal grounds for the trade-restrictive measure taken by Happyland? Is the trade ban WTO consistent?

Case 2

Before 1 January 1995, most dairy products were subject to a range of restrictions on their entry into Joyland. These restrictions ranged from tariff rate quotas (TRQs), to voluntary restraint agreements, to a number of safeguard measures, to high tariffs or to particularly burdensome inspection procedures. The new WTO Agreement on Agriculture required that all non-tariff barriers, in particular quotas and voluntary restraints, in existence in 1994 be changed into their tariff equivalent by 1 January 1995. Joyland did this during the last weeks of 1994. Included in the new Joyland tariffs was a tariff rate quota on the importation of milk. This TRQ allows importation of 5,000 tons of foreign milk at a 20 per cent ad valorem rate, with a prohibitive over-the-quota rate of duty of 250 per cent. The Ministry of Agriculture of Joyland, whose officials adopted this TRQ, has stated that this was reached by “tariffing” a previously enforced quota set on foreign milk in 1991 by the Government of Joyland following a successful safeguard action. This safeguard measure was set for a period of five years, subject to possible renewal, but due to the considerable increase in Milkland’s prices a renewal would have been most improbable. The Government of Milkland is worried and considers that Joyland has acted illegally. Milkland is considering its legal recourses. On the other hand, Joyland argues that its TRQ is WTO-consistent and that, in any event, it is specifically mentioned in its Schedule of Concessions.

Question: What are the various arguments on the legal issues at stake. In particular, what WTO remedies could Milkland resort to? Is Joyland’s TRQ legal? Is it flawed by the previous safeguard measure?

Case 3

As part of its Uruguay Round WTO obligations, Chickenland agreed to specific limits on export subsidies for poultry products. In 1995, Chickenland replaced its subsidy payments on all poultry exports, which were financed by a levy on poultry producers, with a new system. However, this system allowed Chickenland's processors to buy lower-priced poultry meat and use it to make chicken-burgers and chicken sausages and other poultry products when these products were to be exported. Chickenland maintained that the new system was no longer an export subsidy. Two WTO Members (i.e., Birdsland and Poultryland) challenged this measure before the WTO arguing that Chickenland's Special Poultry Scheme, which allowed domestic poultry processors to buy poultry for export at lower prices than the poultry destined for the domestic market, constituted an export subsidy inconsistent with Chickenland's obligations under the Agreement on Agriculture.

Question: On the basis of the most recent WTO "case law", give your opinion concerning the WTO-consistency of Chickenland's measures. In particular, under what WTO provisions could this system be considered an illegal subsidy? What remedies would Birdsland and Poultryland be entitled to?

8. FURTHER READING

Books and Monographs

- **M.G. Desta**, “The Law of International Trade in Agricultural Products”, Kluwer Law International, 2002
- **T.E. Josling, S. Tangermann, T.K. Warley**, “Agriculture in the GATT”, London, 1996
- **J.A. McMahon**, “Trade and Agriculture: Negotiating a New Agreement?”, Cameron May 2001
- **J. Wolf**, “The future of the European Agriculture”, London, 2002
- **R. Barents**, “The Agricultural Law of the EC”, Kluwer, European Monographs 9, 1994
- **B. O’Connor**, “Geographical Indications in National and International Law”
O’Connor and Company, 2003
- **B. O’Connor** “Equivalence of SPS Measures in WTO Law”
O’Connor and Company, 2002
- **B. O’Connor** “Sanitary and Phytosanitary Measures in WTO Law”
O’Connor and Company, 2000
- **B. O’Connor** “Agriculture Export Refunds in EC and WTO Law”
O’Connor and Company, 1999
- **B. O’Connor** “Special Safeguard Provisions in EC and WTO Agricultural Law”
O’Connor and Company, 1998
- **B. O’Connor** “Tariff Rate Quotas in EC and GATT Law”
O’Connor and Company, 1997

Documents and Information

For information on WTO activities, see www.wto.org. Official WTO documents can be obtained by searching on the WTO’s online document database, available at: <http://docsonline.wto.org>. A very useful website on WTO dispute settlement is www.worldtradelaw.net.