

Alberto Alemanno
 Tiziano Balmelli
 Pritam Banerjee
 Maxime Baudouin
 Yves Bonzon
 Christopher Bruner
 Julien Chaisse
 Debashis Chakraborty
 Henri Culot
 Panagiotis Delimatsis
 Aadebukola Eleso
 Lukasz Gruszczynski
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Samira Guennif
 Philippe Gugler
 Marc lynedjian
 Rafael Leal-Arcas
 Pauline Lièvre
 Yenkong Ngangjoh Hodu
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 KD Raju
 Els Reynaers Kini
 Dipankar Sengupta
 Ioana Tudor
 Andreas R. Ziegler

Essays on the Future of the World Trade Organization

Volume I

Policies and Legal Issues

Edited by

Julien Chaisse
 Tiziano Balmelli

Essays on the Future of the WTO - I
 Chaisse / Balmelli

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Volume I
Policies and Legal Issues

Edited by
JULIEN CHAISSE
TIZIANO BALMELLI

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Editors' and Authors' Profiles

Editors' Profiles

Tiziano BALMELLI holds a PhD in Law (Université de Fribourg) and a Master of Arts in European Political and Administrative Studies (College of Europe, Bruges). He worked in the academic field from 1996 to 2001. In 2002, he entered the Diplomatic Service of the Swiss Federal Department of Foreign Affairs. As a diplomat, he has been posted in India from 2002 to 2003 and has then served from 2004 to 2007 in the Directorate of International Law, as Deputy Head of the Service for the Development of International Law and personal collaborator of the Deputy Legal Advisor of the Ministry. Besides the diplomatic career, he is currently lecturing on international law at the University of Fribourg. Contact: tiziano.balmelli@unifr.ch.

Julien CHAISSE holds a PhD in Law (Université d'Aix-Marseille III). He is Alternate Leader of NCCR-IP11 and a Research Fellow of the World Trade Institute since 2007. He coordinates the multilateral rules on investment project of the National Center on Competence in Research Trade Regulation (NCCR). He was Visiting Professor at the International Law Institute of Wuhan University in China, where he taught WTO law and European Union law (Winter Semester 2007/2008). Before joining the World Trade Institute, he taught Public International Law at the Institut d'Etudes Politiques of Aix-en-Provence (2004/2006). His previous experience includes two years in India, where he worked for the French Ministry of Foreign Affairs, as Scientific Secretary at the Centre de Sciences Humaines of New Delhi (2003/2004). His research interests include foreign trade and foreign direct investments, international business law, investment law, WTO law and the central question of its enforcement by its Members (Online Berkeley Press Selected Works available at http://works.bepress.com/julien_chaisse). Contact: World Trade Institute, Berne, Switzerland, julien.chaisse@wti.org.

Authors' Profiles

Alberto ALEMANN is a Legal Secretary at the European Court of Justice in Luxembourg. He is a member of the New York bar and sits in the Executive Committee of the Society for Risk Analysis Europe. He teaches and publishes in the areas of EC and International Trade Law. He read law at the University of Torino, Italy and holds LL.M. degrees from the College of Europe and Harvard Law School. He has been awarded a PhD from Bocconi University in 2005.

Pritam BANERJEE is currently a doctoral student at the School of Public Policy, George Mason University. He has a M.A. in Economics from Centre for International Trade and Development (CITD), Jawaharlal Nehru University (JNU), New Delhi. He has worked as a Consultant for the World Bank and was formerly employed with the Confederation of Indian Industry (CII) as their Trade Policy Analyst. His research interests include trade in services, trade facilitation and transaction costs, and human resources arbitrage. Contact: prit.banerjee@gmail.com.

Maxime BAUDOIN est avocat au bureau de Bruxelles du cabinet Gide Loyrette Nouel. Il est spécialisé en droit communautaire et en droit du commerce international (OMC), en particulier sur les questions liées à l'agriculture et à l'alimentation.

Yves BONZON is a doctoral candidate at the University of Lausanne (Switzerland) and currently a Visiting Researcher at the Georgetown University Law Center in Washington DC. His research focuses on the regulation of non-state actors' participation in WTO decision-making procedures.

Christopher M. BRUNER is an Assistant Professor at Texas Tech University School of Law, and has previously been a Visiting Assistant Professor at Boston University School of Law. He has written in a number of areas – including international trade and investment, corporate law, securities regulation, European Union law, and the global economy – and his articles have appeared in both law and policy journals.

Debashis CHAKRABORTY is currently Assistant Professor of Economics at the Indian Institute of Foreign Trade, New Delhi. Debashis has been educated at University of Calcutta and Centre for International Trade and Development, Jawaharlal Nehru University (JNU), New Delhi. His areas of interest include international trade policy, WTO and Indian economic development, and he has presented his research at various academic and policy forums in India and abroad. Debashis has published his research in several national and international refereed journals. Contact: debchakra@gmail.com.

Henri CULOT est assistant à l'Université catholique de Louvain, où il enseigne le droit commercial. Il y poursuit également des recherches en droit économique international. Il exerce par ailleurs la profession d'avocat au barreau de Bruxelles.

Panagiotis DELIMATIS est Senior Research Fellow auprès du World Trade Institute de Berne. Il est titulaire d'un doctorat en droit de l'Université de Neuchâtel et d'un Master en droit européen de l'Institut de droit européen de Saarbrücken. Auteur du livre "International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity" publié par Oxford University Press, il a travaillé auprès de l'Organe d'Appel de l'OMC et de la CNUCED. Il a aussi exercé la profession d'avocat en Grèce.

Adebukola A. ELESO completed her first degree in law in Nigeria after which she obtained an LL.M. in International Trade & Investments from the University of Pretoria on a World Bank Scholarship. She has since worked in the Legal Vice Presidency of the World Bank, and currently practices corporate and finance law in the law firm of Templars in Lagos.

Lukasz GRUSZCZYNSKI is a graduate from Jagiellonian University in Krakow (Mag. Jur. with merit). He completed LL.M. program in International Business Law at the Central European University in Budapest. He worked as a junior associate at the Banking and Insurance Department of international law firm Lovells (Warsaw). Currently, he is enrolled at the Law Department of the European University Institute in Florence as a PhD Candidate. His research concerns the problem of national risk regulation in the context of WTO Law (working title: "Regulating Risks to Human Health. WTO Law Perspective"). During his PhD studies he worked as an intern at the Legal Affairs Division of the WTO and spent one semester at the Law School of the University of Michigan. The author may be contacted at Lukasz.Gruszczyński@eui.eu.

Mathieu GUENNEC est titulaire d'un doctorat en droit de l'Université de Rennes et d'un Mastère de l'Ecole Nationale Supérieure des Télécommunications de Bretagne. Il a apporté son expertise juridique pendant trois ans à France Telecom en matière de régulation des télécommunications. Désormais avocat au barreau de Paris, il exerce au sein du cabinet Allen & Overy, où il est spécialisé en droit de la concurrence et en droit des télécommunications.

Samira GUENNIF est maître de conférences à l'Université Paris 13 et chercheur au Centre d'Economie de l'Université Paris Nord (CEPN, UMR-CNRS 7115). Ses travaux portent sur l'impact des accords internationaux de propriété intellectuelle (AADPIC et accords de libre échange états-uniens notamment) sur la santé publique au Sud, en particulier en ce qui concerne l'accès des patients aux médicaments.

Phillipe GUGLER is a Professor of Economic and Social Policy at the University of Fribourg. He teaches courses on microeconomics, competitiveness and competition policy. Since August 2006, Professor Gugler has held the post of Dean of the Faculty of Economics and Social Sciences of the University of Fribourg. Professor Gugler is an affiliate faculty member of the Harvard Business School, a guest Professor at the University of Torino and a Member of the Board of Directors of the World Trade Institute, Berne. In December 2005, Professor Gugler was elected President of the EIBA which is the leading European Association dealing with MNEs. Contact: Chair of Economics and Social Policy, Department of Economics, University of Fribourg, Switzerland, philippe.gugler@unifr.ch.

Marc IYNEDJIAN is a lawyer at Python & Peter in Geneva. He is the author of a doctoral thesis on the SPS Agreement and of several other publications on WTO law. In 2000, he worked as an intern for the Legal Affairs Division of the WTO. Marc Iynedjian holds an LL.M. from Columbia University and has practised law in New York.

Rafael LEAL-ARCAS is Lecturer in International Economic Law and Deputy Director of Graduate Studies at Queen Mary, University of London. He is the author of more than 30 publications. Previously he was a Visiting Researcher at Harvard Law School, an Emile Noel Fellow at New York University School of Law, a Fellow at Australian National University, and a Visiting Scholar at the University of Wisconsin-Madison Law School. He completed his graduate legal education at Stanford Law School, Columbia Law School, the London School of Economics and Political Science, and the European University Institute.

Pauline LIEVRE est Conseillère juridique auprès du Tribunal arbitral du sport (TAS) à Lausanne, et doctorante à l'Université de Neuchâtel. Son sujet de thèse porte sur le pouvoir juridictionnel de l'OMC. Elle est titulaire d'un LL.M. en droit européen du Collège d'Europe (Bruges) et du brevet d'avocat.

Yenkong NGANGJOH HODU (LL.Lic. / Dr. iur., LL.D) is a Programme Coordinator on Global Trade and Regional Integration at the Nordic Africa Institute, Uppsala, Sweden. The views expressed in this article are the personal views of the author and not those of the Nordic Africa Institute. He can be contacted by e-mail at yenkong.ngangjohodu@nai.uu.se.

Marion PANIZZON (PhD) is a Senior Research Fellow at the World Trade Institute and an adjunct lecturer in WTO law at the University of Bern. She coordinates the four-year services project of the National Center on Competence in Research Trade Regulation and is an associated researcher of the Institut du Développement Durable et des Relations Internationales (Idtri) in Paris. Her book, 'Good Faith in the Jurisprudence of the WTO', was published in October 2006 by Hart Publishing, Oxford.

Ravindra PRATAP is specialized in WTO Law and Litigation (various publications in this field) and presently teaches at Indraprastha University Law School, Delhi. Previously, he studied law at the University of Allahabad, where he also obtained an M.A. He then took an M.Phil at the Jawaharlal Nehru University, New Delhi, and prior to obtaining a PhD there, gained a Pallas LL.M. from the Universities of Barcelona, Bologna, Essex, Konstanz, LUISS Guido Carli, Jean Moulin Lyon 3 and Nijmegen and passed the Turin-based International Trade Law Postgraduate Course. He can be reached at ravindrpratap@hotmail.com.

KD RAJU was graduated from Mahatma Gandhi University, Kerala, in Science with specialization in Botany in 1990. After graduating from law school in 1997, Raju joined in Ernakulam Bar. He completed his post graduation in Mercantile Law from the same University, where his thesis was dealing with The Fiduciary Duties of Company Directors under the Indian Companies Act, 1956, and he secured second rank in the University. He has done MPhil from Jawaharlal Nehru University, New Delhi, on International Trade Law. He worked on Anti-dumping issues for his doctoral studies in Jawaharlal Nehru University, New Delhi. He is presently Faculty member at Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur, India. His areas of interest and expertise include the WTO, especially Intellectual Property Laws, Anti-dumping Laws, WTO Services Agreement, Corporate, Environmental, Economic and Trade Laws. He has published extensively on these subjects. Contact: rajkd@gmail.com.

Els REYNAERS KINI is a lawyer at the law firm M.V. Kini & Co, India. She completed her law degrees at the University of Brussels, Belgium, the University of Delhi, India, and obtained her LL.M. degree from the University of Georgia, USA. Previously, she was a researcher at The Energy and Resources Institute, New Delhi, where she also taught environmental law. In Belgium, she was an environmental lawyer at Allen & Overy.

Dipankar SENGUPTA is currently Reader at the Department of Economics, University of Jammu. Prior to this, he has worked as Fellow (Economics) at the *Centre de Sciences Humaines*, New Delhi. Dipankar has earlier taught economics at the School of International Studies, Jawaharlal Nehru University, New Delhi. He was educated at the University of Calcutta and at the Centre for International Trade and Development, Jawaharlal Nehru University, and his area of interest includes International Political Economy, Industrial Organisation Theory and Indian Economic Development. He has published extensively on these subjects. Contact: dsg68@hotmail.com.

Ioana TUDOR, titulaire d'un doctorat en droit international de l'Institut Universitaire Européen de Florence, est notamment l'auteur d'un ouvrage consacré à la clause du traitement juste et équitable en droit des investissements, à paraître en mars 2008 chez Oxford University Press. Elle est avocate au barreau de Madrid et dispose d'un Master en droit européen du Collège d'Europe ainsi que d'une maîtrise de l'Université Paris Assas. Elle exerce actuellement au sein du cabinet Gide Loyrette Nouel à Varsovie.

Andreas R. ZIEGLER is a professor of international law at the University of Lausanne and currently Vice Dean of the Faculty of Law and Criminal Sciences. He is also the Director of the Master of Advanced Studies Programme in International and European Economic and Business Law at the same university as well as of the Academy of International Economic Law.

Abstracts

Volume I **Policies and Legal Issues**

Can IBSAC emerge as a Major Bargaining Coalition at WTO Negotiations?

Debashis Chakraborty / Pritam Banerjee / Dipankar Sengupta

India, Brazil, South Africa, China (IBSAC) possess the potential to become the drivers of global economic growth in the coming period and can play a significant role at the multilateral negotiations for protecting developing country interests. IBSAC has earlier come closer to each other at the multi-lateral trade forum under the negotiating umbrella of developing country forum G-20 and have negotiated jointly on several occasions. Analyzing the current profile of the IBSAC countries, the paper argues that the future negotiating agenda of the four countries would be a function of their economic structure. Over the last decade, China has rapidly enhanced its global market share apart from substantially reforming its tariff schedule, while other IBSAC countries lag behind on that front. Moreover, competing trade interest may hurt IBSAC solidarity. The analysis indicates that IBSA is more likely to continue as a bargaining coalition at WTO, with South Africa remaining at periphery and China joining hands only when its interests coincide with others. In addition, given the trade structure of the countries, IBSAC's agenda at WTO is more likely to remain modest in coming future.

Les négociations agricoles à l'OMC: quel cadre multilatéral pour les agricultures mondiales?

Maxime Baudouin

Le défi des négociations agricoles est de concilier le processus de libéralisation progressive et les politiques agricoles des Membres, et de mettre en place des disciplines qui permettent un accroissement des échanges mondiaux de produits agricoles sans remettre en cause la capacité des Membres à développer une agriculture qui réponde aux besoins et attentes de leurs

populations. Mais, les positions des Membres dans le cadre des négociations agricoles dépendent également des négociations sur les produits non agricoles. Par conséquent, la conclusion d'un accord dans le domaine agricole suppose un accord dans le domaine des produits industriels, et vice-versa. Dans ces conditions, les négociations agricoles et le Cycle de Doha ont-ils une chance d'aboutir? Sans prétendre apporter une réponse à cette question, ce chapitre a pour objet de présenter l'état des négociations dans chaque pilier de l'AsA et d'analyser les principales propositions au regard des objectifs de l'AsA, à savoir établir un système de commerce équitable des produits agricoles, par l'établissement de disciplines concernant l'accès au marché et les soutiens en tenant compte de considérations non commerciales et de la situation des PED.

A Look at Services Trade: Implications of the Doha Talks Suspension and Resumption

Rafael Leal-Arcas

This chapter addresses the current World Trade Organization (WTO) negotiations on trade in services in the framework of the Doha Development Agenda. An analysis of the Sixth WTO Ministerial Conference in Hong Kong is provided. Following the suspension of the WTO multilateral trade negotiations in July 2006 – and its subsequent resumption in February 2007 – by WTO Director-General Pascal Lamy, the world trading system must now find ways and means to integrate developing countries. Failing that could be perceived as a danger to the world order. This chapter analyzes the legal and policy implications of the current Doha Round for the two main developed WTO Members, i.e., the United States and the European Community, and the most relevant developing countries of the WTO. Thoughts on alternative ways to move forward in the multilateral trading system are presented in the conclusions.

Foreign Investment Issues and WTO Law – Dealing with Fragmentation while waiting for a Multilateral Framework

Philippe Gugler / Julien Chaisse

This chapter explores the provisions affecting investment in the existing WTO obligations. Worldwide economic integration is not being achieved via expansion of international trade and foreign direct investment acting as separate channels, but rather as two interrelated phenomena that act together and reinforce one another. The previous failures to establish a multilateral framework for investment combined with the increasing volume of invest-

ment and the corollary need for regulation lead back to the existing regulation of investment within WTO. The WTO handles two major agreements that address investment directly: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). The Agreement on Trade-Related Aspects of Property Rights (TRIPS) provides protection for intangible assets that form the basis of the activities of multinational corporations. WTO investment provisions are however limited in scope and lack coherence. Based on the findings, the policy lessons for future prospects are drawn notably on the GATS form a multilateral agreement on investment could adopt.

Droit de l'OMC et droit de l'investissement: regards croisés

Ioana Tudor

Le droit de l'OMC et le droit des investissements sont deux droits relativement récents, qui évoluent rapidement et sont caractérisés par une haute spécialisation et technicité. Leur structure est proche car ils reposent tous les deux sur deux piliers principaux, à savoir une base conventionnelle très dense et en progrès permanent et une jurisprudence très riche. Ils forment tous deux une partie intégrante du droit international général. De plus, les domaines du commerce et des investissements étant souvent complémentaires au niveau économique, cette contribution analyse les similitudes substantielles à ces deux droits. Sur de nombreux points, notamment sur les principes utilisés et leurs méthodes d'interprétation, les deux droits convergent et pourraient davantage s'inspirer l'un de l'autre. Une coopération plus étroite entre les deux serait non seulement enrichissante mais serait aussi utile pour éviter les possibles conflits de compétence qui pourraient surgir à l'avenir.

How to reform WTO decision-making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy

Andreas R. Ziegler / Yves Bonzon

In a context of stalled negotiations and strong public protest against the World Trade Organization (WTO), numerous reform proposals have been put forward in recent years to improve the procedures of the WTO. By analyzing the functioning of WTO decision-making, this chapter lays out a framework against which it assesses some of these reform proposals.

After explaining that these proposals are meant to enhance either the efficiency or the legitimacy of decision-making, we consider separately what

we identify as the three components of decision-making: the object, the organ and the procedural mode. We first enumerate WTO powers and define the legitimacy requirements that result from the nature of these powers, pursuant to the idea of a varying legitimacy requirement. Then we take a close look at the WTO procedural modes and the composition of its organs, and assess to what extent the features of these two components fulfill the legitimacy requirements discussed earlier. We then examine some reform proposals and their potential impact on the efficiency and the legitimacy of WTO decision-making, arguing that a balance must be struck between the two imperatives since they can sometimes collide. We conclude that the scope for reforming the WTO organs and procedural modes is limited and that combining the three components of decision-making in a manner that would fulfill legitimacy requirements may imply making some corrections on the object of decision-making; which would mean limiting WTO powers.

Protection du brevet et promotion de la santé publique: Surenchères autour des standards minimums de l'AADPIC au Sud

Samira Guennif

Au moment où l'entrée en vigueur de l'Accord sur les Droits de Propriété Intellectuelle touchant au Commerce dans les pays en développement pose débat en matière d'accès aux médicaments essentiels, depuis quelques années on assiste à la multiplication des accords de libre échange entre PED et Etats-Unis. Si l'AADPIC institue en pratique des standards minimums concernant la protection des brevets dans le monde, les ALE passés entre les PED et les Etats-Unis visent sans surprise la mise en place de standards plus élevés, d'où l'appellation d'« AADPIC plus ». Ce chapitre se propose de montrer comment, surenchérissant sur les dispositions de l'AADPIC, les ALE favorisent une protection effective et forte de la propriété intellectuelle et négligent la promotion de la santé publique au Sud. Précisément, les dispositions des ALE entendent assurer une promotion considérable des positions dominantes des multinationales en obstruant la concurrence exercée par les génériqueurs, l'effet ultime étant de menacer l'accès des populations à des médicaments plus abordables.

Les télécommunications dans le cadre de l'OMC: bilan et perspectives

Mathieu Guennec

Dans les années 1980 et 1990, Etats-Unis et Union européenne en tête, les grandes puissances commerciales ont libéralisé leur secteur des télécommunications. Lors du Cycle d'Uruguay, les pays de l'OCDE ont fait la promotion de ce modèle d'organisation des marchés. A l'issue de ces négociations

en 1995, de nombreux Membres de la nouvelle OMC ont adopté des engagements sur la libéralisation des services de télécommunications à valeur ajoutée. Immédiatement après le Cycle d'Uruguay, ont débuté des négociations sur la libéralisation des services de télécommunications de base, achevées en 1997. Depuis l'échec de Seattle en 1999, les accessions successives de nouveaux Membres ont étendu la portée de ces accords, en particulier celle de la Chine. Surtout, la décision de l'ORD en 2004, dans le cadre du différend entre les Etats-Unis et le Mexique, a consolidé le corpus normatif des télécommunications au sein de l'OMC. Dans le cadre du Cycle de Doha, il est fort peu probable que les négociations débouchent sur une refonte des règles applicables aux télécommunications. Malgré les tentatives de l'Union européenne d'exporter son nouveau modèle règlementaire adopté en 2002 afin d'adapter les règles du secteur aux mutations technologiques, il semble que les Membres de l'OMC ayant les plus grands intérêts offensifs dans le secteur des télécommunications souhaitent conclure un accord *a minima*, sur la base des règles adoptées en 1997.

**Anti-Dumping Measures in the Context of Global Competition:
Amending a Core Agreement of the WTO**

Debashis Chakraborty / KD Raju / Julien Chaisse

The purpose of the WTO Agreement on Anti-Dumping (ADA) is to ensure that the provision is used only as a contingency measure based upon merit, and not as a veiled protectionist mechanism. However, since the establishment of the WTO in 1995, the number of anti-dumping investigations initiated has increased substantially. Given the growing misuse of anti-dumping investigations, there is an urgent need to look into the modification of the procedure, and the current analysis attempts to identify the broad areas of violation of the ADA in world trade and subsequently discusses the potential provisions for future reform.

The Status of the Precautionary Principle in Public International Law

Els Reynaers Kini

The precautionary principle is an important environmental policy tool according to which scientific uncertainty does not justify regulatory inaction. It is well entrenched in international environmental law, and increasingly finds domestic applications. However, its status as a rule of customary international law (CIL) is still disputed. This is relevant since rules of CIL are binding on States independently of whether they are party to a treaty. No international adjudicating body has so far held that it has acquired a CIL

status. To be recognized as a rule of CIL, two elements must be present, a uniform State practice, and the belief that such a practice is undertaken to conform to a legal obligation. It is argued in this paper that despite there being increasing instances of States adopting the principle domestically, there is no indication yet that States in their international relations comply with the precautionary principle out of sense of legal obligation.

UNESCO, the WTO, and Trade in Cultural Products

Christopher M. Bruner

On 20 October 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a treaty legitimating legal measures to protect domestic producers of “cultural” products. The Convention represents a major victory for Canada and France – its principal proponents – and a major blow to Hollywood and the United States, audiovisual products being among America’s most lucrative exports. This chapter examines the UNESCO Convention’s legal and diplomatic significance. Following a brief look at the treatment of cultural products under the WTO system, the chapter discusses UNESCO’s history, the Convention’s negotiation, and its legal and diplomatic status, concluding that it will have little (if any) legal effect on existing WTO obligations, but a significant diplomatic impact on future negotiations toward greater audiovisual liberalization – a key trade policy goal of the United States.

Volume II**The WTO Judicial System: Contributions and Challenges**

Good Faith, Fairness and Due Process in WTO Dispute Settlement Practice: Overcoming the Positivism of International Trade Law

Marion Panizzon

The WTO Appellate Body has drawn from public international principles to intensify the normative impact of good faith duties vaguely described in Articles 3.10 and 4.3 of the Dispute Settlement Understanding. The fact is noteworthy in comparison to the repeated rejection of the good faith principle in WTO substantive law of GATT, GATS and TRIPS. This chapter identifies the concretizations in WTO case law of such “procedural” good faith duties and finds that the importation of this general principle of law has both filled in the gaps of dispute settlement rules, while maintaining the

flexibility required of a Member-driven dispute settlement procedure. It will trace their evolving functions from a balancing tool to a new institutional use of triangular checks and balances controlling the exercise of authority by the Appellate Body with the Panel, as well as the use of policy space by the parties in dispute. In a second time, this chapter will decode the function of good faith compliance, a first-time judicial assertion of good faith's enforceability in WTO practice. By measuring good faith compliance according to the judicially designed standard of fairness, promptness and effectiveness, the WTO judiciary has introduced nothing less than a constitutional component of procedural fairness by which to review conduct in dispute settlement procedures, specifically the use of litigation strategies. In relating procedural good faith jurisprudence to the level of fairness, the WTO judiciary relegates to the past power-oriented, diplomacy-based structures of WTO dispute settlement.

The Universe of State Responsibility in the WTO Dispute Settlement System

Yenkong Ngangjoh Hodu

The questions “to what extent can the rules of international law be multilaterally enforced? And, what are the relevant ingredients that might lead to the conclusion that a particular act committed by individuals or entities in the territory of a WTO Member amounts to that of the Member in question?” do not have anything approaching an agreed theoretical answer. Yet a large cadre of scholars and practitioners in this area share the identification of a set of practices and empirical arguments that constitute the nucleus of the debate on the relevance of the law of State responsibility in the WTO Treaty system. The UN International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, which has been used in some respects by the WTO judicial organs, although not clinching the issue, provides some insights into this debate. Taking inspiration from the law of State responsibility and examining it in the context of some WTO case law. Part I of this paper explores when and how activities of private individuals/entities can be attributed to those of the WTO Member for the purpose of State responsibility. In the same vein, using the 2001 ILC's Articles, Part II revisits the question of *actio popularis* in the compliance regime of the WTO dispute settlement system.

SPS Measures Adopted in Case of Insufficiency of Scientific Evidence: Where Do We Stand after EC – Biotech Products Case?

Lukasz Gruszczynski

This chapter analyzes the disciplines established by Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures. The analysis is based both on the text of the SPS Agreement as well as on the existing case law with special consideration given to the panel's ruling in EC – Biotech Products. The chapter criticizes the approach of the case law to the issue of applicability of Article 5.7 as it confuses the applicability with the consistency. The chapter argues that it is more appropriate to view the SPS Agreement as providing for three mutually exclusive paths of compliance (i.e. Articles 3.1, 3.3 and 5.7). On the substantive level, the chapter points out the deficiencies of panel's approach to insufficiency of scientific evidence (insufficiency as the absolute term). This chapter claims, consistently with the case law under Article 2.2, that the task of a panel under Article 5.7 should be limited to the assessment of plausibility of scientific opinions on sufficiency of scientific evidence rather than deciding which scientific view is better. The chapter also recognizes several issues that still need to be resolved under Article 5.7 (the extent of the exclusion under Article 2.2, meaning of pertinent information, applicable standard of Article 5.7, second sentence). In this context, possible interpretations are discussed.

La convergence des critères d'examen dans le cadre du GATT et de l'AGCS: Les notions de restrictions et de limitations quantitatives, et l'utilisation des moyens de défense affirmatifs

Panagiotis Delimatsis / Pauline Lièvre

En véritable équilibriste, le juge de l'OMC veille à garantir l'efficacité du droit de l'OMC, tout en respectant la souveraineté et les sensibilités nationales. Bien que décrits dans des termes plutôt vagues, les pouvoirs qui lui sont conférés lui fournissent les moyens d'accomplir cette délicate mission. Le but de ce chapitre est d'évaluer l'utilisation de ces moyens par le juge de l'OMC. Il devient ainsi possible de mesurer son degré d'interférence dans le droit des Membres, tout spécialement dans le champ réglementaire couvert par les accords GATT et AGCS. Dans la mesure où le degré d'interférence dans la sphère nationale est en tout premier lieu déterminé par la portée donnée aux obligations imposées aux Membres, ce chapitre examine de façon comparative l'interprétation de la notion de restriction quantitative dans ces deux accords (Article XI GATT et XVI AGCS). Après avoir mis en évidence un certain degré de symétrie en ce qui concerne l'interprétation de ces obligations de fond par les organes juridictionnels de l'OMC, ce chapitre examine le critère d'examen dans le cas où un moyen de défense affirmatif a

été invoqué pour justifier une dérogation d'une obligation de fond du GATT et de l'AGCS. En parallèle, il examine la manière dont le jeu procédural arrive à influencer le degré d'interférence du droit de l'OMC dans le pouvoir national de réglementer. C'est notamment sur cette problématique que la recherche d'équilibre entre la libéralisation du commerce mondial et d'autres intérêts reconnus comme légitimes apparaît avec la plus grande acuité dans le cadre de l'application des articles XX GATT et XIV AGCS.

Reforming the DSU: An Indian View

Ravindra Pratap

In the light of India's experience at the WTO dispute settlement system, the chapter discusses India's proposals to improve and clarify WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). While India's proposals correctly focus on the special and differential treatment, its proposals on systemic issues have so far not been able to optimize the opportunity. India must be true to its experience with the DSU and mindful of the dynamics of WTO decision making, generally, while negotiating improvements and clarifications of the DSU.

Repeal of the WTO Appeal Process?

Marc Lynedjian

Contrary to most other international procedural treaties, the World Trade Organization's Dispute Settlement Understanding (DSU) institutes a two-tier system. Trade disputes between WTO Members are adjudicated by panels, the decisions of which may be reviewed by the WTO appellate body. This chapter considers whether the WTO's two-tier dispute settlement system is really desirable and whether the move to a single-tier mechanism would not be preferable.

Private Parties and WTO Dispute Settlement System

Alberto Alemanno

This chapter examines the (non) role that private business operators play in the implementation of WTO Dispute Settlement Reports. More precisely, by analysing the legal status of these decisions in national and regional law, it looks at what individuals are entitled to obtain when a WTO Member ignores the results of a Dispute Settlement Body's ruling. As private business operators bear most of the economic costs of non-compliance, there is an

increasing pressure for a more direct involvement of these parties in the Dispute Settlement System mechanisms. The challenge is therefore to find a way to accommodate their interests within the current settlement system, without reducing the discretion WTO Members enjoy in the implementation of the reports. By building upon the EC case law, it is argued that allowing individuals to seek compensation of damages deriving from non-compliance by the losing Member might be a valuable solution to strike a more fair balance between the interests of the WTO actors: its Members and their private business operators.

Une injustice des sanctions de l'OMC

Henri Culot

Ce chapitre examine un problème particulier que pose, sur le plan de la justice, l'application des sanctions dans le droit de l'OMC.

Lorsque les Etats violent les règles de l'OMC, c'est généralement en imposant des mesures protectionnistes qui empêchent les biens étrangers d'être vendus sur leur territoire. Une fois la violation reconnue par l'ORD, l'Etat préjudicié peut prendre des contre-mesures sous la forme d'une augmentation des droits de douane sur les biens originaires de l'autre Etat. Les marchandises concernées par la mesure protectionniste ne sont pas les mêmes que celles visées par la sanction.

Combinées avec l'absence d'effet direct, ces règles induisent des résultats injustes. Les mesures protectionnistes sont seulement imputées aux Etats, mais elles favorisent certains producteurs (généralement appuyés par un lobby efficace) au détriment des producteurs étrangers de biens similaires. De même, les sanctions sont uniquement dirigées contre les États, mais en fait elles portent préjudice aux producteurs de certains (autres) biens choisis par l'Etat qui sanctionne. D'autres catégories d'agents économiques sont également affectées. Sans effet direct, aucun d'entre eux ne peut obtenir un dédommagement. L'absence de coordination entre la violation du droit et la sanction rend ce système injuste.

Ce problème de justice est une conséquence de l'utilisation du concept juridique de la personnalité morale, et se pose dans d'autres hypothèses où le droit considère qu'un groupe d'individus ne forme qu'une seule personne.

WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries

Adebukola A. Eleso

When the WTO came into existence formally as an institution in 1995, it was a culmination of the process to institutionalize the General Agreement on Trade and Tariffs (GATT) which had been in operation since 1947. As an institution with Membership of 151 countries to date, it was imperative on the WTO to provide a forum for Members to settle disputes arising among themselves.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO is probably one of the biggest achievements of the Uruguay Round of negotiations. It aims to provide security and predictability to the multilateral trading system. However, it is a fact that the smaller developing countries have not availed themselves of the procedure.

This chapter argues that the inadequacy and unsuitability of the existing remedies for these countries is responsible, and suggests monetary compensation as an alternative dispute settlement remedy.

Foreign Investment Issues and WTO Law

Dealing with Fragmentation while waiting for a Multilateral Framework

Philippe Gugler / Julien Chaisse

1. **Introduction: International investment regulation and the WTO rules**
2. **WTO provisions related to investment in GATS**
3. **WTO provisions related to investment in TRIMs**
4. **Investment Issues and the TRIPS**
5. **Conclusion: shortcomings and potential improvements of WTO regime**

1. **Introduction: International investment regulation and the WTO rules**

Worldwide economic integration is not being achieved via expansion of international trade and Foreign Direct Investment (FDI) acting as separate channels, but rather as two interrelated phenomena that act together and reinforce one another¹. The synergy effect of trade and investment expansion should open the way for further world economic growth.² For this reason, the surge in spending on foreign investment over the last decade has indeed spurred most of the WTO participants to agree that something needs to be done to make the rules governing foreign investment more consistent across national borders.

¹ See, John H. Dunning and Sarianna Lundan, *Multinational Enterprises and the Global Economy*, (London: Edward Elgar, 2008).

² See, Douglas Brooks, Emma Xiaoqin Fan, Lea Sumulong, 'Foreign Direct Investment in Developing Asia: Trends, Effects, and Likely Issues for the Forthcoming WTO Negotiations', Asian Development Bank, ERD Working Paper Series No. 38/2006.

Advances in information communications technology and the accelerated pace of international distribution in recent years have promoted the growth of foreign investment which divides the various processes of research and development (R&D), procurement, production, manufacturing and sales, etc., across a number of countries. International investment law is one of the fastest-growing areas of international law. Treaties, bilateral, regional³ and plurilateral, have increasingly become the basic source of international investment law. At the same time, new cases are being lodged at an exponential rate. Yet, even though the network of bilateral investment treaties (BITs)⁴ is expanding, it is still heavily one-sided. Most of the agreements are between developed and developing countries.⁵ Also, despite the rapid increase in the importance of international investment, numerous efforts to conclude an international multilateral investment agreement have failed at the United Nations and the Organisation for Economic Co-operation and Development (OECD). The site of the attempt to achieve such a multilateral agreement has now shifted to the World Trade Organization (WTO)⁶: because

³ “Even if some authors raise serious doubts on their effectiveness in compare with WTO law: the threat to the multilateral trading system does not appear to be as large as is often reported, because the long-term dynamics of RTAs lead either to state formation, which is important but rare, or to ineffectiveness, which is the fate of the vast majority of RTAs”, Richard Pomfret, ‘Is Regionalism an Increasing Feature of the World Economy?’, 30 (6) *The World Economy* (2007) at 942.

⁴ Generally, the BITs define foreign investment broadly, require that host states treat private foreign investment fairly and equitably, and require equal treatment of foreign and domestic investment. Many BITs limit expropriation and guarantee fair compensation should expropriation occur. BITs also give investors the right to transfer funds in and out of host countries using market exchange rates. Finally, they provide for state-to-state and sometimes investor-state dispute settlement.

⁵ See, Christian Deblock, ‘Nouveau Régionalisme ou Régionalisme à l’américaine? Le cas de l’investissement’, *Cahiers du Centre Études internationales et Mondialisation*, Institut d’études internationales de Montréal (2005) at 18-19. See also Peter Egger, Mario Larch and Michael Pfaffermayr, ‘Bilateral versus Multilateral Trade and Investment Liberalisation’, 30 (6) *The World Economy* (2007) 567-596.

⁶ In the three earlier attempts (the International Trade Organization – 1948–1950; under the aegis of the UN, 1972–1992; and the Multilateral Agreement on Investment, the MAI, at the OECD – 1995–1997), policymakers were never able to agree even on the objective for such negotiations. In each instance, capital-exporting nations wanted rules to govern entry and post-entry conditions. On the other hand, capital-importing countries wanted obligations that would bind foreign investors as well as investment rules that would help these nations meet their development objectives.

trade and investment are linked in the real world, the system of rules that governs trade should also govern investment.

However, at the 1996 WTO Ministerial Conference in Singapore, an agreement was made to create a committee (the Working Group on Trade and Investment) to analyse the investment issue. Later, this Group was given a new mandate by the Doha Ministerial in 2001. It was required to clarify seven specific issues and to launch negotiations “on the basis of a decision to be taken, by explicit consensus”.⁷ Important differences of opinion made negotiations impossible and contributed, in part, to the breakdown of the Cancun Ministerial meeting. In the summer of 2004, WTO Members conceded that “no work towards negotiations on [investment] will take place within the WTO during the Doha Round”.⁸

We do not intend to examine all the rules, principles and institutions of public international law that affect FDI as the scope of such a project would be too wide. Neither will we explore the reasons for the failure to establish a general agreement for investment within OECD or WTO. Such an analysis has already been done.⁹ The previous failures to establish a multilateral framework for investment combined with the increasing volume of investment and the corollary need for regulation lead back to the existing regulation of investment within WTO and to an exploration of the coverage of investment issues by existing WTO law.

The WTO and its predecessor organization, the General Agreement on Tariffs and Trade (GATT), have not directly tackled the broad issue of foreign investment rules. Instead, GATT and the WTO have dealt with a narrow set of very specific issues, which has left nations to formulate their own policies or through BITs. The WTO handles two major agreements that address investment directly: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). Among the issues addressed by GATT and the WTO are specific aspects of the relationship between trade and invest-

⁷ On this point, Gavin Boyd and Alan Rugman, *The World Trade Organization in the new global economy – trade and investment issues in the Millennium Round*, (London: Edward Elgar, 2002).

⁸ Christian Deblock, ‘Nouveau Régionalisme ou Régionalisme à l’américaine? Le cas de l’investissement’, *Cahiers du Centre Études internationales et Mondialisation*, Institut d’études internationales de Montréal (2005) at 16-18.

⁹ For such an approach, see Kevin Kennedy, ‘A WTO Agreement on Investment: A Solution in Search of a Problem?’, 24 *University of Pennsylvania Journal of International Economic Law* (2003) at 77-188.

ment through the GATS, which concerns the supply of services by foreign companies, and through trade-related investment measures. To the extent that trade in services may require a commercial presence by a foreign service-provider in the territory of another state, the provider may enjoy certain investment rights under the GATS. Additionally, under WTO rules, investment measures, such as local content rules or trade-balancing requirements, would be prohibited, to the extent that they impact upon trade and violate the GATT rules on national treatment and quantitative restrictions.

Three further agreements (the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Government Procurement Agreement (GPA), and the Agreement on Subsidies and Countervailing Measures (ASCM)) have only indirect effects on investment.¹⁰ Of these the TRIPS is the most interesting. It provides protection for intangible assets that form the basis of the activities of multinational corporations. It further requires that Members provide effective legal procedures and remedies for the enforcement of such rights.

The current paper is organized along the following lines. First we explore the WTO provisions related to investment in GATS. TRIMs contribution to investment regulation is analysed next. Third, the impact of TRIPS on investment is explored. Finally, based on the findings, the policy lessons for future prospects are drawn in the conclusion.

2. WTO provisions related to investment in GATS

Of all the existing WTO agreements, the GATS deals most with investment issues. The GATS modes of supply are: cross-border supply, consumption abroad, commercial presence and the presence of natural persons. Although GATS does not deal officially with investment, it covers foreign direct investment through its commercial presence mode of supply. The establishment of a commercial presence relates substantially

¹⁰ The Agreement on Government Procurement deals with public procurement and services because GATS excludes public procurement services. The GPA requirements deal with investment once they apply to procurement of foreign products or services as well as to goods or services produced by locally established foreign suppliers. The Agreement on Subsidies and Countervailing Measures deals with subsidies. Since the Agreement includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment. For this reason, this Agreement tackles investment directly but it does not build up any significant incompatibility between foreign and domestic investment.

and directly to investment. Services obligations that contemplate a “commercial presence” of foreign service providers necessarily imply that the providers will be able to make investments necessary to enjoy the benefits of such commercial presence. Hence, if we focus on the substance and the purpose of this mode of supply, “the commercial presence mode of supply is, for all practical purposes, a multilateral agreement on investment”.¹¹

To that extent, one of the key principles of investment treatment (most-favoured-nation treatment) has become a general obligation for dealing with investment in the Agreement. However, market access and national treatment obligations for investment apply only to those sectors and modes of supply that have been put in the schedules of commitments submitted by the Members, limiting in this way the scope of liberalization for investment in the territory of each WTO Member.

The commercial presence can be directly linked to the two criteria of GATS, market access and national treatment, in the sense that governments can either restrict market access by limiting the issue of banking licences in total, irrespective of whether or not banks are owned by non-residents or residents. Alternatively, the number of foreign banks allowed to set up subsidiaries can be restricted, thus affecting national treatment. Second, the three other modes of supply (cross-border supply, consumption abroad and movement of natural persons) affect the operational part of banking business, for instance, whether foreign banks are allowed to provide services in local currency or from which services they are excluded compared to local banks.

The conditions and limitations for both market access and national treatment could be entered in the schedules of commitments, again specific to sector and mode of supply. This so-called “positive list approach” of enumerating the specific sectors and modes of supply to be covered contrasts with the traditional WTO approach based on general principles. GATS uses in large part the selective liberalization approach to provide access to foreign service suppliers, i.e. to foreign investors in the field of services (para. 3.1). GATS is very important since it seeks to liberalize and to open national economies to investment.¹² International

¹¹ Mitsuo Matsushita, Petros C. Mavroidis and Thomas Schoenbaum, *The World Trade Organization - Law, Practice and Policy*, (Oxford: Oxford University Press, 2003) at 531.

¹² See, Pierre Sauvé, ‘Investment and the Doha Development Agenda: a look at the issues’, in *The Doha Development Agenda, Perspectives from the ESCAP Region*, (New York: United Nations, 2003) at 83.

Investment Agreements are primarily protective, that is, the vast majority of commitments are intended to protect established investment, whereas only a minority of international investment agreements (IIAs) contains liberalization commitments. However, the GATS also contains elements of both the national and most-favoured-nation treatment and it relies on the use of both positive lists of commitments (para. 3.2) and negative lists of exemptions for different purposes (para. 3.3).

2.1. *Commercial presence as an agreement to open up markets to foreign investment*

As we have already mentioned, of all the existing WTO obligations, GATS deals most with investment issues. The investment implications of GATS are largely derived from the key definition of Article I.2, which identifies modes by which services can be supplied. Several of these imply a significant presence (referred to as a “commercial presence” in the legal texts) in the country where the service is provided, and provide the basic protections of GATS to the investments that are an integral part of this presence. The supply of trade in services through “commercial presence”, which is in essence an investment activity, is covered by the so-called “mode 3”.

The notion of “commercial presence”, refers to a situation whereby a service provider establishes or has a presence of commercial facilities in another country in order to render a service. The service itself is supplied by setting up a business or professional establishment, such as a subsidiary corporation or a branch or representative office, in the territory of one Member by a service supplier of another Member. Through the provision covering the commercial presence, the GATS is in fact an agreement which aims to open up markets to foreign investment¹³ and which can apply to many different sectors of activity including educational services, banking, insurance, and telecommunications.

It is only by reference to a country’s schedule, and (where relevant) its MFN exemption list, that it can be seen to which services sectors and under what conditions the basic principles of the GATS (market access, national treatment and MFN treatment) apply within that country’s jurisdiction. A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule.

¹³ To a lesser extent, Mode 4 also tackles investment issues because it deals with the temporary entry of managerial and other key personnel.

The commitments made in the field of “commercial presence” are important since with the constitutional principle of the most-favoured-nation (MFN) obligation, parties to GATS are committed to treating services and service providers from one Member in a no less favourable way than like services and service providers from any other as far as measures affecting trade in services are concerned.¹⁴

National treatment, however, is not automatically accorded across the board. It applies only for scheduled sectors when parties agree to provide national treatment in the context of specific market access commitments.

GATS also states that a Member may maintain a measure inconsistent with MFN treatment provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

The GATS does not set out any operational conditions directly. This is not surprising since the provisions of BITs are usually only negligibly regulatory, meaning that host countries continue to regulate foreign investment through their domestic legislation and not by directly imposing obligations on foreign investors in IIAs. Nevertheless, there are some general obligations within GATS that certainly affect the operational conditions of investment. Such obligations are: domestic regulation, recognition, monopolies and exclusive service suppliers, and business practice obligations.

The domestic regulation affects the operation of investment mostly through an authorization process, qualification requirements, technical standards and licensing requirements, where these conditions and procedures are required for the supply of a service.

The obligations of recognition affect investment in the supply of a service, where services suppliers need to meet standards or criteria for the authorization, licensing, or certification of their services, or they need to have special education or experience.

The obligation on monopolies and exclusive service suppliers within the Agreement states that each Member shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent

¹⁴ The wording of MFN treatment in GATS is the same as in the North American Free Trade Agreement and the United States bilateral investment treaties, using the negative list approach, it states that with respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

with the principle of most-favoured-nation treatment. If a supplier fulfils the condition on monopoly and being an exclusive service supplier, then this Agreement will certainly affect the operation of his/her investment in order to prevent the supplier from abusing its monopoly position.

Regarding the obligations on business practices, the Agreement appeals to the Members to eliminate certain business practices of service suppliers that may limit competition and thereby restrict trade in services.

As in the case of the TRIMs Agreement, GATS promotes the transparency of the investment environment. This is an interesting feature of WTO since most BITs are only slightly transparent. They contribute to transparency only insofar as the provisions of the agreements themselves are transparent, but do not require host countries to make their domestic laws transparent. GATS declares that each Member shall publish promptly all relevant measures of general application,¹⁵ which pertain to or affect the operation of trade in services. Where the publication is not practicable, the Agreement states that such information shall be otherwise made publicly available.

2.2. *Opening an economy to foreign investment through Mode 3 commitments*

Under GATS, all schedules have two sections.¹⁶ First, “horizontal” commitments which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. The second section of the schedule, the “sector-specific section” contains entries that apply only to a particular sector (12 sectors, representing about 160 sub-sectors, can be distinguished under the GATS).¹⁷

¹⁵ On the central notion of transparency in WTO system and its contribution to ensuring the effectiveness of its law, See, Sharif Bhuiyan, *National Law in WTO Law – Effectiveness and Good Governance in the World Trading System*, (Cambridge: Cambridge University Press 2007) at 68-75.

¹⁶ T. Brewer and S. Young, ‘Investment issues at the WTO: the architecture of rules and the settlement of disputes’, 3 (1) *Journal of International Economic Law* (1998) at 460-462.

¹⁷ Philippe Gugler, ‘European Integration and Uruguay Round Results on Trade in Services’, in Hirsch Seev and Almor Tamar (Eds.), *Outsider’s Response to European Integration*, (Copenhagen: Copenhagen Business School Press, 1999) at 157-160.

In determining a country's sector-specific commitment, consideration must also be given to the overall horizontal commitments. The "horizontal commitments" are those commitments that apply across-the-board to all the services sectors listed in the country's "Schedule of Specific Commitments". These commitments are usually written at the beginning of the schedule. They can refer to economic considerations that may be applicable to all the services sectors and sub-sectors listed in the schedule.

All WTO Member States are expected to have a "Schedule of Specific Commitments" under the GATS. This is the list of commitments for every selected service sector that WTO Members came up with during negotiations. WTO Members opened up their markets in an asymmetrical way reflecting their perceptions about how open (or, conversely, how closed) an economy should be to foreign investment. This serves as a guarantee to service providers in other countries that market entry conditions will not become less restrictive, as they can only be improved. A Mode 3 request, offer, or commitment, like those for the other modes, may be for a specific sector or sub-sector, or horizontal.

A WTO Member can, for each service sector or sub-sector, request, or offer, different levels of commitments. This applies for each mode of supply although we focus here on Mode 3. The commitments and the limitations to market access and national treatment are entered in the service schedule with respect to each of the modes of supply. A Mode 3 request, offer, or commitment is essentially about liberalizing the conditions under which the service providers of Switzerland, for example, can invest and set up branch offices, joint ventures, or subsidiaries in the territory of another WTO Member. It can however have different levels. Indeed, the Mode 3 commitments can lead to a full liberalization, a limited liberalization or a retained liberalization.

2.2.1. Full liberalization

A WTO Member can request, offer, or commit to full liberalization. This means that there will not be any limitation on market access or national treatment for the service sector and mode of supply in which this commitment is written. In this scenario, the WTO Member writes "none" in its schedule of commitments. This means that it is committing itself to providing full liberalization of this service sector. It commits itself to allowing the services and service providers of other WTO Members full access to the country's market of consumers and means

that it will not impose any regulations that would restrict such access or discriminate in favour of domestic services or service suppliers.

However, there are certain exceptional circumstances, such as those in GATS Article XIV and XIVbis, under which WTO Members can justify the imposition of regulations that violate their GATS obligations.

2.2.2. *Limited liberalization*

A WTO Member can describe and write specific limitations or conditionalities to market access or national treatment in its “Schedule of Specific Commitments”. Such limitations can be those that are required by existing national laws or regulations.

Moreover, they can always impose restrictions with respect to commercial presence. In making their commitments, WTO Members can specify the limitations or conditions under which they will allow foreign services and service providers under the four modes of supply into their domestic market and compete with domestic services and service providers. These limitations or conditions can be with respect to “market access” or to “national treatment”. They can, for example, limit the number of economic operators (GATS Article XVI). These “market access limitations” are restrictions on the entry of foreign services or service suppliers into the domestic market.

They can make exceptions from the obligations to accord MFN treatment to foreign service suppliers or from the obligation to accord national treatment (GATS Article II:2 and Article XVII). A country’s commitments may be limited by its MFN exemptions (i.e., the maintenance of measures inconsistent with the MFN obligation). Since MFN is a general obligation that applies to all trade in services, exemptions are listed in a separate schedule indicating: (i) the sectors to which the exception applies; (ii) the measure and why it is inconsistent with the MFN obligation; (iii) the countries to which the measure applies; (iv) the duration of the exemption; and (v) the need for the exemption. Exemptions, in principle may not last longer than 10 years.

The national treatment limitations take the form of laws or regulations that effectively discriminate against foreign in favour of domestic services and service suppliers, or provide for market competitive conditions that favour domestic over foreign services and service providers.

2.2.3. *Retained liberalization*

Finally, it is possible for a Member to keep control of a service sector and to decide not to liberalize it. In that case, a WTO Member must in-

dicate “unbound” in its schedule of commitments for a given sector or mode of supply if it wishes to remain free to introduce or maintain laws or regulations that limit market access or national treatment or favour domestic over foreign firms in that sector or mode of supply.

This option will result in a retained liberalization for a given services sector.

2.3. *Towards Investment Disputes at WTO*

All WTO Members are bound by the provisions of the GATS as part of their treaty obligations under the WTO Agreement. Any violation by them of their GATS obligations and commitments may render them open to binding and enforceable WTO dispute settlement.

Indeed, Article XVI:4 of the Agreement Establishing the World Trade Organization (WTO Agreement) states that “each Member shall ensure the conformity of its law, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” This general clause is reaffirmed by special provisions contained in specific agreements whose observance calls for the adaptation of domestic law.¹⁸ However, since the principle expressed by article XVI:4 is included in the Agreement Establishing the WTO, which forms the very basis of the organization, it applies to all other WTO agreements, even if these agreements do not refer to it specifically. Inasmuch as the WTO agreements have become effective and Members do not benefit from any derogation at any given moment as specified by the procedure defined in article IX:3 WTO Agreement, it must amend its legislation to conform to the WTO law. To that extent, the “obligation contained in article XVI:4 is of cardinal importance since a violation of any provision in the agreements (GATT, GATS, TRIPS...) automatically leads to a violation of article XVI:4 of the WTO Agreement”.¹⁹

This principle is applicable to the scheduled commitments. Indeed, the Appellate Body stated that the fact that “Members’ Schedules are an integral part of the GATT 1994 indicates that, while each Schedule repre-

¹⁸ See, Julien Chaisse, *Ensuring the Conformity of Domestic Law with World Trade Organisation Law – India as a case study*, Centre de Sciences Humaines Occasional Paper n°13, (New Delhi: Rajdhani Press, 2005) at 35.

¹⁹ Julien Chaisse and Debashis Chakraborty ‘Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System’, 28 (1) University of Pennsylvania Journal of International Economic Law (2007) at 153-155.

sents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members”.²⁰ This logical solution expressed with regard to the GATT schedule has been extended very logically to GATS schedule commitments.

Pursuant to Article XVI:4 of the WTO Agreement, “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”. Thus, independent of any expectation or any unintentional mistake, the United States’ obligations pursuant to Article XVI:4 are to ensure that its relevant laws are in conformity with its WTO obligations, including any commitments undertaken in its GATS Schedule”.²¹

If a Member does not comply with WTO rules, this may give rise to a dispute. A dispute could then arise when a Member believes that another Member is violating a commitment that it has made under mode 3 of GATS. Such a situation would lead to a dispute related to domestic regulation of investment within the WTO. The WTO/DSB could rule on an investment dispute.

The possibility of seeing investment disputes at WTO is perhaps not so attractive for a reason directly related to the very nature of the dispute settlement mechanism (DSM) system. One feature of many investment agreements, which has contributed to calls for a balancing of investor rights with responsibilities, has been the grant of direct legal personality to investors; i.e., enabling them to mount an international arbitration against host states. Most recent investment agreements provide recourse to so-called investor–state arbitration.²²

²⁰ European Communities – Customs Classification of Certain Computer Equipment – Report of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, 5 June 1998, para. 109 *in fine*.

²¹ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel, WT/DS285/R, 10 November 2004, para. 6.138.

²² “BITs and RTAs show an important trend towards granting investors a wide range of dispute settlement alternatives, as the ability to choose the forum of debate is regarded as a major guarantee to investors against arbitrary and prejudicial conduct from host countries’ authorities. BITs and RTAs commonly envisage both State-to-State procedures, where the home country authorities act on behalf of their investors, as well as Investor-State procedures, which afford private investors direct recourse to challenge host country authorities’ measures in dispute resolution instances. Where Investor-State is recognized, various alternatives regarding the nature of the dispute resolution procedures are usually offered”, Mar-

This novel device has permitted investors to challenge government measures, policies or actions which are thought to contravene the substantive provisions of a given treaty. The investor–state mechanism has given rise to a substantial volume of litigation in recent years. In stark contrast, the WTO dispute settlement rules are exclusively reserved for state-to-state disputes, which makes it less interesting for investors.

3. WTO provisions related to investment in TRIMs

In the Uruguay Round the TRIMs Agreement, which prohibits performance requirements involving quantitative restrictions, was adopted. Developing countries are frequent (but by no means the only) users of TRIMs.

The TRIMs Agreement has constituted a significant net step forward in the area of investment at the multilateral level. From the substantive point of view first, but it “unambiguously and explicitly put investment policies on the multilateral agenda”.²³ It addressed investment measures that were trade-related and which violated Article III (national treatment) or Article XI (general elimination of quantitative restrictions). Basically it prohibited member countries from making the approval of investment conditional on compliance with laws, policies or administrative regulations that favoured domestic products. As an agreement that is based on existing GATT rules on trade in goods, the TRIMs Agreement is not concerned with the regulation of foreign investment. The disciplines of the TRIMs Agreement focus on discriminatory treatment of imported and exported products and do not govern the issue of entry and treatment of foreign investment.

The TRIMs agreement adds value to the GATT/WTO system by describing types of trade-related investment measures (para. 3.1) that are considered to be inconsistent with GATT Article III (para. 3.2) or XI (para. 3.3).

tin Molinuevo, *WTO Disciplines on Foreign Investment, Wasn't the GATS about trade in services?*, (Universidad de Bolonia: Master Thesis, 2006) at 88.

²³ T. Brewer and S. Young, ‘Investment issues at the WTO: the architecture of rules and the settlement of disputes’, 3 (1) *Journal of International Economic Law* (1998) at 462.

3.1. *TRIMs contribution*

Governments often tend to impose trade-related investment measures (performance requirements) to achieve certain national priorities.²⁴ These measures relate to trade-distorting restrictions imposed by the host country on multinational enterprises, which negatively influence trade as well as investment development. According to Dunning, performance-related measures may embrace the whole gamut of operating practice. They can include behavioural guidelines or requirements in respect of local purchases of capital goods, raw materials, intermediate goods and services, the proportion of output exported, the type of value added (e.g. R&D) undertaken by affiliates, information provided on intra-firm pricing practices, conditions attached by MNEs on the use of technology transferred, and so on.²⁵

The TRIMs Agreement, however, does not attempt to regulate the entry and treatment of foreign investment, but applies only to those measures that impose discriminatory treatment on imported and exported goods.²⁶ This Agreement recognizes that certain national practices, such as local content requirements, can restrict and distort trade and, therefore, supports the concept of “national treatment”. As a result, the Agreement outlaws investment measures that restrict quantities, and it discourages measures which limit a company’s imports or which set targets for the company’s exports. Among the measures not covered by the Agreement are export performance requirements, technology transfer requirements, and subsidies to attract investments in specific industries or projects.

The Agreement did not define TRIMs, but provided an illustrative list (Annex 1). The lack of a precise definition means that the issue is not always clear-cut and there has been disagreement as to whether or not certain measures are covered by the Agreement. Yet, the WTO has recognized that some of TRIMs violate the principles of the GATT and it

²⁴ See, Douglas Brooks, Emma Xiaoqin Fan, Lea Sumulong, ‘Foreign Direct Investment in Developing Asia: Trends, Effects, and Likely Issues for the Forthcoming WTO Negotiations’, Asian Development Bank, ERD Working Paper Series No. 38/2006 at 25.

²⁵ John H. Dunning, *Multinationals Enterprises and the Global Economy*, (Wokingham: Addison Wesley, 1993) at 559.

²⁶ Pedro Da Motta Veiga, ‘The international regime on investments: a problematic status quo, an uncertain future’, paper presented at the international seminar ‘The New Agenda For International Trade Relations As The Doha Round Draws To An End’, Observatorio Relaciones UE-America Latina (OBREAL), Barcelona, January 29-30, 2007, at 9.

has required countries to abandon the TRIMs that have been identified as being inconsistent with the GATT rules.

A few points should be mentioned at this stage on the question of the relationship between TRIMs and GATT. The issue of the legal relationship between the GATT and the TRIMs Agreement arises when a measure is challenged under both agreements. Several panels have dealt with measures challenged under both provisions of the GATT and Article 2.1 of the TRIMs agreement. Panels have analysed whether measures should be examined under the TRIMs Agreement before being examined under the GATT, based on the principle that, where two agreements apply, the more specific agreement should be examined before the more general agreement.²⁷ In another case, the panel analysed the measures in question under the GATT first, partly because India, the responding party, encouraged the panel to refrain from analysing the measures under the TRIMs Agreement. The panel then stated that “for the purposes of this case, therefore, there appears to be, in that respect, no particular reason to start our examination on any particular order. Nor does it find that the end result would be affected by either determination of order of analysis”.²⁸ The order of analysis should not affect the outcome but may have an impact on the potential for panels to apply the principle of judicial economy.²⁹ WTO jurisprudence suggests that panels finding a violation of one of the agreements will consider that action

²⁷ “As to which claims, those under Article III:4 of GATT or Article 2 of the TRIMs Agreement, to examine first, we consider that we should first examine the claims under the TRIMs Agreement since the TRIMs Agreement is more specific than Article III:4 as far as the claims under consideration are concerned. A similar issue was presented in *Bananas III*, where the Appellate Body discussed the relationship between Article X of GATT and Article 1.3 of the Licensing Agreement and concluded that the Licensing Agreement being more specific it should have been applied first. This is also in line with the approach of the panel and the Appellate Body in the *Hormones* dispute, where the measure at issue was examined first under the SPS Agreement since the measure was alleged to be an SPS measure” (footnotes omitted). Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.63.

²⁸ India – Measures Affecting the Automotive Sector – Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.158.

²⁹ See, India – Measures Affecting the Automotive Sector – Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.158-7.161. See, Mitsuo Matsushita, Petros C. Mavroidis and Thomas Schoenbaum, *The World Trade Organization – Law, Practice and Policy*, (Oxford: Oxford University Press, 2003) at 527-529.

taken to remedy the inconsistencies under one agreement would necessarily remedy any inconsistencies under the other agreement.³⁰

TRIMs may be understood as any measure taken by a government to discriminate between a domestically produced good and goods produced overseas. This includes:

- local content requirements: where governments require a corporation to use or purchase domestic products in order to avoid a penalty or to benefit from an incentive;
- trade balancing measures: where governments impose restrictions on the import of inputs by a corporation or limit the import of inputs in accordance with its level of exports;
- foreign exchange balancing requirements: where an enterprise has the level of imports linked to the value of its exports in order to maintain a net foreign exchange earning.

Article III:4 and Article XI:1 of the GATT are worded broadly enough to cover investment-related measures. Article III:4 of the GATT applies to “all laws, regulations and requirements affecting... internal sale, offering for sale, purchase, transportation, distribution or use”. Article III:4 has been found to apply to investment-related measures that require the investor to use a certain amount of “domestic content” in manufacturing operations.³¹ Article XI:1 applies to “prohibitions or restrictions” other than duties, taxes or other charges on the importation, exportation or sale for export of any product. By definition, we must underline that any measure that conditions investment upon export performance operates as a restriction.

The Illustrative List is annexed to the TRIMs Agreement and “provides additional guidance as to the identification of certain measures consid-

³⁰ “Under the principle of judicial economy, a panel only has to address the claims that must be addressed to resolve a dispute or which may help a losing party in bringing its measures into conformity with the WTO Agreement. The local content requirement aspects of the measures at issue have been addressed pursuant to the claims of the complainants under the TRIMs Agreement. We consider therefore that action to remedy the inconsistencies that we have found with Indonesia’s obligations under the TRIMs Agreement would necessarily remedy any inconsistency that we might find with the provisions of Article III:4 of GATT”. Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.93.

³¹ [GATT report] Canada – Administration of the Foreign Investment Review Act (FIRA), (L/5504 - 30S/140), adopted on 7 February 1984, at 140.

ered to be inconsistent with Article III:4 and XI:1 of the GATT 1994”.³² As the *Indonesia – Automobiles* panel observed: “An examination of whether the measures [in question] are covered by Item (1) of the Illustrative List... will not only indicate whether they are trade-related but also whether they are inconsistent with Article III:4 and thus in violation of Article 2.1 of the TRIMs agreement”.³³

This List cites the following as examples of host-country investment measures that either restrict imports or exports or require imports or exports: local content requirement, export performance requirements, trade balancing requirements, foreign exchange balancing restrictions, and restrictions on an enterprise’s export or sale for export of products. Such measures are prohibited.

Members were given a “transition period” during which their notified TRIMs were to be eliminated.³⁴ The TRIMs agreement provided for three different transition periods during which WTO Members, according to their level of development, must phase out WTO inconsistent TRIMs that were notified to the Council on Trade in Goods.³⁵ A transition period allowed WTO Members to phase out WTO-inconsistent measures that were notified to the WTO under the TRIMs Agreement. If a government does *not* notify the WTO of an existing TRIM, then it is open to legal action by other WTO Members. The length of the phasing out period was based on a state’s level of development, i.e. developed countries were given 2 years; developing countries were given 5 years; and least-developed countries were given 7 years. Therefore all developing countries should have implemented the TRIMs agreement and eliminated their regulations by 1 January 2000.

³² India – Measures Affecting the Automotive Sector – Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.157.

³³ Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.83.

³⁴ On this transitional period, See Kevin Kennedy, ‘A WTO Agreement on Investment: A Solution in Search of a Problem?’, 24 University of Pennsylvania Journal of International Economic Law (2003) at 138.

³⁵ Art. 5.2 TRIMs: “Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member”.

The problem with this notification provision is that failure to notify can be largely left unpunished because WTO remedies are always prospective.³⁶

The general WTO dispute settlement procedure, as laid down in the Dispute Settlement Understanding, also applies to disputes arising under the TRIMs Agreement (Article 8). Issues relating to the alleged inconsistency of particular measures with the TRIMs Agreement have been raised in a dispute settlement proceeding, in which a panel was established in 1997, concerning measures applied by Indonesia in the automotive sector. We will detail this case and subsequent ones to examine the circumstances in which the TRIMs agreement has been used to regulate domestic investment regulations.

3.2. *Analysing whether TRIMs are inconsistent with GATT Article III:4 under the TRIMs agreement*

The TRIMs Agreement prohibits WTO Members from applying TRIMs that are inconsistent with Article III of the GATT (Article 2.1).

Article III:1 of the GATT 1994 establishes a general principle according to which internal regulations and taxes should not be applied “so as to afford protection to domestic production”. It informs, as a chapeau, the following paragraphs of the provision. Paragraph 2 stipulates national treatment in relation to internal taxes and other internal charges, whereas Paragraph 4 sets out the general obligation to accord imported products treatment no less favourable than that accorded to like products of national origin in respect of internal laws and regulations affecting the sale and use of such products. The second notion of equal treatment and mainstay of the world trading system under the WTO is the principle of national treatment prohibiting discrimination between products (goods and services) produced domestically and those imported from other member countries. Together with the MFN obligation, it forms the fundamental principle of non-discrimination in WTO law within the limit of existing exceptions.³⁷

³⁶ T. Brewer and S. Young, ‘Investment issues at the WTO: the architecture of rules and the settlement of disputes’, 3 (1) *Journal of International Economic Law* (1998) at 462.

³⁷ National treatment is subject to a number of important exceptions, thus permitting differential treatment for various policy reasons. In the GATT 1994, the most common exceptions are stipulated in Article III:8 (subsidization and government procurement), Article XVI (subsidies), Article XIX (safeguard measures), Article XX (general exceptions) and Article XXI (security exceptions).

In regulations explicitly treating domestic and imported products differently, a violation of the national treatment obligation is obvious since an internal law affecting the sale of products, or a tax, has, on its face, a discriminatory effect. Most regulations, however, are designed in a neutral and *de jure* nondiscriminatory manner but nonetheless result in *de facto* discriminatory treatment of imported products. The distinction between *de jure* and *de facto* discrimination is often difficult to draw and blurred in practice. The problem is related to the scope of protection under national treatment. Since the early days of the GATT 1947, the scope of national treatment has been read in broad terms and thus has traditionally covered *de facto* discrimination extensively.

The Illustrative List annexed to the TRIMs Agreement sets out two categories of “TRIMs that are inconsistent with the obligation of national treatment provided for in [Article III:4 of the GATT].”³⁸ TRIMs that are inconsistent with Article III:4 include TRIMs that are:

“mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

- (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source [...]” or
- (b) “that an enterprise’s purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports”.³⁹

For example, it is a violation of the requirement of national treatment for an investment measure to require the purchase of local products by foreign enterprises to be tied with its exports. In *Indonesia - Certain Measures Affecting the Automobile Industry*, the panel ruled on the legality of an Indonesian car programme linking tax benefits for cars manufactured in Indonesia to domestic content requirements and linking customs duty benefits for imported components of cars manufactured in Indonesia to similar domestic content requirements. The panel found that these local requirements were “investment measures” because they had a significant impact on investment in the automotive sector⁴⁰ and that they were

³⁸ TRIMs Annex, para. 1.

³⁹ TRIMs Annex, para. 1.

⁴⁰ *Indonesia – Certain Measures Affecting the Automobile Industry* – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.80.

“trade-related” because they affected trade.⁴¹ The panel also found that compliance with the requirements for the purchase and use of products of domestic origin was necessary to obtain the tax and customs duty benefits and that such benefits were “advantages” within the meaning of the Illustrative List.⁴² As a result, the panel ruled that the local content requirements violated the TRIMs Agreement.⁴³

3.3. *Analysing whether TRIMs are inconsistent with GATT Article XI:1 under the TRIMs agreement*

The TRIMs Agreement prohibits WTO Members from applying TRIMs that are inconsistent with Article XI of the GATT (Article 2.1).

Article XI of the GATT 1994 stipulates the general elimination of quantitative restrictions. Article XI of the GATT 1994 prohibits any measure other than duties, taxes or other charges “or other measures having equivalent effect”. Therefore, it is not the legal form of the measure but its effect on trade which is important.

The GATT regulation on quantitative restrictions, however, has a limited effect because of the many exceptions. Article XI allows for the following exceptions to this prohibition:

- temporary export restrictions of foodstuffs or other “essential” products when there is a shortage of such products on the national market;
- import restrictions on agricultural and fishery products when these restrictions are part of a national policy of subsidizing agricultural prices;
- restrictions on basic products which follow from an international agreement on basic products.

Moreover, Article XIII:1 prohibits any form of discrimination in the establishment or application of import or export restrictions; quantitative

⁴¹ Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.82.

⁴² Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14.89-14-91.

⁴³ Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, para. 14-91.

restrictions must apply equally to all third countries (thus, not only to the other GATT members).

Furthermore, quantitative restrictions are also permitted on the basis of other exceptions, particularly for the protection of the balance of payments and the currency reserves of contracting states and for the protection of domestic industries against serious injury. Quantitative restrictions are mainly lifted within regional unions or on the basis of other cooperation agreements.

The Illustrative List annexed to the TRIMs Agreement sets out three categories of “TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in [Article XI:1 of the GATT]”.⁴⁴ TRIMs that are inconsistent with Article XI:1 include those that are:

“mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: “the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products”.

For instance, it is a violation of prohibitions of quantitative restrictions when investment measures require an enterprise to use its own foreign exchange reserve to import products. The prohibition of quantitative restriction is similarly violated if export is tied in any way with the local production. In 2001, the *India - Measures Affecting the Automotive Sector* case involved a TRIM requiring “trade balancing”. In May 1999 the government of the United States of America lodged a complaint against the Indian Government regarding the auto industry measures it had introduced in November 1997. Under the 1997 law, the Indian government required all new foreign auto-manufacturing investors to sign a standard Memorandum of Understanding (MoU) with the government establishing:

⁴⁴ TRIMs Annex, para. 2.

- a minimum US\$ 50 million investment in joint ventures with majority foreign ownership;
- a waiver of import licences if local content exceeds 50 per cent; and
- the obligation to export within 3 years if export requirements are not met.

According to the Panel, as of the date of the establishment of the trade balancing condition, “there would necessarily have been a practical threshold to the amount of exports that each manufacturer could expect to make, which in turn would determine the amount of imports that could be made. This amounts to an import restriction. The degree of effective restriction which would result from this condition may vary from signatory to signatory depending on its own projections, its output, or specific market conditions, but a manufacturer is in no instance free to import, without commercial constraint, as many kits and components as it wishes without regard to its export opportunities and obligations”.⁴⁵ The Panel therefore found that the “trade balancing condition contained in Public Notice No. 60 and in the MOUs signed thereunder, by limiting the amount of imports through linking them to an export commitment, acts as a restriction on importation, contrary to the terms of Article XI:1”.⁴⁶

After finding that the trade balancing requirements violate GATT Article XI:1, the *India - Measures Affecting the Automotive Sector* panel invoked the principle of judicial economy and concluded that it was not necessary to analyse the measures under the TRIMs Agreement.⁴⁷

The TRIMs agreement has an indirect impact on national policies, which may affect the activities of foreign firms.⁴⁸ Indeed, as stated above, this agreement relates to local-content requirements and incentives such as tax concessions tied to exports. Domestic regulations in these areas violate the principle of national treatment (Art. III GATT) and the prohibition of quantitative restrictions (Art. XI GATT). These restrictions are therefore forbidden under the TRIMs Agreement. The

⁴⁵ India – Measures Affecting the Automotive Sector – Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.277.

⁴⁶ India – Measures Affecting the Automotive Sector – Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.278.

⁴⁷ India – Measures Affecting the Automotive Sector – Report of the Panel, WT/DS146/R, WT/DS175/R, 21 December 2001, para. 7.323-7.324.

⁴⁸ Robert Edwards and Simon Lester, ‘Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures’, 33 *Stanford Journal of International Law* (1997).

TRIMs Agreement also prohibits other measures that violate Arts. III and IV of the GATT 1994, such as trade-balancing requirements, foreign exchange restrictions related to foreign exchange inflows and export controls. The TRIMs Agreement has also been referred to in the disputes concerning the European Community's import regime for bananas; however, the panels established in those disputes did not make findings under the TRIMs Agreement. In addition, measures taken by Brazil and the Philippines have been the subject of bilateral consultations pursuant to the TRIMs Agreement.⁴⁹

4. Investment Issues and the TRIPS

The purpose of TRIPS Agreement is to provide minimum standards of intellectual property (IP) protection with members having flexibility to determine the most appropriate method of implementing the provisions of the Agreement within their own legal system and practice. It attempts to reduce the differences in the manner by which IPRs are protected around the world by fixing a minimum level of intellectual property protection that each of the WTO's Members ought to guarantee. Even if not directly related to investment, TRIPS has an impact on the level of investment in a country (para. 4.1). To that extent, the question must be raised of whether there is a negative impact of compulsory licensing on investment decisions (para. 4.2).

4.1. *Opening up economies to foreign investment by protecting technology*

The TRIPS Agreement emphasizes that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁵⁰ In other words, the TRIPS

⁴⁹ Kevin Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem?', 24 *University of Pennsylvania Journal of International Economic Law* (2003) at 145.

⁵⁰ Article 7 of the TRIPS Agreement.

Agreement contains no provisions on investment, but it helps to open up economies to foreign investment by protecting technology.⁵¹

The relationship between the TRIPS Agreement and foreign investment is also evident from the fact that virtually all modern investment agreements which lay down standards for the promotion and protection of foreign investment include intellectual property within the definition of investment.

In addition, the existence of certain standards of IPR protection should be one of the elements taken into consideration by potential foreign investors with respect to their decisions on where to locate their production facilities. However, in the long term, to the extent that the levels of protection are substantially harmonized under the TRIPS Agreement, IPRs are likely to become a less significant issue in investment decisions, except with respect to the effective enforcement of available rights.

As a result, the question arises as to the relationship between the application to intellectual property of rules contained in international investment agreements, on the one hand, and rights and obligations contained in international agreements on the protection of intellectual property rights, such as the TRIPS Agreement, on the other.

4.2. *Is there a negative impact of compulsory licensing on investment decisions?*

An example of the difficult relationship between the application to intellectual property of rules contained in international investment agreements and rights and obligations contained in international agreements on the protection of intellectual property rights, such as the TRIPS Agreement appears in the context of compulsory licensing organized by TRIPS agreements.

More particularly, could the wide definition of the term expropriation in international investment agreements be considered to prohibit certain measures that governments are explicitly permitted to take under the TRIPS Agreement, such as compulsory licensing?

In accordance with Articles 8 and 40 of the TRIPS Agreement, as reaffirmed by the *Declaration on the TRIPS Agreement and Public Health*,⁵²

⁵¹ T. Brewer and S. Young, 'Investment issues at the WTO: the architecture of rules and the settlement of disputes', 3 (1) *Journal of International Economic Law* (1998) at 463.

governments can take steps to prevent patent owners from abusing their rights, by “unreasonably” restraining trade or hampering the international transfer of technology. In practice, public authorities can authorize a third party to manufacture a patented product or to use the patented process without the patent owner’s consent.⁵³ Most developed and developing countries provide for a compulsory licensing concession in their legislation. Recourse to compulsory licensing is based on Article 31 of the TRIPS agreement devoted to “other uses without authorization of the right holder”. The article aims to strike a balance between the concern to promote access to medicines and to provide protection and incentives for R&D in the pharmaceutical field. The objective is to create a more competitive environment without, however, ignoring the rights of the patent owner, who ought to be adequately compensated whatever the circumstances.

It is possible to issue a compulsory licence under certain conditions to ensure that the legitimate interests of the patent owner have been protected.⁵⁴ In particular, an attempt should have been made to obtain a voluntary licence from the right holder on reasonable commercial terms (Article 31.b).⁵⁵ However, this article provides for making the voluntary

⁵² “Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted”, *WTO, Doha Ministerial Conference 2001, Declaration on the TRIPS Agreement and Public Health*, 14 November 2001, WT/MIN(01)/DEC/2, para. 5 b.

⁵³ Sara Ford, ‘Compulsory Licensing Provision Under the TRIPS Agreement: Balancing Pills and Patents’, 15 *American University International Law Review* (2000) at 941.

⁵⁴ Article 31 of the Agreement sets out to determine, as accurately as possible, a framework for the compulsory licence (CL) regime. The list of conditions for the use of CL covers in particular the following points: authorization to use without the patent owner’s consent should be reviewed based on the circumstances peculiar to this problem; a voluntary licence should have been requested from the patent owner, at reasonable commercial conditions and within a reasonable period of time (except in times of national emergencies or other circumstances of extreme urgency or in cases of public non-commercial use); the CL’s scope and the duration should be limited to the purpose for which it was authorized; its use should be non-exclusive; the use is authorized mainly for replenishment of the domestic market of the Member State that granted this licence; the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization and taking into account that the remunerations are likely to be revised.

⁵⁵ A voluntary licence means that the patent holder has given his consent to a local company to copy the drug concerned, against royalty payments, which shall be marketed only in the internal market.

licence redundant in the case of a national emergency, circumstances of extreme urgency, public non-commercial use (or government use) or anti-competitive practices. The compulsory licensing is of particular importance for developing countries that are subject to epidemics such as that of HIV/AIDS.⁵⁶ Their objective is to improve patients' access to drugs. Thus, certain countries see this as a means to prevent the negative effects of patents on prices and availability of medicines, insofar as it makes it possible to reduce the prices of drugs protected by a patent in force and to obtain technology.

Nevertheless, certain difficulties persist. First, the lack of a clear definition of these scenarios and the resultant legal insecurity have led developing countries to demand a specific statement on this matter. Further, a compulsory licence is normally granted mainly to replenish the local market. So what about developing countries reeling under a national emergency or victim of a monopolistic practice which do not have local manufacturing capacities?

There is a potential negative impact of compulsory licensing, as with other measures limiting patentees' rights. The consequences include the possibility of discouraging foreign investment, transfer of technology, and research, including research into local diseases.

5. Conclusion: shortcomings and potential improvements of WTO regime

There is no doubt that the TRIMs and GATS agreements "have indirectly imposed both investment liberalization and investment protection obligations upon WTO Members".⁵⁷ However, WTO investment provisions are limited in scope and lack coherence. Each of the WTO investment-related agreements is designed to do one thing, to ensure that trade is promoted. They are not designed to govern international investment *per se*. They deal with particular areas or particular aspects of investment.

⁵⁶ Julien Chaisse and Samira Guennif, 'Present Stakes around Patent Political Economy', 2 (1) Asian Journal of WTO and International Health Law and Policy (2007) at 65-98.

⁵⁷ Pippa Read, 'International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI', 11 (2) Bond Law Review (1999) at 360.

5.1. *Shortcomings of the WTO investment regime*

The Agreement on Trade-Related Investment Measures bans a limited number of performance requirements as far as they are inconsistent with GATT provisions on national treatment and quantitative restrictions. All Members needed to notify and phase out contravening measures, although developing and least-developed countries were granted transition periods. The Agreement has considerably enhanced the transparency of investment policies throughout the world. To promote business and investment, it is very important to emphasize transparency. The TRIMs Agreement relies heavily on transparency – it requires each Member to notify the publications in which TRIMs may be found, including those applied by regional and local governments and authorities.

But in addition to these advantages, the TRIMs has several drawbacks. First, the Agreement is limited to measures affecting only trade in goods. Also, the TRIMs Agreement is notable for its lack of any reference to most-favoured-nation treatment, for the lack of a specific definition of investment, and the absence of any mention of fair and equitable treatment.

Above all, while the TRIMs prohibits a category of performance requirements that impact negatively upon trade (e.g., requirements to export a given percentage of goods), governments generally remain free to impose a broad range of other requirements on foreign investors including requirements to establish joint ventures, hire local employees (including from minority or disadvantaged groups), or invest in local research and development. In contrast, Article 1106 of NAFTA contains an extensive list of prohibited policies concerning export percentages, domestic content percentages, domestic purchase requirements or preferences, relationships between imports and exports or foreign exchange flows, relationships between domestic sales and exports or foreign earnings, technology transfer requirements, or exclusive supplier arrangements. Thus, NAFTA represents a significant advance in attempts to limit performance requirements.⁵⁸ To the same extent, while the TRIMs is applicable only to local content requirements and trade balancing requirements, the Multilateral Agreement on Investment would have regulated the use of the following performance requirements: trade-related performance requirements, such as ratio of exports to total sales, domes-

⁵⁸ See, Philippe Gugler and Vladimir Tomsik, 'The North American and European Approaches in the International Investment Agreements', 4 (5) *Transnational Dispute Management Review* (2007).

tic content, local purchases, ratio of imports to exports, and ratio of local sales to exports.

Technically, TRIMs could be expanded by adding more examples to the Illustrative List.⁵⁹ This adds to the uncertainty about which aspects of a national industrial policy can or will be challenged in the WTO – either through a loose interpretation of TRIMs or additions to the Illustrative List.

Despite the relative lack of WTO coverage on investment, many WTO Members have seized on the WTO accession process as a lever to encourage prospective Members to go beyond the WTO agreements on investment-related issues. They believe, with some justification, that they will never have more leverage than they have now.

As a result, investment-related issues have become an important aspect of WTO accession: prompt compliance with the requirements of TRIMs ; industrial policy including subsidies under the SCM Agreement ; market access for certain types of investment including financial services and telecoms (Algeria; Cambodia; Vietnam or Saudi Arabia).

5.2. *Parameters of a multilateral framework*

In recent times trade and investment have become complementary, and achieving one is impossible in the absence of the other. However, the inclusion of the relationship between trade and investment in the WTO forum for negotiation, with the establishment of a Working Group on Trade and Investment, one of the four Singapore Issues,⁶⁰ has been subject to fiery debates right from the beginning.⁶¹

Investment had been the subject matter at the origin of the derailment of the WTO's Cancún meeting. The conflict of interest between the two groups of countries has played a key role in leading up to the current scenario. In general the developed countries believe that inclusion of

⁵⁹ See, Robert Edwards and Simon Lester, 'Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures', 33 *Stanford Journal of International Law* (1997) at 169.

⁶⁰ Alongside trade and competition, trade facilitation and transparency in government procurement.

⁶¹ See, V. Balasubramanyam and David Sapsford, 'Foreign Direct Investment and the World Trade Organization', University of Lancaster, International Business Research Group – Discussion Paper, No. 8/2001 at 6-8 and Pierre Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?', 9 (2) *Journal of International Economic Law* (2006) at 325–355.

Trade and Investment (TI) under the negotiating agenda of the WTO would be a major step towards ensuring the attainment of the WTO objective of a freer trade and investment regime, leading to increased FDI to Members with freer investment regime.⁶² From this perspective, Japan and the EU pushed forcefully for the commencement of negotiations on investment, while the US did not strongly support this initiative.⁶³ The ‘flying geese model’ for the development of the four “Asian tigers” has always been a case in point. However, a number of developing countries remained averse to that idea, mostly owing to the potential risk involved with capital flight and the development consequences observed following the South-East Asian currency crisis, which led even the IMF and the World Bank to acknowledge the importance of maintaining a strict investment regime in developing countries.⁶⁴

Concerning inconsistencies with the TRIMs agreement, the domestic automobile development policies of Indonesia, India, Brazil, and the Philippines have been brought forward or made subject to consultation for dispute settlement.⁶⁵ Also, developing countries were not easily able to obtain extensions of the period for removing measures that do not comply with the Agreement. In response to these incidents, developing countries remain concerned that adoption of a new agreement would impede their freedom to implement their own domestic development policies.

Conflict over the interpretation of the TRIMs Agreement reflects the fact that it was a compromise agreement in the first place. Differences of opinion between trade officials from developing and developed countries could not be resolved during the Uruguay Round of GATT talks, and this is reflected in the vague wording of the TRIMs Agreement. If the EC, US and Japanese governments had succeeded, then the TRIMs would have been a comprehensive agreement on investment similar to

⁶² Kevin Kennedy, ‘A WTO Agreement on Investment: A Solution in Search of a Problem?’, 24 *University of Pennsylvania Journal of International Economic Law* (2003) at 150.

⁶³ Jürgen Kurtz, ‘A General Investment Agreement in the WTO? – Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment’, New York University School of Law, Jean Monnet Working Paper No. 6/2002 at 58.

⁶⁴ See, Yong-Shik Lee, ‘Foreign Direct Investment and Regional Trade Liberalization: A Viable Answer for Economic Development?’, 39 (4) *Journal of World Trade* (2005) at 707.

⁶⁵ T. Brewer and S. Young, ‘Investment issues at the WTO: the architecture of rules and the settlement of disputes’, 3 (1) *Journal of International Economic Law* (1998) at 466-467.

Chapter 11 of NAFTA or the Multilateral Agreement on Investment (MAI).

The TRIMs Agreement constrains the use of performance requirements by a host country government and GATS provides investors with national/Most Favoured Nation Treatment, movement of personnel and transfer rights in service sectors selected by Members. WTO rules cover some forms of investment (“commercial presence” for service suppliers under the GATS) or address issues highly relevant to investment (e.g. TRIMs and subsidies) but do not address for instance, investment protection.

It can be concluded that both agreements could represent a “departure” from BITs because many BITs include some performance requirements, investment obligations as well as provisions on investment protection. There should be no doubt that addressing these issues in more details would improve conditions for business and facilitate investment. The current state of the art challenges all countries, and their economic policies, to commit themselves to ongoing efforts towards the improvement and further liberalization of investment regimes.

In any event, while the economic incentives favouring liberalization of national investment rules are likely to persist, a significant part of that liberalization has originated either directly or indirectly in response to national commitments to such international agreements as the TRIPS Agreement and the General Agreement on Trade in Services.

5.3. *GATS as model?*

Parallels have been drawn between the investment talks and the way in which services negotiators are addressing the question of “non-discrimination”. Non-discrimination in the WTO means treating all countries alike through most-favoured-nation and national treatment (treating foreign and domestic firms in the same way). In the GATS, countries can theoretically put limitations on national treatment awarded to sectors they choose to liberalize, while allowing exceptions to MFN. This idea of being able to “pick and choose” which sectors to liberalize is referred to as the “positive list”.

Trade negotiations have to make the choice between a positive or a negative list approach. The positive list approach is used where only those sectors and services listed in the agreement will be liberalized. Conversely, under a negative list approach, all sectors and services will be liberalized except for those explicitly stated in the agreement. The negative list approach requires Members to stipulate exceptions and

conditions regarding the pace and scope of liberalization, which can be more difficult and may reduce the control exerted on the scope of liberalization of investment.

An investment agreement could follow a “GATS-type” positive list approach in the “pre-establishment” phase, meaning that countries could “pick and choose” which commitments they wanted to make.

The advantage of the positive list approach over the top-down or negative list approach is the greater flexibility of the former. In the case of the NAFTA-type negative list approach, some countries might feel deprived of an important policy tool. The point is that in some sectors and industries, it is very difficult to anticipate their future development and character at the moment of writing down the negative list. Here the combined national and MFN treatment approach offers less flexibility to host countries in FDI flows into such sectors. In this sense, the GATS provides a realistic approach for dealing with admission of foreign investment. The positive list approach would probably permit more gradual liberalization⁶⁶ with which some countries may be more comfortable. In GATS, no Member of the WTO is *a priori* forced to make any commitments in any given sector.⁶⁷

But the GATS type has its disadvantages as well – primarily the level of investment liberalization is probably much lower than if the top-down approach were adopted. Generally it can be said that: “experience with GATS showed that a positive list approach was preferable when a new area was for the first time the subject of liberalization at a multilateral level. However, the flexibility inherent in this approach has considerably weakened the scope of the national treatment principle. It was noted that the positive list approach needs constant updating if it is to assist to transparency and the aim of investment liberalization.”⁶⁸ Besides, understanding exactly which sectors to open up and what types of limitations and exceptions to put under each sector so that a country is not

⁶⁶ See, Peter Egger, Mario Larch and Michael Pfaffermayr, ‘Bilateral versus Multilateral Trade and Investment Liberalisation’, 30 (6) *The World Economy* (2007) 582-583.

⁶⁷ Philippe Gugler and Vladimir Tomsik, ‘A Comparison of the Provisions Affecting Investment in the Existing WTO Obligations’, in John Dunning and Philippe Gugler (Eds.), *Foreign Direct Investments, Location and Competitiveness*, (London: Elsevier Pub. 2007).

⁶⁸ WTO (2002): WT/WGTI/W120 Modalities for Pre-establishment Commitments Based on a GATS-type, Positive List Approach. World Trade Organization, Geneva.

economically, socially or politically harmed requires extensive understanding of the various economic sectors. It also requires an understanding of how certain commitments will impact upon constitutional and legislative mandates as well as domestic regulation in each country. Currently, many countries in the WTO are struggling with these issues in the services negotiations and realizing that even a “positive list” is quite overwhelming for effective and informed negotiations.

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