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THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND NON-TARIFF
BARRIERS: IMPACT ON INTERNATIONAL LAW AND ON TRADE IN GENERAL AND ON
IMPORT AND EXPORT TRADE IN CANADA IN PARTICULAR

Submitted by:
Pamela A. Harrod

Thesis submitted to the School of Graduate
Studies and Research of the University of Ottawa
in partial fulfillment of the requirements for
the LL.M Degree in Law.



UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

To the chamber of deputies: we are subjected to the intolerable competition of a foreign rival, who enjoys such superior facilities for the production of light that he inundates our national market at reduced prices. This rival is no other than the Sun. Our petition is to pass a law shutting up all windows, openings and fissures through which the light of the Sun is used to penetrate our dwellings, to the prejudice of the profitable manufacture we have been unable to bestow on the country.

Signed: Candle Makers*

* Frederic Bastiak, Economic Sophisms (G.P. Putnam's Sons, New York, 1922) at pp. 60-65.

FOREWARD

I wish to gratefully acknowledge the valuable advice and assistance given to me by my thesis supervisor, Mr. Jean-Paul Lacasse. I also wish to gratefully acknowledge the encouragement and support provided by my parents throughout the preparation of my thesis.

TABLE OF CONTENTS

	<u>PAGE</u>
ACRONYMS	i
SUMMARY	ii
INTRODUCTION	1
I. GENERAL AGREEMENT ON TARIFFS AND TRADE	4
A. General Principles	5
B. Derogations	7
C. Effects of the Tokyo Round of Negotiations	12
II. NON-TARIFF BARRIERS	14
Introduction	14
A. The General Scheme	17
1. Export Subsidies	17
2. Dumping	35
3. Quantitative Restrictions	39
B. Derogations	46
1. State Trading Enterprise	46
2. Safeguard Measure	50
(a) Article XIX - Safeguard Measure Clause	50
(b) Safeguard Agreements	53
(i) Voluntary Export Restriction Agreements	53
(ii) Multifibre Arrangement	57
3. National Security	60

	<u>PAGE</u>
C. Balance-of-Payments	61
D. Indirect Non-Tariff Barriers	64
1. Government Procurement	65
2. Services	69
E. Dispute Resolution Mechanism	72
III. IMPACT ON INTERNATIONAL LAW AND ON TRADE	76
Introduction	76
A. Impact on International Law and Trade in General	79
B. Impact on Import and Export Trade in Canada in Particular	95
C. Towards the Development of a Canadian Export and Import Strategy	111
CONCLUSION	131
ENDNOTES	I
BIBLIOGRAPHY	II
APPENDICES	III

KEY TO SELECTED ACRONYMS

ASEAN	Association of South-East Asian Nations
BISD	Basic Instruments and Selected Documents
CARICOM	Central American Common Market and Caribbean Market
CIT	Canadian Import Tribunal
COCOM	Coordinating Committee for Multilateral Export Controls
CONG.REC.	Congressional Record
D.I.S.C.	Domestic International Sales Corporation
Enterprise(s)	State Trading Enterprise(s)
EEC	European Economic Community
FAO	Food and Agricultural Organization
Fed.Reg.	Federal Register
F.I.S.C.	Foreign Sales Corporation
f.o.b.	free on board
G.A.T.T.	General Agreement on Tariffs and Trade
GNP	Gross National Product
I.L.M.	International Legal Materials
MFA	Multifibre Arrangement
MTN	Multilateral Trade Negotiations
OECD	Organization for Economic Cooperation and Development
O.J.EUR.COMM.	Official Journal of the European Community
SIMA	Special Import Measures Act
T.I.A.S.	Treaties and Other International Act Series
UNCTAD	United Nations Conference on Trade and Development
U.N.T.S.	United Nations Treaty Series
USITC	United States International Trade Commission
U.S.T.	United States Treaties and Other International Agree- ments
USTR	United States Trade Representative
U.S.T.S.	United States Treaty Series
VER Agreement(s)	Voluntary Export Restriction Agreement(s)
WEEKLY COMP.PRES.DOC.	Weekly Compilation of Presidential Documents

SUMMARY

The aim of this paper is to discuss the nature of non-tariff barriers and their effect on the G.A.T.T. from the perspective of international law and trade in general, and of import and export trade of Canada in particular. The question that arises is whether the G.A.T.T. can continue to serve as the international mechanism for combatting the rising tide of protectionism and to maintain the concept of "free trade" in the international market arena.

The discussion of the G.A.T.T. and non-tariff barriers in this paper represents the status of the law up to February 29, 1988.

This paper first examines the structure of the G.A.T.T. itself briefly. Secondly, the nature of the non-tariff barriers are discussed, together with the response of the G.A.T.T. to these barriers in the context of the Tokyo Round of Negotiations and subsequent G.A.T.T. developments. Finally, the impact of non-tariff barriers in the formulation of a nation's trade policy, with special emphasis on Canada's response to such barriers, are discussed in order to determine whether "free trade" can exist as a viable force along with the G.A.T.T. in today's trading environment, or whether a new international trade strategy must be developed.

The G.A.T.T. entered into force in 1948, with twenty-three signatories, as a response to the concerns of the industrialized nations for access to international markets. The purpose of the G.A.T.T. was to promote and maintain a fair and open international trading system, principally through the world-wide reduction, by negotiation, of tariff barriers.

The goals of the G.A.T.T. can be summarized as follows: the promotion of non-discriminatory international trade, the prohibition of quantitative restrictions (except for customs duties) and the reduction of tariffs. The cornerstone of the G.A.T.T. is the "most-favoured-nation" principle.

Although directed towards the liberalization of commerce through the reduction, and non-discriminatory application of tariffs, the G.A.T.T. permits contracting parties to deviate from its principles in certain situations. These derogations were in respect to balance-of-payments (Article XII), economic development (Article XVIII), emergency action (Article XIX), and for other purposes. In addition, the prohibition against the application of quantitative restrictions (Article XI) or the use of subsidies, generally (Article XVI) were weakened either by permitted exceptions within the articles themselves or by a lack of precise language within which to define the scope of the prohibition. Indeed, in some instances, these derogations have fostered the growth of non-tariff barriers.

As tariff barriers were lowered, through successful negotiations under the auspices of the G.A.T.T., it was discovered by the G.A.T.T. members that the free flow of goods was continuing to be impeded.

With the decrease in the average level of tariff protection, fiscal, administrative, political and other pressures were causing contracting parties to ignore G.A.T.T. principles and to introduce, instead, policies or programs designed to protect domestic industries. These policies or programs would take such forms as "Buy national" policies; exclusionary product standards or testing procedures; "special" bilateral arrangements, or VERs established outside the framework of the G.A.T.T. to protect such industries as steel and textiles, subsidies on primary and manufactured products; "temporary" import restrictions; and "emergency" measures to improve balance-of-payment and other difficulties. These devices became known as non-tariff measures or barriers.

By the time of the Tokyo Round Negotiations of the G.A.T.T. in 1979, it was fair to state that contracting parties were beginning to recognize that non-tariff barriers represented formidable impediments to the free flow of goods and services in international commerce. It is also true to say that contracting parties developed certain agreements by which some control could be exerted over the imposition of non-tariff barriers. However, the 1979

Agreements, as they became known, did not achieve much success in reducing the use of non-tariff barriers by contracting parties especially as these agreements only applied to those contracting parties which were signatories to each agreement. Indeed, the inability of the G.A.T.T. to contain non-tariff barriers was further demonstrated by the renewal of the Multifibre Arrangement in 1986, the continued use of other VER agreements, and the extensive application of safeguard and emergency measures to protect domestic industries. The G.A.T.T. became a mechanism by which contracting parties could criticize the application of non-tariff barriers by importing nations while at the same time justifying the implementation of its own non-tariff barriers in order to protect domestic industries from unfair competition. Canada, itself, has not been remiss in imposing trade restrictions especially with respect to textiles and agricultural products.

A key factor, this paper submits, which has led to the breakdown of the G.A.T.T. as an effective instrument with which to combat non-tariff barriers is the reorientation of the premise upon which an international trading structure is to be based. Currently nations will not hesitate to intervene in the market place when economic circumstances so dictate. The emphasis has switched from one of international trade being determined by free market force and the specialization of nations in those products to which it has a comparative advantage, to that of "managed" trade. Governments now dictate the direction of economic forces as each government desires to obtain the largest share of the international market for its export goods while protecting its domestic industries. Hence, the tenets of free trade upon which the G.A.T.T. is based, have been undermined. The attainment of an international market system structured on the free flow of goods is more of an illusion than reality. Unfortunately, the G.A.T.T. maintains the status quo.

Furthermore, the principles of the G.A.T.T. could be circumvented as a result of a structural flaw: the principles of the G.A.T.T. only apply to the extent that they are not in conflict with the internal rules of the original Contracting Parties as of 1947, or for other Contracting Parties, as to the

date to which they became signatories to the G.A.T.T. The G.A.T.T. has also not been able to cope with new developments such as trade in services.

The international trading environment, in addition, has undergone other changes since the introduction of the G.A.T.T. Contracting parties have begun to realize that economic policies and programs, although primarily directed to a nation's domestic concerns, have a tendency to severely affect the economies of other nations. The integration of the world economy in the last ten years has meant that economic problems faced by developing nations are translated into international economic problems. Developed countries also feel threatened by the rise of developing nations in Asia, for example, as economic powers in their own right which cannot be easily ignored.

This paper recommends that a new trading mechanism, with international governmental powers, must be designed to reflect the reorientation of the international trading system and to promote dialogue amongst nations.

What is essential is for nations to recognize the threat of non-tariff barriers to the well-being of the world economic structure and to take steps from a global, as opposed to a national, outlook. An organization must evolve on the international scene which would have the capacity to bind a nation's policies in the arena of international trade. This organization would become the "governmental" structure responsible for establishing and ruling on international trade policies. In this regard, the G.A.T.T. could serve as a point of departure upon which both developed and developing nations can meet to discuss the establishment of the new international trading structure which goes beyond the G.A.T.T. in emphasis and recognition capabilities.

In conclusion, this paper recommends that outmoded rules must be updated, and basic principles reinforced to include current international trading developments. A "G.A.T.T. II", with international government powers and the capacity to influence a contracting party's domestic policy in trade, must emerge upon the international scene to prevent a further erosion to a "liberalized" or "enhanced" international trading system.

INTRODUCTION

For many people, the optimal commercial policy for international trade is that of "free trade", which policy has been derived, to varying degrees, from the theory of Comparative Advantage. Originally propounded by David Ricardo, economist, in 1817, this theory envisioned that international trade would be freely determined by market force.¹ Each country was to specialize in those products in which it possessed a comparative advantage in order that it could import those products which it needed but could not produce advantageously.² The theory of Comparative Advantage has never been implemented in its "pure" form as it did not account for the rise of multi-national enterprises, the active participation of governments in international trade or the need of nations to protect themselves and their economies for national security, environmental, health or safety reasons. Nevertheless, the policy of "free trade", albeit in modified form, has survived to play a pivotal role in determining how international trade should be structured, and this policy has an impact on how nations, including Canada, formulate their trading strategy.

Free trade is now the rallying theory for those who desire to see the elimination of trade barriers which prohibit the free flow of goods or services from the territory of one nation to another. Their main opponents: protectionists, who extol the virtues of raising tariffs to protect domestic industries from external competition, to reduce unemployment, and to safeguard their nation's balance-of-payments. Protectionists tend to dominate in times of economic depression or recession.

It is difficult to deny that exports are one of the major tools employed by both industrialized and developing countries to achieve economic growth. Traditionally, Canada has always sought markets for its natural resource products and this search for markets has continued with respect to Canada's manufactured goods. Canada's relatively small population has made it harder for Canada to attain economies of scale and specialization. Indeed, the Canadian Export Association has noted that Canada is "the only major

industrialized country which does not enjoy unimpeded access to a market of, at least, 100 million people".³

International competition for export sales is on the rise, especially with the recent industrialization of such third world countries as Malaysia, Taiwan and South Korea, and the entry into the international market stage of relatively new competitors such as the People's Republic of China. Along with the increase in international competition arises the perceived need of exporting countries to protect their domestic industries from "uncompetitive" imports.

Canada has not been immune from pressure of renewed international competition for export sales or the need to protect its domestic industry, and Canada's dependence on the United States market for many of its resource-based or manufactured goods places Canada in a vulnerable position from a trade point of view. This vulnerability was illustrated, for example, with the preliminary determination by the American International Trade Commission in October, 1986, that Canadian exporters of certain softwood lumber products were in receipt of benefits which constituted subsidies and hence, counter-available.⁴ This result also caused the Canadian government to negotiate a resolution of this dispute with the United States.⁵

Based on the need to promote unrestricted access to international markets in the hopes of enhancing the free flow of trade, Canada and other industrialized nations after the Second World War focussed, initially, on the reduction of tariff barriers. Tariffs, at this time, were perceived to be the primary threat to the free flow of trade in the international market.

The General Agreement on Tariffs and Trade (hereinafter referred to as "the G.A.T.T.") entered into force in 1948, with twenty-three signatories, as a response to the concerns of the industrialized nations for access to international markets. The purpose of the G.A.T.T. was to promote and maintain a fair and open international trading system, principally through the world-wide reduction, by negotiation, of tariff barriers.

To-date, there have been seven multi-lateral trade negotiating conferences of the G.A.T.T.⁶ Six of those seven conferences focussed on the reduction of tariffs and achieved a large measure of success in that regard. However, the seventh conference, known as the Tokyo Round of Negotiations concentrated on another threat to the free flow of goods in international trade: non-tariff barriers. Preliminary discussions in preparation of the eighth round of discussions, also highlighting the concerns of the G.A.T.T. members to the continuing growth of non-tariff barriers, were held in Uruguay in September 1986.

As tariff barriers were lowered, through successful negotiations under the auspices of the G.A.T.T., it was discovered by the G.A.T.T. members that the free flow of goods was continuing to be impeded. Other devices were being used by nations, and in particular, by G.A.T.T. members themselves, to meet the demands of domestic producers for more protection. These devices consisted of quotas, voluntary export restraint agreements, the utilization of state trading enterprises, subsidization, fiscal arrangements and technical and administrative hindrances. Known as "non-tariff barriers", these protectionist measures have tended to diminish the effect of previously negotiated tariff reductions within the G.A.T.T. and to undermine the purpose of the G.A.T.T.

The aim of this paper is to discuss the nature of the non-tariff barriers and their effect on the G.A.T.T. from the perspective of international law and trade in general, and of import and export trade of Canada in particular. The question that arises is whether the G.A.T.T. can continue to serve as the international mechanism for combatting the rising tide of protectionism and to maintain the concept of "free trade" in the international market arena. Or must nations accept the reign of protectionism as a fait accompli and seek only to mitigate its impact on international trade to the greatest extent possible through alternative mechanisms? Indeed, for a nation such as Canada which is dependent upon obtaining access to new export markets, should Canada implement an import and export strategy based on an "enhanced" trade agreement

with the United States, which agreement may fall within those "free trade" accords acceptable to the G.A.T.T.? Or, should Canada seek access to new exports through the mechanism of bilateral agreements while continuing to impose protectionist measures on those nations not covered by the bilateral agreements in order to protect Canada's domestic industries? Perhaps Canada and other nations would be better served by remaining within the G.A.T.T. which would have been strengthened to include a mechanism through which the most recent concerns regarding non-tariff barriers could be reduced or virtually eliminated?

This paper will, first, examine the structure of the G.A.T.T. itself briefly. Secondly, the nature of the non-tariff barriers will be discussed together with the response of the G.A.T.T. to these barriers in the context of the Tokyo Round of negotiations and subsequent G.A.T.T. developments. Finally, the impact of non-tariff barriers in the formulation of a nation's international trade policy, with special emphasis on Canada's response to such barriers, will be discussed in order to determine whether "free trade" can exist as a viable force along with the G.A.T.T. in today's trading environment, or whether a new international trade strategy must be developed.

I. GENERAL AGREEMENT ON TARIFFS AND TRADE

In order to replace the protectionist commercial regime which developed among States in the period between the two World Wars with a more liberal trading environment embracing the concept of "free trade", international negotiations occurred from 1946 to 1948 within the framework of the United Nations organization.⁷ Previous negotiations culminated in the formulation of the Havana Charter at the World Trade Conference in November 1947. The Havana Charter envisioned the creation of an International Trade Organization which would contain a comprehensive set of rules for international trade, joining the already established International Bank of Reconstruction and Development and the International Monetary Fund institution in this area.⁸

In anticipation of the creation of the International Trade Organization and as an interim measure, twenty-three countries also negotiated the G.A.T.T. in 1947. The G.A.T.T. comprised the central provisions of the International Trade Organization together with certain tariff concessions which had recently been concluded on a most-favoured nation-basis.⁹

The Havana Charter, the agreement which would have brought the International Trade Organization into existence, was never adopted, mainly because the United States Congress failed to ratify the treaty establishing it.¹⁰ By default, the G.A.T.T. signed in October 1947, with effect from January 1, 1948, became the nucleus of an international economic system composed of the International Bank of Reconstruction and Development, the International Monetary Fund and itself.

The goals of the G.A.T.T. can be summarized as follows: the promotion of non-discriminatory international trade, the prohibition of quantitative restrictions (except for customs duties) and the reduction of tariffs.¹¹

A. General Principles

The general principles of the G.A.T.T. are found in Articles I to III, VII, VIII, XVII and XXIII. Article I states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".¹² This is the "most-favoured-nation" principle which is the cornerstone of the G.A.T.T.

By Article II, contracting parties shall "accord to the commerce of the other contracting parties treatment no less favourable than that provided in the ... appropriate Schedule". Thus, all contracting parties are to impose only the agreed tariffs on any given item. New Schedules are generally

formulated during negotiations which take place at Conferences, evoked under the rules and procedures of the G.A.T.T. for this purpose.¹³

Article III recognizes that imported goods should be treated the same as domestic goods with respect to internal taxation and regulation. Article VIII provides that all fees and charges of whatever character (except for those imposed by Article III -- internal taxation) imposed by contracting parties, in connection with importation or exportation, should be limited in amount to the approximate cost of the services rendered and not represent an indirect protection to domestic products or a taxation of either exports or imports for a fiscal purpose.

Disputes which arise from the application of the various principles of the G.A.T.T. are not referred to a formal, "legal" tribunal for resolution. Article XXIII of the G.A.T.T. obligates the contracting parties to enter into consultation with the other contracting parties by firstly making written representations to the other contracting party. If a satisfactory solution is not effected between the contracting parties concerned within a reasonable time, the matter is referred to working groups of national representatives or to panels of experts who are not involved in the dispute. Once again the aim of the G.A.T.T. is to mediate an amicable solution to the dispute. Where a solution cannot be mediated, the working group or the panel issues a report with recommendations. The purpose of the report is to exert international "peer pressure" against the offending contracting party¹⁴ to further encourage that party to resolve the dispute. There is provision in Article XXIII for the suspension of concessions or other obligations if the Contracting Parties consider the circumstances are serious enough.¹⁵

In accordance with Article XVII, every contracting party undertakes that if it establishes or maintains a State Enterprise or grants to any Enterprise special privileges, the Enterprise shall, in its purchases or sales involving imports or exports, apply non-discriminatory treatment. Finally, Article VII establishes the general principles for customs valuation.

The G.A.T.T. then provides specific rules concerning import or export restrictions, subsidies and "dumping" to encourage the use of customs duties as opposed to other barriers. While these rules could be considered to be directed at "other" barriers, they appear to be primarily tied into the regulation of the imposition of customs tariffs.

Furthermore, these rules are linked to various exemptions which, together with measures designed to protect a nation's security, economic development, and other interests, constitute derogations to the G.A.T.T. itself from its principles.

B. Derogations

Although directed towards the liberalization of commerce through the reduction of, and non-discriminatory application of tariffs, the G.A.T.T. permits contracting parties to deviate from its general principles in certain situations. In some instances, these "exceptions" have helped foster the growth of non-tariff barriers.

Exceptions to the general rules established by the G.A.T.T. are contained in Articles XI, XII, XIV and Part IV, and in Articles XVI and VI.

Article XI states that no prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any contracting party on the importation of any product from the territory of any other contracting party, or on the exportation or sale for export of any product destined for the territories of other contracting parties. There are three main exceptions to this Article: measures relating to the protection of agriculture, measures introduced for balance-of-payment purposes, and actions taken by developing countries for the protection of their economies. Article XI itself also permits derogations to its principles.

Paragraph 2(c) of Article XI provides that exemptions from this Article are allowed for import restrictions on any agricultural or fisheries product necessary to the enforcement of governmental measures which operate, for example, to restrict the quantities of the imported product for which a domestic product can be directly substituted or to remove a temporary surplus of a like domestic product. However, prior to the imposition of the agricultural or fisheries restrictions, contracting parties must give public notice of the total quantity or value of the product permitted to be imported during a specified future period.

Other exceptions to the application of Article XI concern export restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other essential products, and import and export prohibitions necessary to the application of standards for the classification or marketing of commodities in international trade.

Article XII provides that a contracting party may temporarily restrict the quantity or value of merchandise permitted to be imported for balance-of-payment purposes, subject to certain conditions.¹⁶ Contracting parties applying quotas, by reason of Article XIV, may then be exempt from the rule of non-discrimination set out in Article XIII of the G.A.T.T.

Part IV provides an exemption to the application of the principles of the G.A.T.T. for developing countries.¹⁷ Developing countries, for example, are permitted to negotiate the lowering of tariff barriers with a developed country without having to reciprocally lower their own trade barriers. The purpose of this exemption, more particularly set out in Article XVII C, is to enable developing countries to promote the establishment of a certain industry. Quantitative restrictions can be introduced after notification procedures within Article XIII C are followed.

With a view to furthering the employment, by contracting parties, of customs duties as opposed to other measures, the G.A.T.T. contains rules in

Article XVI to regulate the use of subsidies by contracting parties. These rules complement the rules relating to quantitative restrictions set out in Article XI.

Article XVI distinguishes between two categories of subsidies -- subsidies, in general, and export subsidies. The latter category is further divided into two categories: rules applicable to industrial products and those applicable to primary products.

Section A of Article XVI states that if any contracting party "grants or maintains any subsidy, including any form of income or price support" which directly or indirectly increases the exports of any product, or reduces any imports of a product into, its territory, the contracting party is to notify the Contracting Parties of this fact. Where it is determined that a "serious prejudice to the interests of any of the other contracting parties is caused or threatened by any such subsidization", the contracting party granting the subsidy, upon request, may discuss the possibilities of limiting the subsidization.

Subsidies are difficult to define as they can be disguised as incentives, grants, bounties, favourable interest rates on loans, governmental provision or financed provision of utility, supply distribution and other support services or facilities, and fiscal incentives.¹⁸

Concerning export subsidies, Article XVI, section B, requests contracting parties to seek to avoid the use of subsidies on the export of primary products. This section is permissive in nature regarding the use of subsidies with respect to primary products. Nevertheless, if a contracting party grants such a subsidy, either directly or indirectly, the subsidy is not to be applied in a manner which "results in that contracting party having more than an equitable share of world export trade in that product".

On the other hand, Article XVI, section B also states that from January 1, 1958, contracting parties were to cease to grant, either directly or indirectly, any form of subsidy on the export of any product other than a primary product, which subsidy "results in the sale of such product for export at a price lower than the comparable price charged for the like product" in the domestic market. There is, thus, a prohibition against the employment of subsidies in regard to industrial products. In order to permit contracting parties to negate the effects of subsidies, the G.A.T.T., by way of Article VI, permits contracting parties to have recourse to countervailing duties or anti-dumping duties.

Article VI establishes the rules by which countervailing duties may be imposed. A countervailing duty is defined in this Article as a duty "levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise". Hence, a condition precedent to the application of a countervailing duty is the existence of a bounty or subsidy.

By section 3 of this Article, a countervailing duty may not be levied by a contracting party in excess of "an amount equal to the estimated bounty or subsidy determined to have been granted" by the exporting country. Paragraph 6(a) provides that a countervailing duty cannot be levied unless it has been determined that the effect of the subsidization is such as "to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

The concept of "dumping" is also covered by Article VI. Section 1 of Article VI stipulates that dumping, "by which products of one country are introduced into the commerce of another country at less than the normal value of the products", is to be condemned if it causes or threatens to cause material injury to a domestic industry. If it is determined that a product is being "dumped", the affected country may impose on the dumped product an anti-dumping duty "not greater in amount than the margin of dumping in respect

of such product". As opposed to countervailing duties, therefore, an anti-dumping duty, in accordance with its definition, may be imposed whether or not a bounty or subsidy has been determined as long as it is proved that the value of the goods being imported is below their normal value.

It should be noted that the Kennedy Round of negotiations under the G.A.T.T. developed a code for the application of Article VI concerning dumping. This code required that the "dumped" products were those proven to be "demonstrably the principle cause" of material injury; that the contracting party's authorities had to weigh the effect of other factors which may have affected the domestic industry; and that domestic production could be divided into two or more separate industries under certain circumstances, for instance, if some producers were isolated by special regional marketing conditions.¹⁹

Thus, Articles XVI and VI appear designed to reduce the potentially negative effects of artificially low-priced or subsidized products on the basic principles of the G.A.T.T.

Other derogations permitted by the G.A.T.T. are found in Articles XVIII, XIX, XX, XXI, XXV and XXIV.

Article XVIII permits governments, when implementing programmes and policies of economic development designed to raise the general standard of living of their citizens, to take protective or other measures affecting imports. Procedures are also established by this Article for bringing the protective measures into effect. For example, a contracting party wishing to modify or withdraw a concession must, under section A of Article XVIII, notify the Contracting Parties to this effect and enter into negotiations with any contracting parties with whom such concession was initially negotiated.

Article XIX or the "safeguard" clause states that if as a result of unforeseen developments and of the obligations incurred pursuant to the G.A.T.T., any product is being imported in such quantities so as to cause or threaten serious injury to domestic producers, the contracting party may suspend such obligations or withdraw or modify concessions, for such time as may be necessary to prevent or remedy the injury. It is this clause which is utilized by contracting parties to implement the exceptions to Article XI (quantitative restrictions). The contracting party contemplating such action must notify the other contracting parties in writing, and do so in advance.

In accordance with Article XX, government measures relating to the protection of public morals; the protection of human, animal or plant life; the products of prison labour; the protection of national treasures and other items, are exempt from the general application of the G.A.T.T.

The "national security" exception to principles of the G.A.T.T. is found in Article XXI. This Article provides that nothing in the G.A.T.T. should be construed, for instance, "to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests" relating to fissionable materials; to traffic in arms; or taken in time of war or other emergency in international relations.

Article XXV allows the waiver of an obligation imposed by the G.A.T.T. where the request is approved by the contracting parties.²⁰ Exemptions for customs unions and free-trade areas are found in Article XXIV of the G.A.T.T.

C. Effects of the Tokyo Round of Negotiations

From the above examination of the structure of the G.A.T.T., it can be observed that the G.A.T.T. was perceived to be the main defense mechanism to prevent the re-occurrence of the protectionist wars of the 1930's. Its purpose, as set out in Part I: to protect and enhance the tariff concessions granted under its auspices, thereby liberalizing international commerce.

Initially having only twenty-three signatories at its inception in 1947, the G.A.T.T. presently has over ninety-two members²¹ and regulates at least eighty-five percent of world trade.²² Furthermore, the G.A.T.T. has succeeded in reducing tariff barriers and, consequently, promoting the growth of international trade since the Second World War.²³

In the Canadian context, the G.A.T.T. serves as Canada's principal trade agreement with the United States of America, and enabled Canada and Great Britain to release each other from existing contractual obligations in regard to tariff preference margins in 1947.²⁴ Indeed, for Canada, a country which is heavily dependent on exports,²⁵ the implementation of the Tokyo Round of Negotiations under the G.A.T.T., especially with respect to Canada and the United States of America relations, meant that at least eighty percent of American imports of industrial products from Canada became tariff free and approximately sixty-five percent of Canadian imports from the United States of America entered duty free.²⁶

Although the continued reduction of tariff barriers was an important goal of the G.A.T.T. Tokyo Round of Negotiations, these negotiations also represented the first comprehensive attempt by contracting parties to reduce barriers to trade created by barriers other than tariffs. Indeed, the Tokyo Round of Negotiations emphasized the need to bring such "other" barriers, or non-tariff barriers as they came to be known, within the framework of the G.A.T.T.²⁷ With the decrease in the average level of tariff protection, fiscal, administrative, political and other pressures were causing contracting parties to ignore G.A.T.T. principles and to introduce, instead, policies or programs to protect domestic industries which were implemented through non-tariff measures.²⁸ These non-tariff measures would take such forms as "Buy National" policies, exclusionary product standards or testing procedures; "special" bilateral arrangements established outside the framework of the G.A.T.T. to protect such industries as steel and textiles; subsidies on primary and manufactured products; "temporary" import restrictions, and "emergency" measures to improve balance-of-payment difficulties.²⁹

Hence, the Tokyo Round of Negotiations attempted to find a means of bringing non-tariff barriers under the umbrella of the G.A.T.T. and of formulating more precise criteria for those provisions of the G.A.T.T. which have created "loopholes" to the application of the G.A.T.T. principles and derogations. In this regard, the contracting parties were successful in concluding several agreements with respect to certain non-tariff barriers in such areas as subsidies, government procurement, technical barriers to trade and the dairy sector.

Nevertheless, it has become apparent from subsequent declarations issued by the Contracting Parties in 1982³⁰ and in 1987³¹ that the agreements concluded in 1979 as a result of the Tokyo Round of Negotiations have not proved to be the definitive answer to non-tariff barriers. From these declarations, however, it can be seen that the Tokyo Round of Negotiations and the agreements arising therefrom serve as a basis amongst contracting parties for further dialogue on the issue of non-tariff barriers.

The nature of non-tariff barriers and their growth in international trade, together with the G.A.T.T.'s response to these barriers, must now be examined in order to determine whether the G.A.T.T. is still the most suitable environment within which to promote a liberalized international trading environment.

II. NON-TARIFF BARRIERS

Introduction

Non-tariff barriers have been defined as "restrictions, other than the imposition of duties, which hinder the free movement of commodities among nations".³² The G.A.T.T., as currently drafted, does not refer to non-tariff barriers as a class of measures which could pose a threat to the free flow of goods in international commerce. The primary focus of the G.A.T.T. was

directed towards the eventual elimination of tariffs through the progressive reduction of such tariffs in accordance with the procedures set out in Article II.

Derogations to the principles of the G.A.T.T. for balance-of-payment (Article XII), economic development (Article XVIII), emergency action (Article XIX), and other purposes along with the prohibitions on the use of quantitative restrictions (Article XI) and subsidies (Article XVI) were incidental to the elimination of tariffs.³³ Indeed, the concept of "non-tariff barriers" was not defined in the G.A.T.T. document.

Thus, in many respects the foundation and structure of the G.A.T.T. have created problems for the enforcement of its goals of promoting "free" trade among its contracting parties which, in turn, have encouraged the use by contracting parties of non-tariff measures.

First, the G.A.T.T. did not establish a new international system; it merely "standardized and modified the long-established language of treaties of friendship, commerce, and navigation".³⁴ Secondly, the G.A.T.T. was never officially brought into force, but was implemented by means of a "Protocol of Provisional Application"³⁵ which permitted nations to apply Parts I and III of the G.A.T.T. on a provisional basis and Part II of the G.A.T.T. (National Treatment on Internal Taxation and Regulation) to "the fullest extent not inconsistent with existing legislation". Furthermore, the G.A.T.T. was designed during a period where commerce was a "fraction of its present volume, tariffs were the main trade barrier, a few Western States dominated international trade and postwar optimism for international free trade was high".³⁶ It is fair to state that the structure of international commerce and the balance of economic power has changed dramatically since the G.A.T.T. was first introduced as a framework within which international trade was to be liberalized.

In this respect, the 1960's saw the emergence of the European Economic Community as a successful challenger to the United States' leadership in international trade, and "developing" countries, in the 1970's, utilized the United Nations Conference on Trade and Development as the platform to promote their trading interests and their concept of an international trading system.³⁷

Economic conditions in the 1970's provided an ideal climate for the growth of non-tariff barriers. Confronted with unemployment, inflation and rising trade deficits, governments sought a means of protecting their nations' economies without "violating" their obligations under the G.A.T.T. Protectionist sentiments and pressures were a force to be reckoned with.³⁸ At the same time, contracting parties did not hesitate to "protest" against the imposition of protectionist measures adopted by other contracting parties, which measures were threatening their own domestic industries. This was demonstrated through the numerous complaints launched by contracting parties prior or during the 1979 round of G.A.T.T. negotiations. For instance, there were complaints concerning quotas in the Canadian egg and EEC beef industries, in the granting of concessional loans and in the provision of assistance for research and development.³⁹ Furthermore, concerns were raised on the concentrated importation of cast iron soil pipes and of steel, the granting of an automobile export remission plan, the imposition of direct subsidies on transmission towers and tomato paste, sugar refunds, assistance for wheat and on textile restrictions.⁴⁰

In addition, the rapid rise of oil prices and the appearance on the international market scene of the Organization of Petroleum Exporting Countries posed a serious challenge to the economic status quo. It appears that this status quo will be even further disrupted with the emergence of Asia as a centre of economic power due to the recent burgeoning economies of Japan, Taiwan, Singapore and South Korea, and the entrance of the People's Republic of China onto the international market scene.

Finally, the G.A.T.T. structure evolved from a one-tier system of rights and obligations that applied on equal terms and with equal force between all contracting parties, to a four-tiered system of differing levels of application and force.⁴¹ Hence, it was easier to circumvent such principles of the G.A.T.T. as the most-favoured nation treatment, and the non-discriminatory application of internal taxes and internal charges and laws and regulations affecting the sale and purchase of goods.

It now remains to take a closer examination of non-tariff barriers within the context of the G.A.T.T.

The following non-tariff barriers, including the G.A.T.T.'s response to these barriers especially during the 1979 round of negotiations, will be analyzed within the context of the G.A.T.T.: subsidies on manufactured and primary products; State Enterprises; voluntary export restraint agreements; quantitative restrictions; provisions related to technical standards and services; and government procurement policies. The balance of payment, dumping, national security and national treatment provisions of the G.A.T.T. along with the G.A.T.T. dispute resolution mechanism will also be discussed briefly.

A. The General Scheme

1. Export Subsidies

Initially, Article XVI of the G.A.T.T., which regulates subsidies, only required contracting parties granting or maintaining any form of income or price support to notify⁴² the Contracting Parties, in writing, of the extent and nature of the subsidization and the estimated effect of this subsidization on the imported or exported product. No distinction was introduced, for instance, between the effect of subsidies, in general, and export subsidies as opposed to domestic subsidies.⁴³

The provision with respect to export subsidies; that is, Section B of Article XVI, was added after the 1954-55 review session of the G.A.T.T. by the Contracting Parties.⁴⁴ Subsequently, paragraph 2 of Section B was modified to provide for the recognition by contracting parties that the granting of a subsidy on the export of any product may have "harmful effects" for other contracting parties,⁴⁵ and paragraph 3 of Section B was amended to provide an exemption to the application of this Article for domestic marketing schemes.⁴⁶

With the addition of Section B to Article XVI, the application of subsidies was regulated by this Article XVI in three ways as follows: by requiring the notification by contracting parties of subsidies, generally, to the G.A.T.T. Secretariat; by prohibiting the application of a direct or indirect subsidy on the export of any product other than a primary product; and by requesting that contracting parties avoid the use of subsidies on primary products, but where used, such subsidies should not be applied in a manner which results in the contracting party having more than its equitable share of the world trade in that product.

There are three main difficulties with Article XVI which have enhanced the creation of non-tariff barriers: what is a subsidy; when does a subsidy apply specifically to exports (and therefore, reprehensible) or for other purposes; and what are the circumstances in which it is justifiable to impose a countervailing duty?⁴⁷

Article XVI does not provide a definition for determining whether a subsidy is an export subsidy and thus, prohibited, in the case of non-primary products, or permissive with regard to primary products, unless the subsidy on the primary product causes the contracting party applying the subsidy to receive more than its equitable share in world trade in that product.

Subsidies have the effect of satisfying other than protectionist objectives; for instance, confronted with rising unemployment, subsidies are used to revitalize non-competitive domestic industries, to increase production

generally and to enhance consumer purchasing power.⁴⁸ Indeed, subsidies in the domestic environment can be used by governments to optimize resource allocation within the state and to pursue non-economic goals such as providing assistance to economically depressed regions.⁴⁹

On the other hand, subsidies, by supporting particular groups or economic positions in the nation, may cause an exporter to become more competitive due to the subsidy and not because the product is more efficiently manufactured and monitored.⁵⁰ It has also been argued that, for developing countries, export subsidies are needed where developed countries are applying quantitative restrictions to stem the flow of imports from developing countries⁵¹ which rely primarily on agricultural products to generate revenue. Needless to say, developing (and developed) countries, in order to generate development, have introduced such incentives as preferential financing, duty rebates for machinery and equipment used in export production and multiple exchange rates to subsidize exports.⁵²

Without standards to differentiate between subsidies which are validly imposed and those which disturb the flow of international trade, it is difficult to make a ruling under Article XVI. The only criterion provided in Article XVI is to look to the effects of any given subsidy. This lack of precise criteria has permitted the proliferation of rules which emphasize the impact of the subsidies on the "trade and production interests" of other nations⁵³ and has also enabled contracting parties to argue that the imposition of a given subsidy does not fall within the parameters of Article XVI.

In an attempt to overcome the lack of definition of export subsidy in the G.A.T.T., the contracting parties established an illustrative and non-exhaustive list of prohibited subsidies for non-primary products in 1960.⁵⁴ Examples of prohibited subsidies on this list included: currency retention schemes; the provision by governments of direct subsidies to commercial enterprises upon export performance; the remission, calculated in relation to exports, of direct taxes or social welfare charges paid or payable by industrial or

commercial enterprises; and the provision by governments of export credit, guarantee or insurance programs against increases in the costs of exported products.

The establishment of a list of prohibited subsidies by the contracting parties was a useful tool for assisting contracting parties in their determination of whether a subsidy imposed by another member was contrary to Article XVI of the G.A.T.T. Yet, despite the introduction of this list, certain difficulties remained with the application of Article XVI.

A Panel Report adopted on November 21, 1961 noted that members of the G.A.T.T. were hesitant to notify Contracting Parties of the subsidies being applied by their nations.⁵⁵ The provision of the list of subsidies also did not address the issue as to when, in accordance with Section B(4) of Article XVI, the Contracting Parties were to cease to grant new or to extend existing subsidies.⁵⁶

Furthermore, the list of subsidies has, ironically, provided contracting parties with a means of justifying their support of various industries. Contracting parties can now argue that subsidies introduced by their governments are not prohibited because they do not fall within the list.⁵⁷ By so arguing, contracting parties can avoid the question of determining whether the subsidy is, in fact, a violation of Article XVI and whether the subsidy results in the sale of the product to be exported at a price lower than the "comparable price charged for the like product to buyers in the domestic market". Thus, export subsidies, although meeting the criterion set out in Article XVI of the G.A.T.T. could still continue to exist under the G.A.T.T. because they are not, as yet, on the list of prohibited subsidies.

The controversy as to what is or is not a prohibitive export subsidy did not cease after the development of the list of subsidies.

In 1962, the Canadian government established a duty rebate plan in which automobile manufacturers, who increased the Canadian content of exports of motor vehicles and parts, were granted a rebate of import duties on imports of automatic transmissions and engines. Countervailing duty proceedings were launched in 1964 by an American parts manufacturer against the rebate, alleging that the Canadian automobile exporter, by receiving a larger duty remission on the export of the automobile than the amount of duty actually paid on the imports, was receiving a subsidy.⁵⁸ A determination as to whether the duty remissions in question were excessive, and therefore, countervailable, was never made in this instance as the proceedings were terminated upon the signing of what was to become known as the "autopact" between Canada and the United States of America in 1965, and the obtaining of a G.A.T.T. waiver to the "autopact" by the United States of America.⁵⁹

Nevertheless, other findings of subsidies or determinations of injuries by imports were made between 1962 and 1979, especially by the United States of America. These determinations ranged from a consideration of an European Economic Community price support system for vegetables,⁶⁰ the negative effect of subsidies and imports on a regional market,⁶¹ the impact of funds provided to exporters in France to offset higher wages granted as a result of civil disturbances,⁶² and the institution and granting of provincial loans to a Canadian tire manufacturer to encourage the establishment of industry in an economically depressed region.⁶³

The difficulties of enforcing the principle of Article XVI of the G.A.T.T. was also demonstrated with the creation of the Domestic International Sales Corporation or D.I.S.C.⁶⁴ in the United States of America in 1972.

The D.I.S.C. was designed to assist the United States of America with its international trade deficit by increasing the overall level of export sales. This increase would be accomplished by giving parent corporations with D.I.S.C. subsidiaries a lower effective income tax rate on the export income derived from domestically produced goods. In order to qualify as a D.I.S.C.,

a Corporation had to be a United States Corporation incorporated under any State law or in the District of Columbia and had to elect to be treated as a D.I.S.C. More than ninety-five percent of the D.I.S.C.'s gross receipts had to be "qualified export receipts",⁶⁵ more than ninety-five percent of its assets had to be "qualified export assets",⁶⁶ and the D.I.S.C. must have issued only one class of stock. An export manufacturing corporation (the supplier) would create the separate "paper" corporation, known as the D.I.S.C.; there was no requirement for the D.I.S.C. to have employees or to actually operate. The supplier could be the parent corporation of the D.I.S.C. or one of several D.I.S.C. shareholders. The supplier would transfer the manufactured goods to the D.I.S.C., which in turn would sell the goods abroad, on behalf of the supplier. The D.I.S.C., itself, was prohibited from manufacturing the product which was to be exported. If the D.I.S.C. retained the income from the sale, then neither the D.I.S.C. nor the supplier would pay any immediate income tax.⁶⁷

Complaints were filed with the G.A.T.T. by the European Economic Community, in particular Netherlands, France and Belgium, and by Canada against the D.I.S.C. legislation immediately after this legislation was introduced in the United States of America.⁶⁸ The European Economic Community, along with Canada, argued that the D.I.S.C. legislation breached Article XVI of the G.A.T.T. as the deferral of taxes, pursuant to the D.I.S.C. legislation, constituted a "remission" or exemption of direct taxes calculated in relation to exports which were prohibited in accordance with paragraph (e) of the list of prohibited subsidies.

The United States of America alleged that the D.I.S.C. legislation provided only a deferral of taxes, and not a "remission". It was not until 1981 that the G.A.T.T. Council finally ruled on this matter. The G.A.T.T. Council held that the tax breaks to the D.I.S.C.'s were in violation of Article XVI primarily because no interest was charged on the deferred tax, which interest forgiveness amounted to a subsidy in itself.⁶⁹ It should be noted that upon receipt of the adverse ruling the Reagan Administration

introduced legislation to create "foreign sales corporations" or F.I.S.C.'s⁷⁰ as a replacement to the D.I.S.C.'s. The F.I.S.C. will be discussed, briefly, later on in this paper.

Additional drawbacks to Article XVI as a mechanism to curtail the growth of "prohibited" subsidies are: it does not contain any bilateral or multi-lateral approach to international price discriminatory actions; it does not refer to other monopolistic behaviour such as international market sharing agreements, pre-emption of markets, and the exclusionary policies of internationally dominating suppliers; and it was not designed to regulate granting of government subsidies to private industries, but to promote competition among private industries.⁷¹

Thus, as the controversy as to what is or is not a prohibitive export subsidy did not cease after the development of the illustrative list, more precise criteria for evaluating the subsidies was required to be incorporated into Article XVI to provide clearer guidelines and principles as to the definition of a subsidy. Indeed, trade distortions can occur where prohibited subsidies are funnelled into advertising, improving services or giving more extensive product guarantees. Although no effects on the price of the product would be evident,⁷² non-tariff barriers are in fact, being created.

Nations have been extremely nationalistic in their policies with respect to the agricultural sector. These policies range from the desire to ensure the security of food supply to maintaining a traditional lifestyle. The method of achieving these policies: protecting a nation's farmers from international competition through subsidization of the domestic market and the prohibition of most agricultural imports.

The nationalistic attitude of contracting parties towards the agricultural sector is reflected in the wording of Section B of Article XVI of the G.A.T.T. This Section is tolerant to the use of subsidies with respect to primary products which are defined in Annex I, Ad. Article XVI: B(2) as "any

product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade".⁷³

Section B(3) of Article XVI merely requests contracting parties to refrain from using subsidies on the export of primary products. While it is true that export subsidies on primary products can be subject to a complaint where such subsidies result in the contracting party attaining "more than an equitable share of world export trade", the concept of "equitable share of world export trade" is difficult to apply because it is an ambiguous and imprecise concept.⁷⁴ No criteria is provided for determining when a nation's share of world trade, because of the application of subsidies, is inequitable.

The G.A.T.T. Panel constituted to consider the case of French assistance to exports of wheat and wheat flour in 1958 was one of the few examinations by the G.A.T.T. of the issue of what was meant by "more than an equitable share of world trade".⁷⁵

In this case, Australia lodged a complaint that French exports of wheat and wheat flour had displaced the Australian trade in these products, especially in Ceylon (now Sri Lanka), Indonesia and Malaysia, due to the granting of export subsidies. The Panel determined that the export price charged by French exporters for wheat flour barely exceeded that charged for wheat while, in contrast, the export price charged by Canada, Australia and the United States of America for flour exceeded the import price for wheat from between thirty to fifty percent. Furthermore, the Panel determined that as a result of the subsidies granted by the French government on the exports of wheat and wheat flour, France's share of world exports in these products increased approximately fifty-seven percent in a four year period. As a result, that Panel determined that it was reasonable to conclude that France's share of world trade in wheat and wheat flour had become more than equitable.⁷⁶

Unfortunately, the difficulty of proving a connection between subsidization and a "more than an equitable share of world trade" is demonstrated by the inclusiveness of a Panel's observations in the case of Malawi's complaint concerning the United States of America's subsidy on unmanufactured tobacco in 1967.⁷⁷ This difficulty is further shown in the inability of a Panel, in 1979, to conclude that refunds granted by the European Economic Community on sugar were "more than an equitable share of world trade" despite evidence that the European Economic Community's share of the world sugar trade increased substantially during the granting of the refunds.⁷⁸

The G.A.T.T. has not been successful in regulating the growth of subsidies in the primary sector. Due to the vagueness of the G.A.T.T. in the area of primary products, the application of subsidies on agricultural products has become a standard practice.

In 1958, the Haberler Report⁷⁹ issued by the G.A.T.T. commented on the array of restrictions practiced by contracting parties in the agricultural sector. This was followed by a G.A.T.T. report adopted in 1961 which illustrated that forty different groups of primary products had been granted direct production subsidies, or other forms of governmental support, and at least fourteen groups of primary products were reported by various countries as receiving direct export subsidies and other types of export assistance.⁸⁰ Indeed, the situation had not changed by 1964 in accordance to a Food and Agriculture Organization Study⁸¹ commissioned at that time.

The situation in the agricultural sector was rendered more complex by the United States of America obtaining a G.A.T.T. waiver in 1955, enabling it to impose additional quotas and tariffs on agricultural imports that were interfering with price support programs of the United States' Department of Agriculture,⁸² and with the establishment of the European Economic Community in 1957.⁸³

Following in the footsteps of the United States of America, the European Economic Community instituted its Common Agricultural Policy, which although was discussed by Contracting Parties with a view to determining its compatibility with the G.A.T.T., did not receive a formal waiver from the Contracting Parties to operate.⁸⁴ The objective of the Common Agricultural Policy was to assure the stabilization of exports and imports of agricultural products within the European Economic Community. Unfortunately, the Common Agricultural Policy tended to maintain high and guaranteed prices to community producers while at the same time insulating them from import competition through the implementation of various import-control practices established by the European Agricultural Guidance and Guarantee Fund.⁸⁵

The impact of Article XVI on the use of subsidies in the agricultural sector is further weakened by the exemption provided with respect to systems for the stabilization of the domestic price or of the return to domestic producers of a primary product in accordance with Annex 1, Ad Article XVI: Section B(3) of the G.A.T.T.

Schemes to stabilize the domestic price of agricultural products or the returns to domestic producers are authorized by Annex 1, Ad Article XVI: Section B(3) if certain conditions are met, namely: 1. the system results in the sale of the product at a price higher than the comparable price charged for the like product in the domestic market; and 2. the system operates so as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties. Yet such schemes have often resulted in creating a higher price for the primary product than could be obtained on the world market, and when these products are exported, they tended to prejudice the interests of other contracting parties, especially in times of surpluses.

The impact on the interests of other contracting parties or nations was illustrated in the cases of French assistance to wheat and wheat flour and the complaints by Australia and Brazil concerning the European Economic Community sugar refunds which were discussed earlier.⁸⁶ Furthermore, in 1976 the

G.A.T.T. Council decided that skim milk powder held by intervention agencies (established pursuant to the Common Agricultural Policy) in the European Economic Community for use in various animal feeds were in contravention of Article III of the G.A.T.T. by giving rise to discriminatory internal quantitative regulations.⁸⁷

In view of the fact that developing countries with economies heavily dependent on the export of one or two unprocessed agricultural or mineral raw materials were vulnerable to fluctuations in the prices of these materials, various commodity agreements were established to regulate the prices of such materials or commodities. These international commodity agreements were set up in the areas of tin, wheat, sugar, coffee, cocoa and natural rubber to maintain prices through export quotas, contractual arrangements or the establishment of internationally financed buffer stocks of the commodities.⁸⁸

A report commissioned by the Food and Agricultural Organization in 1964 commented on the limited success of commodity agreements to promote the stabilization of trade in the commodities.⁸⁹ Further concerns over commodities resulted in the adoption of an Integrated Programme for Commodities under the auspices of the United Nations Conference on Trade and Development in 1976 and the formulation of a Common Fund in 1980, which although is not yet in force, was ratified by Canada.⁹⁰

In spite of commodity agreements and other measures related thereto, as discussed, the issue of subsidies remained, and other non-tariff barriers continued to develop in the agricultural sector. Examples of such barriers included production subsidies, import levies and technical or administrative delays in the importation of agricultural products from the territories of other contracting parties.⁹¹ Hence, the barriers to the free flow of primary products in the international market were formidable and did not seem to be able to be combatted by Article XVI of the G.A.T.T. as currently drafted.

Closely linked, but not subject to, Article XVI of the G.A.T.T. are the provisions in Article VI permitting the application of countervailing duties by contracting parties to products which have been the subject-matter of a subsidy. The objective of the countervailing duty is to protect domestic manufacturers from imports receiving unfair competitive advantage due to the subsidy.⁹²

Article VI (3) of the G.A.T.T. defines a countervailing duty as a "special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise". The countervailing duty levied cannot be in excess of an amount equal to the bounty or grant determined to have been granted on the manufacture, production or export of the product in the country of origin or exportation. In addition, section 6(a) of Article VI stipulates that a countervailing duty cannot be levied unless the contracting party determines that the effect of the subsidization causes or threatens material injury to an established domestic industry or retards materially the establishment of the domestic industry.

In this regard, Article VI was attempting to counteract the effect of subsidies which have been imposed by contracting parties notwithstanding the prohibition expressed in Article XVI of the G.A.T.T. and whether or not the subsidy fell within the parameters of Article XVI. Nevertheless, serious problems existed with Article VI.

First, not all contracting parties accepted that countervailing duties could not be imposed prior to the demonstration of injury or the threat of injury to a domestic industry.⁹³ Secondly, Article VI has been criticized as not providing precise criteria for determining what is a prejudice or a serious injury.⁹⁴ Finally, Article VI does not provide a definition of what is a bounty or subsidy making it difficult to regulate whether countervailing duties are being validly levied in accordance with this Article.

in an attempt to reduce the drawbacks caused by the wording of Articles XVI and VI of the G.A.T.T., the Contracting Parties during the 1979 Tokyo Round of Negotiations, formulated the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (hereinafter referred to as the "Subsidies Agreement").⁹⁵ The Subsidies Agreement, although recognizing in Article 8(1) that subsidies constituted a legitimate tool for the promotion of national policies such as regional development, research development and industrial trade, introduced more discipline into the use of such subsidies.

The Subsidies Agreement changed the rules of the G.A.T.T. relating to subsidies in three respects. Firstly, Article 9 of the Subsidies Agreement prohibited the signatories from granting export subsidies on non-primary products. Secondly, export subsidies on primary products, in accordance with Article 10, were only permitted if the subsidy granted, whether directly or indirectly on such products, did not allow the signatory granting the subsidy to have more than an equitable share of the world trade in that product, and if the said subsidy was granted in a manner that did not permit the subsidized product to be sold at prices materially below those of other suppliers in the same market. Finally, by Article 12 of the Subsidies Agreement, access to consultation was increased, for when a signatory believed that any subsidy was being granted or maintained by another signatory which was causing injury to its domestic sector, serious prejudice or the nullification or impairment of benefits accruing to it under the G.A.T.T., such a signatory had to request consultations with the other signatory. Then, if any violations of the Subsidies Agreement were not resolved within thirty days of the request for consultations, the Committee of Signatories, established under this Subsidies Agreement, could make such recommendations to the signatories as may be appropriate, and could "authorize such countermeasures as may be appropriate" where its recommendations were not followed.

In contrast to Article XVI of the G.A.T.T., the Subsidies Agreement in Article 6(4) clearly established that a countervailing duty could be imposed on a product imported from another state where it has been demonstrated that the product was being subsidized and the subsidization resulted in a material injury to a domestic industry. Articles 2 to 5 of the Subsidy Agreement set out the procedures whereby a countervailing duty may be invoked. For example, Article 2 stipulated that countervailing duties could only be utilized after an investigation had evaluated the existence, degree and effect of any subsidy. The requesting signatory had to first supply sufficient evidence of the existence of the subsidy, the injury to the domestic industry and the link between the imports and the alleged injury. When it had been determined that an investigation was warranted, the complainants were notified and a public notice issued. At this stage, the evidence of both the subsidy, and the injury caused thereby, were to be considered simultaneously and the signatories were afforded an opportunity for consultation.⁹⁶

Article 4 stated that it was the 'authorities' of the importing signatory who decided whether a countervailing duty should be imposed and the amount of that duty, where it had been adjudged that the requirements for the imposition of a countervailing duty had been met. Nevertheless, the amount of the duty could not exceed the amount of the offending subsidy, and it had to be levied on a non-discriminatory basis on imports of the product from all sources found to be subsidized and causing the injury.

Article 4, at section 5, also provides for proceedings to be suspended or terminated without the imposition of provisional measures or countervailing duties if the following undertakings are accepted:

1. the government of the exporting country agrees to eliminate or limit the subsidy, or
2. the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated.

Article 6(1) set out the factors which had to be considered before a determination could be made as to whether an injury had occurred; for instance, there had to be an examination of the volume of the subsidized import, of the effect of the subsidized imports on prices in the domestic market for like products, and of the impact of these imports on domestic producers of such products.

The Subsidies Agreement is an important instrument for the regulation of the application of subsidies which are imposed contrary to the principles established by Article XVI of the G.A.T.T. Article XVI was strengthened by the presence of the Subsidies Agreement because the said Agreement was more explicit in stating the kinds of subsidies which would be tolerated, in clearly establishing that a "material injury" or "prejudice" must be demonstrated before a countervailing duty may be imposed, and by providing precise rules and procedures to be followed by the signatories in their investigation of alleged subsidy violations. The list of prohibited export subsidies was incorporated into the Subsidies Agreement as an Annex, along with interpretative "notes". In addition, the Subsidies Agreement, in the note to Article 7, expanded the definition of the word "subsidy" by stating that "subsidy" included subsidies granted by any government or any public institution within the territory of the signatory. Nevertheless, the concept of "more than an equitable share of world export trade" was still retained by Article 10 of the Subsidies Agreement in regards to primary products; albeit tightened to include any case where the effect of the export subsidy was to "displace" the exports of another contracting party, and to consider "traditional patterns of supply" in new market areas.⁹⁷

Despite the improvements incorporated into Article XVI by the Subsidies Agreement, the said Agreement itself contained several defects. First, it is questionable whether the signatories could influence other governments or public institutions outside their spheres of influence. The signatories recognized that governments could not always control public institutions or local governments. However, the signatories did agree to accept the "international consequences" that could arise, under the Subsidies Agreement, as a

result of subsidies granted by these other public institutions and governments within their territories.

This acceptance, together with the emphasis in the Subsidies Agreement for contracting parties to seek a "mutually agreed solution" or conciliation prior to proceeding to dispute settlement, demonstrates that sovereign states may have an interest in following the rules set out in the Subsidies Agreement.⁹⁸ Yet, formal rules for dispute resolution are important as they establish the parameters within which the contracting parties are to operate, and provide certainty in the dispute resolution process.

Where, however, the offending subsidies are granted by public institutions or local governments which remain outside the ambit of the G.A.T.T., it is not clear that a willingness by G.A.T.T. signatories, in the Subsidies Agreement, to accept the "international consequences" arising as a result of the granting of such subsidies by other institutions would provide in all cases sufficient "self-interest" or incentive for the removal of such subsidies by contracting parties without further "legal" controls.⁹⁹

A further factor which may diminish the impact of the Subsidies Agreement is the exemption provided to developing countries to the application of the said Agreement. Article 14 provided that developing countries could adopt measures and policies to assist their industries, including those in the export sector. By this provision, developing countries were merely requested to enter into commitments to eliminate export subsidies inconsistent with their comprehensive development needs. With respect to subsidies other than export subsidies, Articles (5) and (7) stipulated that countermeasures could be applied against developing countries only where a nullification or impairment or tariff concessions or other G.A.T.T. obligations were found to exist. Ironically, the liberalization of the Subsidies Agreement in favour of developing countries has not encouraged developing countries to become signatories to the said Agreement which, in fact, has been criticized as not going far enough to protect the interests of developing countries.¹⁰⁰

Although the G.A.T.T. itself, in Part IV¹⁰¹ exempted developing countries from the application of its principles, it is questionable whether such an extensive exemption should have been continued in the Subsidies Agreement, due to the potential for abuse. It is recognized that multilateral agreements are not achieved without compromises. However, this "exemption" provision could have been improved, and its potential for evading the intent of the Subsidies Agreement reduced, if for example, a definition of "developing countries" was provided therein, and if some restrictions were stated as to when the exemption could be invoked. Thus, although the Subsidies Agreement tightened the regulation of prohibited subsidies, avenues for evasion continued to exist.

In an attempt to liberalize trade in certain agricultural products, the Contracting Parties concluded the Arrangement Concerning Bovine Meat¹⁰² and the International Dairy Arrangement (hereinafter called "Arrangement")¹⁰³, only the latter of which will be discussed in this paper.

The objectives of the Arrangement, as established in Article I, were to expand and liberalize world trade in dairy products, under stable market conditions, which would be mutually beneficial to both importers and exporters of dairy products, and to promote the economic and social development of developing countries. Pursuant to Article II, the dairy products covered by this Arrangement were fresh milk and cream; preserved, concentrated or sweetened milk; butter; cheese and curd; and casein.

The two important features of this Arrangement were the establishment in Article VII of the International Dairy Products Council, which serves as a forum for discussions and monitors the international dairy market, and the establishment in Article 3 of each Annex of a minimum export price for the dairy products covered by the Arrangement.

By Article III of the Arrangement, the participants were also to communicate to the International Dairy Products Council, on a regular basis, all necessary information to permit the said Council to monitor the international dairy market. Such information to be provided included statistics on the evolution of the dairy market, perspectives on the production, consummation, price and stocks of dairy products as well as information on each participants domestic policy, and the commercial measures on dairy products taken by each participant.

The Arrangement established during the Tokyo Round of Negotiations under the G.A.T.T. was a major achievement as, for the first time, contracting parties agreed to the regulation of the marketing of an important agricultural product.

Nevertheless, the Arrangement contained certain drawbacks. For instance, Article III(1)(c) stipulated that all decisions by the International Dairy Products Council were to be by consensus. This meant that the said Council would be deemed to have rendered a decision only where no member of the International Dairy Products Council did not formally oppose a proposition. Furthermore, the International Dairy Council had no means of enforcing a decision -- it was only a consultative council, although it could revise minimum export prices once a year based on certain broad principles.

While the Protocols to the Arrangement established minimum export prices for those dairy products covered by the Arrangement, derogations were permitted in each Annex of the Arrangement with respect to dairy products directed towards animal feed, and in regard to dairy products which were donated or destined for relief or development purposes in developing countries. Upon request of a participant, Part 3, Article 7 of Annex II stipulated that the International Dairy Products Council had to consider providing a derogation to minimum export prices, within three months from the request, in order to remedy difficulties. As well, any participant who considered its interests were seriously affected by countries which were not participants to the

Arrangement, could request an extraordinary meeting ("emergency action") of the International Dairy Products Council to determine the appropriate measures to be taken. Indeed, where such a meeting could not be convened within two days and the commercial interests of the participants were seriously threatened, the participant could unilaterally take any measures necessary to safeguard its position, on condition that it notified the other participants.

Finally, this Arrangement only affected its signatory participants, it did not regulate subsidies or quotas imposed by such participants with respect to the importation or exportation of dairy products into or out of the participants' country, and it did not regulate the operations of Enterprises in the dairy sector.

2. Dumping

In order to neutralize the effect of price discrimination between a product that is produced domestically and one that is imported into the domestic market, Article VI of the G.A.T.T. permits contracting parties to levy a duty on the imported product under certain circumstances. Article VI, therefore, recognizes that a domestic industry may be harmed by the importation of products at artificially low prices. This practice is identified in Article VI as that of "dumping".

"Dumping" is defined in section 1 of Article VI as the process by which products of one country are introduced into the commerce of another country at less than the normal value of the product. Not all "dumping" is condemned by the G.A.T.T.; the dumping must cause or threaten to cause material injury to an established industry in the territory of the said contracting party or materially delay the establishment of a domestic industry. Where material injury is determined or the development of a domestic industry has been delayed due to dumping, a contracting party may, by section 2 of Article VI, impose an anti-dumping duty in an amount not to exceed the margin of dumping in respect of the dumped product.

As was experienced with Article XVI with respect to subsidies, the text of Article VI gave rise to certain interpretation difficulties concerning the application of anti-dumping duties.¹⁰⁴ There was no definition in Article VI as to what was meant by "normal value" of a product and as to what constituted a "material injury". Furthermore, the concepts of "industry" and "territory" were not determined.

With a view to correcting some of these drawbacks, the contracting parties adopted the Anti-dumping Code in 1967.¹⁰⁵ The major improvements to Article VI brought about by the enactment of the Anti-dumping Code were: the requirement that dumping be "demonstrably the principle cause" of material injury, that national authorities weigh the effect of other factors (other than price) which could be affecting a domestic injury, and that domestic production could be divided into two or more separate industries if certain producers could be considered apart from other producers by reason, for instance, of transportation costs.¹⁰⁶

The purpose of the Anti-dumping Code was to prevent the utilization of anti-dumping duties as a means of protecting domestic industry otherwise than by the institution of customs duties.¹⁰⁷ One of the major difficulties with the application of this Code was the fact that it was not utilized by the United States of America when rendering dumping determinations. The United States of America employed the Antidumping Act, 1921¹⁰⁸ which only required a preliminary determination of injury before anti-dumping duties could be applied against an imported product.¹⁰⁹

As a corollary to the Subsidies Agreement, and to obtain the United States of America's concurrence regarding the concept of "material injury" in both the question of subsidies and dumping, the contracting parties, during the Tokyo Round of Negotiations, obtained agreement on, and implemented, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "Anti-dumping Agreement").¹¹⁰

The Anti-dumping Agreement, in Article 1, stipulates that the imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided in Article VI of the G.A.T.T. Article 2 of the Anti-dumping Agreement provides that a product is to be considered "dumped" if the export price of the product exported from one country to another is "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

The key provisions concerning the determination of injury and the definition of industry are found in Articles 3 and 4 of the Anti-dumping Agreement.

Section 1 of Article 3 states that a determination of injury for the purposes of Article VI of the G.A.T.T. is to be based on an examination of both the volume of the dumped imports and their effect on prices on the domestic market for like products, and the "consequent impact of these imports on domestic producers of such products". By section 2 of Article 3, the contracting parties are to consider whether there has been a "significant increase" in dumped products and whether there has been "significant price cutting" by the dumped products. In accordance with section 4 of Article 3, it must be demonstrated that the dumped imports, by reason of the dumping, are causing injury within the meaning of the Anti-dumping Agreement. Furthermore, other factors which may, at the same time, be causing injury to the domestic product are not to be attributed to the dumped products.

While "domestic injury" is to be considered, generally, as referring to domestic producers as a whole of the like products or to those of them whose "collective output" of the product constitutes a "major proportion of the total domestic production" of those products, Article 4 also provides for two exceptions to the term "domestic injury". Where producers are related to the exporters or importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of the products. Furthermore, in exceptional circumstances, the territory of a contracting party may be divided into two or more competitive markets, and the producers within each market may be treated as a separate industry.

Articles 5 to 8 of the Anti-dumping Agreement provide for the procedures to be followed when investigating allegations of dumping, including the provision for suspending or terminating dumping investigations or anti-dumping duties upon the receipt of price undertakings.

By Article 9 of the Anti-dumping Agreement, contracting parties are to ensure that anti-dumping duties only remain in effect to the extent necessary to counteract the dumping which is causing the injury. As well, in accordance with Article 13 of the said Agreement, contracting parties are to give special consideration to the needs of developing countries when considering the application of anti-dumping measures.

The principles of the Anti-dumping Agreement were enacted by Canada, the United States of America and the European Economic Community.¹¹¹ Nevertheless, problems still exist with the text of the Anti-dumping Agreement.

The Anti-dumping Agreement eliminates the requirement, established in the Anti-dumping Code, that dumping be "demonstrably the principal cause" of material injury, entailing a "weighing of other factors" involved. Instead, Article 3(4) of the Anti-dumping Agreement stipulated only that it must be "demonstrated" that dumped imports are causing injury and that injuries "caused by other factors" must not be attributed to the dumped imports.

Furthermore, unlike the Anti-dumping Code, separate industries are no longer determined in terms of "isolation" from other products, but are defined by Article 4 of the Anti-dumping Agreement, in terms of domestic producers whose output constitutes "all or almost all of their production of the product in question in that market".

Thus, there is concern that the Anti-dumping Agreement has enhanced protectionism rather than reduce it.¹¹² Indeed, in the United States of America, such factors as evidence of lost and depressed sales and reduced domestic demand for a product resulting from alternative substitutes, as well

as the existence of different contractual terms with the importer, have been considered valid reasons for demonstrating the link between less than normal value imports and material injury.¹¹³ Administrative concerns have also been raised in relation to the Canadian Special Imports Measures Act.¹¹⁴

3. Quantitative Restrictions

Article XI of the G.A.T.T. deals with the general elimination of quantitative restrictions. At a cursory glance, Article XI could serve as a useful weapon in the arsenal of those promoting trade liberalization.

Section 1 of Article XI states that no prohibitions or restrictions "other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures" are to be instituted or maintained by any contracting party. This provision applies both to the importation of any product to the territory of any contracting party and to the exportation or sale for export of any product destined for the territory of any other contracting party.

Unfortunately, the effect of section 1 of Article XI is practically eviscerated through the allowance of certain exceptions to the general rule, all of which are contained in section 2 of the said Article. Section 2 of Article XI stipulates that the provisions of section 1 do not extend to those restrictions applied to prevent or relieve critical shortages of foodstuffs, necessary to the application of international standards or regulations for the grading, classification or marketing of commodities, and necessary to the enforcement of government measures on any agricultural and fisheries product which operate to restrict the production of such product or to remove temporary surpluses. Article XIII of the G.A.T.T. does provide, however, that where such restrictions are to be applied to the importation or exportation of any product of, or destined for, the territory of another contracting party, they are to be applied on a non-discriminatory basis.

Together with the exceptions enumerated in paragraph 2 of Article XI, and in spite of the general prohibition against the application of quantitative restrictions outlined in paragraph 1 of the said Article, such restrictions continue to exist. Indeed, quantitative restrictions abound in form and variety. These restrictions appear in such forms as import and export restraints, quality standards, quotas and technical standards.

In Canada, a variety of laws impede the importation of goods. Legislation has been implemented in the areas of agriculture, livestock, food and drugs, explosives, inland water freight, textiles and canned foods, among others.¹¹⁵ However, the primary legislation in Canada which regulates the entry and exit of goods is the Export and Import Permits Act,¹¹⁶ which has been in existence since 1947, and provides for the introduction of quotas.

Trade is controlled by the Executive in the United States of America primarily through emergency legislation such as the Export Administration Act of 1979.¹¹⁷ In Japan, the norms for export and export licensing are set out in the Foreign Exchange and Foreign Trade Control Law.¹¹⁸ This legislation enabled the Japanese government to control exports by stipulating, for example, that prior government approval was required of the destination of the goods to be exported and of the method of payment for the goods.¹¹⁹

Tariffs, quotas, safeguard measures and other restrictions applying to the import of goods into the European Economic Community are applied under the authority of the said Community pursuant to Article 113 of the Treaty of Rome,¹²⁰ which Article establishes the common commercial policy of the European Economic Community. The common Community rules with respect to imports from non-member states are set out in Council Regulation 288/82.¹²¹

Some of the most difficult restrictions for contracting parties to overcome in the area of non-tariff barriers are technical standards. Such standards can facilitate trade or obstruct trade depending on the purpose for which they have been implemented.

Technical standards have been defined as "any law, regulation, specification, or other requirement with respect to the properties of a product or the manner, conditions or circumstances under which a product is produced or marketed".¹²²

Where standards are international in scope, they facilitate the exchange of goods from one country to another, and standards solely aimed at ensuring the health and safety of citizens or at protecting the environment do not hinder the flow of trade. On the other hand, standards or technical restrictions can be considered barriers to trade if they are "intentionally formulated to exclude or discourage foreign imports, or if the certification procedure that accompanies such standards is used as a means of slowing down or preventing foreign imports".¹²³

Countries can demand that importers must meet certain labelling or packaging standards and these standards effectively increase the cost of the imported product. The foreign product may also have to meet such high technical standards or particular requirements that it is effectively excluded from participating in a share of the domestic market. With respect to approbation or certification procedures, they can be considered protectionist in design where the procedures are costly or lengthy or if they refuse outright to consider imported products.¹²⁴ The main difficulty in the area of technical standards is trying to determine the true purpose behind the promulgation of the standard especially when they are alleged to have been formulated for health or security reasons. Even if the standards are determined to be obstacles to trade, international bodies cannot control standards invoked by state or municipal governments or by private organizations.¹²⁵

With a view to reducing the application of quantitative restrictions, the contracting parties negotiated two agreements during the Tokyo Round of Negotiations: the Agreement on Import Licensing Procedures (hereinafter referred to as the "Licensing Agreement")¹²⁶ and the Agreement on Technical Barriers to Trade (hereinafter referred to as the "Technical Agreement").¹²⁷

The Licensing Agreement encompassed a series of principles and guidelines which were directed at reducing, to the greatest extent possible, those barriers designed to impede the flow of goods in international trade by means of licensing requirements. By sections 2 and 3 of Article 1, the Licensing Agreement requested that its signatories follow the general principles of the G.A.T.T. and ensure that licensing procedures were neutral in their application and administered in a just and equitable fashion. Regulations and all information concerning the procedures governing licenses, in accordance with sections 4, 5 and 7 of the said Article, were to be published without undue delay, all required documents were to be strictly necessary for the smooth functioning of the licensing system, and applications for licenses were not to be refused because of minor errors which did not modify the basic information supplied.

The role of the Licensing Agreement, as a counterforce to non-tariff barriers which exist in this sector of trade, is weak in several respects. For example, section 3 of Article 5 stipulates that the Licensing Agreement only affects those Contracting Parties who are signatories of the Agreement; pursuant to Article 1(10), licensing procedures related to national security are exempt from the application of the Licensing Agreement; and by Article 3(1) special consideration is to be given under the Agreement, to those products being imported from developing and less-developed countries, in the granting of discretionary licenses. Although the Licensing Agreement in Article 4, forms a Committee on Licenses to regulate disputes, this Committee meets only where it is necessary to give signatories the possibility of proceeding by means of consultations on all matters relating to the function of the Licensing Agreement. Furthermore, the signatories must utilize the consultation procedures established in Articles XXII and XXIII of the G.A.T.T. which have been criticized as being inefficient and antiquated as shown in this paper's section on dispute resolution.

Thus, the concepts of, and exemptions to, the Licensing Agreement are so broad and imprecise that almost every "refusal" to apply the principles of the Licensing Agreement could be easily justified. Hence, the Licensing Agreement only partially succeeds in regulating non-tariff barriers in the area of licensing procedures.

The goal of the Technical Agreement was to ensure that technical regulations and trade and certification methods did not create unnecessary barriers to trade. To this end, guidelines were provided for the preparation, adoption, and application of technical regulations and standards, and central government bodies were encouraged to use international standards as often as possible. In addition, the Technical Agreement established a scheme for regulating the disputes which arose out of the application or non-application of this Technical Agreement. These principles will now be examined.

Article 2 of the Technical Agreement states that signatories to the Technical Agreement were to ensure that technical regulations and standards were not adopted or applied with a view to creating obstacles to international trade. In this regard, imported products were to be accorded treatment no less favourable than that accorded to domestic products and products of other origin. Pursuant to Article 2 (2.2), when technical regulations or standards existed or their completion was imminent, signatories were to utilize these standards as the basis for their technical regulations or standards. It should be noted that Article 2 (2.5) provided that where international standards did not exist, or their content was not substantially the same as the technical content of the international standard, the signatories were able to use national standards upon notification to the other contracting parties.

Article 5 stipulates that imported products were to be accepted for testing under conditions 'no less favourable than those accorded to imported products in a comparable situation'. Signatories were also to endeavor to accept the test results or certificates issued by relevant bodies in the territories of other signatories, even where the test methods differed from

their own, if they were satisfied that the methods employed in the other territories would determine whether a product was in conformity with the relevant technical standards.

The Technical Agreement, in Articles 7 to 9, establishes guidelines and procedures, similar to those provided for licensing standards, to be followed in the implementation of certification systems. The key provision here is that certification systems were not to be applied in a manner which would create obstacles to trade, but applied so as to grant access to suppliers of products originating in the territories of other signatories under conditions no less favourable than those accorded to domestic suppliers and to suppliers of other signatory countries.

Article 10 of the Technical Agreement requires signatories to supply information about technical regulations, standards and certification systems to other signatories, and to answer all reasonable enquiries. Articles 13 and 14 establish an extensive procedure for dispute regulation; for example, in the case of a dispute, the signatories were first to consult with each other in an effort to resolve the difficulties and where no solution was reached, the Committee on Technical Barriers to Trade was to meet, at the request of any signatory to the dispute, within thirty days of receipt of the request to work out a solution. If no mutually satisfactory solution was reached within three months of the Committee's investigation, the Committee, at the request of a signatory, was to establish either a technical expert group or a panel to examine the matter, consult with the signatories, and make a statement or recommendations which would assist the Committee in formulating its recommendations or any other appropriate ruling to present to the signatories.

The Technical Agreement was not a complete and definitive solution to the obstacles created by technical standards or regulations and certification systems in international trade. While the Technical Agreement, pursuant to Article 1, applied to both industrial and agricultural products, purchasing specifications prepared by government bodies in respect of government procure-

ment, by this same Article, were not covered by the Agreement. Furthermore, pursuant to Articles 3, 4, 6 and 8, the Technical Agreement only bound central government bodies, and not local or non-government bodies, although central government bodies were required to take "such reasonable measures as may be available" to ensure that the non-central bodies within their territories complied with the said Agreement. The issue that arises is what is meant by "reasonable" and "available" as these words are ambiguous. Thus, the effectiveness of the Licensing Agreement was dependent, to some extent, on whether there would be cooperation between central and non-central government bodies.

The impact of the requirement of the signatories to the Technical Agreement to use international standards where they were available and appropriate to the circumstances, was mitigated by the fact that the signatories, by Article 2 (2.2), could avoid this obligation for such reasons as: national security requirements, the prevention of deceptive practices, the protection of human health or safety or the protection of the environment. Concern has been raised that signatories would utilize national standards as an alternative, rather than as an exception, to international standards when the signatories were interested in promoting or protecting their economic interests.¹²⁸

Another barrier to the effectiveness of the Technical Agreement in regulating technical standards or certification systems is found in Article 12 of the Technical Agreement. This Article permits differential and more favourable treatment to developing countries, thereby retarding the harmonization process for certification systems. This Article provides that the Committee on Technical Barriers to Trade, upon request, may also grant exceptions from the obligations of the Technical Agreement to developing countries due to special development and trade needs, although such exceptions are to be limited in time.

The extensive dispute system established pursuant to Article 14 of the Technical Agreement could only be utilized by central governments, and not by importers or exporters. As well, the findings of the Committee on Technical Barriers to Trade were unenforceable in the traditional sense. If circumstances were "serious enough" to justify such an action, the Committee could, by Article 14 (14.21), authorize a signatory to suspend such obligations under the Technical Agreement, vis-à-vis other signatories, as the Committee deemed appropriate.¹²⁹ The issue to be resolved is: when would the Committee consider that circumstances were "serious enough"? Where the dispute procedures under the Technical Agreement were exhausted, signatories could resort to the mechanisms under Article XVIII of the G.A.T.T. But, any determination made pursuant to Article XVIII should be based solely on the principles of the G.A.T.T.

Again, the Technical Agreement does not completely resolve the problems created by technical standards when the Technical Agreement itself provided exemptions to the regulation of such non-tariff barriers.

B. Derogations

1. State Trading Enterprises

At the inception of the G.A.T.T., the impact of the public sector on the national economic scene was not extensive. Indeed, the regulation of State Trading Enterprises (hereinafter referred to as "Enterprises") is provided for in only one area -- Article XVII. The guiding principles of this regulation of Enterprises are found in section 1 of Article XVII.

Paragraph 1(a) of Article XVII stipulates that if a contracting party establishes or maintains an Enterprise or grants to any Enterprise special privileges, the contracting party undertakes, in its purchase or sales involving either imports or exports, to conform to the principle of non-

discrimination. By paragraph 1(b) of the said Article, such Enterprises shall make their purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale.

In accordance with Article XVII of the G.A.T.T., Enterprises are not prohibited from undertaking commercial operations. Indeed, such Enterprises, by Article XVII, are encouraged to apply the same principle of non-discriminatory treatment in their purchases or sales, involving exports and imports, as would be applied to private traders.

Nevertheless, as Enterprises are operated by government entities, the establishment of prices for goods by such Enterprises may reflect other than cost and profit considerations.¹³⁰ This raises the issue as to whether the functioning of Enterprises actually promotes the growth of non-tariff barriers. Indeed, if Enterprises are not basing their operations on "commercial considerations", one can argue that Enterprises, in their purchases or sales of goods, are subsidizing such goods thereby creating a form of protectionism.¹³¹

To compound the difficulty of determining whether Enterprises are promoting the development of trade barriers, Article XVII, itself, provides certain exceptions to the application of the principle of non-discrimination and the concept of "commercial considerations".

Section 2 of Article XVII of the G.A.T.T. states that Article XVII shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. This allows governments a wide latitude in the procurement of goods for its own use.

Pursuant to the interpretative note on Article XVII, in Annex I of the G.A.T.T., governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade or privileges granted for the exploitation of national natural resources (but which do not empower the government to exercise control over the trading activities of such Enterprises) do not constitute "exclusive or special privileges" in accordance with paragraph 1(a) of Article XVII. Furthermore, this interpretative note also provides that Enterprises may charge different prices for its sales of a product in different markets where such different prices are charged for commercial reasons, and that countries receiving "tied loans" may take these loans into account when purchasing their requirements abroad.

Paragraph 1(c) of Article XVII stipulates that contracting parties may, at the request of a contracting party who is adversely affected by the operations of an Enterprise, request the contracting party operating this Enterprise to provide information about its operations. The impact of this provision, however, is mitigated by paragraph 1(d) which provides that contracting parties are not required to disclose confidential information which may, among others, prejudice the legitimate commercial interests of particular Enterprises. This leaves open the question of interpretation as to what constitutes "legitimate commercial interests" of Enterprises as this term is not defined in Article XVII.

An important issue which remains unanswered by Article XVII is what is to be considered an Enterprise? The interpretative note to Article XVII (in Annex I) merely states that Marketing Boards established by contracting parties and which are engaged in purchasing and selling, or which do not purchase and sell, but lay down regulations covering private trade are governed by the provisions of Article XVII. There is also the matter of determining the extent to which governmental participation is necessary for the activity or organization to be considered an Enterprise.¹³²

Enterprises are generally considered to be centralized governmental buying and selling agencies which operate in national and international markets. These Enterprises can be mere agents of the Government or operate semi-autonomously as State corporations. They have as their object to promote and facilitate the marketing of their nation's products domestically and abroad or to assist in the importation of required products for domestic consumption or use.¹³³

Originally dominating only "non-market" economy countries, in the last fifteen to twenty years, Enterprises have proliferated in the economies of countries consisting of "free" markets, especially in the agricultural sectors of such economies. Today, many countries require that sales of agricultural products to, or purchases of, such products from their countries must be made to a central government agency. Enterprises have also been set up to regulate and promote the sale of industrial products on the export market. Assistance to manufacturers of export products, by Enterprises or other Government legislation, is given by means of loans, insurance, tax incentives, transportation and storage subsidies, and flexible credit terms.¹³⁴ Indeed, gradually Enterprises are taking over the role of the market place for determining domestic prices, the quantities of goods to be produced, and the distribution of such goods.

The impact of Enterprises on the economies of contracting parties and the role of the public sector on these economies was definitely not foreseen in the 1950's. This accounts for the weaknesses of Article XVII in controlling the activities of Enterprises as discussed above. In addition, Article XVII was not, by Annex I, intended to cover the purchase or sale of services by Enterprises. The purchase and sale of services, generally, play an important part in trading activities today.¹³⁵ Article XVII also does not touch such activities of Enterprises as assisting in the obtaining of credit terms or in the promoting of domestic products on the international market place. Thus, where Enterprises exist, another form of barrier has arisen unrelated to tariffs.

2. Safeguard Measure

(a) Article XIX - Safeguard Measure Clause

In order to promote the transition of a nation's economy from a heavily protected to a more liberal trading system, the founders of the G.A.T.T. inserted several safeguard measures into the G.A.T.T. It was realized that the contracting parties would require a breathing space within which to allow their domestic industries to become more efficient in light of the competition from imports which would arrive with trade liberalization.

Article XIX of the G.A.T.T. is one of the mechanisms by which contracting parties could protect themselves against import competition while at the same time adjusting their economies to greater trade liberalization as foreseen by the G.A.T.T.

A contracting party, by section 1 of Article XIX, is permitted to suspend a concession or obligation incurred under it, where any product is being imported into the territory in such increased quantities so as to cause or threaten to cause serious injury to domestic products. In order to invoke Article XIX, the contracting parties must show:

1. a product is being imported into the country of the contracting party in "such increased quantities";
2. the increase is a result of:
 - (i) unforeseen developments, and
 - (ii) concessions granted pursuant to the G.A.T.T.; and
3. the increase of imports caused "serious injury" or "threatened serious injury".

Prior to taking action pursuant to section 1 of Article XIX, members, by section 2 of this Article, must provide Contracting Parties with advance written notice of the member's intention of applying Article XIX, and must give those contracting parties with a substantial interest as exporters of the product concerned, an opportunity to consult with regard to the proposed action where a delay in the application of Article XIX would cause damage which would be difficult to remedy, action may be taken by the member under section 1 on a provisional basis, subject to that member effecting consultation, immediately after taking the action, with those contracting parties having a substantial interest in the action.

If the criteria and procedures of Article XIX are met, contracting parties may postpone tariff cuts, raise previously lowered tariffs or impose quantitative restrictions. However, the contracting party invoking this safeguard clause is also subject to either the suspension of equivalent concessions or the imposition of retaliatory trade measures by the affected contracting parties as provided by section 3 of Article XIX.

The purpose of Article XIX of the G.A.T.T. is to permit the use of special measures against the import of goods which are causing serious injury to domestic goods on an emergency basis. In view of the emergency nature of this Article, these measures are to be introduced on a limited-time basis and to be applied on a non-discriminatory manner against the importation of a product from all origins.

Unfortunately, in practice, Article XIX has been invoked in a long-term and discriminatory manner by various contracting parties.

Concern over the non-temporary and non-selective application of Article XIX was raised by the European Economic Community with respect to the extension by Canada of footwear quotas (which quotas had already been in existence for eight years), and to the continued applications of quotas to the importation into Canada of European Economic Community beef in 1985.¹³⁶ On the other

hand, the European Economic Community has also utilized Article XIX to justify its continued application of an increased duty on the importation of video recorders from selected countries on the basis that European manufacturers were still in a "vulnerable position and need protection against Japan and new producers such as South Korea".¹³⁷

The application of Article XIX has also been extended to support the imposition of quantitative restrictions by a contracting party on imports of a product from another contracting party, which contracting party has applied preferences to the importation into its country of a different product from a third country. This was demonstrated in the ten year dispute between the United States of America and the European Economic Community with regard to the application by the said Community of citrus tariff preferences for certain Mediterranean countries, which preferences were alleged by the United States of America to adversely affect American citrus exports to the European Economic Community.¹³⁸ In retaliation, the United States of America, in the absence of a settlement of the dispute, increased the duties levied on the imports of pasta products from the European Economic Community.¹³⁹ This dispute was only resolved, in 1986, after the negotiation of trade concessions between both parties.¹⁴⁰

Lack of clearly defined pre-conditions within Article XIX as to when such Article can be applied by contracting parties has also created difficulties.

The criterion of "in such increased quantities" has been interpreted to mean only a relative increase in the quantity of goods, making it possible to apply Article XIX where "domestic consumption of an import-competing authority and the imports of the commodity both decrease in absolute amount, but the proportion of imports to domestic consumption increases".¹⁴¹ In addition, the requirement of "unforeseen development" has been interpreted so broadly that almost an increase in imports itself could be an unforeseen event, and the invocation of Article XIX has even been justified where there has been a rapid increase in the proportion of imports to domestic production as this "rapid increase" has been considered to be a "serious injury".¹⁴²

Intended as a temporary safeguard measure, Article XIX has, hence, developed into a form of non-tariff barrier. To-date, no agreement has been entered into by Contracting Parties to resolve the difficulties in the application of Article XIX.

(b) Safeguard Agreements

(i) Voluntary Export Restriction Agreements

Due to the limitations identified in the application of Article XIX; namely, the requirement to demonstrate "serious injury" and to impose the restrictions on a short-term and non-discriminatory manner, coupled with the necessity for granting compensation in the form of other trade concessions, contracting parties have sought other methods to safeguard their domestic industry from imports or to protect their share of the international market. One such method has been to enter into bilateral arrangements between the importing and exporting countries. These arrangements have become identified as orderly marketing or voluntary export restraint agreements (hereinafter referred to as "VER agreements").

The objective of a VER agreement is to require a particular exporting country to limit its exports of a certain product to the country which has imposed the agreement for the duration of the agreement. VER agreements may be formulated as the result of bilateral negotiations between industries in the importing and exporting countries, with the support of the governments concerned, leaving the implementation of the agreement to the industry in the exporting country. However, the majority of VER agreements are negotiated on a government to government basis with the implementation of the arrangement left to the government of the exporting country on an explicit and formal basis.¹⁴³ The elements of VER agreements are as follows:

1. pression d'un pays importateur en vue de faire restreindre les exportations en provenance d'un pays donné d'un produit ou d'une marchandise quelconque;
2. assentiment du pays exportateur qui restreint volontairement ses exportations à destination du pays importateur; et
3. engagement implicite ou explicite de ce dernier de ne pas imposer de restrictions quantitatives à l'endroit du pays exportateur.¹⁴⁴

Confronted with the threat of the imposition of unilateral import quotas, exporting countries have been willing to enter into VER agreements in order to guarantee them at least access to the markets of the importing country, albeit on a more restricted and regulated basis. For the importing country, the "voluntary" entering into of such an agreement by the exporting country enables it to protect its domestic industry without the necessity of having recourse to Article XIX and its pre-conditions and procedures.

Unlike Article XIX of the G.A.T.T., VER agreements are designed to be applied on a long term basis against selected imports which are posing a new threat to the viability of domestic industries. Based on the need to protect their domestic industries from "market disruption", VER agreements circumvent the obligations imposed by Article XIX by not requiring a domestic industry to demonstrate that the increase in imports is causing "serious injury" to domestic products. By operating outside Article XIX, there is no need for the contracting party entering into a VER agreement to grant compensation, in the form of other concessions, or to face retaliatory action by affected contracting parties.

The use of VER agreements is wide-spread among contracting parties. In 1981, Canada "invited" Japan to limit its exports of automobiles to Canada due to concerns raised by the Canadian automotive industry that its economic difficulties were being caused by the increased inflow of Japanese automobiles

into Canada.¹⁴⁵ Although the Japanese agreed to "exercise prudence" in its exports of automobiles to Canada in the 1981 fiscal year, this was not acceptable to Canada. Thus, Canada exerted pressure on the Japanese government to further limit its automobile exports through the imposition of customs inspections of all Japanese automobiles arriving at the port of Vancouver in British Columbia during 1982.¹⁴⁶ As a result of this pressure, a VER agreement was negotiated between Canada and Japan to limit the export of Japanese automobiles to Canada up to a set ceiling in 1982 which VER agreement was renegotiated in subsequent years until 1985.¹⁴⁷ This VER agreement permitted Canada to limit imports on a selective and discriminatory basis without the need to grant compensation.

Canada, itself, was not immune to "requests" to restrain the exports of certain products by entering into VER agreements. This was clearly demonstrated as a result of the preliminary determination of the United States Department of Commerce of injury against the importation of Canadian softwood lumber products and the preliminary decision to set a countervailing duty of fifteen per cent on such products.¹⁴⁸

Extensive negotiations between representatives of Canada and the United States of America led to the formulation of a Memorandum of Understanding between the two countries to "resolve differences with respect to the conditions affecting trade in softwood lumber products."¹⁴⁹ By paragraph 3(a) of the Memorandum of Understanding, the Government of Canada is to collect an export charge on exports of certain softwood lumber products made on or after January 8, 1987, which charge, in accordance with paragraph 3(b) of the Memorandum of Understanding is to be equal to fifteen per cent of the ad valorem of the f.o.b. final mill price of the exported product.¹⁵⁰

The VER agreement on softwood lumber manifested into the Canadian Softwood Lumber Products Export Charge Act.¹⁵¹ Justification of the VER agreement was based on the need to recognize the right of Canada to manage its resources on its own terms, to keep increased softwood lumber revenues in Canada, and to

avoid the creation of legal precedents which could be used against other Canadian resource industries.¹⁵² Similarly, current pressures on Canada from the United States of America for Canada to reduce its share of the United States steel market has caused the Canadian government to pass legislation to monitor the shipments of steel outside of Canada in an attempt to diffuse protectionist sentiment in the United States of America.¹⁵³

VER agreements exist in the European Economic Community covering such diverse products as footwear, videotape recorders and motor vehicles although it does not appear that a published list exists in which these VER agreements can be identified.¹⁵⁴ The European Economic Community has entered into VER agreements with the United States of America in respect of restraining exports of certain steel products and steel pipes and tubes.¹⁵⁵ Various VER agreements exist, as well, between the United States of America and Japan.¹⁵⁶ Indeed, VER measures were agreed to, and undertaken, as early as 1971 by Japan with respect to limiting exports of textiles and radios to Canada, by China, in 1978, with regard to limiting the export of textiles to Canada, and between European producers and their governments, in 1979, to restrain exports of 'adjusted butter' to Japan.¹⁵⁷

VER agreements have been criticized as being contrary to the present rules of the G.A.T.T.¹⁵⁸ VER agreements, in contrast to Article I of the G.A.T.T., do not appear to be in accord with the "most-favoured nation" principle, and tend to constitute quantitative restrictions, thereby being in violation of Article XI of the G.A.T.T. Even if VER agreements are instituted for balance-of-payment purposes (Article XII) or for safeguard measures (Article XIX), such purposes or measures do not seem to be progressively relaxed or applied on a non-discriminatory basis as required by Articles XII, XIII and XIX of the G.A.T.T. Moreover, in the area of international trade generally, VER agreements have been associated with causing trade restrictions by: being solely directed at those suppliers who are the most competitive, causing trade diversion at the expense of restraining countries by allowing unrestrained sources to fill import gaps, and leading to the cartelization of

markets through limiting competition and raising prices in the importing country and creating a licensing or quota system in the exporting country which prohibits the entry of new exporters onto the international market scene.¹⁵⁹ VER agreements, hence, constitute an additional type of non-tariff barrier which exists outside the framework of the G.A.T.T. Of course, the most infamous VER agreement currently in existence involves the regulation of international trade in the textile industry.

(ii) Multifibre Arrangement

Concerns of industrialized contracting parties about losing a substantial share of their textiles and clothing industries to low-cost importing countries provided the impetus for the establishment of a G.A.T.T. Working Party to study the effects of "market disruption" on the domestic textile and clothing industries. As a result of this study, the Contracting Parties of the G.A.T.T. adopted a decision which recognized the problem of market disruption arising from the increase of imports of certain textile and clothing products at prices below those charged by the domestic industry, which imports were causing or threatening to cause serious injury to the domestic industry.¹⁶⁰

This decision of the Contracting Parties was implemented, in 1961, with the creation of the Short Term Arrangement Regarding International Trade in Cotton Products¹⁶¹ which was designed to permit the negotiation of bilateral restraint agreement between importing and exporting countries of cotton textiles in order to avoid market disruption. This Arrangement was replaced, in 1962, by the Long Term Arrangement Regarding Trade in Cotton Textiles¹⁶² which extended the coverage of the earlier arrangement to synthetic and woollen products in addition to cotton products. The current arrangement, the Arrangement Regarding International Trade in Textiles, or the Multifibre Arrangement as it has become known,¹⁶³ was first negotiated in 1973 and is the most comprehensive of the earlier arrangements in regulating the textile and clothing industries.

The Multifibre Arrangement, as with its predecessors, was conceived under the auspices of the G.A.T.T. and was designed to provide a temporary mechanism by which importing countries could protect their domestic textile industries when the pre-conditions to the invocation of the Article XIX safeguard clause could not be met. Accordingly, the basic objectives of the Multifibre Arrangement, as set out in Article 1(1), were to "achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade".¹⁶⁴ In this regard, all existing restrictions on textiles and any new restrictions were to be dismantled or justified in terms of market disruption in the importing country concerned and all signatories of the Multifibre Arrangement had to notify the G.A.T.T. of all import controls or export restraints relating to textiles.¹⁶⁵ Furthermore, textile quotas were normally to be increased by at least six per cent per year.¹⁶⁶

Nevertheless, Article 3 of the Multifibre Arrangement permitted the imposition on a short-term basis, by an importing country, of restrictions by means of bilateral agreements on the import of textile products in the event of market disruption which term was defined as the existence of serious damage to domestic products or an actual threat thereof, together with:

1. a substantial or imminent increase of imports of textile products;
and
2. the offering of textile products at prices substantially lower than those prevailing for similar goods of comparable quality.¹⁶⁷

It should be noted that Article 3 also permits the unilateral imposition of restrictions where no agreement has been negotiated with the exporting country.

By Article 4 of the Multifibre Arrangement, long-term bilateral agreements may be concluded with respect to textile products conditional upon such agreements being designed and administered "to facilitate the export in full of the levels provided for under such agreements" and include "provisions assuring substantial flexibility for the conduct of trade thereunder, consistent with the need for orderly expansion of such trade and conditions in the domestic market of the importing country concerned".¹⁶⁸ The details of these agreements are to be communicated to the Textiles Surveillance Body.

Other provisions in the Multifibre Arrangement establish how the Article 3 and Article 4 bilateral agreements are to be administered, recognize the special needs of developing countries yet bear in mind that there should not be undue prejudice to the interests of established suppliers, establish a Textiles Committee within the framework of the G.A.T.T., set up a Textiles Surveillance Body to supervise the implementation of the Multifibre Arrangement, and outline the coverage of the Multifibre Arrangement.¹⁶⁹

Formulated to give developing countries guaranteed and growing access to markets in Europe and North America, in a manner so as not to disrupt the textiles industries of Europe and North America, the Multifibre Arrangement represents a formidable non-tariff barrier to the international marketing of textile products. Initially, designed as a "temporary measure", the Multifibre Arrangement has existed in some form since 1961 and will continue in operation until at least 1991.¹⁷⁰ During this period, the coverage of the Multifibre Arrangement has been increased to cover cotton, wool, synthetic and vegetable fibres. The advent of the rise in oil prices and the ensuing slump in the western economies led to the request for tougher bilateral restrictions under the Multifibre Arrangement in 1977.¹⁷¹ Extensions of the Multifibre Arrangement in 1982 and 1986 were also justified on the continuation of the decline in the rate of growth per capita consumption in textiles and clothing and in the advent of technological changes and changes in consumer preferences.¹⁷² Indeed, the Multifibre Arrangement currently comprises at least forty-two countries.¹⁷³

Even though, in accordance with the preamble of the Multifibre Arrangement, the signatories are to have regard to the principles and objectives of the G.A.T.T., the operation of the Multifibre Arrangement has tended to institutionalize the system of protectionism in the international textile trade. Allowing importing countries to enter into bilateral restraint agreements in which such restraints can be of more than a year's duration, detracts from the G.A.T.T. goal of trade liberalization and erodes the principles of non-discrimination and "most-favoured-nation". As well, the allocation of quotas to established textile exporting countries tends to lead to the cartelization of the textile industry to the detriment of new entrants onto the market scene.

The Multifibre Arrangement, and its predecessors, were never formally approved by the G.A.T.T. However, the establishment of the Textile Committee within the G.A.T.T. to review the operations of the Multifibre Arrangement introduces a sense of legitimacy to the continued existence of this Multifibre Arrangement. This appearance of approval for the Multifibre Arrangement, thus, assists with the perpetuation of the Multifibre Arrangement as a "valid" non-tariff barrier.

3. National Security

Article XXI of the G.A.T.T. provides that a contracting party can take any measures necessary to safeguard the security of the nation. By this Article, a contracting party is not required to furnish any information, the disclosure of which, it considers contrary to its essential security interests. Furthermore, in accordance with paragraph (b) of Article XXI, a contracting party is not prevented from taking any action which it considers necessary for the protection of its essential security interests relating, for example, to fissionable materials, traffic in arms, ammunition and the implements of war; or taken in time of war or other emergency in international relations. Paragraph (c) of Article XXI also permits a contracting party to

take any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Unfortunately, the application of this Article is open to abuse as it does not provide criteria for determining, for instance, what is an essential security interest and what is an emergency. In addition, the use of words like "such traffic in goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment", encourages countries to justify the protection of industries peripheral to the maintenance of the nations' security.

Actually, it is questionable whether a measure of free trade can be achieved in an area related to the preservation of industries or other capabilities necessary for "essential security interests" in which, historically, nations have had strong protectionist tendencies.¹⁷⁴ Nevertheless, Article XXI, as presently structured, encourages nations to use non-tariff barriers on the pretext of national security and assists in the undermining of the principles of the G.A.T.T.

C. Balance-of-Payments

Pursuant to Articles XII and XVIII B of the G.A.T.T., contracting parties, in order to safeguard their external financial positions and balance-of-payments, may restrict the quantity or value of merchandise permitted to be imported. However, Articles XII and XVIII B stipulate, further, that these restrictions may be instituted, maintained or intensified so long as such restrictions do not exceed those necessary to forestall the imminent threat of a serious decline in its monetary reserves or, in the case where it has very low reserves, to achieve a reasonable rate of interest in its reserves. In addition, paragraph 2(b) of Article XII and Section 11 of Article XVIII B state that once instituted to protect a contracting party's external financial position or balance-of-payments, the restrictions are to be progressively relaxed as conditions improved.

Section 3 of Article XII and section 10 of Article XVIII B set out the conditions under which restrictions are to be imposed; for instance, to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities, the exclusion of which would impair regular channels of trade. One of the most important provisions of Articles XII and XVIII B is that any contracting party envisioning the necessity of applying import restrictions must, by section 4 of Article XII and by section 12 of Article XVIII B, enter into consultations with the Contracting Parties¹⁷⁵ and must justify the imposition of such restrictions. Indeed, where the Contracting Parties determine that the restrictions have not been imposed in accordance with Article XII or Article XVIII B, and the contracting party applying these restrictions does not modify them, the contracting party adversely affected by the restrictions may be released from any of its obligations under the G.A.T.T. towards the contracting party applying the restrictions.

Restrictions imposed under Articles XII and XVIII B of the G.A.T.T. are only acceptable if they are intended to complement measures taken by a contracting party to safeguard its external financial position and its balance-of-payments. To ensure compliance with the G.A.T.T., the contracting party, immediately after instituting such restrictions, must consult with the Contracting Parties. By Article XV of the G.A.T.T., the Contracting Parties must consult, in turn, with the International Monetary Fund.¹⁷⁶

Section 1 of Article XV indicates that the International Monetary Fund shall be responsible for all issues related to exchange matters, whereas the G.A.T.T. would deal with questions relating to quantitative restrictions and other trade measures. Nevertheless, by section 2 of Article XV, the Contracting Parties are to accept all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balances-of-payments. It is the International Monetary Fund, as well, which determines what constitutes a serious decline in a

contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves. The Contracting Parties are to accept the determination of the International Monetary Fund when reaching a decision pursuant to Articles XII and XVIII B of the G.A.T.T.

While the use of Articles XII and XVIII B of the G.A.T.T. by contracting parties has declined over the years,¹⁷⁷ especially with the introduction of the floating exchange rate in 1973,¹⁷⁸ contracting parties have resorted to the application of subsidies, surcharges and import deposits to safeguard their external financial position and balance-of-payments in contravention of Articles XII and XVIII B of the G.A.T.T.¹⁷⁹ For instance, France, following a recommendation of the G.A.T.T. in 1962, was required to lift its quotas against the importation of certain fruits and conserves from the United States of America as these quotas could not be justified for reasons of balance-of-payments.¹⁸⁰ For similar reasons, the Contracting Parties contested the imposition of a fifteen per cent import tax by Great Britain in 1964, and concluded, in 1978, that surety deposits applied by the European Economic Community in respect of imports of certain processed fruits and vegetables were inconsistent with G.A.T.T. obligations.¹⁸¹

In order to reinforce the provisions in the G.A.T.T. related to measures taken for balance-of-payments purposes, the Contracting Parties, in 1979, negotiated the Declaration on Trade Measures Taken For Balance-of-Payments Purposes (hereinafter referred to as the "Declaration").¹⁸²

Section 1 of the Declaration declares that the procedures for examination stipulated in Articles XII and XVIII of the G.A.T.T. apply to all restrictive import measures taken for balance-of-payments purposes. Previously, these procedures only applied with respect to quantitative restrictions. Furthermore, paragraph (b) of section 1 states that the simultaneous application of more than one type of trade measure for balance-of-payments purposes should be avoided. Apparently, contracting parties had been imposing more than one type of control on certain products.¹⁸³

Section 2 of the Declaration stipulates that where a developed contracting party is required to apply restrictive import measures for balance-of-payments purposes, it shall take into account the export interests of the less-developed contracting parties. Section 3 requires that the G.A.T.T. be notified of the introduction or intensification of all restrictive import measures taken for balance-of-payments purposes and all such measures, by section 4, are subject to consultation in the G.A.T.T. Committee on Balance-of-Payments Restrictions.

Sections 7, 8, 11, 12 and 13 of the Declaration, for instance, are designed to improve the consultations of the Committee, provide factors upon which the Committee should base its decisions, indicate what the Committee's report to the G.A.T.T. Council should contain, and to enable the Committee to make such findings as will assist the G.A.T.T. Council in making appropriate recommendations developed to promote the implementation of Articles XII and XVIII B of the G.A.T.T. These sections of the Declaration, in fact, streamline the notification, review and enforcement provisions of the G.A.T.T. in this area.

Although the Declaration strengthens the surveillance of trade measures taken for balance-of-payment purposes, and while Articles XII and XVIII B may be invoked less frequently today, the potential for utilizing non-sanctioned safeguards in this area still remains, as these articles constitute exceptions to the general prohibition outlined in Article XI against the employment of quantitative restrictions.

D. Indirect Non-Tariff Barriers

The expansion of trade into markets not contemplated at the birth of the G.A.T.T. and the manner in which certain governmental provisions, for example, were applied to imports also led to the creation of non-tariff barriers indirectly; in other words, outside the context of the G.A.T.T. In this

regard, non-tariff barriers arose in governmental procurement practices and with the growth of services.

1. Government Procurement

According to paragraph 8(a) of Article III, the provisions of national treatment with regard to internal taxes and other internal charges, laws, regulations and requirements affecting the internal sale of goods do not apply to the laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes. This exception to the G.A.T.T. has permitted governments, including Canada, to favour domestic suppliers of goods and services for their procurement needs.¹⁸⁴

Thus, the purchases of goods and services by governments constitute a large percentage of the G.N.P.'s of many countries. Governments have used procurement policies as a means of "promoting economic development, to attract new industry, to develop and maintain industrial strategy especially in relation to defense, and to assist flagging industries or economically underdeveloped regions".¹⁸⁵ Hence, domestic suppliers are the favoured purchasers especially as they know the market and the requirements of their government departments. Foreign suppliers would like to have access to this market. Yet, domestic governments wish to protect themselves from such accusations as neglecting national interests, exporting jobs and failing to protect the domestic market.¹⁸⁶ Government procurement policies by their non-inclusion in the G.A.T.T., therefore, presented further obstacles to free trade.

The Agreement on Government Procurement (hereinafter referred to as the "Procurement Agreement")¹⁸⁷ negotiated by the contracting parties in 1979, provided an avenue whereby foreign suppliers of signatories could obtain access to procurement offers of foreign governments, which offers were previously the exclusive domain of domestic suppliers. In this respect, the Procurement Agreement represented a major achievement in trade liberalization.

The Procurement Agreement was structured on two basic premises of the G.A.T.T.: those of national treatment and non-discrimination. Pursuant to Article II, national treatment was to be provided to both the products and foreign suppliers covered by this Agreement and to products and suppliers of other countries, and signatories were to apply the same rules of origin to government procurement that prevailed with respect to other imported products. In addition, by Article IV, signatories were requested to ensure that technical specifications, such as quality, performance, testing and test methods, packaging, and marking, were not adopted "with a view to creating obstacles to trade".

The Procurement Agreement, in Article V, then set out the tendering procedures to be followed by signatories to the Agreement. Governments were required to use open tendering procedures, to publish any conditions to the participation in tendering procedures in appropriate publications and in sufficient time to enable all interested suppliers to complete qualification procedures, and to ensure that the conditions for participation were no less favourable to foreign suppliers than to domestic suppliers and that qualified suppliers so requesting it, were included in any list of qualified suppliers maintained by the signatories, within a reasonably short time. Single tenders by section 15 of Article V, were permitted under certain conditions, for instance, for reasons of extreme urgency brought about by events unforeseeable by the entity. A notice of each purchase had to be published which included such information as the nature and quality of the products to be supplied, any delivery date, the address and final date for submitting an application, and any economic and technical requirements. In addition, section 14 of Article V provided rules for the submission, receipt and opening of tenders, and for the awarding of contracts.

Articles VI and VII of the Procurement Agreement prescribe the procedures to be used for the resolution of disputes. Where an aggrieved supplier could not reach a satisfactory solution with its "contact point" with the purchasing agency, as a result of consultation, a Committee on Government Procurement was

to meet, at the request of any party to the dispute, within thirty days of the receipt of the request. If the Committee was unable to resolve the complaint, the Committee then convened an impartial panel to hear the dispute, make findings of fact, and report these findings to the Committee and the Committee, then, addressed the ruling or recommendations of the panel. It should be noted that the Committee could authorize a party to suspend the application of the Procurement Agreement only where the Committee's recommendations were not accepted by a party to the dispute, and the Committee considered that the circumstances were serious enough to justify such action. Any rulings or recommendations of the Committee were declaratory in effect.

Although the Procurement Agreement does open up some areas of government procurement to foreign suppliers, and establishes rules and procedures related to the offering and awarding of procurement contracts, the Procurement Agreement is deficient in several key aspects.

First, by Article I (1)(c), the Procurement Agreement does not apply to entities which exist outside the list located in Annex 1 to the Agreement. Hence, governments merely have to limit the number of entities they wish to appear on the list to once again preserve most procurement contracts to domestic suppliers. Secondly, Articles I (1)(a) and (b) stipulate that the Procurement Agreement does not generally apply to service contracts which are not incidental to the supply of the products within a certain value or to any procurement contract of a value of less than 150,000 Special Drawing Rights. Finally, section 1 of Article VIII of the Procurement Agreement does not prevent any signatory from taking action or not disclosing any information which it considers necessary "for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes". In this regard, section 1 of Article VIII parallels Article XXI of the G.A.T.T. concerning national security. Unfortunately, the terms "essential security interests", "national security" and "national defence" are not defined by Article VIII of the Procurement Agreement. Reference to those

products and technology which may be considered of strategic importance to industrialized contracting parties may be identified through the Coordinating Committee on Multilateral Export Controls, which coordinates three embargo lists.¹⁸⁸ Resort may also be had to a contracting party's defence legislation or export permit regulations.¹⁸⁹ Nevertheless, the vagueness in the drafting of Article VIII of the Procurement Agreement could permit governments to reserve procurement contracts unrelated to security interests or defence purposes from the ambit of the Procurement Agreement.

Another drawback to the effectiveness of the Procurement Agreement in reducing obstacles to trade in government procurement lies with the exclusion, in section 2 of Article I, of local and regional governments from the application of the Procurement Agreement. This drawback is difficult to eliminate because some governments, due to their federal structure, do not have the jurisdiction to control local and regional government entities. It is also possible that certain sectors are the responsibility of the private sector or of the States. Furthermore, regional and local governments are not signatories to the Procurement Agreement and because of jurisdictional limitations, would not likely be able to become signatories to the said Agreement.

Ironically, the principles of the Procurement Agreement only apply to its signatories.¹⁹⁰ Thus, non-signatories could be subject to discriminatory rules relating to the determination of the origin of a product since section 3 of Article II stipulates that the rules of origin applied to products imported for purposes of government procurement, among the signatories to the Agreement only, should not differ from the rules of origin applied in the normal course of trade.

Section 2 of Article VIII of the Procurement Agreement states that signatories could impose or enforce measures necessary to protect "public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labour". To be valid, such measures must not be

applied so as to constitute a means of "arbitrary or unjustifiable discrimination between countries", or a "disguised restriction on international trade". Nevertheless, the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction" are ambiguous, and, therefore, do not place sufficient restrictions on the use of section 2 of Article VIII for other invalid motives.

Finally, pursuant to section 4 of Article III, developing countries could negotiate with other signatories to the Procurement Agreement mutually acceptable exclusions from the rules of national treatment with respect to certain entities or products that were included in their list of entities. In accordance with sections 11 and 12 of Article III, special treatment was also granted to "least-developed" countries.

2. Services

Except for minor exceptions,¹⁹¹ the G.A.T.T. has traditionally focussed on the regulation of the flow of goods in international trade as opposed to the regulation of services. The Procurement Agreement and the Subsidies Agreement negotiated during the 1979 Tokyo Round of Negotiations did incorporate certain references to services, but to a very limited extent.¹⁹² Although other multilateral organizations have dealt with services in general,¹⁹³ it was not until 1982 that the Contracting Parties in their declaration recognized the need to give "consideration to changes in the trading environment so as to ensure that the G.A.T.T. is responsive to the changes".¹⁹⁴ At this time, the Contracting Parties recommended that each contracting party with an interest in services undertake a national examination of the issues in this sector, that information on services be exchanged amongst contracting parties, and that the results of the national examinations be reviewed by the Contracting Parties.¹⁹⁵

A major difficulty in bringing the services sector within the scope of the G.A.T.T. is in the formulation of a definition for services. Services, in many instances, consist of intangibles. Therefore, it is difficult to develop a system for identifying and quantifying services in order to regulate and categorize restrictions or barriers to trade in services.¹⁹⁶ The issue arises as to whether services should (or can) be identified based on the output of the production process; defined as any activity which is not manufacturing, mining or agriculture; categorized in terms of common characteristics, or by some other method.¹⁹⁷

Services, which cover such diverse areas as accounting, advertising, communications, franchising, insurance, banking, shipping, computers and construction, have not been immune from the imposition of non-tariff barriers. Governments can, and do, impose restrictions requiring full or partial ownership of local service establishments, require local labour to be employed and impose license, visa and permit obligations. Governments have also subsidized locally owned firms, placed restrictions or prohibitions on materials necessary to the service industry and imposed quantitative restrictions on the import of services.¹⁹⁸ The United States of America, for example, instituted various actions under its legislation against restrictions imposed by several countries in such services as the carriage of documents, the sale of insurance policies, the marketing, advertising and selling of tobacco products, and in the marketing of informatics.¹⁹⁹

For the successful introduction of the services sector within the framework of the G.A.T.T., it seems that the Contracting Parties will have to reconcile the division between developed and developing contracting parties over the necessity of bringing the service sector into the G.A.T.T.

Developed contracting parties have generally indicated that the G.A.T.T. must be adapted to the changing international environment by including non-traditional issues, such as services, into its agenda.²⁰⁰ There is concern that if the G.A.T.T. is not brought into line with present and future

realities with respect to the services sector which accounts for a large part of world trade,²⁰¹ trade would become distorted with all countries not being able to develop their own zones of comparative advantage in services.²⁰² Indeed, it is felt that the lack of rules in the G.A.T.T. for trade in services also affects developing contracting parties which are competitive in certain services and which undertake investment and research and development activities.²⁰³

On the other hand, developing contracting parties, in some cases, do not believe that services are within the competence of the G.A.T.T.; that the approaches and disciplines of the G.A.T.T. cannot be transported into the services sector.²⁰⁴ There is also a concern that either the area of services has not been studied sufficiently in order for the Contracting Parties to reach a consensus or that the exchange of information on services, to date, has not established the need or feasibility of multilateral action for services.²⁰⁵ Of primary importance, in the view of developing contracting parties, generally, is that if services are to be considered by Contracting Parties for inclusion into the G.A.T.T., there should be no link between market access for goods from developing countries and the concessions they may make in the area of services.²⁰⁶ For some developing contracting parties, however, there is a need to establish multilateral rules and disciplines that would tend to liberalize services and prevent forms of discrimination in trade in services as long as there is an equitable and fair distribution of the benefit of this trade, and the special situation of developing countries is taken into account.²⁰⁷

Until a consensus is reached by the Contracting Parties with respect to the services sector, this sector remains an obstacle to the furtherance of trade liberalization.

E. Dispute Resolution Mechanism

The method for the resolution of disputes under the G.A.T.T., as envisioned by the Contracting Parties, was through consultation. This is illustrated by Articles XXII and XXIII of the G.A.T.T.

Article XXII contains the general principle with respect to consultation. Pursuant to this Article, each contracting party is to "accord sympathetic consideration to, and shall afford adequate opportunity for consultation" regarding representations made by another contracting party with respect to any matter arising out of the G.A.T.T. At the request of a contracting party, Article XXII also provides that the Contracting Parties may consult with any contracting party in relation to any matter which the contracting parties have not been able to resolve through consultation.

The concept of consultation is continued with regard to the nullification or impairment sections of Article XXIII of the G.A.T.T. In accordance with Article XXIII, where a contracting party considers that any benefit accruing under the G.A.T.T. is being nullified or impaired as the result of, for instance, the failure of another contracting party to carry out its obligations under the G.A.T.T., the contracting party may make written representations or proposals to the other contracting party. If the contracting parties are not able to resolve the matter by written representations or proposals, the matter could be referred to the Contracting Parties. The Contracting Parties were, then, to promptly investigate any matter referred to them and to make appropriate recommendations or rulings to the contracting parties concerned. Indeed, if the Contracting Parties considered that the circumstances were serious enough to justify such action, the Contracting Parties, by this same Article, could authorize a contracting party to suspend the application, to any other contracting party, of such concessions or other obligations under the G.A.T.T. as they considered appropriate in the circumstances.

The impact of Article XXIII is very broad. It covers a wide range of disputes by the language of "any benefit accruing to it directly or indirectly under this Agreement". Furthermore, the existence of paragraph 1(c) of Article XXIII referring to "the existence of any other situation", enables the Contracting Parties to consider disputes which do not specifically involve a violation of the G.A.T.T. Initially, however, the efficacy in utilizing this consultation process was impeded due to the lack of a dispute resolution mechanism.²⁰⁸ This matter was eventually resolved through the practice²⁰⁹ of appointing "panels". The purpose of the panels, which were composed of independent experts or working parties of national representatives, was to attempt to effect a reconciliation between the contracting parties, or in the alternative, to review the disputed matter and make recommendations to the Contracting Parties.²¹⁰

The dispute resolution mechanism developed within the G.A.T.T. has been credited with the resolution of many intergovernmental disputes which have arisen from the application of the G.A.T.T. amongst contracting parties.²¹¹ The G.A.T.T., as with other international trade law, is consensual, consisting of "explicit reciprocal undertakings by national governments to restrain their own actions and to recognize as legitimate the sanctions imposed by other governments if they fail to do so".²¹² In fact, the G.A.T.T. could be considered to represent, in the international forum, a form of "economic soft law"²¹³ since it establishes provisions for international cooperation and consultation and provides a mechanism for reviewing intergovernmental trade disputes.²¹⁴

Through collective action, conciliation and political pressure, together with the perceived threats of the use of economic sanctions, the G.A.T.T. appears to have created, among contracting parties, the expectation or the "psychological element" that its obligations are to be respected and binding.²¹⁵ Nevertheless, expressions of dissatisfaction by contracting parties with certain elements of the dispute resolution mechanism has given rise to criticism of the effectiveness of the G.A.T.T. consultation process generally.

This dissatisfaction arose, in part, over the emergence of conflicting "bloc" interests in the constitution of the panels, the absence of objectivity of the panels, the length of the panel proceedings, and the vagueness of the resulting recommendations of certain panels.²¹⁶ Criticism has also been directed at the lack of specific rules and time limits for conducting the hearings which prolonged the settlement of the dispute, and over the delays instigated by the contracting parties when they questioned whether bilateral consultations had been fully exhausted, whether a panel's terms of reference were correct, and whether the dispute was one that was properly litigable.²¹⁷ Furthermore, the fact that the resolution of the disputes were undertaken in an ad hoc manner, mitigated against the creation of a uniform approach for arriving at an amicable solution.²¹⁸

As a result of the dissatisfaction expressed by contracting parties with respect to the G.A.T.T. dispute resolution mechanism, the Contracting Parties negotiated the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (hereinafter referred to as the "Understanding") in 1979.²¹⁹ This Understanding reconfirmed the Contracting Parties' adherence to Articles XXII and XXIII of the G.A.T.T. and recognized, by section 7, that the customary practice of the G.A.T.T. with respect to panels in the field of dispute settlement should be continued in the future.

In addition, by section 3 of the Understanding, contracting parties are, to the maximum extent possible, to notify Contracting Parties of their adoption of trade measures affecting the operation of the G.A.T.T. Sections 4, 5 and 6 of the Understanding reaffirm the resolve of contracting parties to strengthen and improve the effectiveness of the G.A.T.T. consultative procedures. The establishment and constitution of the G.A.T.T. panels are clarified in sections 10 through 14 of the Understanding. Of importance here is the clear recognition that panel members should serve in their individual capacities and not as government representatives.

Pursuant to section 17 of the Understanding, panels are to submit their findings in a written form where the contracting parties have failed to develop a mutually satisfactory solution to the dispute. Furthermore, by sections 20 and 21 of the Understanding, panels are requested to deliver their findings without undue delay, and the findings and reports of panels and working parties are to be given prompt consideration by Contracting Parties. Finally, section 24 of the Understanding indicates that Contracting Parties have agreed to conduct a regular and systematic review of developments in the trading system.

The concluding of the Understanding by the Contracting Parties was an important achievement as it represented the first major concerted effort of the Contracting Parties to address the criticisms which have been directed at the G.A.T.T. consultation and dispute resolution proceedings.

It could be stated that such proceedings were strengthened through the establishment of improved access to the panel system, the reduction in delays for constituting the panels and for the rendering of panel findings, the introduction of measures to ensure the neutrality of panel members, and in the request for Contracting Parties to take appropriate action on reports of panels and working parties within a reasonable period of time. The improvements in the G.A.T.T. consultation and dispute resolution proceedings initiated in the Tokyo Round of Negotiations were, then, followed up and reinforced by the Contracting Parties in the 1982 Ministerial Declaration.²²⁰

Nevertheless, concern amongst the contracting parties over the ability of the G.A.T.T. consultation and dispute resolution procedures to enforce the compliance by the contracting parties of their G.A.T.T. obligations continued despite the presence of the Understanding and the 1982 Ministerial Declaration.²²¹ This concern surfaced, once again, during the G.A.T.T. Ministerial meeting held in Uruguay in 1986. At this time, developed and developing contracting parties indicated the need for "improved and strengthened" dispute settlement machinery which would be efficient and just with a view to ensuring

the protection of all contracting parties.²²² An "improved and strengthened" mechanism would be achieved through a thorough review of the dispute settlement procedures in order to eliminate such remaining weaknesses as delays in the initiation of procedures and inadequate compliance with panel recommendations, with the understanding that any improvement in procedures would not be effective unless supported by the "political will of the parties to comply with their commitments and the recommendations of panels".²²³

On the international plane, the resolution of disputes through consultation and negotiation is an effective method of resolving differences between sovereign nations. This effectiveness has been demonstrated with the G.A.T.T. However, where the enforcement of the obligations of parties to an international agreement seems to be weakening due to the lack of precise rules and procedures, as with the G.A.T.T. in certain respects, action must be taken to rectify this situation. Otherwise, the unwillingness of contracting parties to comply with their obligations as a result of this impreciseness could, and will in itself, encourage the growth of non-tariff barriers.

III IMPACT ON INTERNATIONAL LAW AND ON TRADE

Introduction

The G.A.T.T. was conceived in the late 1940s as the framework within which nations could reduce the forces of protectionism in international trade, which forces took the form of tariff barriers. It was apparent that the various safeguard provisions, emergency measures clauses and other derogations in the G.A.T.T. were designed as temporary measures to allow contracting parties to gradually adapt their economies to a "freer" trading regime, and not as a means of placing additional obstacles in the path of achieving this new regime.

From the above examination of the rise of non-tariff barriers, it seems that the G.A.T.T., in its lack of precise criteria for implementing its principles and prohibitions, its exclusion of a prohibition against imposing subsidies on primary products, its ambiguities as to when its derogations were to be applied, its uncertainty towards the role of Enterprises in international trade, and its absence of certain criteria for its dispute resolution mechanism, amongst others, has itself created the tool by which contracting parties could promote the growth of non-tariff barriers. In this context, the numerous agreements formulated during the 1979 Tokyo Round of Negotiations (hereinafter referred to as "Agreement" or "Agreements") were significant in the evolution of the G.A.T.T. since, by these Agreements, the Contracting Parties acknowledged, officially, the presence of non-tariff barriers; established procedures and guidelines for the regulation of several non-tariff barriers; and provided improved access to consultation and dispute resolution proceedings.

Nevertheless, it was not clear that the Agreements, negotiated under the auspices of the G.A.T.T., would make significant inroads into the use of non-tariff barriers by contracting parties. Firstly, non-tariff barriers such as VER agreements and restrictions in the services sector, were not covered by the G.A.T.T. or an Agreement. Secondly, while contracting parties may be restrained by the Agreements from utilizing restrictive measures regulated by the G.A.T.T. or an Agreement, they were not constrained from resorting to other forms of restrictive mechanisms which might constitute non-tariff barriers.²²⁴ Finally, even where non-tariff barriers were made subject to an Agreement, these barriers, to a certain extent, could continue to operate due to the exceptions provided within the Agreements themselves, to trade liberalization.²²⁵

Another drawback to the effectiveness of the Agreements was their legal status vis-à-vis the G.A.T.T. Pursuant to Article XXX of the G.A.T.T., except for amendments to Part I and Article XXIX, which required acceptance by all Contracting Parties, amendments to other provisions of the G.A.T.T. are valid

if accepted by a two-thirds majority of the Contracting Parties. Hence, the Agreements, by not obtaining this majority, constituted merely "side" agreements to the G.A.T.T. Furthermore, the benefits of the Agreements are only available to their signatories.²²⁶ Ironically, this stipulation in the Agreements appears to have introduced the concept of "conditional most favoured nation" into the G.A.T.T.

Indications that the Agreements were not going to be as effective as the contracting parties would have desired in controlling the rise of non-tariff barriers was confirmed by the G.A.T.T. Contracting Parties at their 1982 ministerial meeting.²²⁷

At this time, the Contracting Parties acknowledged that the multilateral trading system was seriously endangered due to the prevailing economic crisis which contributed to the multiplication of protectionist pressures on governments, a further disregard of G.A.T.T. disciplines, and the accentuation of shortcomings in the functioning of the G.A.T.T. system.²²⁸

Consequently, the Contracting Parties reaffirmed certain priorities for the 1980s through the mechanism of undertakings. These undertakings by the Contracting Parties included commitments, for instance, to ensure that trade policies and measures were consistent with G.A.T.T. principles and rules, to resist protectionist measures in the formulation and implementation of national trade policy, to bring agriculture more fully into the multilateral trading system, to refrain from taking or maintaining any measures inconsistent with the G.A.T.T., and to make determined efforts to avoid measures which would limit or distort trade.²²⁹

Non-tariff barriers either directly affect the flow of international trade through the use of quantitative restrictions, VER agreements, subsidies, or licensing requirements, or indirectly affect such flow, through the introduction of health, safety, environmental, administrative, technical or other similar governmental regulations. It can also be argued that since the

implementation of the G.A.T.T. in 1948, the structure of international trade has been altered in accordance with governmental policies and programs designed to protect domestic industries and to create exports by means of linking imports and exports for balance-of-payment purposes, countertrade arrangements, tied aid, credit arrangements, economic cooperation programs, state trading and the like.²³⁰

Thus, does the "free trade" concept actually exist in international trade in the terms expressed by the G.A.T.T., or has this concept been superseded by a controlled, protectionist international trading system? This issue must now be explored.

Due to the importance of this issue in regard to international trade, it will be examined in a more comprehensive manner. This part, therefore, will not be subdivided into the same type of subsections as was the case for Parts I and II of this paper.

A. Impact on International Law and Trade in General

It has often been decried that "necessity is the mother of invention". This platitude certainly appears to be apt with respect to the activities undertaken by Contracting Parties of the G.A.T.T. in the arena of international trade during the first half of the 1980s.

Political and economic expediency appears to have overridden the strict application of the G.A.T.T. in the regulation of international trade. This raises the question as to the extent Contracting Parties can justify the application of quantitative restrictions and export subsidies and still be considered adhering to their obligations under the G.A.T.T.

Although frequently described as mechanisms for imposing limits on the volume of trade and insulating domestic prices and production against the changing requirements of the world economy,²³¹ quantitative restrictions continue to abound. This is evidenced by various ongoing activities carried out by the contracting parties in response to the application of quantitative restrictions and subsidies.

Due to "unfair" practices by exporting contracting parties, the President of the United States of America ruled, for example, that domestic producers of leather wearing apparel, mushrooms, motorcycles and stainless steel were entitled to temporary relief from imports in these areas.²³² Japan's quotas on leather and leather footwear were also considered by the President of the United States of America to be a burden and restriction on United States Commerce in accordance with section 301 of the Trade Act of 1974.²³³ Canada initiated complaints against the European Economic Community for unilaterally withdrawing a legally bound tariff for imports of newsprint, and for restricting the imports of Canadian beef into the Community.²³⁴ The European Economic Community imposed antidumping duties on imports of electronic typewriters and plain-paper photocopiers originating in Japan, on imports of polystyrene sheet originating in Spain, and on imports of standardized multi-phase electric motors originating, for example, in Bulgaria, Czechoslovakia and Hungary.²³⁵

As a result of the continued application of quantitative restrictions and subsidies, several disputes between contracting parties over these matters were long-standing and acrimonious. This was the case in respect to the dispute between the United States of America and the European Economic Community over the said Community's Mediterranean tariff preferences on citrus fruit.

Pursuant to a complaint by Florida citrus growers over the alleged citrus preferences, the Special Trade Representative of the United States of America launched an investigation in 1976. After public hearings in 1977, the receipt of a favourable G.A.T.T. panel report in 1984 which was not adopted by the G.A.T.T. Council as it was blocked by the European Economic Community, and the expiration of a "cooling-off" period between the two contracting parties which did not lead to a settlement of the matter, the President of the United States of America proclaimed duties on imports of pasta from the European Economic Community.²³⁶ The European Economic Community retaliated by raising duties on American exports of lemons and walnuts into the Community. It was not until

August 1986, ten years after the initiation of the original complaint, that a solution was eventually reached through bilateral negotiations.²³⁷

Similar on-going disputes were occurring between the United States of America and the European Economic Community with respect to the consequences of enlargement of the European Economic Community²³⁸ and between the United States of America and Japan over Japanese quotas on the import of American leather goods.²³⁹

With respect to the application of quantitative restrictions and subsidies, one remarks on the tendency of contracting parties to ignore the results of G.A.T.T. panels established to investigate the alleged infringement of various G.A.T.T. principles.²⁴⁰ One may also notice that a contracting party's concerns in regard to the imposition of illegal subsidies, quantitative restrictions or a violation of G.A.T.T. principles seems to arise when the contracting party itself feels directly threatened by the imposition of such measures. However, the contracting party is not concerned as to whether its measures, employed to protect its domestic industry, are in contravention of the G.A.T.T. For instance, while the sale of butter by the European Economic Community below the minimum export prices established by the International Arrangement, caused the United States of America to withdraw from the said Arrangement, this did not prevent the United States of America from adopting measures to support its farmers in the export of agricultural products.²⁴¹

It is also interesting to note that the application of subsidies and quotas by Contracting Parties has been justified recently as permitting domestic producers to "catch up" with their international competition. This was the rationalization used by the United States of America since the 1960s to impose quotas on imported steel products -- such quotas would allow a "breathing space" in which American steel producers were to improve their structure and efficiency.²⁴² In addition, the EEC, in 1980, first granted subsidies to its steel manufacturers in return for the orderly reduction in

surplus steel capacity. These subsidies have been extended presently, until the end of December 1988, due to the perceived continuation of the "crisis" in the steel industry.²⁴³ It is doubtful, however, that contracting parties can continue to support these quotas or subsidies on an "emergency basis", as contemplated by the G.A.T.T., because of the length of time such quotas and subsidies have been in existence in the steel industry, both in the United States of America and in the European Economic Community.

In conjunction with the efforts of contracting parties to extend the exceptions in the G.A.T.T., permitting the use of quantitative restrictions, were the efforts of these same contracting parties to discover additional means by which they could support their domestic industry against the challenge from abroad. This is the case with the United States of America in seeking a mechanism, to replace the D.I.S.C., which would be in line with G.A.T.T. principles.

Following the 1983 ruling by the G.A.T.T. Council that the tax breaks to the D.I.S.C.'s were in violation Article XVI of the G.A.T.T., the Foreign Sales Corporation Act of 1983 was passed by both houses of the United States Congress on June 27, 1984, and obtained the force of law on July 18, 1984.²⁴⁴ F.I.S.C.'s were modeled on the G.A.T.T. Council finding, in its review of D.I.S.C.'s, that the G.A.T.T. would not be interpreted as to require signatories to tax economic processes taking place outside the territorial limits of the exporting country.²⁴⁵

The F.I.S.C. legislation was designed to provide domestic income exemptions to parent corporations in proportion to the level of that corporation's income from foreign sources. To qualify as a F.I.S.C., a corporation must have its shares held by no more than twenty-five persons, maintain an office outside United States' territory, maintain a summary of its permanent accounting records at its foreign office, have at least one director resident outside the United States of America, and be incorporated outside the United States of America. The F.I.S.C. must also participate in the making of any agreement

related to a transaction from which a F.I.S.C. will be assigned income, and fulfill a foreign direct cost - total direct cost ratio.²⁴⁶

The introduction of the concept of the F.I.S.C. by the United States of America does not appear to have generated as much controversy as did the entrance of its predecessor--the D.I.S.C. This may be due to the fact that F.I.S.C.'s seem to have responded to some of the criticisms directed against the D.I.S.C.'s operation as a "paper" corporation. F.I.S.C.'s are required to have employees and to generate income. It is likely that the F.I.S.C. has had an easier passage than that of the D.I.S.C. because it has had the benefit of the G.A.T.T. Council's findings concerning "tax breaks". F.I.S.C.'s, thus, represent an innovative method by which a contracting party can provide support to domestic industries while, at the same time, fulfilling its obligations under the G.A.T.T. It remains to be seen whether the F.I.S.C. provides the desired support to domestic industries or whether it is too structured.²⁴⁷

Developing and newly-developed countries are quick to criticize the policies of developed countries in the arena of quantitative restrictions and export subsidies, and readily lay the blame for a majority of their economic woes on the doorsteps of developed countries.

Dissatisfaction with the effectiveness of the G.A.T.T. to respond to the special trade interests of developing countries was the impetus which gave rise, in 1964, to the United Nations Conference on Trade and Development. The Conference was designed to create within the United Nations system a new permanent institution for world trade and development.²⁴⁸ In response to the creation of the United Nations Conference on Trade and Development, the G.A.T.T. contracting parties added Part IV to the G.A.T.T. as an endorsement of the special requirements of developing countries in the area of trade and development, even though Part IV does not appear to provide the developing countries with a concrete means for obtaining exemption from the trade policy measures adopted by developed countries.²⁴⁹

Concern about the impediments to trade liberalization confronted by developing and newly-developed countries increased after the Tokyo Round of Negotiations in view of the continued slowdown of the economies of many developing countries. Developing countries claim that they need to have increased access to the markets of industrialized countries in order to improve the economic situation of developing countries. However, developing countries have stated that the consequences of the restrictive and protectionist trade practices of industrialized countries have caused developing countries to lose international trade opportunities, thereby preventing developing countries from improving their economic situation.²⁵⁰ This situation is exacerbated by the fact that newly-developed countries, such as Taiwan, already under pressure from non-tariff barriers, are confronted in a tight United States market, for instance, with lower-priced competitors from China, India and Indonesia -- countries which have recently entered the already highly competitive international market place.²⁵¹

Given these circumstances, it would seem natural for developing and newly-developed countries to push for trade liberalization. Ironically, the solution most often selected by these countries to respond to slow economic growth, a rapid deterioration in their trade balance, high unemployment, and huge external debts, is by imposing quantitative restrictions and other non-tariff barriers on imports.²⁵² For instance, Brazil has banned foreign companies from selling mini-computers, terminals and personal computers, and has prevented multinationals from selling digital telephone switches unless they disclosed sufficient technical details to allow other companies' equipment to be connected to them; South Korea, imposed restrictions on the ability of foreign companies to sell life and marine insurance policies in South Korea and denied protection of intellectual property rights to United States of America trade interests; and Japan imposed barriers to the marketing, advertising and sale of foreign tobacco products.²⁵³

Thus, there is interest on the part of developing and newly-developed countries in promoting adherence to the principles of the G.A.T.T. in order to break through the non-tariff barriers imposed by other trading nations. It is quite another matter, however, when developing and newly-developed countries' own economies are threatened by these same trading nations.

International trade in the agricultural sector also continues to be characterized by the absence of "free" movement in agricultural products, and by the prevalence of subsidies, quotas and other restrictions. Progress in eliminating or reducing the effects of such restrictions is hampered by the division between developing and developed contracting parties, and amongst developed contracting parties themselves, as to the extent to which trade practices in the agriculture sector should be liberalized. Developing contracting parties are concerned about the prevalence of export subsidies and other restrictive trade measures applied to agricultural products which constitute impediments to the growth of developing countries' export markets in these products.²⁵⁴

While many developed countries are in favour of reforming the rules of agricultural trade, others, and in particular, the European Economic Community, will not support any measures taken to liberalize the agricultural sector which would place into question the fundamental aims and mechanisms of the common agricultural policy of the Community.²⁵⁵

Another hurdle in the way of trade liberalization in agriculture is the need to control excess production while at the same time maintaining farm incomes where, for example, objections are raised even within trading blocks as to the solutions to be applied.

In the European Economic Community, there was a general concern over the accumulation of surpluses of agricultural produce and stocks, especially in the dairy sector. This concern led to a program to sell butter at reduced prices, which prices were below the minimum export prices set by the Inter-

national Dairy Arrangement and this violation resulted in the withdrawal of the United States of America and Austria from this Arrangement.²⁵⁶ Attempts by the European Economic Community to control surpluses, by adding milk production quotas for instance, or to reduce the cost of the agricultural policy by phasing out monetary compensation amounts (designed to shelter farmers from fluctuating exchange rates) gave rise to protests and criticism by various members of the European Economic Community.²⁵⁷ The United States of America has also been involved in removing agricultural surpluses through the mechanism of providing additional free tonnage of agricultural products to a country which has already agreed to buy a certain amount of that product or another product.²⁵⁸ This policy tends to make it more difficult for other countries to sell agricultural products on the international market without also providing "supplements". The efforts of contracting parties in obtaining freer movement in international trade in agricultural products is not eased by the rise of tensions between the United States of America and the European Economic Community in their attempts to export agricultural products into each others markets.²⁵⁹

From the above exposé, it appears that quantitative restrictions and subsidies have had a large impact on international trade, and that the role of the G.A.T.T. is reduced to attacking restrictions imposed by other contracting parties, while at the same time justifying the imposition of a contracting party's own non-tariff barriers.

Despite criticisms directed against the employment of VER agreements by developed countries as mechanisms to protect domestic industries,²⁶⁰ VER agreements appear to have become important appendages to a developed country's international trading strategy. The desire to perpetuate the use of these bilateral trade mechanisms, regardless of the impact they may have on the free-flow of goods in international trade, is evidenced by the renewal in July 1986, of the Multifibre Arrangement.

At the meeting of the G.A.T.T. Textiles Committee, held in July 1985 to consider whether the Multifibre Arrangement should be extended, modified or discontinued after July 1986, the representative of the European Economic Community indicated that the Community "remained attached to the objective of progressive liberalization of trade in textiles"; nevertheless, due to the difficulties faced by the European clothing and textile industry, the "extension of an appropriate multilateral framework was considered necessary".²⁶¹ The representative stated further that the European Economic Community was "ready to show greater flexibility" in the application of the Multifibre Arrangement provided "other countries participating in international textile trade made a parallel effort towards the opening of their markets, according to their level of development".²⁶²

Although espoused approximately a year prior to the institution of negotiations, the position of the European Economic Community appears to have been reflected by the parties to the Multifibre Arrangement in the Protocol extending the said Arrangement in July 1986.²⁶³ While emphasizing the need to reduce the barriers to, and to obtain the progressive liberalization of, world trade in the textile industry, concern of the participants for market disruption continued to form the basis upon which to extend the duration of the Multifibre Arrangement.²⁶⁴ Indeed, in recognizing the commitment towards liberalization in the textile trade, participating countries agreed, amongst others, that restraints should not "normally" be imposed on exports from small suppliers, new entrants and least developed countries; where restraints have to be introduced for least developing countries they should be "significantly more favourable"; and where restraints are to be applied on new entrants and new suppliers, economic terms relating to growth and flexibility rates "should take due account" of future possibilities for development and trade.²⁶⁵

Nevertheless, exporting countries could agree with importing participants to "any mutually acceptable solution as regards growth and flexibility; but in no case should this growth and flexibility be negative".²⁶⁶ It is, thus, not surprising that participating exporting countries would acquiesce in the

extention of the duration and coverage of the Multifibre Arrangement so as to maintain the status quo in order to protect the market shares they presently hold.²⁶⁷ Dissatisfaction with the continuation of impediments to liberalization of the textile trade and to the extension of the Multifibre Arrangement was expressed, however, by developing countries at the G.A.T.T. ministerial meeting held in Uruguay in September 1986.²⁶⁸ Regrettably, the only commitment reached by Contracting Parties in this area, upon the launching of the eighth round of multilateral trade negotiations of the G.A.T.T., was to "formulate modalities that would permit the eventual integration of this sector into the G.A.T.T."²⁶⁹

Once perceived as a temporary measure, the Multifibre Arrangement, as a trade policy implement, has become a permanent fixture in the international trading system. Developed countries continue to appear concerned that the inexpensive labour of developing countries will give these countries a comparative advantage over the textile industries of developed countries.²⁷⁰

While those critical of the protectionist regime fostered by the use of VER agreements often cite the Multifibre Arrangement as one of the prime illustrations of the effect of non-tariff barriers on world trade, VER agreements exist in other sectors of the international marketplace. Two sectors where VER agreements have become well established are the steel and automobile sectors.

With respect to the steel industry in the United States of America, both the 1982 arrangement on the restriction of exports of certain steel products to the U.S.A. and the 1985 arrangement on the restriction of exports of steel pipes and tubes to the U.S.A., negotiated with the European Economic Community, were recently extended.²⁷¹ In a reciprocal fashion, the European Economic Community extended its arrangement with the United States of America in regard to the importation of American steel into the said Community, as well as renewing its VER arrangements governing the import of steel from Spain and Romania, and concluding a new arrangement with Brazil for rolled iron and

steel products.²⁷² As a result, it is difficult to state that the free movement of goods in world trade exists in the steel industry. The principles of the G.A.T.T. do not appear to have been effectively applied here.

The existence of VER arrangements in the automobile industry, especially in the United States of America, has also had considerable impact on trade.

The automobile industry in the United States of America is important to the economic well-being of United States of America. A country with only 5.3 percent of the world's population, it, nevertheless, contains forty percent of the world's automobiles. In addition, it is estimated that twenty percent of the total American work force is involved in the automobile industry in some aspect or other.²⁷³

The United States automobile industry in 1980 was in a poor financial situation due to decline in production and sales, which gave rise to increased unemployment in the automobile industry, as well as in such related areas as automobile parts, steel and other supply industries.²⁷⁴ This situation was exacerbated by the prosperity of foreign manufacturers, particularly the Japanese,²⁷⁵ and by the imposition by Japan of a number of non-tariff barriers on the importation of American automobiles into Japan²⁷⁶ which increased the price of American automobiles by fifty to one hundred percent.²⁷⁷

It is understandable, thus, that strong protectionist sentiments would arise when the American automobile industry was threatened, and the petitions launched by the United Auto Workers and the Ford Motor Company with the United States International Trade Commission requesting temporary import quotas, were dismissed for not demonstrating that increased imports were a substantial cause of the industry's problems.²⁷⁸ The year 1981, after negotiations between American and Japanese officials witnessed the introduction, between the United States of America and Japan, of the first VER agreement to restrict the importation of Japanese automobiles into the United States of America.²⁷⁹

It is interesting to note that the effects of the VER agreements on the automobile industry in the United States of America were substantial. From 1981 until its expiration in 1985, the VER agreement enabled the American automobile industry to attain a full recovery, albeit at the expense of American consumers who paid significantly more for a new automobile.²⁸⁰ The VER agreement, by restricting competition in the market, seemed to create a monopoly which was shared by domestic and Japanese automobile manufacturers. It is not surprising, therefore, that the Japanese decided to continue their export controls in this area after March 1985.²⁸¹ What was once regarded as a temporary solution now appears to have become a permanent fixture, thereby encouraging the demand for the introduction of further protectionist measures in the United States of America, and providing the precedent for the imposition of similar measures by other G.A.T.T. contracting parties.²⁸² Indeed, the situation in the automobile industry in international trade today is complicated by the entering into of cooperative deals that have transcended national borders.²⁸³ This raises the question as to whether the object of these transnational deals is to circumvent the consequences of a VER agreement.

Even though the 1979 Agreement on Technical Barriers to Trade was designed to eliminate or, at least, reduce the efforts of contracting parties to manipulate product standards, health and safety procedures, and testing and certification procedures, these barriers continue to make their presence felt.

Within the European Economic Community, provision for the establishment of a common commercial policy for the Community is found in Article 113 of the Treaty of Rome.²⁸⁴ Article 113 is supported by Council Regulation 288/82 which provides the Community's "common rules on imports" for industrial products which stipulates that Member States may no longer impose quantitative restrictions on those products; the import of which, has been liberalized by this Regulation.²⁸⁵ Yet, to date, the European Economic Community has not set up a single internal market or a single common policy for external trade.²⁸⁶ Quantitative restrictions exist in such forms as European Economic Community

surveillance measures, the completing of import documents before goods can be permitted free circulation within the Community, quotas and special approval requirements.²⁸⁷

In spite of Article 113 of the Treaty of Rome and Council Regulation 288/82, restrictive measures are imposed due to exceptions within these regulations. For example, Council Regulation 288/82 does not apply to imports from State-trading countries or to textiles and Member States or the European Economic Community as a whole may utilize safeguard measures or take emergency action where a domestic industry is threatened by imported products.²⁸⁸ Furthermore, Article 115 of the Treaty of Rome permits the application of protective measures in case of economic difficulties in one or more member states.²⁸⁹ Therefore, national measures governing imports of automobiles from Japan can vary from no restrictions to set quota limits, community quotas can be administered on a national basis, and approval documents of certain products can be used to restrict the entry of an imported product.²⁹⁰

The operation of the European Economic Community as a single entity is complicated by the rulings rendered by the Court of Justice of the European Communities on the applicability of the G.A.T.T. to the Community. The Court of Justice of the European Economic Community while recognizing the binding effect, and primacy of, the G.A.T.T. law over secondary European Economic Community legislation and over national trade restrictions imposed by Member States, has held that individuals cannot directly invoke the G.A.T.T. provisions before domestic courts to contest the validity of trade restrictions.²⁹¹

The completion of a common internal market within the European Economic Community may be accelerated due to the adoption of the Single European Act by the Community in 1986.²⁹² One of the goals of the Single European Act is to achieve the implementation of such a market by the end of the year 1992.²⁹³ Measures were also contemplated, for instance, for providing Community licences in respect to the haulage of goods by road between Member States.²⁹⁴

Criticism by contracting parties has continued to be directed against Japan in recent years. Complaints abound concerning Japan's cumbersome and detailed inspection procedures, the difficulty in getting foreign test results accepted in Japan, stringent standards and their arbitrary enforcement, and the difficulty of foreign firms having sufficient input into the formulation of technical standards.²⁹⁵ Pressure from the United States of America focused on obtaining liberalization of the Japanese telecommunications, forestry, pharmaceuticals, and medical equipment industries.²⁹⁶

In response to this criticism and pressure, Japan created a "commission testing system" wherein an exporter could apply for the testing of his product by a designated testing authority in his home market, and agreed to open bidding on contracts to foreign firms for several more public affiliates of the central government.²⁹⁷ In addition, the Japanese government announced an "action plan" for the liberalization of restrictive laws in such areas as import controls, standard certification and import procedures, government procurement, financial and capital market, services and import promotion matters.²⁹⁸

Although the announcement of this "action plan" was welcomed, there was concern expressed by the European Economic Community, for instance, that further measures were required to be taken by the Japanese government together with a faster implementation of the "action plan".²⁹⁹

While the United States of America did amend certain legislation to be in accord with the 1979 Agreements, doubts have been raised as how to close the amendments actually paralleled the substance of the said Agreements. It has been argued that the new countervailing duty provisions provided in the U.S. Trade Agreements Act of 1979³⁰⁰ permitted the International Trade Commission to consider cases not only at the federal government level, but at the private and other government levels; and to allow a finding of subsidy where harm was not inconsequential, immaterial or unimportant (and thus only indirect).³⁰¹ The Trade Agreements Act of 1979 also retained a definition of "bounty or

grant" which encompassed such domestic subsidies as the provision of capital; loans or loan guarantees; the provision of goods at preferential rates; the grant of funds or forgiveness of debt; and the assumption of any cost of manufacture, production or distribution.³⁰² The application of this legislation was demonstrated with the preliminary finding by the International Trade Commission that the Canadian government, with its low stumpage fees, was granting a subsidy to the softwood lumber industry.³⁰³

Furthermore, the United States of America's anti-dumping code has been criticized as an example of "protectionism run riot" when the definitions of causation and material injury permit "the widest flexibility to individual commissioners to find that dumped imports have resulted in material injury even where they have contributed thereto in the smallest degree";³⁰⁴ and the existence of "Buy American" legislation at all levels of government has made it difficult for foreign companies to bid on American government contracts or even on private contract dependent on government financing.³⁰⁵

Non-tariff barriers have arisen in regard to business undertaken by multi-national enterprises. The conflict is normally generated when the policies of the government wherein the foreign subsidy is located are contrary to those of the "home" government of the multi-national enterprises in areas that, in particular, will effect vital economic or security interests. The United States of America with its Trading with the Enemy Act and its Export Administration Act of 1979 is diligent in "policing" the acts of foreign subsidiaries of American companies although, it is argued, that the recent trend is one of minimizing conflict with multi-national enterprises by providing exemptions in the regulations for certain activities by subsidiaries of American corporations.³⁰⁶ Developing countries blame the restrictive business practices applied by multi-national enterprises and their growing monopoly on world trade for worsening their economic position in terms of trade.³⁰⁷

Of course, western allies have established another mechanism for controlling the export of sensitive products: the Coordinating Committee for Multilateral Export Controls or COCOM.

COCOM, which was established in Paris in the 1950s by the United States of America and its allies as an informal consulting group, is designed to coordinate national controls as they apply to the export strategic goods and technology. This policy is coordinated through three embargo lists: the International Atomic Energy List, the International Munitions List, and the International List, which are updated every three years. While these lists are not made public, their content is reflected in the export control lists of member states and control is safeguarded by the requirement of the exporter to obtain a statement from the importer, certified by the importer's government, that the importer will be receiving the goods.³⁰⁸ Thus, these controls appear to be justified by the exception rule in the G.A.T.T. relating to national security interests, even though it is questionable that a country like the United States of America should be able to control the acquisition of strategic items by a country which is able to obtain such items from a foreign source.³⁰⁹

It has been stated that global trade in services has exceeded in value that of trade in goods, even though it seems that non-tariff barriers in services are growing in scope, are found in both developing and developed countries, and are beginning to infiltrate previously unrestricted markets such as electronic communications and information transmittal services.³¹⁰ As previously indicated,³¹¹ one of the problems hindering the elimination of restriction in the services sector is the development of a definition for services which consist of intangibles and are, therefore, difficult to measure.

Due to the intangible nature of many services and the fact that this sector is not, as yet, within the scope of the G.A.T.T., service industries are confronted with obstacles hampering their establishment and operation of affiliates abroad, especially in developing countries. Barriers are found in the areas of the right of establishment and ownership, foreign taxation, nationality restrictions on the employment of personnel, exchange restrictions, and on the protection of intellectual property.³¹² The list is endless

and covers such areas as accounting (restricting the establishment of foreign firms -- Denmark, France and Germany); banking (prohibition on the establishment of foreign branches -- Australia, India and Malaysia); computer services (barriers to the establishment of foreign firms -- Brazil, Israel, Italy and Japan; or licensing requirements -- Belgium, France, Mexico and the Netherlands); construction and engineering services (legal requirement that the majority of employees must be nationals -- Brazil, India, Peru, Saudi Arabia and Tunisia); and in the motion picture industry (trade is subject to quantitative restrictions -- Australia, Egypt, India and Switzerland; subject to government monopoly -- Burma and Syria; or subject to local work requirements -- Brazil, Canada, Italy and Portugal).³¹³

Of course, one can take "judicial notice" of the restrictive barriers that are found in the air transportation and shipping transportation industries with national carriers receiving preferential treatment. Even during the preliminary negotiations leading to the next round of discussions under the G.A.T.T., requests by certain Contracting Parties to eliminate barriers in the service industry generated controversy between developed and developing contracting members.³¹⁴ Indeed, the Contracting Parties only decided, with the launching of the eighth round of multilateral trade negotiations pursuant to the G.A.T.T. in 1986, to aim to establish a multilateral framework of principles and rules for trade in services in view of this controversy.³¹⁵

Once again, technical and other non-tariff barriers seem to play a key role in the regulation of international trade and do not seem to be constrained by the G.A.T.T.

B. Impact on Import and Export Trade in Canada in Particular

The importance of international commerce in the development of Canada's economy cannot be understated. As with other contracting parties, Canada depends on exports for its economic well-being, and hence, requires access to

overseas markets. Access is particularly important to Canada in view of its small population which is not capable of sustaining economic growth without exports. On the other hand, the lack of a broad manufacturing base gives rise to concern by domestic manufacturers that their position of strength within Canada is being eroded by non-competitive imports. Domestic producers appear to be apprehensive that new technology, the international rationalization of industry, the growth of the information industry and unfavourable exchange rates have combined to place independent Canadian manufacturers and producers at a disadvantage.³¹⁶

It is against this background that the role of non-tariff barriers on the Canadian scene must be explored.

An examination of non-tariff barriers imposed by means of quotas or subsidies seems to indicate that Canada has been placed in the unenviable position of, on the one hand, being pressured by domestic producers to assist their failing industries, while on the other hand, being under attack from its major trading partners for not following the principles of the G.A.T.T.

Concern of the European Economic Community over the continued existence of Canada's import quotas on footwear, which have been in force for over eight years, manifested itself in a request for G.A.T.T. Article XIX consultations with an aim for obtaining full compensation for the trade loss suffered by the Community.³¹⁷ This matter was only resolved after Canada agreed to offer the European Economic Community compensation under Article XIX of the G.A.T.T. for the trade loss.³¹⁸ Complaints of the European Economic Community against Canada's restrictions on the importation of European beef and over Canadian provinces' unfair treatment of imported alcoholic beverages were recently upheld by G.A.T.T. Panels as being contrary to the G.A.T.T.³¹⁹

In the United States of America, the United States International Trade Commission ruled, among others, that British Columbia raspberry shippers and Atlantic dried cod exporters were dumping their products at less than fair market value into the United States of America.³²⁰ Furthermore, a recent G.A.T.T. Panel agreed with allegations of the United States of America that Canada's requirement that all fresh salmon and herring exports must be processed domestically before being exported, was in violation of the G.A.T.T. This has led to concerns by the British Columbia fishing industry that Canada will lose control over its West Coast salmon and herring fisheries if the G.A.T.T. Panel ruling is upheld by the G.A.T.T. Council.³²¹ Emerging consultations, at the request of Canada, were also held between Canadian and American government officials over the proposed imposition by the United States of America of a tax on all Canadian truckers operating in the United States of America.³²²

These trade disputes are illustrative of the far reaching effects of the implementation of a domestic trade policy, especially in a period of economic uncertainty. Indeed, in some cases these disputes have transcended political levels, as was demonstrated by the Canada-United States of America dispute over the value of the stumpage fees charged by Canada in the softwood lumber industry.

In May 1986, the Coalition for Fair Lumber Imports filed a petition with the United States Department of Commerce on behalf of the American industry producing certain softwood lumber products. The petitioners claimed that Canadian imports of softwood lumber into the United States of America due to low stumpage fees, which constituted an unfair subsidy, were causing the American softwood lumber industry to lose its share of the United States of America market for its products. As a result, the Department of Commerce instituted a countervailing duty investigation.³²³

Despite the fact that differences in stumpage prices occurred in different regions of both Canada and the United States of America, a preliminary ruling by the said Department concurred with the position put forth by the American lumber industry, and thus the Department of Commerce announced the imposition of a thirty-five percent duty on imports of such products.³²⁴ The Canadian softwood lumber dispute was only resolved after intensive negotiations between the two governments wherein the United States of America agreed to withdraw the duty in return for Canada imposing an export tax on Canadian softwood lumber products destined for the United States.³²⁵

From the Canadian government's perspective, the conclusion of a Memorandum of Understanding with the United States of America in this matter was important as it meant that Canada retained its right to manage its forestry resources, any additional revenues received from the export tax would remain in Canada, and a precedent in American countervail policy would be avoided.³²⁶ The negotiations also involved discussions by the Canadian government with the provinces, labour and industry, and after conclusion of the Memorandum, the establishment of a federal-provincial task force to review all aspects relating to the implementation of the Memorandum.³²⁷ In total, considerable resources were expended not only by the Federal government, but also by provincial governments, the Canadian forestry industry, and its workers to defend one trade dispute emanating from the United States of America. There is also no guarantee that the American softwood lumber industry would not file another petition in the future.³²⁸

Thus, Canada's export policies are being seriously threatened by the liberal application of safeguard measures through the mechanism of countervailing duties. While such duties are a G.A.T.T. recognized method of protecting domestic industries, it is not certain that countervailing duties are being applied in the sense permitted by the G.A.T.T. What is clear is that declines in market shares and lack of competitive position in times of economic recession and high unemployment, will be attributed to the imposition of

export subsidies or other internal subsidies, regardless of whether countervailing duties are properly applied, and Canada is not immune from scrutiny by its closest trading partner and ally.

It is interesting to note that although Canada is quick to protest the imposition of countervailing duties on its exports, Canada will also institute inquiries on imports which appear to threaten its domestic products. This occurred, for instance, with respect to photo albums with self-adhesive leaves originating or exported from the People's Republic of China; rubber hockey pucks from Czechoslovakia and the German Democratic Republic; whole potatoes from the United States of America; drywall screws from Taiwan; subsidized grain corn from the United States of America; yellow onions originating from the United States of America; gasoline powered chain saws from the Federal Republic of Germany, Sweden and the United States of America; and photo albums originating from Singapore, Malaysia and Taiwan.³²⁹ The inquiries are numerous and are conducted by the Canadian Import Tribunal which is authorized, pursuant to the Special Import Measures Act, to determine whether goods imported into Canada are being dumped or subsidized, thereby causing material injury to the production in Canada of similar goods.³³⁰ The inquiries, as illustrated, cover both agricultural and manufactured products.

An illustrative example of Canada's use of a VER agreement, based on a perceived need to introduce "temporary" protective measures for Canadian industry, is that found in the textile and clothing sectors.

Canada's protective action in the textile and clothing industries was formalized in 1971 with the enactment of the Textile and Clothing Board Act³³¹, which had as its object to continue to give special protection to Canadian textile and clothing producers against low cost imports, and with the provision of financial assistance to the said industry, in order that the Canadian textile and clothing industries could become competitive internationally.³³² The Canadian government's ability to introduce restrictions on imports was enhanced by Section 5 of the Export and Import Permits Act.³³³

Following a report issued by the Textile and Clothing Board in 1976,³³⁴ the Canadian government negotiated VER agreements with textile and clothing exporting countries, as well as imposed global quantitative restrictions on most imports of clothing, and set quota levels below existing imports with no provision for annual growth, citing Article XIX of the G.A.T.T. in support of such actions.³³⁵ This policy led to severe international criticism on the basis that these measures were being imposed unilaterally and not in accordance with the principles of the G.A.T.T.³³⁶

In response to a further Textile and Clothing Board Inquiry held in 1979-1980,³³⁷ and which recommended the continuation of special measures of protection for the textile and clothing industries beyond 1981, the Canadian government announced its policy for these industries for the post-1981 period.³³⁸ Once again, this policy indicated the need to establish a viable and competitive Canadian textile and clothing industry, which was to be implemented through a new adjustment program to be administered by a Canadian Industrial Review Board, and the negotiation of bilateral restraint agreements with exporting countries having a duration of five years.³³⁹

As Canada, in this policy, indicated that it did not "favour special measures of protection on a permanent basis",³⁴⁰ one would have expected that Canada would want to see some easing of restrictions in the textile and clothing sectors at the end of July 1986, the date when the Multifibre Arrangement was due to expire. Ironically, Canada ratified the protocol extending the Multifibre Arrangement until July 31, 1991, on November 11, 1986, and authorized its officials to pursue bilateral negotiations with twenty-two exporting countries.³⁴¹

The Canadian government reaffirmed its commitment to maintaining a viable level of textile and clothing production in Canada by obtaining a substantial moderation in the import growth rate; better control over import surges; and differentiating between the dominant, newly industrialized suppliers and the smaller, newer entrants, the latter of which were to be permitted expansion in

their market access. These objectives were to be accomplished by "finding internationally accepted longer-term solutions to the import-related problems the industries have been experiencing through the negotiation of a more effective restraint regime".³⁴²

Hence, Canada has succumbed to protectionist pressures by continuing to support trade restrictions not contemplated within the G.A.T.T., albeit on the perceived need to protect domestic industries from non-competitive imports, and based on political considerations.

While the Multifibre Arrangement is an important illustration of Canada's utilization of non-tariff barriers in a multilateral environment, Canada has also entered into various bilateral VER agreements in order to protect Canadian industries, especially in the automobile sector.

In this regard, Canada and the United States of America, in 1965, entered into a mutual protection arrangement for the automobile industries of these two countries through the mechanism of the Autopact.³⁴³ Since the Autopact was in violation of the non-discriminatory and most favoured nation principles of the G.A.T.T., the United States of America had to obtain a waiver for the Autopact from the G.A.T.T. Contracting Parties to operate.³⁴⁴ The Autopact has now been in operation for over twenty years, and its principles have just been confirmed in the Canada-US Free Trade Agreement with minor modifications.³⁴⁵ This agreement represents a formidable barrier to liberalized trade vis-a-vis other contracting parties.

Canada, in 1981, entered into a VER agreement with Japan due to the concern over the perceived threat to the domestic industry posed by the importation of Japanese automobiles, which VER agreement was renegotiated until 1985.³⁴⁶ Although the issue of Japanese automobile exports to Canada has not been resolved, Canada is now seeking to develop stronger commercial ties with Japan by "opening up the rules relating to both trade and investment" in Canada.³⁴⁷ In this regard, the Japanese manufacturers of automo-

biles, Toyota and Honda, have established manufacturing plants in the Province of Ontario.³⁴⁸ Whether this move made by Toyota and Honda was in response to a more favourable trading climate, or as a method for circumventing the effects of a VER agreement setting quotas on the entry of automobiles, it is not clear. What is certain is that it is still open for Canada to resort to VER agreement when the need arises.

Of concern with respect to the implementation of VER agreement by Canada in order to protect its domestic industries from low-cost imports, is that Canada, itself, is not immune to pressure from other contracting parties to enter into VER agreements, thereby restricting its exports to the markets of these other contracting parties. This was shown in the cases of softwood lumber and steel, and more recently, with the case of potash.³⁴⁹

The utilization of VER agreements by contracting parties derogate from the principles of the G.A.T.T. and give rise to imposed "bilateral" solutions. As Canada appears willing to resort to such VER agreements as "stop-gap" or interim solutions on a permanent basis, Canada is also contributing to the erosion of G.A.T.T. principles. It is submitted that it is doubtful that contracting parties should be employing non-tariff barriers to combat non-tariff barriers imposed by other contracting parties.

The G.A.T.T. permits certain derogations from its principles for balance-of-payment purposes, for the purpose of raising the standard of living of a contracting party's citizens, for health reasons and for reasons of national security, in order to protect its domestic producers in emergency situations, and others. Due to the broad language of the articles providing for the derogation, and to the growth of restrictions of a technical nature, the Tokyo Round of Negotiations in 1979 attempted to introduce controls to the application of the derogations and other restrictions, through the mechanism of subsidiary agreements in the licencing, technical, subsidy, balance-of-payments and government procurement fields.

In this regard, Canada implemented the 1979 Agreements on customs valuation, subsidies and countervailing duties, anti-dumping duties, and on bovine meat, tropical products and trade in civil aircraft.³⁵⁰ No legislation was introduced (or required) to give effect to the agreements on balance-of-payments, technical and licencing matters, dispute settlement, safeguard actions taken for development purposes, or on government procurement, although government procurement administrative practices were revised.³⁵¹ Furthermore, communications with the Provinces have been maintained by means of annual conferences of first ministers, regular meetings of federal and provincial trade ministers, participation of the provinces in trade negotiations, attendance as part of the Canadian delegation at the G.A.T.T. Uruguay Round of Negotiations and through the placement of provincial trade representatives at selected federal posts abroad.³⁵²

While Canada has implemented most of the 1979 Agreements through legislation or administrative practice, Canada has not been hesitant in employing technical and other obstacles to the flow of international trade in order to protect its domestic industry from foreign competition.

The primary Canadian legislation used for the purpose of administering quantitative restrictions on the import and export of goods is the Export and Import Permits Act.³⁵³ The Export and Import Permits Act seeks to control the export of goods of a strategic nature, to implement Canada's commitments toward COCOM to ensure the protection of natural resources and raw materials, to restrict the import of products which may affect internal agricultural or industrial marketing schemes, or to implement intergovernmental arrangements or commitments.

Exports are controlled through the establishment of an area control list by the Governor in Council, and the entry of imports is restricted through the import control list, also established by the Governor in Council.³⁵⁴ In addition, goods may be added to the import control list where it is determined, pursuant to the Textile and Clothing Board or the Canadian Import

Tribunal, that goods are being imported in such quantities as to cause or threaten to cause damage to the production in Canada of similar or directly competitive goods.³⁵⁵ In support of this legislation are various regulations controlling hundreds of products which are divided into various groups, each group subject to numerous exceptions implemented by general import or export permits.³⁵⁶

The coverage of the Export and Import Permits Act is very extensive, thereby representing a formidable barrier to the free flow of goods. In view of this fact, doubts have been raised as to whether such legislation can be justified on the basis of the G.A.T.T. derogations, especially when prohibitions are not temporary in nature and tend to justify a means of protecting Canadian producers, as well as having become well-entrenched, given that the original purpose of the legislation was to prevent the export of weapons and munitions that could be used for purposes of war.³⁵⁷

Following "on the heels" of the export and import legislation are laws of an economic nature which introduce marketing schemes, primarily in the area of agriculture, which vary according to the type of product, their origin and destination, and laws in the area of health, quality control, and safety to assure the reputation of Canadian products.³⁵⁸ Thus, legislation, particularly in the agricultural arena, has tended to create a monopoly within Canada for the export and import of regulated products, and the requirement to produce a certificate of inspection attesting that the products mentioned within the certificate conform with the implementing legislation, while designed primarily to protect Canadian consumers, has certainly placed constraints on the flow of international trade as product standards, for example, tend to be very technical in design.³⁵⁹

Along with marketing schemes developed to provide assistance to Canadian agricultural producers, the Federal government enacted legislation to provide financing arrangements to aid the sale of manufactured goods, to protect

Canadian firms from being taken over by foreign companies where such a take-over would not be beneficial to Canada, and to secure Canadian ownership of natural resources in Canada.³⁶⁰

Canada's policies on foreign-investment and on national energy in the 1970s and early 1980s, due to their differing treatment between domestic and foreign firms, were criticized by contracting parties as being in contravention of the spirit of the G.A.T.T.

In November 1982, the G.A.T.T. Council acceded to a request of the United States of America to set up a G.A.T.T. panel to examine, in particular, whether the export and purchase undertakings supplied by foreign investors to the Canadian federal government were in contravention of Article III:4 of the G.A.T.T.³⁶¹ Members of the Organization for Economic Cooperation and Development also argued that the Foreign Investment Review Act contravened the Organization's Declaration of 1976 concerning guidelines for the regulation of multinational enterprises, which guidelines stated that national treatment was to be assured to foreign investors.³⁶² Canada denied that domestic policy concerned with investment contravened the G.A.T.T. and stated that it was not in breach of the Declaration of 1976, as it reserved the right, in spite of the said Declaration, to take measures affecting foreign investment where necessary.

While the G.A.T.T. panel agreed with Canada that the national treatment obligation of the G.A.T.T. did not fall within the scope of Article XVII concerning non-discrimination, the G.A.T.T. panel also ruled that the undertakings to purchase goods of Canadian origin were inconsistent with Article III:4 of the G.A.T.T. as treating imported goods less favourably than domestic products.³⁶⁴ Subsequent to the ruling of the G.A.T.T. panel, Canada repealed the Foreign Investment Review Act and enacted the Investment Canada Act in its place.³⁶⁵

The Investment Canada Act, among others, did not require that undertakings from foreign investors give preference to Canadian goods and services over imported goods, reduced the threshold for review of, for instance, direct acquisitions, by indicating that these acquisitions would not be reviewed unless the asset value exceeded five million dollars, and provided that a foreign investment must only be of a "net benefit" as opposed to a "significant benefit" to Canada.³⁶⁶ It is interesting to note that the Investment Canada Act, as opposed to its predecessor, did not appear to generate controversy, and it has been submitted that this is due to the fact that the Investment Canada Act may be more compatible to foreign investors, as it presumes that all investment in Canada is beneficial and as it is not designed to curtail control of the economy by non-Canadians.³⁶⁷

The introduction by the Federal Government of its national energy policy in the early 1980s also generated criticism, as foreign owned oil and gas companies argued that this policy was discriminatory in that it treated foreign-owned companies less favourably than Canadian-owned firms, for instance, in the issuance of production licences and in the provision of exploration incentive grants, and, in that it promoted the use of Canadian goods and services by oil and gas companies seeking approval to undertake operations on Canadian lands. Canada denied it was in breach of its obligations under the G.A.T.T.³⁶⁸ However, the controversy in this area seemed to decline in conjunction with the revamping by Canada of its oil and gas program which removed the alleged discriminatory provisions of the policy.³⁶⁹

The above discussion illustrates that Canada, when it considers it necessary to support domestic industries, is willing to depart from the strict applications of the principles of the G.A.T.T. The impact of the G.A.T.T. framework to Canada (as well as in other countries) is further restrained by the inability of the Canadian Federal government to regulate or eliminate certain non-tariff barriers introduced by Provincial governments.

While it is recognized that the Federal government has jurisdiction pursuant to Section 91(2) of the Constitution Act of 1982 to regulate international trade and commerce, this power is not absolute. Laws established by Provincial governments, which indirectly affect international trade and commerce, are also considered valid, and, the regulation of technical regulations and standards on products are within the competence of the provinces' powers.³⁷⁰ The Constitution Act of 1982 also conferred power on the Provinces to control the interprovincial export of their resources as long as they did not discriminate with regard to price or supply in exports within Canada.³⁷¹ Provincial governments have utilized their powers to subsidize local industries and to promote exports, to impose restrictions on goods from other provinces, to create monopolies in certain service industries, to promote government purchases of locally manufactured products, and to create provincial monopolies to control the sale of certain goods.³⁷² Indeed, the use of non-tariff barriers by Provincial governments is quite extensive.

Nevertheless, the fact that Provincial governments may not come within the gambit of the G.A.T.T. has not prevented their subsidies and other obstacles or controls as being cited by contracting parties, and in particular, the United States of America, as justification for the imposition of quantitative restrictions or countervailing duties. This has occurred recently in regard to the softwood lumber industry and alcoholic beverages.³⁷³

In the last few years, Canadian exporters of agricultural and manufactured products have continually run afoul of American anti-dumping and "unfair trade legislation" and have been subject to numerous subsidization complaints against imported products by American producers. It has been noted that protectionism in the United States of America is on the rise, and this fact is threatening the trading patterns between Canada and the United States of America.³⁷⁴

Canadian domestic producers or manufacturers have been subject to numerous investigations by the United States of America International Trade Administration or the International Trade Commission in response to allegations by American producers or manufacturers that Canadian goods have been sold at less than fair market value or have been subsidized. Investigations had been undertaken in such areas as softwood lumber, potassium chloride, fresh cut flowers, carbon steel pipe, beef and cattle, carbon steel bars, Atlantic groundfish, raspberries, iron construction castings and oil country tubular goods.³⁷⁵ The list is endless. Repeated requests have also been made by American steel manufacturers for the United States government to make Canadian steel exporters subject to voluntary restraint programs and subject to new regulations for marking the country of origin on steel products.³⁷⁶

These investigations or rulings are following earlier decisions of the United States Treasury Board Department holding that cash payments, tax credits or low interest rates provided by Canadian Federal or Provincial governments were "bounties or grants" and, therefore, not recognized as being instruments of development policy for regions of high unemployment.³⁷⁷ This policy was confirmed in the case of Bombardier.³⁷⁸ In this case, the Department of Commerce launched an investigation as to whether Bombardier, Inc., a manufacturer and exporter in Canada of railcars, had received certain benefits, thereby constituting subsidies, in its sale of subway cars to the Metropolitan Transportation Authority of New York. The investigation was initiated as a result of the receipt of a petition from the Budd Company, an American producer of railcars, filed on behalf of the United States of America industry producing railcars. At issue was the export credit financing received from Bombardier, Inc. from the Canadian Export Development Corporation and the grants received from the Federal Department of Regional Economic Expansion and the Quebec Industrial Development Corporation, to encourage growth in various Canadian regions. Based on its examination of the transaction, the Department of Commerce determined that the export credit financing by the Export Development Corporation at preferential rates and commitment fees, as well as the grants received from federal and provincial authorities, constituted subsidies within the meaning of the Tariff Act.³⁷⁹

The Tariff Act represents only one mechanism by which American producers and manufacturers can protect their interests. In addition, American agricultural producers and manufacturers may request protection for various goods through section 301 of the Trade Act of 1974³⁸⁰ which permits a complaint to be lodged when a foreign government or any of its agencies implements a policy or program that results in reduced exports to the country, lower United States of America exports to a third country, or a higher level of imports to the United States. Section 201 of the Trade Act of 1974 also permits American industry to seek relief from imports with which it cannot compete effectively.³⁸¹ Together with the "Buy American" programs and laws implementing America's foreign policy with respect to multinational enterprises, this legislation increases the burden of Canadian companies trying to penetrate the United States of America market, which companies may also be confronted with the following cost disadvantages: United States of America tariffs, locational disadvantages and consequential higher transportation expenses, lack of a well-known brand name, or no history of product reliability or quality.³⁸²

Along with the United States of America and other contracting parties, Canada has not been remiss in enacting legislation to protect its domestic industry from subsidized foreign imports and dumping by foreign manufacturers.

Canada enacted the Special Import Measures Act in 1984 (hereinafter called "SIMA")³⁸³ to bring its legislation in the area of subsidies and anti-dumping into line with the Subsidies Agreement. Although sub-section 2(2) of the SIMA is broadly defined to include any financial or other commercial benefit that has accrued or will accrue directly or indirectly, to persons engaged in the production, manufacture, growth, processing and the like, of goods, as a result of any program of a foreign country, subsection 2(5) requires that the Deputy Minister, in considering the interpretation of the term "subsidy" or "subsidized goods", must take into account the Subsidies Agreement. Furthermore, section 7 requires that where an investigation has been ordered by the Governor in Council to determine the amount of subsidy on

imported goods, the Governor in Council may only impose a countervailing duty where, for example, Canada is authorized to do so by Article 16 of the Subsidies Agreement.

Pursuant to section 42 of the SIMA, the Canadian Import Tribunal is charged with the responsibility, after notice of a preliminary determination of dumping or subsidization has been received from the Deputy Minister, to determine whether imported goods are being dumped or subsidized in such a manner that is likely to cause material injury. The said tribunal, in accordance with section 48 of the SIMA, may also inquire into any matter relating to the importation of goods into Canada that may cause or threaten injury to, or retard the establishment of not only the protection of goods, but of the provision of services. Investigative time limits were also prescribed in sections 31 to 41 of the SIMA.³⁸⁴

Even though the Federal government considers the SIMA to be within the parameters of the G.A.T.T., criticism has still been directed against the SIMA in the area of time limits and in the procedures surrounding the rendering of a preliminary or final determination.³⁸⁵ Concern has also been raised with respect to the provision of undertakings, the lack of reasons where an investigation is terminated on the grounds of no apparent injury, and the fact that the Special Import Tribunal is not legislatively required to provide public hearings on reviews,³⁸⁶ although for the most part, it is submitted that the SIMA is in accord with the principles of the G.A.T.T.

It is interesting to note that while Canada has objected to the enforcement of American foreign and international trade policy abroad by the extra-territorial application of legislation by the United States of America, which caused Canada to enact the Foreign Extra-territorial Measures Act,³⁸⁷ Canada does not hesitate to restrict the import and export of goods based on political considerations, for example in the application of various embargoes.³⁸⁸ Furthermore, while the United States of America is often cited as the contracting party which creates the majority of Canada's trade difficulties,

another force to be reckoned with, when Canada "assists" the export of its goods, is the European Economic Community, which, vis-à-vis importers, acts as a trading unit with a common external tariff and a common policy in regard to quantitative restrictions; in fact, the European Economic Community itself, could virtually be a non-tariff barrier.³⁸⁹

The utilization of non-tariff barriers by Canada has had an important role in the development of Canada's domestic policies whether from the point of view of the Federal or Provincial governments. Nevertheless, the use of such barriers has caused Canadian exporters to face severe backlash from other contracting parties who believe that their domestic producers are being threatened by subsidized imports, even though this threat may only be perceived. The safeguard provisions of the G.A.T.T. tend to be used, even by Canada³⁹⁰ as a mechanism to counter an "opponent's" domestic policy which has the effect of influencing international trade, but is largely ignored when domestic industry "requires" assistance.

What remains to be discussed, therefore, is whether a new strategy or mechanism should be developed to replace the G.A.T.T., or whether the G.A.T.T. should be revamped.

C. Towards the Development of a Canadian Export and Import Strategy

Based on the above analysis of the G.A.T.T. within the context of the growth of protectionist sentiments in the world trading environment, it is not certain that the G.A.T.T., in its present form is the best mechanism with which to promote the "free" flow of goods and services between contracting parties. Designed in the 1940s to combat the trade wars of the 1930s through the enhancement of tariff concessions, the G.A.T.T. was not equipped to handle the development of non-tariff barriers. Inherent weaknesses in the structure of the G.A.T.T. such as the absence of rules to govern multinational enterprises, services and agricultural subsidies; the lack of clear definitions of

certain principles, for example, with respect to emergency actions, giving rise to differing interpretations; the existence of various derogations; and the dissatisfaction expressed by Contracting Parties with respect to dispute resolution, enabled contracting parties, in times of economic and political expediency, to overcome the strict application of the principles of the G.A.T.T.

The advent of the economic recession in the late 1970s and continuing into the 1980s, along with the debt crisis faced by numerous governments of developing countries, illustrated the vulnerability of the world economy, which vulnerability was exacerbated by the imposition of quantitative restrictions, countervailing duties, technical impediments, and other non-tariff barriers. Indeed, the Canadian economy was not exempted from the imposition of such non-tariff barriers by contracting parties, and in particular, by the United States of America. While complaining about the indiscriminate use of non-tariff barriers, contracting parties, Canada included, did not hesitate to apply them in order to protect their own domestic industries.

If the G.A.T.T., in its present form, does not appear to be serving the needs of international trade, the issue to be examined is whether a reorganized G.A.T.T. or alternative economic strategies developed by Canada and other contracting parties, would be able to become the frontrunner for the promotion of a "liberalized" international trading environment. It has been suggested that as the need for trade increases, nations have tended to become more interdependent.³⁹¹ Thus, the formation of domestic policies in one nation, especially when these policies give rise to subsidization, concession loans, product standards and countervailing duties, are of direct interest to other nations. This trend has been compounded by the growing inclination of governments to directly intervene in the market place in an effort to influence employment income and investment and trade currents.³⁹²

The susceptibility of the world economy to the policies of a leading industrial nation's domestic policies is demonstrated by the adoption by the United States of America of a monetarist solution to its economic problems. Confronted with a downturn in the American economy, double digit inflation, and the rising protectionist sentiments of American manufacturing and agriculture interests, the United States of America's Federal Reserve Board tightened the growth of money supply. This, in turn, caused extensive world-wide ramifications: interest rates soared, the American economy plunged into a recession, the prices of commodities fluctuated, in some cases, dramatically and demand for such commodities and other goods declined.³⁹³ Even with the lowering of interest rates and oil prices, the International Monetary Fund remarked that trade activity in developed countries declined, thereby retarding developing countries' trade, real export earnings and real import earnings in a period in which they were attempting to restore creditworthiness and growth.³⁹⁴

Under the auspices of an austerity program designed by the International Monetary Fund, developing countries have devalued their currencies, restrained wage increases, attempted to reduce the size of their public sector and decreased the rate of credit growth in order to relieve debt pressures.³⁹⁵ However, developing countries also need access to the markets of developed countries in order to obtain the foreign exchange necessary for imports and debt service and to enable their economies to expand.³⁹⁶

Thus, any export and import strategy introduced by developed countries must take into account not only the requirements of a nation's domestic interests, but those of importing nations. If, for example, developing countries must curtail imports since they do not have sufficient foreign exchange to pay for these imports, it is difficult to envisage developed countries pulling out of their economic recessions when their industries have no markets in which to export goods. What is clear is that neither the imposition of non-tariff barriers nor the application of the principles of the G.A.T.T. have been able to resolve the on-going international economic difficulties.

Developed countries, and those of western nations in particular, have opted for non-tariff barriers and "managed" international trade as the mechanisms to confront economic decline when faced with the maturing of their economies into a post-industrial age, the shift of comparative advantage to those of newly-developed nations, the emergence of the European Economic Community and Japan as major economic powers, the increasing role of multinational enterprises in world trade and the internationalization of production.³⁹⁷ In short, a realignment of the international trading structure.

As we have seen, Canada has freely employed quotas to limit export competition in agricultural products, and in textiles and footwear, and utilized VER agreements to control the import of automobiles.

The issue which must be addressed is whether the employment of non-tariff barriers should continue as the preferred domestic policy to promote domestic industries. Should not increased competition from abroad encourage domestic industries to become more competitive and achieve economies of scale? And has it not been determined that restrictive trade practices, through the use of non-tariff barriers, have created trade distortions?³⁹⁸

Putting aside the role of the G.A.T.T. and the influence of government policies in international trade for the moment, it is extremely important for the Canadian private sector to seek a means of increasing exports, while at the same time protecting itself against the risks of international business transactions on both an economic and political level. Indeed, it has been stated that due to the export dependency of the Canadian economy, it is "obvious that it is not in Canada's interest to continue to contribute to protectionist trends. Instead it must fight them."³⁹⁹ Exports of goods and services account for approximately 31% of Canada's Gross National Product with over three million Canadian jobs depending directly or indirectly on international trade.⁴⁰⁰

Keeping in mind the importance of export trade, the Canadian private sector should develop an "export legal strategy" which would include such elements as: a pricing strategy which takes into account the possibility of the imposition of anti-dumping duties, evaluates the effect of domestic government subsidies to the application of countervailing duties, and investigates the technical impediments of importing countries as well as these countries' buy-national purchase policies.⁴⁰¹ The Canadian private sector may also obtain government assistance to enter into foreign markets on a reciprocal basis, seek product niches, use foreign distributors, and establish manufacturing facilities in foreign countries while, at the same time, importing a large number of components.⁴⁰² Lobbying efforts could also be undertaken where the market is an important one for a certain industry.

Of crucial importance to any export legal strategy is to reduce the impediments which may be imposed by the trade laws and policies of an importing country, and to battle such laws and policies on the importing countries' own terms. Another strategy is to establish a "forum for business people of all nations where they get together informally to exchange information and to expand their international trade by doing business with each other".⁴⁰³ Dialogue amongst parties with similar interests is essential, not only to promote, but also to increase awareness of international business opportunities and problems. It is a method of demonstrating to their governments that the private sector is interested in resolving trade problems. Furthermore, it is vital to educate government economic policy-making officials as to international business concerns of the private sector, because it is unrealistic to assume that governments will completely withdraw from their involvement in private sector economic concerns. These concerns, generally, have had a direct impact on the formulation of a government's national economic policy.

Bearing in mind the criticism directed by importing countries towards unfair government subsidization and other government-imposed quantitative restrictions by exporting countries, it is important, it is submitted, for governments to reduce their interventions into the economy. This could be

achieved by privatizing Enterprises and by encouraging the private sector to promote their exports through, for instance, trading houses.

Article XVII of the G.A.T.T. with respect to the establishment of Enterprises, requests that contracting parties operate such Enterprises in a manner consistent with the general principles of non-discriminatory treatment as prescribed in the G.A.T.T. However, it has been contended that the operation of Enterprises may, in themselves, represent a form of protectionism, as the price of goods sold by these Enterprises may be determined by other than profit considerations.⁴⁰⁴ It is also contended that Enterprises do not have to realize economies of scale or to rationalize price structures in pursuit of political considerations, for example, to support domestic industries, especially in the agricultural sector.⁴⁰⁵

In this regard, governments have begun to "privatize" various Enterprises. For example, jute mills in Bangladesh and cotton mills in Pakistan have been denationalized, the State's share of Nippon Telegraph and Telephone in Japan has been reduced, local-authority housing in Britain has been sold to tenants, and British has divested its control of the National Freight Company.⁴⁰⁶ In Canada, the government has divested its interests in Canadair Limited, Teleglobe Canada, Canadian Arsenals Limited and repealed Canagrex.⁴⁰⁷

Whether or not such denationalization or divestment efforts achieve the economic success predicted by those governments supporting privatization of certain Enterprises, it is further submitted that this is an important step towards liberalizing international trade and reducing the need for such governments to impose non-tariff barriers.

Directly linked to privatization, is the use of trading houses as an additional arm of the "export legal strategy" that could be adopted by the Canadian private sector.

Trading houses were used as a mechanism by which former colonial powers built up trade relations with their colonies and these trading houses continue to hold important spheres of influence with former colonies. Trading houses have also provided an international network for commerce in such countries as Japan, Holland and Sweden.⁴⁰⁸ Indeed, the Special Committee on a National Trading Corporation envisioned a real potential for increasing exports through the development of a Canadian Trading Corporation.⁴⁰⁹ While this Corporation was not developed by the Canadian government, private sector trading houses do exist.⁴¹⁰ Furthermore, the principle aid agency of the Canadian government, the Canadian International Development Agency, has announced that trading houses are an important component of Canada's campaign to increase Canada's share of markets in developing countries and to establish closer links between the government and the private sector export community.⁴¹¹

In view of the controversy surrounding the provision by contracting parties of concessional loans, reduced interest rates and development assistance in the promotion of exports, not to mention the fact that such items could be considered unlawful subsidies and hence, susceptible to the imposition of countervailing duties, trading houses can provide a mechanism for developing markets, a source of expertise and a centre for information without attracting unfavourable comment. Unfortunately, concessional financing by governments continues to play a leading role in the attempt by governments to promote exports.

Traditionally carried out by an international network of private banking institutions and supplemented in certain countries by specialized export financing houses, the need for long-term financing of capital goods led to the adoption of a government system of export credits, guarantees, insurance or a combination of all of the above.⁴¹²

The primary institution of the Canadian Federal government for promoting and financing export sales is the Export Development Corporation, a Crown agency, which has as its purpose to facilitate and develop trade between Canada and other countries through the provision of insurance, guarantees, loans and other financial facilities.⁴¹³ The purpose of the Export Development Corporation is to assist the exporter who has a competitive product in terms of price, quality, delivery and after-sales services irrespective of whether the exporter is Canadian-controlled, although the said Corporation sets Canadian content rules which must be met by the exporter in order to qualify for the various programs.⁴¹⁴ An additional governmental assistance mechanism consists of the payment, by the Department of Regional and Industrial Expansion, of up to fifty percent of eligible costs incurred by Canadian businesses in their international marketing efforts, which payment need only be returned if export sales are realized. Also the Canadian International Development Agency provides funding for feasibility studies for projects to be carried out by Canadian firms in developing countries as well as the provision of related technical assistance.⁴¹⁵

Attention must be paid to ensure that governmental financing assistance does not create unfair subsidies which attract retaliatory measures in the form of countervailing duties. Although the Canadian government has claimed that only ten percent of Canadian exports are supported by governmental programs,⁴¹⁶ concern has been raised amongst contracting parties on the growing reliance of developed countries using what has become known as "mixed credits", a method of financing designed to reduce the effective rates of interest on project loans to developing countries. By blending government aid with commercial credits, developed countries seek to increase the competitiveness of their exports in various developing countries.⁴¹⁷

This form of government support has tended to distort the market forces in international trade, and to lead to the imposition of an additional subsidy. As a result, the Organization for Economic Cooperation and Development has extolled its members to be consistent with fair trade competition in their support of priority development projects.⁴¹⁸

However, when properly applied, that is other than by means of "mixed credits", concessional financing could be considered another element of the "expert legal strategy" to be developed by the Canadian private export sector as long as the impact of such financing on the trade policies of the importing countries are carefully evaluated.

In light of foreign exchange difficulties and the application of austerity programs to reduce the heavy debt burden, developing countries have turned to countertrade as a means of promoting trade. The Organization for Economic Cooperation and Development has estimated that countertrade covers fifteen to twenty percent of East-West trade and at least ten percent of trade between members of the Organization for Economic Cooperation and Development.⁴¹⁹

Countertrade, an "agreement between an importing nation and a foreign seller requiring that, as a condition for the completion of an import transaction, the seller separately purchase certain goods from the importing nation",⁴²⁰ has proven to be a method to generate exports in times of significant hard cash shortages. Other reasons cited for the growth of countertrade include the need to improve the balance of trade, to gain access to new markets, to promote industrial expansion, to maintain prices of export goods and to combat the protectionist measures undertaken by developed nations.⁴²¹ Thus, countertrade appears to stimulate trade during periods of economic recession, thereby enabling developing countries to obtain much needed imports and developed countries to generate additional sales.

Those opposed to countertrade argue that it is a "distortion of trade that threatens to undermine the multinational trading and international monetary system which has been used by most of the world since World War II".⁴²² Where countries promoting countertrade transactions do not impose the same countertrade arrangements with imports from other contracting parties or use countertrade arrangements to limit imports to a certain level, such arrangements create ad hoc and bilateral agreements which are not always

"open" to scrutiny or can lead to anti-competitive or coercive practices. These countertrade arrangements may also be in violation of the most-favoured nation principle of the G.A.T.T. and constitute quantitative restrictions which are prohibited by the G.A.T.T. unless justified within the context of emergency measures.⁴²³

Although the Canadian government considers countertrade a regressive trade system which, among others, prejudices the opportunities of small and medium exporting firms in achieving international sales, information on the nature of countertrade and how to deal with countertrade, is provided by the Trading House and Countertrade Division of the Department of External Affairs. The responsibility for countertrade arrangement, however, rests with the exporter.⁴²⁴ Exporters may enter countertrade transactions to take advantage of sales opportunities which may not otherwise materialize, to gain sources of supply, to achieve prominence in new markets or to obtain exclusive importation or distributorship rights in its domestic market.⁴²⁵

Therefore, countertrade can be advantageous to both parties to the arrangement and facilitate the development of export trade. Care must be taken, however, by the firm which has purchased the countertrade goods to ensure that when reselling these goods, it does not offend various anti-trust or competition legislation in the importing country.⁴²⁶ Where such legislation is not breached and countertrade does not become a mandatory requirement in order to obtain goods, and consequently, leading to a distortion of the free flow of trade and investment, it is submitted that countertrade, at least in times of recession, could provide a positive export strategy to replace that of protectionism. The mechanism of protectionism, in contrast, is primarily defensive in nature.

Returning to the context of the G.A.T.T., the Governments of Canada and the United States of America have recently concluded an "enhanced" or "free trade" deal.⁴²⁷ Considering that three out of every ten jobs in Canada depend on exports to the United States of America, and that three quarters of

Canada's exports enter the American market,⁴²⁸ this type of export strategy appears to be worthwhile implementing. In addition, free trade areas can be sanctioned by the G.A.T.T. if the eventual agreement falls within the parameters established for such agreements by Article XXIV.

On the introduction, in 1987, of a motion that the House of Commons support the negotiation of a bilateral trading agreement with the United States of America,⁴²⁹ the Government of Canada cited the need for continued economic growth, maintaining a strong sovereign nation, and enhancing Canada's access to the United States of America market in support of its motion. The Government of Canada indicated that the negotiation of such an agreement was important as Canada's economy was dependent on trade for growth; yet due to increasing protectionism, the international trading system was being eroded.⁴³⁰ Therefore, the Government of Canada, through the mechanism of a free trade agreement with the United States of America, was seeking further reductions in tariffs; the elimination of non-tariff barriers, especially in the areas of technical or health standards and government procurement practices; the regulation of subsidies; the development of an equitable dispute resolution system; the simplification of customs administration procedures; and to ensure Canadian access, in the areas of services and intellectual property to the United States of America market. Items not included in the agenda of the Government of Canada for negotiations were regional development, cultural policies and social programs.⁴³¹

From an examination of the Free Trade Agreement negotiated between the two governments, it appears the principles of the G.A.T.T., in regard to Canada and the United States of America, have been enhanced.

The objectives of the Agreement, as set out in Article 102 of the Agreement,⁴³² are to eliminate barriers to trade in goods and services between Canada and the United States of America, to facilitate conditions of fair competition within the free trade area; to liberalize "significantly" conditions for investments within the said area; to establish effective proce-

dures for the joint administration of the Agreement and the resolution of disputes; and to "lay the foundation" for further bilateral and multilateral cooperation. In accordance with Article 105, both the United States of America and Canada are to accord national treatment with respect to investment and to trade in goods and services to the extent provided in the Agreement.

In the area of tariffs, Article 401 of the Agreement provides that each party should progressively eliminate customs duties on goods originating in the territory of the other party.⁴³³ The date by which tariffs are to be phased out has been determined to be January 1, 1998. Together with the elimination of tariffs, are provisions for the prohibition of custom user fees (Article 403) and duty drawbacks (Article 404); cooperation in customs administration (Article 406); and prohibition to the introduction of an export tax unless such tax is also introduced on goods destined for domestic consumption (Article 408).

An important element of the Agreement is the confirmation, by Article 407, of the general G.A.T.T. prohibitions on the application of import and export restrictions. Furthermore, export measures justified under the provisions of articles XI:2(a) and XX(g),(i) and (j) of the G.A.T.T. are only to be utilized under certain circumstances.⁴³⁴ Finally, in accordance with Article 501 of the Agreement, both Canada and the United States of America are to grant national treatment to the goods of the other as stipulated by Article III of the G.A.T.T.

The Agreement between Canada and the United States of America also takes into consideration those areas of trade which are not subject to the principles of the G.A.T.T., but which constitute non-tariff barriers to the flow of trade. These areas are agriculture, technical standards, services and investment. There is, as well, clarification with respect to the imposition of countervailing duty or anti-dumping measures, government procurement and safeguards.

Canada and the United States of America, pursuant to Article 602 of the Agreement, affirm their respective rights and obligations under the G.A.T.T. Agreement on Technical Barriers to Trade, and agree, by Article 603 not to maintain standards-related measures or procedures for product approval that would create unnecessary obstacles to trade. Article 604 states that each party shall make compatible its standards-related measures and procedures for product approval with those of the other party, and each party, by Article 605, is to provide for recognition of the accreditation systems for testing facilities, inspection agencies and certification bodies of the other party.

In the area of agriculture, Canada and the United States of America have agreed, in Article 701, to prohibit the introduction of, or to maintain any export subsidies originating in its territory and to phase in, over a ten year period, the elimination of tariffs on agricultural products, except for fresh fruits and vegetables (Article 401).⁴³⁵ Articles 704, 705, 706 and 707 of the Agreement provide market access for meat goods, grain and grain products, poultry and eggs and for sugar products containing ten percent or less sugar by dry weight. In the area of technical regulations and standards for agricultural, food and beverage goods, Article 708 provides, among others, that the parties shall seek to harmonize their respective technical regulatory requirements and to establish equivalent accreditation procedures for inspection systems and inspectors.

Article 1304 of the Agreement reduces the threshold to twenty-five thousand United States dollars for when procurement for government departments, as listed in the G.A.T.T. Agreement on Government Procurement, shall be open for competitive bidding from nationals of the other party, and Article 1305 provides that each party shall accord to eligible goods treatment no less favourable than the most favourable treatment accorded to its own goods. In the area of services,⁴³⁶ Article 1402 provides that Canada and the United States of America shall accord to persons of the other party, treatment no less favourable than that accorded in like circumstances to its persons. Exceptions to this principle are found in paragraph 3 of this Article for the

purpose of prudential, fiduciary, health and safety or consumer protection reasons. Article 1502 of the Agreement provides for the temporary entry of business persons, on a reciprocal basis, who are otherwise qualified under applicable law relating to public health and safety and national security. National treatment is to be accorded to investors of the other party, pursuant to Article 1602, with respect to measures affecting the establishment of new business enterprises located in its territory; the acquisition of business enterprises located in its territory; and the like.

Articles 1101 and 1102 of the Agreement appear to establish stricter criteria than that allowed for in the G.A.T.T. for the application of emergency safeguards to bilateral trade. Canada and the United States of America have agreed that each party can take emergency action during the transition period only, provided that notification and consultation precede the action; no action is maintained for a period exceeding three years; no action is taken more than once during the transition period for the same good; and upon termination of the action, the rate of duty is the rate which would have been in effect but for the action.⁴³⁷ In addition, Article 1102 of the Agreement stipulates that each party shall exempt each other from global actions under Article XIX of the G.A.T.T. except where the other's producers are important contributors to the injury caused by the surge of imports from all countries.⁴³⁸

In the matter of countervailing duties and anti-dumping duties, each party reserved its right, pursuant to Article 1902, to apply its countervailing law and anti-dumping duty law to goods imported from the territory of the other party, and to modify such law (subject to the provision of notification and consultation). However, Article 1904 indicates that either party may seek review of a final countervailing or anti-dumping duty determination by a binational panel. The binational panel replaces final judicial review and its decision is binding on the parties with respect to the particular matter before the panel.⁴³⁹

Articles 1801 through 1808 of the Agreement set up the institutional procedures by which disputes are to be determined under the Agreement, except for matters covered by financial services and dispute settlement in anti-dumping and countervailing duty cases which are provided for in chapters 17 and 19, respectively, of the Agreement. In accordance with Articles 1801 through 1808, a Canada-United States Commission is formed to supervise the implementation of the Agreement and to resolve disputes which may arise over its interpretation and application; procedures for binding arbitration are established; and provisions are made for the setting up of panels to consider disputes referred to the Canada-United States Trade Commission that have not been resolved within a period of thirty days after such a referral.⁴⁴⁰

Other matters concerning wine and distilled spirits, trade in automotive goods, energy, and financial services have also been brought within the umbrella of the Agreement.⁴⁴¹

It is submitted that the Canada-U.S. Free Trade Agreement, if ratified and implemented by the parties, could form an integral part of a new Canadian legal export and import strategy within the context of the G.A.T.T. Indeed, this Agreement represents a determined effort by two major trading partners to come to terms with the growth of non-tariff barriers in international trade and the need to resolve numerous bilateral trade disputes on a non-adversarial basis.

The G.A.T.T. provides the framework for the liberalization of trade in the international arena, primarily through the reduction of tariffs and the prohibition against the application of quantitative restrictions or the use of export subsidies on non-primary products. Yet, it is the domestic legislation of the contracting parties which gives effect to the principles enunciated under the G.A.T.T., thereby providing the interpretation of the said principles.⁴⁴² The situation is exacerbated by the inherent ambiguities in the wording of certain G.A.T.T. provisions, the sanction of derogations from the principles of the G.A.T.T., and the evolution of impediments to international

trade which remain, to a large extent, outside the ambit of the G.A.T.T. Hence, the penchant for contracting parties to seek alternative solutions to international trade problems.

In this regard, from the viewpoint of the United States of America and Canada, the Free Trade Agreement constitutes one answer to the inherent weaknesses of the G.A.T.T. in promoting trade liberalization, at least between these two countries. This Agreement does commit both Canada and the United States to eliminate tariffs over a ten year period, extends the application of the principles of national treatment and non-discrimination to the areas of services, business travel and investment; prohibits the use of subsidies in the agricultural sector; seeks to harmonize technical and health standards between the parties; improves access to government procurement by the other party's nationals; restricts the application of quantitative and emergency measures; and develops a mechanism for resolving bilateral trade disputes within the context of the Agreement. The Agreement, in addition, reaffirms each party's rights and obligations under the G.A.T.T. system. In theory, thus, the Agreement enhances the principles of the G.A.T.T. in a bilateral framework, while at the same time appears to reinforce the commitment of Canada and the United States of America to the multilateral trading environment.

Article XXIV of the G.A.T.T. provides for the evolution of customs unions and free-trade areas under certain conditions. For instance, with respect to a free-trade area or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable to the free-trade areas or to the adoption of the interim agreement, are not to be higher or more restrictive than the corresponding duties or other regulations of commerce in the same constituent areas prior to the formation of the free-trade area or the interim agreement. Free-trade areas have been previously considered and adopted by the Contracting Parties to the G.A.T.T.⁴⁴³ Therefore, precedents exist for the consideration of the proposed Canada-U.S. Free Trade Agreement within the ambit of the G.A.T.T.

Nevertheless, the Canada-U.S. Free Trade Agreement should not be implemented by Canada (or the United States of America) in isolation from the international trade arena, even though for the purpose of the Agreement the principles of the G.A.T.T. are to be followed.

First, this Agreement has not yet been applied or subjected to interpretation. Differing interpretations may evolve as to what is meant, for example, by an "export subsidy" within the terms of the Agreement (Article 701); as to when government support for grains in the United States of America becomes "equal or less than the level of government support for that grain in Canada" (Article 705); and as to whether measures governing licensing and certification of nationals providing "covered services" relate "principally to competence or the ability to provide such covered services" (Article 1403); or whether standards-related measures or procedures for product approval create "unnecessary obstacles to trade between the territories of the Parties" (Article 603).

In addition, the Agreement incorporates Article XX of the G.A.T.T. relating to the application of import and export control measures for public policy reasons (Article 1201); excludes from its coverage trade in logs, unprocessed fish on the Canadian east coast and beer and malt sales and distribution (Article 1204); incorporates the Article VIII G.A.T.T. exemption concerning national security, as well as small business set-asides, in the area of government procurement (Article 1308 and Annex 13.04.3); and maintains the restrictions employed by Ontario, British Columbia and Quebec for wine distribution. Of course, the issue that remains unresolved is to what extent the Agreement will be incorporated into state and provincial legislation in those areas which fall within their respective jurisdictions.

Furthermore, while the Agreement provides mechanisms for the resolution of disputes pertaining to the Agreement, these mechanisms do not necessarily operate to the exclusion of similar provisions contained in the G.A.T.T. This may give rise to confusion as to which forum should be selected by a party in

which to resolve a dispute or launch a complaint affecting not only the United States of America or Canada, but a third country outside the parameters of the Agreement. At a minimum, these newly created mechanisms relating to the resolution of disputes superimpose another layer of administrative bureaucracy in this area, and hence, may bring with them consequential delays. Indeed, with respect to countervailing and anti-dumping duties, the domestic laws of each party remain valid. It is only after recourse through domestic legislation has been fully exhausted; that is, upon the conclusion of a "final determination", that either party may submit such "final determination" to a binational panel constituted under the Agreement for review purposes (Article 1904).

The Canada-U.S. Free Trade Agreement seems to represent a comprehensive agreement for the enhancement of trade between Canada and the United States of America, and if implemented by the parties, may reduce the frictions which have been occurring between these parties in trade matters. Nevertheless, the United States of America is not Canada's only trading partner. It is possible that this Agreement may prejudice the trading interests of these other partners by increasing non-tariff barriers vis-à-vis their commerce with Canada and the United States of America.⁴⁴⁴ Indeed, the presence of free trade areas and customs unions, although sanctioned by the G.A.T.T., may, if extensively implemented, create a new form of impediment to international trade. International trade may develop into a form of contest between industrialized trading blocks, each block attempting to protect its area against the commerce of other blocks to the detriment of non-aligned countries, especially, those countries considered to be developing countries. As we have seen, international trade crosses national frontiers. Developing countries also require access to export markets in order to generate growth and reduce their debt burden, and without foreign exchange, it is difficult for developing countries to purchase goods and services from developed countries.

The G.A.T.T. was designed to eliminate the resolution of international trade problems by means of bilateral solutions. The G.A.T.T., in fact, evolved due to the inability of contracting parties to extricate themselves from trade difficulties at the bilateral level.

Given the premise that contracting parties must, in view of the prevalence of non-tariff barriers in the international arena, develop a new export strategy on the multilateral plane, the question that arises is whether this strategy can be accomplished through a re-vitalized G.A.T.T.

The eighth round of multilateral negotiations under the auspices of the G.A.T.T. are currently underway. During these negotiations Canada has indicated that it desires that the G.A.T.T. system be strengthened through its transformation from an administrative type institution to one that is more policy oriented. Canada has also stated that it would like the G.A.T.T. to provide new rules and market access for agricultural trade; to improve accessibility for all types of goods, including natural resource-based products and high technology products; to incorporate measure relating to trade in services and investment; and to integrate developing countries further into the G.A.T.T. system.⁴⁴⁵

Due to the dichotomy of opinions in such areas as agriculture, textiles, tropical products and services, for instance, the Contracting Parties appeared to find it difficult to obtain common ground as to which matters should be included on the agenda of the eighth round of multilateral negotiations. This was illustrated during the discussions of the Contracting Parties held in Uruguay, in September, 1986, for the launching of these negotiations.⁴⁴⁶ It is not surprising that there would be disagreements between developed and developing countries over the inclusion of services on the negotiating agenda. On the one hand, developed countries would like services such as banking, telecommunications and insurance to be governed by the international rules of the G.A.T.T. as these services play an important role in their economies. On

the other hand, developing countries have claimed that the areas that developed countries desire to liberalize do not reflect the interests of developing countries and will not provide them with an export advantage.

Indeed, the decisions reached by the Contracting Parties in January, 1987 concerning the implementation of negotiating structures and plans for the Uruguay Round are conservative in nature and call for the carrying out of additional studies and for the collection of more comprehensive data in such controversial areas as services and textiles.⁴⁴⁷ Contracting Parties appear to be hesitant to commence a re-evaluation of the G.A.T.T. from an international perspective; concern is still focussed on regional or national interests. This Round, however, is involved in considering both tariff and non-tariff barriers to international commerce.

We have seen that changes in the world trading environment have tended to create an interdependent international trading system which is manipulated by governments for the purposes of encouraging the sale of their products on world markets. It is submitted that, due to these changes and to the structural defects within the framework of the G.A.T.T. system, which defects have become more prominent in times of economic recession, only a complete revamping of the G.A.T.T.'s organization would justify continuing its use as the main mechanism for promoting the free flow of goods and services on a global basis.

Therefore, it is expedient that Contracting Parties must create a new international mechanism for international trading concerns which would acknowledge that "managed" trade has superseded the nineteenth century concept of a "liberalized" trading environment where comparative advantage was the sought after goal; that industrialized nations may not hold the monopoly of economic power; and that economic policies even when directed to securing domestic industries will have a direct or indirect impact on the international trading environment as a whole. In short, a new international export strategy must be developed based on the above realities which will be promoted through

an organization that is more closely attuned to the prevailing trade restriction practices used by all contracting parties as a matter of course. Canada cannot afford to develop its trade strategies in isolation from this international environment.

CONCLUSION

Non-tariff barriers, it is proposed, have not only had a direct impact on international commerce in general and on the import and export trade of Canada in particular, but have eviscerated the G.A.T.T. to such a degree that it is no longer an effective mechanism through which to promote a more open international trading environment. Indeed, the above examination of the G.A.T.T. and the rise of non-tariff barriers has demonstrated the need to recognize that the concerns of the international trading scene have changed since the 1940's. This has brought about a requirement to structure an international mechanism which is better able to take these changes into account.

In any discussion of the G.A.T.T. it must be remembered that it was designed as an interim measure until the coming into force of a new International Trade Organization, which Organization was envisioned by the World Trade Conference in 1948. At this period, the international trading environment was characterized by a homogeneous nature with economic power being held by a handful of western industrialized nations. Developing nations did not have much influence in the international trading arena, governmental intervention of the private export sector was minimal, and multinational enterprises had not achieved significant prominence in international commerce. The primary concern of developed nations was to reduce the impact of tariffs on the liberalization of trade. Furthermore, the world was entering into a period of economic prosperity.

This being the case, the G.A.T.T. was directed towards promoting the non-discrimination of international trade, the prohibition of quantitative restrictions, except for customs duties, and the reduction of tariffs. The cornerstone of the G.A.T.T. was the principle of most-favoured-nation. Although derogations from its principles were to be tolerated, such derogations were intended to be implemented only in emergency situations and on a temporary basis to permit a nation's economy to adapt to a more liberal trading environment. Unfortunately, as the Havana Charter, the instrument which was to bring the International Trade Organization into operation, was never ratified, the G.A.T.T. was forced to become the main tool to promote the interests of nations in international commerce, a role for which it was not designed. The weaknesses of the G.A.T.T. therefore, were exacerbated with the reorientation of the world economy.

Confronted with high unemployment, inflation, balance-of-payment difficulties and a general economic malaise, contracting parties sought a means to extricate themselves from their economic difficulties without obviously avoiding their obligations under the G.A.T.T. The method selected by contracting parties was the introduction of non-tariff barriers which have been defined as any type of restrictions other than duties which affect the free flow of commodities. As we have seen, non-tariff barriers include quantitative restrictions, subsidies, technical restrictions and concessional financing; all barriers unrelated to tariffs. To complicate matters, the G.A.T.T. became the main instrument through which to justify the imposition of non-tariff barriers. Ironically, the safeguard and emergency provisions of the G.A.T.T. were themselves translated into a type of non-tariff barrier due to the lack of precise criteria as to when such provisions could be applied. In addition, the principles of the G.A.T.T. could be circumvented as a result of a structural flaw: the principles of the G.A.T.T. only apply to the extent they are not in conflict with the internal rules of the original Contracting Parties as of 1947, or for other Contracting Parties, as to the date to which they became signatories to the G.A.T.T. Hence, the framework of the G.A.T.T. itself permitted extensive leeway within which contracting parties could justify their use of non-tariff barriers.

By the time of the Tokyo Round negotiations of the G.A.T.T. in 1979, it was fair to state that contracting parties were beginning to recognize that non-tariff barriers represented formidable impediments to the free flow of goods and services in international commerce. It is also true to say that contracting parties developed certain agreements by which some control could be exerted over the imposition of non-tariff barriers. However, the 1979 Agreements, as they became known, did not achieve much success in reducing the use of non-tariff barriers by contracting parties especially as these agreements only applied to those contracting parties which were signatories to each agreement. Indeed, the inability of the G.A.T.T. to contain non-tariff barriers is further demonstrated by the renewal of the Multifibre Arrangement in 1986, the continued use of other VER agreements, and the extensive application of safeguard and emergency measures to protect domestic industries. The G.A.T.T. has become a mechanism by which contracting parties can criticize the application of non-tariff barriers by importing nations while at the same time justifying the implementation of its own non-tariff barriers in order to protect domestic industries from unfair competition. As we have seen, Canada has not been remiss in imposing trade restrictions especially with respect to textiles and agricultural products. Thus, the G.A.T.T. in a role not envisioned by its founders in 1947, is now the primary instrument through which to legitimize the use of non-tariff barriers in establishing economic policy.

A key factor, it is submitted, which has led to the breakdown of the G.A.T.T. as an effective instrument with which to combat non-tariff barriers is the reorientation of the premise upon which an international trading structure is to be based. Currently nations will not hesitate to intervene in the market place when economic circumstances so dictate. The emphasis has switched from one of international trade being determined by free market force and the specialization of nations in those products to which it has a comparative advantage, to that of "managed" trade. Governments now dictate the direction of economic forces as each government desires to obtain the largest share of the international market for its export goods while protecting its domestic industries. Hence the tenets of free trade upon which the G.A.T.T.

is based have been undermined. The attainment of an international market system structured on the free flow of goods is more of an illusion than reality. Unfortunately, the G.A.T.T. maintains the status quo.

The international trading environment, in addition, has undergone other changes since the introduction of the G.A.T.T. Contracting parties have begun to realize that economic policies and programs, although primarily directed to a nation's domestic concerns, have a tendency to severely affect the economies of other nations. The integration of the world economy in the last ten years has meant that economic problems faced by developing nations are translated into international economic problems. Developed countries also feel threatened by the rise of developing nations in Asia, for example, as economic powers in their own right which cannot be easily ignored.

In conclusion, the increasing complexity and integration of the international marketing system in the last two decades has shown that the pursuance of 'free trade' as the premise upon which to found a new international trading system is not a viable concept. The prevailing theory is that of 'managed trade' within which non-tariff barriers have become important implements for the development of a nation's economy. Thus, the G.A.T.T., based on the ideals of free trading environment and comparative advantage, has become outdated and, therefore, unable to prevent the dominance of non-tariff barriers which exist apart from the G.A.T.T.

A new international trading mechanism, with international governmental powers, must be designed to reflect the reorientation of the international trading system and to promote dialogue amongst nations. However, along with the establishment of this new mechanism, nations should recognize the importance of developing an export and import legal strategy which would reduce the use of quantitative restrictions such as subsidies; encourage domestic industries to become more competitive; increase the role of the private sector in the promotion of exports; and lessen the need for the private sector to obtain concessional financing, in order to minimize the chances of breaching the unfair competition legislation of other nations.

What is essential is for nations to recognize the threat of non-tariff barriers to the well-being of the world economic structure and to take steps from a global, as opposed to a national, outlook. An organization must evolve on the international scene which would have the capacity to bind a nation's domestic policies in the arena of international trade. This organization would become the "governmental" structure responsible for establishing and ruling on international trade policies. Contracting Parties must be willing to accept the operation of an international "governmental" organization within their jurisdiction, which organization would have the power to alter a Contracting Party's international trade policy and influence domestic policies in this context. In this regard, the G.A.T.T. could serve as a point of departure upon which both developed and developing nations can meet to discuss the establishment of the new international trading structure which goes beyond the G.A.T.T. in emphasis and recognition capabilities.

The current international trading problems cannot be resolved on the basis of piecemeal negotiations; the entire structure must be revamped. The proposed Canada-U.S. Free Trade Agreement is but one of the first indicators, albeit on a bilateral basis, of the desire of Contracting Parties to take innovative and comprehensive steps to formulate new trading rules in order to promote the enhancement of the flow of both goods and services internationally. New trading rules must now be introduced internationally amongst Contracting Parties.

The G.A.T.T., in 1987, just celebrated its fortieth anniversary as an international trade institution. It is time for this institution to become more than just an organization of "provisional application." Outmoded rules must be updated and basic principles reinforced to include current international trading developments. Keeping in mind the requirement of a multi-lateral system, a "G.A.T.T. II", with international government powers and the capacity to influence a Contracting Party's domestic policy in trade, must emerge upon the international scene in order to prevent further erosion to a "liberalized" or "enhanced" international trading system.

ENDNOTES

1. Gerald M. Meier, "Externality Law and Market Safeguards: Applications in the G.A.T.T. Multilateral Trade Negotiations, (1977) 18 Harv. Internat'l L.J. 491, at p. 501.
2. Louise Sabourin-Hébert, "De la Validité des Subventions au regard de l'Accord général sur les Tariffs douaniers et le Commerce," (1975) 6 Rev. Générale de Droit 339, at p. 356.
3. Canadian Export Association, "Presentation to the Special Joint Committee on Canada's International Relations Bilateral Trade with the United States", Minutes of Proceeding and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Canada's International Relations, Issue No. 4 (Wednesday, July 17, 1985) 32, at p. 33.
4. Certain Softwood Lumber Products From Canada, 51 Fed. Reg. (22 October 1986) 37453.
5. See, infra, text at pp. 55-56, and 97-98.
6. The Conferences held by the G.A.T.T. were:
 - 1947-drafting of the G.A.T.T.;
 - 1949-Annecey, France;
 - 1951-Torquay, England;
 - 1955/56-Geneva, Switzerland;
 - 1960/62-Geneva, Switzerland ("Dillon Round");
 - 1964/67-Geneva, Switzerland ("Kennedy Round"); and
 - 1979-Tokyo/Geneva ("Tokyo Round").
7. Thiébaud Flory, Le G.A.T.T. Droit International et Commerce Mondial (Librairie générale de droit et de jurisprudence - - R. Pichon et R. Durand-Auzias, Paris, 1968) at pp. 3-4.
8. Frank Stone, Canada, the Gatt and the International Trade System (The Institute for Research on Public Policy, Montreal, 1984) at p. 18.
9. Id.
10. Nada J. Farless, "G.A.T.T. and the Tokyo Round: Legal Implications of the New Trade Agreement", (1981) 11 California Western Internat'l L.J. 302, at p. 302.
11. Jean-Yves Grenon, "Les Traités de commerce, cadre de la libéralisation des échanges", (1972) 10 Canada Yearbook of Internat'l L. 65, at p. 89.

12. The General Agreement on Tariffs and Trade, G.A.T.T./1969-1 (Geneva), at p. 2. All further references to articles and sections of the G.A.T.T. are set out in Appendix 1 of this paper.
13. General Agreement on Tariffs and Trade, BISD, IV Supp./82, s. vii (15) (1956). See also: Farless, supra note 10, at p. 305.
14. Thomas R. Graham, "Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage", (1979) 12 Cornell Internat'l L.J. 1, at p. 29.
15. "Contracting Parties" (as opposed to "contracting parties") refers to the situation where the members of the G.A.T.T. are taking joint action.
16. Examples of pre-conditions cited in the G.A.T.T. are: the import restrictions instituted shall not exceed those necessary: (i) to forestall the imminent threat of a serious decline in its monetary reserves, or (ii) in the case of a contracting party with very low reserves, to achieve a reasonable rate of increase in its reserves. Contracting parties applying restrictions must also progressively relax them as such conditions improve.
17. This exemption was added to the G.A.T.T. in 1965.
18. Examples of subsidies are illustrated in: X-Radial Steel Belted Tires From Canada, 38 Fed. Reg. 1018 (8 January 1973), 46 Fed. Reg. 48,737 (1981) aff'd in part, rev'd in part, Michelin Tire & Rubber Corp. v. U.S., 469 F. Supp. 270 (Ct. of International Trade, Oct. 26, 1981) (concessional loan); Final Affirmative Countervailing Duty Determination; Railcars from Canada, 48 Fed. Reg. 6569 (14 February 1983) (concessional loans) and Certain Softwood Lumber Products from Canada, supra note 4 (beneficial stumpage rates). See also: Article II (3) of the G.A.T.T. and Annex to Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, G.A.T.T. Doc. MTN/NTM/W/232, Add. 1/Rev. 1, Add. 2 & Corr. 1, as am. by MTN/NTM/W/241/Rev. 1 (hereinafter referred to as "Subsidies Agreement"). Further references to the Annex to the Subsidies Agreement are set out in Appendix 2 to this paper.
19. Articles 3 and 4, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, BISD, 15th Supp./24 (1967) (hereinafter called "Anti-dumping Code").
20. The decision must be approved by 2/3's of the majority of votes cast and such majority must comprise more than one-half of the Contracting Parties.
21. G.A.T.T. Information, "G.A.T.T. membership as at September 1, 1986", G.A.T.T./1393 (Geneva).

22. Ernst-Ulrich Petersmann, "International and European Foreign Trade Law: G.A.T.T. Dispute Proceedings Against the EEC", (1985) 22 Common Market L. Rev. 441, at p. 452.
23. W. Cline, N. Kawanabe, T. Kronsjö, and T. Williams, Trade Negotiations in the Tokyo Round: A Quantitative Assessment 9 (1978), at p. 1.
24. See: Agreement between Canada and the United States Supplementary to the General Agreement on Tariffs and Trade of October 30, 1947, signed at Geneva, October 30, 1947, as well as the Agreement between Canada and Great Britain Supplementary to the General Agreement on Tariffs and Trade, both published in Canada Treaty Series 1947, No. 27 (Ottawa: Kings Printer, 1947).
25. Government of Canada, A Review of Canadian Trade Policy (Ottawa, 1983) at p. 22. This publication indicated that Canada was the most export-dependant of the leading non-communist industrial nations; id.
26. Report of the Senate Standing Committee on Foreign Affairs, Canada - United States of America Relations, Vol. III, at p. 9.
27. G.A.T.T., "Declaration of Ministers", G.A.T.T. Doc. No. MIN (73) 1 (Sept. 14, 1973) reprinted in General Agreement on Tariffs and Trade, BISD, 20th Supp./19-22 (1974).
28. See, generally: Jackson, "The Crumbling Institutions of International Trade", (1978) 12 Journal of World Trade L. 93; Marks and Malmgren, "Negotiating Non-tariff Distortions to Trade", (1975) 7 Law & Policy in Internat'l Bus. 327; and K. Dam, The G.A.T.T.: Law and International Economic Organization 19-21 (1970).
29. See, generally: G.A.T.T. Information, "Gatt Ministerial Session - Background Notes", G.A.T.T./1395 (Geneva) (10 September 1986).
30. G.A.T.T. Release, "Ministers at G.A.T.T. Session Adopt Declaration", G.A.T.T./1328 (Geneva) (29 November 1982).
31. G.A.T.T. Information, "The Uruguay Round-Decisions of 28 January 1987", G.A.T.T./1405 (Geneva) (5 February 1987).
32. Richard A. Horsch, "Eliminating Non-tariff Barriers to International Trade: The MTN Agreements on Government Procurement", (1979) 12 N.Y.U.J. of Internat'l L. and Pol. 315, at p. 315.
33. For an overview of the origins of the G.A.T.T., see: Stone, supra note 8, at chp. 3.

34. Rodney de C. Grey, "The General Agreement after the Tokyo Round", J. Quinn and P. Slayton (eds.), Non-Tariff Barriers After the Tokyo Round 3 (1982), at p. 4. See, for example, the 1850 Switzerland-United States General Convention of Friendship (11 Stat. 587).
35. T.I.A.S. No. 1700, 55 U.N.T.S. 308. A "grandfather clause" provides that government actions consistent with national legislation enacted prior to the G.A.T.T. and in conflict with the commercial policy sections of the G.A.T.T. are not considered as violations of the G.A.T.T. See: Thomas Sauermilch, "Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade", (1982) 14 Case W.Res. Jrl. of Internat'l L. 83, at p. 86.
36. J. Heller, "International Trade: G.A.T.T. Tokyo Round", (1979) 20 Harv. Internat'l L.J. 695, at p. 696, note 12.
37. See: Graham, supra note 14, at pp. 4-5. UNCTAD was created as a council to consider the terms of world trade in an effort to obtain a fairer exchange among nations. It is more of a political organization which provides resolutions on trade matters. Farless, supra note 10, at p. 309, note 47.
38. See: Farless, supra note 10, at pp. 307-308 and John J. Barceló, "Subsidies, Countervailing Duties and Antidumping After the Tokyo Round", (1980) 13 Cornell Internat'l L. Jrl. 257, at p. 259.
39. See: G.A.T.T. Panel Report, BISD, 23rd Supp./91 (1975-76) (Canadian egg quotas/complaint by U.S.A.); G.A.T.T. Panel Report, BISD, 28th Supp./92-100 (1981) (E.C.C. beef quotas/complaint by Canada); X-Radial Steel Belted Tires from Canada, supra note 18 (concessional loans); and Optic Liquid Level Sensing Systems from Canada, 44 Fed. Reg. (8 Jan. 1979) 1728-30 (assistance for research and development/complaint by U.S.A. producers).
40. See: Cast Iron Soil Pipes..., 32 Fed. Reg. (1967) 12925 and Imports of Stainless Steel on Alloy Tool Steel, 41 Fed. Reg. (18 Mar. 1976) 11269 (concentrated importation from various contracting parties/complaint by U.S.A. producers); Drawback on Automobile Exports from Canada, 29 Fed. Reg. 7249 (3 June 1964) 7249 (import duty remission plan/complaint by U.S.A. manufacturers); Italian Transmission Towers, T.D. 67-102, 32 Fed. Reg. (1967) 6274 and French Tomato Paste, T.D. 68-111, 33 Fed. Reg. (1968) 6010 and Italian Tomato Paste, T.D. 68-112, 33 Fed. Reg. (1968) 6010 (determination of direct subsidy/complaint by U.S.A. manufacturers and producers); European Communities - Refunds on Exports of Sugar - Complaint by Australia, G.A.T.T. Doc. L/4833, BISD 26th Supp./290 (1979) and Complaint by Brazil, G.A.T.T. Doc. L/5011 (1980) (sugar refunds); G.A.T.T. Panel Report, BISD, 10th Supp./46 (1958) (French subsidization of wheat/ complaint by Australia); and G.A.T.T. Panel Report, BISD, 27th Supp./119-126 (1980) (Norwegian textile restrictions/complaint by the United Kingdom on behalf of Hong Kong).

41. Grey, supra note 34, at pp. 5-6. The four tiers are as follows:
1. countries between which the first 34 Articles of the G.A.T.T. established the commercial treaty system;
 2. countries between which free trade area or custom unions operated;
 3. rules as between developed countries applying the G.A.T.T. and developing countries operating under Part IV; and
 4. developing countries arrangements for trade with other developing countries.

It has also been argued that the 1979 Tokyo Round Agreements established a new tier: countries that applied the new Agreements and those which did not. Id.

42. For the procedures with respect to notification, see: G.A.T.T. Art. XVI A(1), General Agreement on Tariffs and Trade, BISD, Vol. III/30 (1958), and BISD, 11th Supp./58-59 (1963).
43. For a discussion as to whether a distinction between "domestic" and "export" subsidies should be incorporated into Article XVI, see, for example, the last draft of the Havana Charter, Section C, Chp. IV, Arts. 25-28), see: Brown, The United States and the Restoration of World Trade (1950), at p. 119. See also: Colin Phegan, "G.A.T.T. Article XVI.3: Export Subsidies and 'Equitable Shares'," (1962) 16 Journal of World Trade L. 251, at p. 251 and the discussion in Phegan, id., at pp 251-54.
44. Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade, 278 U.N.T.S. 168 (10 March 1955).
45. Procès-Verbal of Rectification Concerning the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement on Tariffs and Trade, the Protocol amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade and the Protocol of Organizational Amendments to the General Agreement on Tariffs and Trade, 278 U.N.T.S. 248 (3 December 1955).
46. Id.
47. Sidney Golt, The G.A.T.T. Negotiations 1973-79: The Closing Stage (British-North American Committee, 1978) at p. 23.
48. Steven R. Berger, "Judicial Review of Countervailing Duty Determinations", 19 Harvard Internat'l L.J. 593, at p. 593.
49. Barcelō, supra note 38, at p. 263.

50. E. Bruce Butler, "Countervailing Duties and Export Subsidization: A re-emerging Issue in International Trade", (1969) 9 Virginia Jrl. of Internat'l L. 82, at p. 83.
51. Vijay Laxman Kelkar, "G.A.T.T., Export Subsidies and Developing Countries", (1980) 14 Journal of World Trade L. 368, at p. 369.
52. See: Export Policy: Hearing Before Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs, 95th Congress, 2d Session, part 3, at p. 76 (1978) (prepared statement of Robert D. Hormats, Deputy Assistant Secretary of State for Economic and Business Affairs). See also: R. Richard Rivers and John D. Greenwald, "The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences", (1979) 11 Law and Policy in Internat'l Bus. 1447, at p. 1453.
53. Patrick Low, "The Definition of 'Export Subsidies' in G.A.T.T.", (1982) 16 Journal of World Trade L. 375, at p. 375.
54. G.A.T.T., Declaration Giving Effect to the Provisions of Article XVI: 4, November 19, 1960, G.A.T.T. Doc. L/1381, para. 5 (November 19, 1960), reprinted in General Agreement on Tariffs and Trade, BISD, 9th Supp./186-87 (1961).
55. Report Adopted 21 November 1961 Concerning Operation of Provisions of Article XVI, General Agreement on Tariffs and Trade, BISD, 10th Supp./201-05 (1962).
56. Initially, section B(4) of Article XVI stipulated that Contracting Parties would not introduce or extend existing subsidies from January 1, 1955 to December 31, 1957 (G.A.T.T., Article XVI (4), General Agreement on Tariffs and Trade, BISD, Vol. III/31 (1958)). In a supplementary note to the G.A.T.T., the Contracting Parties agreed to seek agreement to abolish all remaining subsidies before the end of 1957 or to agree to a standstill until an agreement was reached (Interpretative Notes to G.A.T.T., Annex I, Ad. Art. XVI, s. B, para. 4, General Agreement on Tariffs and Trade, BISD, Vol. III/72 (1958)).

By a Declaration dated November 19, 1960, the standstill provision was changed to the date of the Declaration (Declaration of 19 November 1960, Extension of Standstill Provisions of Article XVI:4, General Agreement on Tariffs and Trade, BISD, 9th Supp./34 (1961)). As not all Contracting Parties signed this Declaration, a further declaration was presented in 1964, although this second Declaration was signed, as well, by only a couple of Contracting Parties (Second Declaration on the Extension of the Standstill Provisions of Article XVI:4, General Agreement on Tariffs and Trade, BISD, 12th Supp./50-51 (1964)). See also: Butler, supra note 50, at pp. 90-91.

57. Graham, supra note 14, at p. 20.
58. Drawback on Automobile Exports from Canada, 29 Fed. Reg. 7249 (June 3, 1964).
59. For termination of proceedings, see: 30 Fed. Reg. 764 (1965) (Bureau of Customs). For the text of the "Autopact", see: Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States of America, (1966) 14 Canada Treaty Series or (1966) 17 U.S.T.S. 1372, T.I.A.S. No. 6093. For the G.A.T.T. waiver, see: General Agreement on Tariffs and Trade, BISD, 14th Supp./37 (1966).
60. European Communities, 44 Fed. Reg. 1504 (USTR 1979) (termination) (complaint by U.S. Cannery Association).
61. Cast Iron Soil Pipe., supra note 40 (determination of injury).
62. French Decree No. 68-581, T.D. 68-192, 33 Fed. Reg. 11661 (1968); duty imposed on August 14, 1968 (33 Fed. Reg. 9834 (1968)).
63. X-Radial Steel Belted Tires from Canada, supra note 18. This case considered the effects of a domestic loan program on industry rather than an export subsidy. The finding of injury indicates that the purpose of provincial loans to Michelin Tire & Rubber Corp. was to promote exports, although the form of the loan was not that of an "export subsidy".
64. Domestic International Sales Corporation (D.I.S.C.), 26 U.S.C. ss. 991-997 (1982).
65. Qualified export receipts consist of the sale/exchange/lease/rental of export property, the provision of engineering and architectural skills outside the United States and gains from disposition of assets used in export sales. L. Gilles Sion, "Export Promotion Through Tax Incentives: The Future of D.I.S.C. Under the G.A.T.T. Subsidies Code", (1979) 20 Virginia Jrl. of Internat'l L. 171, at p. 179.
66. Qualified export assets consist of export property, stocks or securities issued by foreign export corporations. Id.
67. Colin Muva, "Note: D.I.S.C.'s - Toward More Effective Export Incentives in the 1980's", (1980-81) 34 Tax Law 197, at pp. 199-200.
68. Report of the G.A.T.T. Panel, United States Tax Legislation (D.I.S.C.), G.A.T.T. Doc. L/4422 (2 Nov. 1976) reprinted in BISD, 23rd Supp./98 (1975-76). For an interesting discussion of the D.I.S.C. controversy, see: David James Cichanowicz, "Notes - Foreign Sales Corporations: A Viable Solution to the D.I.S.C. Controversy?", (1984) 11 Syracuse Jrl. Internat'l L. & Com. 47, at p. 58.

69. December 1981 Statement of Understanding, Report Accompanying adoption of the G.A.T.T. panel reports, reprinted in 16 Tax Notes (CCH) No. 3, at 269 (July 19, 1982).

The issue of tax export aids was also examined by three other G.A.T.T. panels commissioned in 1973 as follows (final reports): Income Tax Practices Maintained by France, Report of the Panel, G.A.T.T. Doc. L/4423 (12 November 1976); Income Tax Practices Maintained by Belgium, Report of the Panel, G.A.T.T. Doc. L/4424 (12 November 1976); and Income Tax Practices Maintained by the Netherlands, Report of the Panel, G.A.T.T. Doc. L/4425 (12 November 1976). In these cases, the G.A.T.T. panel indicated that the defects in the territorial tax systems did not render them in breach of the G.A.T.T. (Id.).

70. Foreign Sales Corporation Act of 1983, 130 CONG. REC. D902, D905 (daily ed. June 27, 1984); 20 WEEKLY COMP. PRES. DOC. 1037 (July 23, 1984).
71. See: H.W. de Jong, "What Role for World Trade", 3 Economic Impact 6 cited in Sabourin-Hébert, supra note 3, at p. 389, and Graham, supra note 14, at p. 19.
72. John J. Barceló, "Subsidies and Countervailing Duties and a Proposal", (1977) 9 Law and Policy in Internat'l Bus. 779, at p. 784.
73. Annex I, Ad. Art. XVI: B(2), General Agreement on Tariffs and Trade, BISD, Vol. III/71 (1958) confirmed by Panel Report adopted 19 November 1960, BISD, 9th Supp./197 (1961).
74. Graham, supra note 14, at p. 34.
75. French Assistance to Exports of Wheat and Wheat Flour, supra note 40.
76. Id.
77. United States Subsidy on Unmanufactured Tobacco, Report of the Working Party, General Agreement on Tariffs and Trade, BISD, 15th Supp./116 (1967).
78. European Communities - Refunds on Exports of Sugar - Complaint by Australia, supra note 40; European Communities - Refunds on Exports of Sugar - Complaint by Brazil, supra note 40. For an interesting discussion of the Panel Report, see: Phegan, supra note 43, at pp. 258-60.
79. G.A.T.T., Trends in International Trade: Report by a Panel of Experts (The Haberler Report), G.A.T.T./1958-3 (October 1958).
80. Report Adopted 21 November 1961 Concerning Operation of Provisions of Article XVI, General Agreement on Tariffs and Trade, BISD, 10th Supp./201-10 (1962).

81. G. Blau & D. Music, Agricultural Commodity Trade and Development: Prospects, Problems and Policies (FAO Commodity Policy Study No. 17, 1964), at pp. 40-46, 107-10.
82. General Agreement on Tariffs and Trade, BISD, 3rd Supp./32 (1955).
83. Treaty of Rome (opened for signature March 25, 1957), 298 U.N.T.S. 3,53, 1 CCH Com. Market Rep. para. 3011.
84. Report of the Sub-Committee C, adopted 29 November 1957, General Agreement on Tariffs and Trade, BISD, 6th Supp./92 (1957).
85. Regulation 25, EEC Council, January 14, 1962, 5 EEC J.O. 991 (1962), 1 CCH Com. Market Rep. para. 901 B as amended. See also: Stone, supra note 8, at pp. 159-160.
86. Supra, note 40.
87. Panel Report on EEC - Measure on Animal Feed Proteins, adopted on 14 March 1978, General Agreement on Tariffs and Trade, BISD, 25th Supp./49-68 (1978).
88. See, for example: 1971 International Wheat Agreement (extended to June 30, 1979) (U.N. Doc. TD/Wheat 5/7, Annex A; U.N. Doc. TD/Wheat 6/5); International Coffee Agreement (B.T.S. 1978/12; U.S., T.I.A.S. 8638); International Sugar Agreement, 1977 (49 Canada Treaty Series, 1980); International Tin Agreement, 1981 (UNCTAD Doc. TD/TIN 6/14). For an interesting discussion in this area, see: Stone, supra note 8, at pp. 144-152.
89. G. Blair, International Commodity Arrangements and Policies (FAO Commodity Policy Study, No. 16, 1964), at pp. 5-6.
90. Integrated Programme for Commodities (Resolution 93(iv)), Proceedings of the United Nations Conference on Trade and Development, Fourth Session, Nairobi, Vol. 1, Report and Annexes, TD/218, 1977); Agreement Establishing the Common Fund for Commodities, (1980) 19 I.L.M. 896-937.
91. In Canada, producers of dairy products and wheat, for instance, are guaranteed a certain return on their labour through the payment of subsidies by the Agricultural Stabilization Board. Furthermore, Canadian legislation regulating the quality of the product permitted to be imported as well as labelling requirements is found in the Agricultural Products Standards Act, R.S.C. 1970, c. A-7.
92. Butler, supra note 50, at p. 83.

93. In the United States of America, prior to the enactment of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974), there was no injury determination in any countervailing duty investigation under section 303 of the Act. See: Judith Hippler Bello and Alan F. Holmer, "U.S. Trade Law and Policy Series #8: Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations", (1986) 20 The International Lawyer 689, at pp. 691-93.
94. For a discussion of a lack of definition of what constitutes injury, see: Sabourin-Hébert, supra note 2, at p. 351 and Golt, supra note 47, at p. 23.
95. Subsidies Agreement, supra note 18. All further references to articles and sections in this Agreement are set out in Appendix 3 of this paper.
96. An example where the question of both a subsidy and the injury caused thereby were considered simultaneously is found in Final Affirmative Countervailing Duty Determination, Railcars from Canada, International Trade Administration, U.S. Department of Commerce, 48 Fed. Reg. 6569. (1983). In this case, the U.S. Department of Commerce determined that export credits provided to Bombardier Inc. of Montreal by the Export Development Corporation of the Government of Canada constituted a subsidy under Title VII of the Tariff Act of 1930, as amended by 19 U.S.C. ss. 1671-1677g (1982) and that the imports of railcars by Bombardier Inc. of Montreal materially injured the U.S.A. industry in this area (Budd Company). For a further discussion of this case, see: infra, text, at p. 108.
97. For a criticism of the retention of the concept of the term "equitable" and proving any increase in share of world trade is the result of subsidization, see: Phegan, supra note 43, at p. 262.
98. For an interesting discussion in this area, see: Rivers and Greenwald, supra note 52, at p. 1488.
99. In contrast, see: the case of Certain Softwood Lumber Products From Canada, supra note 4, and the resulting Canadian legislation, the Softwood Lumber Products Export Charge Act, S.C. 1987, c.15, imposing an export tax on softwood lumber to counteract alleged low provincial and federal stumpage fees on this product. This legislation was enacted by the Federal Government to avoid the imposition by the United States of America of a countervailing duty on softwood lumber imported to the United States of America, which product was deemed to have received a subsidy as a result of low stumpage fees.
100. General Agreement on Tariffs and Trade, G.A.T.T. Doc. L/5808/Add. 12 (20 November 1986) - Status of Acceptances of Protocols, Agreements and Arrangements. For a discussion of the Subsidies Agreement from the point of view of a developing country, see: Kelkar, supra note 51, at pp. 371-73.

101. Part IV of the G.A.T.T., (General Agreement on Tariffs and Trade, Final Act, 2nd Sp. Sess. 25) was added to take into account the concerns of developing countries that their interests were being ignored by developed countries. The addition of Part IV followed on the findings of the Haberler Report (supra note 79) which held developed countries in a large measure responsible for some of the export difficulties of developing countries; the lack of success of the G.A.T.T. Action Programme BISD, 12th Supp./1960 which was not supported by developed countries; and the launching of the United Nations Conference on Trade and Development in 1964, designed to focus on the interests of developing countries. See: Stone, supra note 8, at pp. 117-123.
102. Arrangement Concerning Bovine Meat, General Agreement on Tariff and Trade Doc. MTN/ME/8 (1979).
103. International Dairy Arrangement, General Agreement on Tariffs and Trade Doc. MTN/DP/8 (1979). Further references to the Articles in this Arrangement are set out in Appendix 9 to this paper.

The original signatories to this Arrangement were Argentina, Australia, Austria, Bulgaria, Canada, EEC, Finland, Hungary, Japan, New Zealand, Norway, South Africa, Spain, Sweden, Switzerland, Uruguay and the U.S.A.
104. See: Report of Working Group, adopted May 13, 1959, The General Agreement on Tariffs and Trade, BISD, 8th Supp./156-164 (1959) and Antidumping Duties and Countervailing Duties, G.A.T.T. (Geneva, March 1961) at pp. 7 et seq.
105. Anti-dumping Code, supra note 19. This Code entered into force on July 1, 1968 for the signatories as of that date. This Code was adopted by Canada in 19 Canada Treaty Series (1968) and was in legislation as: Anti-Dumping Act, R.S.C. 1970, c. A-15 (since repealed by S.C. 1984, c. 25, s. 110).
106. Anti-dumping Code, supra note 19, at Articles 3 and 4.
107. See: Flory, supra note 7, at pp. 38-40.
108. Anti-dumping Act, 1921, 19 U.S.C., ss. 160 - 171 (1976) (since repealed by s. 106(a) of the Trade Agreements Act of 1979, 93 Stat. 144, 193 (1979)).
109. Anti-dumping Act, 1921, 19 U.S.C., s. 160 (c) (2).
110. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, G.A.T.T. Doc. MTN/NTM/W/232 Corr. 1, Add. 1/Rev. 1: Add. 2 (1979) (hereinafter referred to as "Anti-dumping Agreement"). All further references to articles and sections of the Anti-dumping Agreement are set out in Appendix 4 of this paper.

111. In Canada, the legislation is contained in the Special Import Measures Act, S.C. 1984, c. 25 (in force 1st December 1984). In the United States of America, the applicable legislation is the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979). The European Economic Communities' legislation is found in Council Regulation No. 2176/84, 27 O. J. EUR. COMM. (No. L. 201) 1 (1984).
112. See: Barcelo, supra note 38, at p. 286; Robert K. Paterson, Canadian Regulation of International Trade and Investment (Carswell, 1986), at pp. 106-107; and J.-G. Castel, A.L.C. de Mestral and W.C. Graham, International Business Transactions and Economic Relations (Edmont Montgomery Publications Limited, 1986), at pp. 271-272.
113. See: Barium Chloride from the People's Republic of China, USITC Pub. No. 1584 (1984) and Chloropicrin from the People's Republic of China, USITC Pub. No. 1505 (1983). See also: William D. DeGrandis, "Proving Causation in Antidumping Cases", (1986) 20 The International Lawyer 563, at pp. 572-575.
114. These concerns were raised with respect to the provisions on undertakings, the lack of reasons where an investigation is terminated on grounds of no apparent injury, the inadequacy of preliminary determination notices and the lack of requirement for the Canadian Import Tribunal to hold public meetings or take evidence when it reviews its own orders, see: Paterson, supra note 112, at pp. 136-138.
115. See, for example, Agricultural Products Board Act, R.S.C. 1970, c. A-5; Livestock and Livestock Products Act, R.S.C. 1970, c. L-8; Food and Drugs Act, R.S.C. 1970, c. F-27 (am. 1976-77, c. 28); Explosives Act, R.S.C. 1970, c. E-15 (am. 1974-75-76, c. 60); Inland Water Freight Rates Act, R.S.C. 1970, c. 26 (1st Supp.); Textile Labelling Act, R.S.C. 1970, c. 46 (1st Supp.); and Meat and Canned Foods Act, R.S.C. 1970, c. M-6.
116. Export and Import Permits Act, R.S.C. 1970, c. E-17, as amended.
117. Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503, 50 U.S.C. App., ss. 2401 et seq. (1982). See also: Trade Expansion Act, 19 U.S.C., s. 1862 (1982) and the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App., ss. 1 et seq. (1982).
118. Foreign Exchange and Foreign Trade Control Law, Law No. 288, 1949, 5 EHS, at AA1.
119. The procedures to be followed are set out in the Export Trade Control Regulation, 1st December 1959, 5 EHS, at AL1, with the conditions of approval set out in the Export Trade Control Ordinance, 1st December 1949, 5 EHS, at AJ1. The Import Control Order, Cabinet Ordinance

No. 414, 1949, 5 EHS, at AO and the Import Control Regulation, MITI Reg. No. 27, 1949, EHS, at AO regulate imports into Japan. See also, Paterson, supra note 112, at pp. 266 et seq.

120. Treaty of Rome, supra note 83.
121. Council Regulation 288/82, 23 O.J. EUR. COMM. (No. L. 35/1) (1982) as am. by 26 O.J. Eur. Comm. (No. C38/1)(1985). This regulation also lists, in Annex 1, those imports which are subject to both national and European Economic Community restrictions.
122. Anita Blair, "Prospects for Implementation of the G.A.T.T. Standards Agreement in the United States", (1979) 20 Virginia Jrl. of Internat'l L. 699, at p. 701.
123. I. Bernier, "Product Standards and Non-Tariff Obstacles: The G.A.T.T. Code on Barriers to Trade", J. Quinn & P. Slayton (eds.) Non-Tariff Barriers after the Tokyo Round 195 (1982), at p. 196.
124. A 1976 complaint by the United States of America that European Economic Community Regulation No. 1927/75, as well as certain implementing regulations, was upheld by the G.A.T.T. in that minimum import prices, licences and surety deposits for tomato concentrates were inconsistent with Articles XI and II of the G.A.T.T. (Panel Report, "EEC-Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" (adopted on 18 October 1978), General Agreement on Tariffs and Trade, BISD, 25th Supp./68-107). See also: Bernier, supra note 123 for a further discussion in this area; and Panel Report, "EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong" (adopted 12th July 1983), General Agreement on Tariffs and Trade, BISD, 30th Supp./129-40 (complaint by U.K. on behalf of Hong Kong against restrictions imposed by France on various imports from Hong Kong; restrictions held to contravene Article XI).
125. Graham, supra note 14, at pp. 13-14. In the United States of America, the American Home Assurance Company complained that Korea discriminated against their company by, among others, failing to allow its company to be licenced to issue marine insurance policies or to participate on joint ventures on fire insurance; see: American Home Assurance Company, 44 Fed. Reg. 75,246 (1979) (initiation). (As a result of consultations with the Korean Government, the investigation was terminated; see: American Home Assurance Company, 45 Fed. Reg. 85,539 (1980) (termination)).
126. Agreement on Import Licensing Procedures, G.A.T.T. Doc MTN/NTM/W/231/Rev. 2 (hereinafter referred to as "Licensing Agreement"). All further references to articles and sections in this Agreement are set out in Appendix 6 to this paper.

127. Agreement on Technical Barriers to Trade, G.A.T.T. Doc. MTN/W/192/Rev. 5 (hereinafter referred to as "Technical Agreement"). All further references to articles and sections in this Agreement are set out in Appendix 7 to this paper.
128. See: Bernier, supra note 123, at p. 214.
129. See also, Blair, supra note 122, at p. 706.
130. Butler, supra note 50, at p. 106.
131. This has been a criticism often directed at the Common Agricultural Policy operated by the European Common Market. For an interesting discussion of the Common Agricultural Policy and proposed reforms thereto, see: Graham Avery, "The Common Agricultural Policy: A Turning Point", (1984) 21 Common Market L. Rev. 481.
132. See: Emond M. Ianni, "The International Treatment of State Trading", (1982) 16 Journal of World Trade L. 480, at pp. 481-482.

Ianni states that at least three types of state trading may be described:
 - (a) where the State owns the trading enterprise;
 - (b) where the State directly controls but does not own a private enterprise to the extent that its trading operations and/or management is predominantly controlled by the State; and
 - (c) where trading enterprises are granted exclusive or special privileges by the State.
133. For example, Canada has the following marketing boards: the Canadian Dairy Commission, the Canadian Wheat Board and the Egg Marketing Board. Other Enterprises exist in other countries such as: Compañia Nacional de Subsistencias Populares (Mexico); Empresa Nacional de Comercialización de Insumos (Peru); and The General Company for Dairies and Products (Libya).
134. With respect to promoting the sale of Canadian products, the Federal Government has enacted the Canadian Commercial Corporation Act, R.S.C. 1970, c. C-6. Loans, insurance and tax incentives are dealt with, for example, by the Export Development Act, R.S.C. 1970, c. E-17, Agricultural and Rural Development Act, R.S.C. 1970, c. A-4, the Farm Credit Corporation Act, R.S.C. 1970, c. F-2, and the Agricultural Stabilization Act, R.S.C. 1970, c. A-9. Most Canadian provinces also have development corporations; for example, Small Business Development Corporation Act, R.S.O. 1980, c. 475 (Ontario) and Act respecting the Société de développement industriel du Québec, R.S.Q. 1977, c. S-11.01 (Québec).

135. For a recent discussion of the services issue in the G.A.T.T., see: G.A.T.T. Ministerial Session - background Notes, supra note 29, at pp. 22-24.
136. (1985) 18 Bulletin of the European Communities (no. 4), at pp. 45-46; (1985) 18 Bulletin of the European Communities (no. 11), at pp. 85-86.
137. (1985) 18 Bulletin of the European Communities (no. 7/8), at pp. 83-84 and (1985) 18 Bulletin of the European Communities (no. 12), at pp. 91-92.
138. 41 Fed. Reg. 52,567 (1976) (initiation); 50 Fed. Reg. 15,266 (1985) (recommendations); 50 Fed. Reg. 25,685 (1985) (determination of discrimination).
139. Proclamation No. 5354, 50 Fed. Reg. 26,143 (1985) (imposition of duties on EEC pasta products).
140. The European Economic Community agreed to lower tariffs on various citrus products and nuts and the United States of America agreed to lower tariffs on anchovies, olives, olive oil, paprika, capers and fermented cider. See: "Withdrawal of Increased Rates of Duty on Certain Pasta Articles from the European Economic Community", 51 Fed. Reg. 30,146 (1986) and (1985) 18 Bulletin of the European Communities (no. 7/8), at pp. 85-86.
141. Meier, supra note 1, at p. 494.
142. See: J. Jackson, World Trade and the Law of G.A.T.T., c. 23 (1969), at p. 151 and Meier, supra note 1, at p. 495. "Hatter's Fur Case" - Contracting Parties to the G.A.T.T., Report on the Withdrawal by the U.S. of a Tariff Concession Under Article XIX of the G.A.T.T.; G.A.T.T./1951-3/1951, G.A.T.T./CP/106.
143. Sauermilch, supra note 35, at p. 113. Government to government agreements are also referred to as orderly marketing arrangements. For the purpose of this paper, all agreements will be identified as VER agreements.
144. I. Bernier, "Les ententes de restriction volontaire à l'exportation en droit international économique", (1973) 11 Canada Yearbook of Internat'l L. 48, at p. 49.
145. Castel, supra note 112, at p. 142.
146. See: Kyoda News Agency, 7th May 1981, cited in Paterson, supra note 112, at p. 79, note 14 as well as Paterson, supra note 112, at p. 79.
147. For a discussion on the Canada-Japanese VER agreement for automobiles, see: Castel, supra note 112, at pp. 142-143 and Paterson, supra note 112, at pp. 79-80.

148. Certain Softwood Lumber Products From Canada, supra note 4.
149. Section 1, Memorandum of Understanding, Note, Embassy of Canada, December 30, 1986. See also: Minister for International Trade, Statement, 86/80, dated December 31, 1986.
150. Id.
151. Softwood Lumber Export Charge Act, supra note 99.
152. Statement by the Honourable Pat Carney, Minister for International Trade, to the Legislative Committee on Bill C-37 (Softwood Lumber Products Export Charge Act), Appendix C-37/1, Hansard, Issue no. 1 (Thursday, February 10, 1987) 40.
153. See: Statement in the House of Commons by the Honourable Pat Carney, Minister for International Trade, on Canadian Steel Policy, Hansard, Issue no. 103 (Wednesday, April 8, 1987) 4980-4981 and An Act to Amend the Export and Import Permits Act, S.C. 1987, c. 16 (monitoring of steel).
154. Petersmann, supra note 22, at p. 443, note 5.
155. Arrangement on the Restriction of exports of Certain Steel Products to the U.S.A., Official Journal Legislation 307, 1.11.1982 as am. by O.J. EUR. COMM. - Legislation 355, 31.12.1985; and arrangement on the Restriction of Exports of Steel Pipes and Tubes to the USA, O.J. EUR. COMM. - Legislation 9, 10.1.1985, as am. by O.J. EUR. COMM. - Legislation 355, 31.12.1985.
156. See, for example: Semi-Conductor Industry Association, 50 Fed. Reg. 28,866 (U.S.T.R. 1985) (initiation), 51 Fed. Reg. 27,811 (U.S.T.R. 1986) (agreement); Imports of Stainless Steel or Alloy Tool Steel, 41 Fed. Reg. 11,269 (18 March 1986), White House Press Release (11 June 1976) (text of VER agreements). See, generally, Paterson, supra note 112, at pp. 282-284.
157. See: John H. Jackson et al, "Implementing The Tokyo Round: Legal Aspects of Changing International Economic Rules", (1982-83) 81 Michigan L. Rev. 267, at pp. 302-303; Patrick Orr, "International and Canadian Quantitative Restrictions on World Textile Trade", (1980) 38 U. of Toronto Faculty of L. Rev. 52, at p. 78; and Bernier, supra note 144, at p. 48.
158. See: Annex to 1984 Report on 'Safeguards', by the Chairman of the G.A.T.T. Council, General Agreement on Tariffs and Trade, BISD, 31st Supp./1985-2.
159. Sauermilch, supra note 143, at p. 115.

160. Decision by the Contracting Parties With Respect to Market Disruption, General Agreement on Tariffs and Trade, BISD, 9th Supp./26-28 (19 November 1960).
161. The Short Term Arrangement Regarding International Trade in Cotton Products, General Agreement on Tariffs and Trade, BISD, 10th Supp./18-22 (21 July 1961).
162. The Long Term Arrangement Regarding Trade in Cotton Textiles, General Agreement on Tariffs and Trade, BISD, 11th Supp./25-41 (9 February 1962).
163. The Arrangement Regarding International Trade in Textiles, General Agreement on Tariffs and Trade, BISD, 21st Supp./3-18 (20 December 1973), extended by protocol in 1977 (G.A.T.T., BISD, 24th Supp./5-8 (1 January 1978)) and in 1978 (G.A.T.T., BISD, 28th Supp. (1 January 1982)) and recently, in 1986 (G.A.T.T./COMM. TEX/W/183 (31 July 1986)). In this paper, this arrangement will be identified as the "Multifibre Arrangement".
164. Multifibre Arrangement, General Agreement on Tariffs and Trade, BISD, 21st Supp./ (1973), at Article 1(1).
165. Id., at Article 2.
166. Id., at Annex B.
167. Id., at Annex A.
168. Id., at Article 4(3).
169. Id., at Articles 5, 6, 10, 11, and 12, respectively.
170. Protocol of Extension of 1986, General Agreement on Tariffs and Trade, COMM. TEX/W/183 (31 July 1986).
171. The 1977 Protocol (G.A.T.T., BISD, 24th Supp./5-8 (1 January 1978)) permitted "jointly agreed departures from the rules established for base-year quota levels, annual growth of quotas, and the administration of such quotas". See: Stone, supra note 8, at p. 106.
172. See: 1982 Protocol (G.A.T.T., BISD, 28th Supp. (1 January 1982), at s. 4 and 1986 Protocol, supra note 170, at s. 5.
173. For a list of signatories to the Multifibre Arrangement, see: Castel, supra note 112, at p. 115.
174. Leonard E. Santos, "The National Security Exception to Free Trade", (1983) 30 Federal B. News and Jrl. 293, at p. 293.

175. Procedures for Consultations on Balance-of-Payments Restrictions, General Agreement on Tariffs and Trade, BISD, 18th Supp./48-53 (28 April 1970) and Consultations on Balance-of-Payment Restrictions With Developing Countries, General Agreement on Tariffs and Trade, BISD, 20th Supp./47-49 (19 December 1972).
176. The International Monetary Fund was established by the International Monetary Fund Treaty, T.I.A.S. No. 1501, 2 U.N.T.S. 39 (opened for signature December 27, 1945).
177. Flory, supra note 7, at pp. 29-30.
178. Ernst-Ulrich Petersmann, "Application of G.A.T.T. By the Court of Justice of the European Communities", (1983) 20 Common Market L. Rev. 397, at p. 428 and Frieder Roessler, "The G.A.T.T. Declaration on Trade Measures Taken for Balance-of-Payment Purposes: A Commentary", (1980) 12 Case W. Res. Jrl. of Internat'l L. 383, at p. 383.
179. Roessler, supra note 178, at p. 383. See also: G.A.T.T. Doc. COMM. TD/F/W/3 (1965).
180. Recommendation of Contracting Parties, General Agreement on Tariffs and Trade, BISD, 11th Supp./56 (14 November 1962).
181. See: G.A.T.T. Press Communiqué of December 21, 1964, G.A.T.T./913, (relating to Great Britain) and G.A.T.T. Doc. L/4687 (1978), at p. 41 (adopted by G.A.T.T. Doc. C/M/128 (1978), at p. 4).
182. Declaration On Trade Measures Taken For Balance-of-Payments Purposes, G.A.T.T. Doc. L/4904 (adopted November 28, 1979) (hereinafter referred to as the "Declaration"). Further references to articles in this Declaration are set out in Appendix 8 to this paper.
183. See: Roessler, supra note 178, at pp. 392-393.
184. See: Stegeman and Acheson, "Canadian Government Purchasing Policy", (1972) 6 Journal of World Trade L. 42.
185. A.L.C. de Mestral, "The Impact of the G.A.T.T. Agreement on Government Procurement in Canada", J. Quinn & P. Slayton, (eds.), Non-Tariff Barriers After the Tokyo Round (1982) 171, at p. 172.
186. Id.
187. Agreement on Government Procurement, G.A.T.T. Doc. MTN/NTM/W/211/Rev. 2 & Add. 1 (hereinafter referred to as "Procurement Agreement"). Further references to articles and sections in this Procurement Agreement are set out in Appendix 5 to this paper.

188. See, infra text at pp. 94-95. Unfortunately, the embargo lists of this Committee are not made public.
189. In Canada, see: Export and Import Permits Act, supra note 116 and Defence Production Sharing Agreement, dated 27 July 1956, as am. by 17 December 1956, 31 May 1957, 6 January 1961, and 15 October 1962, Federal Acquisition Regulations 25.7102 (Appendix T, Subpart 2).
190. The following countries have accepted the Procurement Agreement: Austria, Canada, EEC, Finland, Israel, Japan, Norway, Singapore, Sweden, Switzerland, the U.K. (with reservations), Hong Kong and the United States of America. See: Status of Acceptances of Protocols, Agreements and Arrangements, supra note 100.
191. These exceptions are found in Article III(10) and Article IV (cinematography films) and Article V (freedom of transit) of the G.A.T.T.
192. Procurement Agreement, supra note 187, at paragraph 1(a) of Article I; and Subsidies Agreement, Illustrative List of Subsidies, supra note 18, at paragraphs (d), (j) and (k).
193. See, for example, Convention on the Organization for Economic Co-operation and Development, 12 U.S.T. 1728, T.I.A.S. No. 4891 (14 December 1960); OECD, Code of Liberalization of Current Invisible Operations, March 1973, Paris; OECD, Code of Liberalization of Capital Movements, March 1982; OECD Trade Declaration of 1980, OECD Observer, No. 111, July 1981, pp. 16-17; Services and the Development Process, UNCTAD, TD/B/1008 (1984); Convention on International Civil Aviation, Doc. 7300/4, 15 UNTS 295; and the UN Convention on the Carriage of Goods by Sea (Hamburg Rules) (1978).
194. Ministers at G.A.T.T. Session Adopt Declaration, supra note 30, at paragraph 7(ix) (at p. 4).
195. Id., at p. 14.
196. Paterson, supra note 112, at pp. 305-306.
197. Steven F. Benz, "Trade Liberalization and the Global Service Economy", (1985) 19 Journal of World Trade L. 95, at pp. 95-97.
198. M. Cohen and T. Morante, "Elimination of Non-Tariff barriers to trade in services: recommendations for future negotiations", (1981) 13 Law and Policy in Internat'l Bus. 495, at p. 499. For example, Canada's Bank Act, S.C. 1980-81-82-83, c. 40, as amended, demands that data be processed and kept within Canada.

199. See: Memorandum of November 16, 1984 to the U.S. Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 49 Fed. Reg. 45,733 (1984) (Complaint against Argentina - carriage of documents); American Home Insurance Company, supra note 125 (complaint against Korea - restrictions regarding selling of insurance policies); Japan's Practice With Respect to the Manufacture, Importation and Sale of Tobacco Products, 50 Fed. Reg. 37,609 (USTR 1985) (initiation), 51 Fed. Reg. 35,995 (1986) (termination) (complaint against Japan - marketing restrictions for tobacco products); and Brazil's Informatic Policy, 50 Fed. Reg. 37,608 (1985) (initiation), 51 Fed. Reg. 35,995 (1986) (determination) (complaint against Brazil - restrictions on sale of computer services).
200. See, for example, Austria: Statement By Mr. Gerhard Waas, Director-General in the Ministry for Commerce, Trade and Industry, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/65 (18 September 1986); Japan: Statement by Mr. Kuranari, Foreign Minister, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, G.A.T.T. DOC. MIN (86)/ST/2 (15 September 1986); EEC: Statement by Mr. De Lerq, Member of the Commission of the European Communities, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/38 (17 September 1986); and Belgium: Statement by Mr. Herman de Croo, Minister for Foreign Trade, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/41 (17 September 1986).
201. See: Benz, supra note 197, at p. 97.
202. See, for example, United Kingdom: Statement by the Hon. Alan Clark, M.P., Minister for Trade, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/52 (18 September 1986).
203. See, for example, United States: Statement By Ambassador Clayton Yeutter, Trade Representative, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/5 (15 September 1986).
204. See, for example, Nicaragua: Statement at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/29 (17 September 1986) and Peru: Statement by Dr. Pedro Menendez R., Deputy Minister for Trade of Peru, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/28 (17 September 1986).

205. See, for example, India: Statement By Mr. Vishwanath Pratap Singh, Finance Minister, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/33 (17 September 1986); and Brazil: Statement by Mr. Roberto de Abreu Sodre, Minister for External Relations, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/20 (16 September 1986).
206. See, for example, Peru: Statement ... At the Meeting of the G.A.T.T. Contracting Parties, supra note 204; and ASEAN: Statement at the Meeting of the G.A.T.T. Contracting Parties at the Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/4 (15 September 1986).
207. See, for example, Chile: Statement by Mr. Hernan Buchi, Minister of Finance at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/68 (19 September 1986); Mexico: Statement by Mr. Hector Hernandez Cervantes, Minister for Trade and Industrial Development, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/16 (16 September 1986); and Cote d'Ivoire: Statement by H.E. Mr. Ambassador Amadou Traore, Head of the Delegation, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/6 (15 September 1986).
208. See: R. Hudec, "G.A.T.T. Dispute Settlement After the Tokyo Round: An Unfinished Business", (1980) 13 Cornell Internat'l L. Jrl. 145.
209. This practice was officially recognized in: the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, General Agreement on Tariffs and Trade, BISD, 26th Supp./210 (28 November 1979).
210. See: Phegan, supra note 43, at p. 256 and Graham, supra note 14, at p. 29.
211. In this regard, see the discussion in: Petersmann, supra note 22, at pp. 465-473.
212. Kenneth W. Abbott, "The Trading Nation's Dilemma: The Functions of the Law of International Trade", (1985) 26 Harvard Internat'l L. Jrl. 501, at p. 502.

213. "Economic soft law" norms have been defined as "legal or non-legal obligations which create the expectation that they will be used to avoid or resolve disputes. They are not subject to effective third party interpretation and their subject matter and formation is international in nature". Tadeusz Gruchalla-Wesierski, "Framework for Understanding 'Soft Law'", (1984) 30 McGill L. Jnl. 38, at p. 44.
214. Id., at p. 48.
215. Id., at pp. 46, 54 and 69. See also: Serge Sur, "Quelques observations sur les normes juridiques internationales", (1985) 89 Revue générale de droit international public 901 for a general discussion on the effect of international law among States.
216. Rivers and Greenwald, supra note 52, at p. 1464. See also: European Communities - Refunds on Exports of Sugar, supra note 40; G.A.T.T. Panel, United States Tax Legislation (D.I.S.C.), supra note 68, and Withdrawal of Increased Rates of Duties on Certain Pasta Articles from the European Economic Community, supra note 140.
217. American Society of International Law, "Multilateral Trade Negotiations: Dispute Settlement", Proceedings of the 74th Annual Meeting (April 17-19, 1980), Washington D.C. 129, at p. 131 (Hudec).
218. Thomas E. Roschke, "The G.A.T.T.: Problems and Prospects", (1977) 12 Journal of Internat'l L. and Ecos. 85, at p. 90.
219. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (hereinafter referred to as the "Understanding"), supra note 209. Further references to articles and sections of the Understanding are set out in Appendix 10 to this paper.
220. Ministers at G.A.T.T. Session Adopt Declaration, supra note 30, at pp. 6-8. This Declaration, in the area of dispute settlement procedures, set out a means, for example, of obtaining better access to the conciliatory process (clause (i), p. 6).
221. For an interesting examination of the G.A.T.T. dispute resolution mechanism from two different perspectives, see: Peter D. Ehrenhaft, "A US View of the G.A.T.T.", (1986) 14 International Business Lawyer 146 and R. Phan van Phi, "A European View of the G.A.T.T.", (1986) 14 International Business Lawyer 150.
222. See, for example, India: Statement ... At the Meeting of the G.A.T.T. Contracting Parties, supra note 205; Nicaragua: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 204; Peru: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 204; Uruguay: Statement at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este,

- Uruguay, G.A.T.T. DOC. MIN (86)/ST/45 (17 September 1986); Canada: Statement at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/10 (16 September 1986); Kenya: Statement by Hon. Professor Jonathan K. Ng'Eno, Minister for Commerce and Industry, at the Meeting of the G.A.T.T. Contracting Parties at the Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/48 (18 September 1986); France: Statement by Mr. Michel Noir, Minister for Foreign Trade, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/32 (17 September 1986); Israel: Statement by Ariel Sharon, Minister of Industry, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/51 (18 September 1986); Mexico: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 207; and Austria: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 200.
223. See: G.A.T.T. Ministerial Session - Background Notes, supra note 29, at p. 20 and The Uruguay Round - Decisions of 28 January 1987, supra note 31, at p. 20.
224. For example, with the demise of the D.I.S.C. (supra note 64), the United States immediately passed legislation introducing the F.I.S.C. (supra note 70) as a replacement. In addition, the U.S. Superfund tax on imported oil was recently determined to be discriminatory and in violation of the G.A.T.T., see: G.A.T.T. DOC. L/6175 (5 June 1987) (adopted July 17, 1987).
225. See, for example, Article 10 (primary products) and Article 14 (developing countries) of the Subsidies Agreement; Annexes (exceptions to minimum dairy products export prices) to the Arrangement; Article 3(4) (interpretation of material injury) of Anti-dumping Agreement; Article 2(2.2) (national security, health and safety, etc. exceptions) of the Technical Agreement; and Article I(1)(c) (application restricted to certain entities) and Article VIII(2) (public morals, health and safety, etc. exceptions) of the Procurement Agreement.
226. See, for example, Articles VII and VIII of the Arrangement; Articles 1, 7, 8 and 12 of the Subsidies Agreement; and Article 5(3) of the Licensing Agreement.
227. Ministers at G.A.T.T. Session Adopt Declaration, supra note 30, at p. 26. For an interpretation of the 1982 Ministerial meeting, see: Bhagirath L. Das, "The G.A.T.T. Ministerial Meeting, 1982, An Interpretative Note", (1984) 18 Journal of World Trade L. 3.
228. Ministers at G.A.T.T. Session Adopt Declaration, supra note 30, at pp. 1-2.

229. Id., at pp. 3-4. The effectiveness of the Undertakings of the Contracting Parties was mitigated by the declaration of the European Economic Community that only its "best efforts" would be deployed to avoid taking or maintaining any measures inconsistent with the G.A.T.T. and that its acceptance of the priorities was on the understanding that such priorities would not include a commitment to any new negotiation or obligation in relation to agricultural products, see: "G.A.T.T.: Ministerial Declaration", (1983) 17 Journal of World Trade L. 67, at p. 78, Note.
230. See: James Walsh, "Countertrade: Not just for East-West anymore", (1983) 17 Journal of World Trade L. 3, at p. 5.
231. Excerpt from statement by Claire Wilcox, one of the chief U.S. negotiators of the G.A.T.T. quoted in Orr, supra note 157, at pp. 53-54.
232. See: Investigation No. TA-201-40, 45 Fed. Reg. 8165 (1980)(leather wearing apparel; adjustment assistance/45 Fed. Reg. 19543); Investigation No. TA-201-43, 45 Fed. Reg. 57221 (1980)(mushrooms; duties/45 Fed. Reg. 7217); Investigation No. TA-201-47, 48 Fed. Reg. 6043 (1983)(motorcycles; tariff-rate quotas/48 Fed. Reg. 16639); and Investigation No. TA-201-48, 48 Fed. Reg. 22373 (1983)(stainless steel; tariffs and quotas/48 Fed. Reg. 33233).
233. Trade Act of 1974, supra note 93. Memorandum of March 16, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 9437 (1986).
234. General Agreement on Tariffs and Trade, BISD, 31st Supp. (20 November 1984) (newsprint) and Canadian beef, supra note 39.
235. (1986) 19 Bulletin of the European Communities (no. 7/8), at p. 80 (typewriters and photocopiers - Japan); (1985) 18 Bulletin of the European Communities (no. 7/8), at p. 82 (polystyrene sheet - Spain); and (1985) Bulletin of the European Communities (no. 11), at p. 83 (multiphase electric motors).
236. Citrus dispute, supra notes 139 and 140. See also: (1985) 18 Bulletin of the European Communities, (no. 10), at pp. 60-61 and Judith Hippler Bello and Alan F. Holmer, "U.S. Trade Law and Policy Series #10: Significant Recent Developments in Section 301 Unfair Trade Cases", (1987) 21 The International Lawyer 211, at pp. 225-227.
237. See: (1986) 19 Bulletin of the European Communities (no. 7/8), at pp. 81-82; and (1986) 19 Bulletin of the European Communities (no. 10), at pp. 60-61 (citrus fruits and pasta).
238. As part of the arrangements for Portugal's and Spain's accession to the European Economic Community, the Community imposed, for instance, restrictions on the importation into Portugal of oilseeds and oilseed products and on the consumption of certain vegetable oils in Portugal.

- Accordingly, the United States of America imposed quantitative restrictions on chocolate candy, apple juice, certain beer, and white wine from the European Economic Community. In response, the European Economic Community withdrew tariff concessions on American corn and sorghum exported by the United States of America to Spain. An interim solution was negotiated between the parties in July 1986. See: Memorandum of May 15, 1986. See: Memorandum of May 15, 1986, for the United States Trade Representative, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 18,294 (1986); (1986) 19 Bulletin of the European Communities (no. 7/8), at pp. 82-83; (1986) 19 Bulletin of the European Communities (no. 10), at pp. 60-61; and Bello and Holmer, supra note 236, at pp. 216-218.
239. Tanner's Council of America, Inc., 42 Fed. Reg. 42,413 (1977) (initiation); 45 Fed. Reg. 51,171 (1980) (monitoring of understanding reached between U.S.A. and Japan); 51 Fed. Reg. 9437 (1986) (determination).
240. This occurred in the disputes involving pasta, oilseeds and leather, supra notes 236-239. See also: Review of the Effectiveness of Trade Dispute Settlement Under the G.A.T.T. and the Tokyo Round Agreements, Inv. No. 332-12, US ITC Pub. 1793 (December 1985).
241. Withdrawal of United States of America from International Dairy Arrangement - Notice, General Agreement on Tariffs and Trade, G.A.T.T. DOC. L/5517/Add. 11 (15 January 1985); and Food Security Act of 1985, Pub. L. 99-198, 99 Stat. 1354 (December 23, 1985).
242. Joel B. Dirlam and Hans Mueller, "Import Restraints and Reindustrialization: The Case of the U.S. Steel Industry", (1982) 14 Case W. Res. Jrl. of Internat'l L. 419, at pp. 427 and 430.
243. Com. Dec. 257/80/ECSC, O.J. 1980, L29/5 (First Aids Code); Com. Dec. 2320/81/ECSC, O.J. 1981, L228/14 (Second Code on Aids); Com. Dec. 3484/85/ECSC, O.J. 1985, L340/1 (Third Aids Code).
244. Foreign Sales Corporation Act of 1983, supra note 70.
245. December 1981 Statement of Understanding, Report Accompanying Adoption of the G.A.T.T. Panel Reports, supra note 69. The G.A.T.T. Council also concluded that Article XVI (4) of the G.A.T.T. would be interpreted to require arm's-length prices in connection with the taxation of export transactions and would not be interpreted as a prohibition on the adoption of measures designed to prevent double taxation on export earnings. Id.
246. Cichanowicz, supra note 68, at pp. 63-65.

247. Id. at p. 82. It was stated that the benefits to be obtained by the F.I.S.C. will depend on whether the F.I.S.C. is located in a low tax country, the costs of foreign administration, and the like.
248. The United Nation's Conference on Trade and Development in Geneva in 1964 agreed to meet every three years, to establish permanent institutional arrangements to deal with international commodity-trade arrangements, and to establish a new secretariat in Geneva and a Trade and Development Board. For a discussion on the development of the United Nations Conference on Trade and Development, see: Stone, supra note 8, at pp. 120-125.
249. Protocol Amending the General Agreement on Tariffs and Trade to Introduce Part IV on Trade and Development, General Agreement on Tariffs and Trade, BISD, 13th Supp./2 (8 February 1965).

Article XXXVI sets out the objectives and principles of Part IV; that is, to assist developing countries in promoting their trade and development. In Article XXXVII, developed contracting parties, among others, are to accord high priority to the reduction and elimination of trade barriers to products of interest to developing countries, to the "fullest extent possible" and except when "compelling reasons" make it impossible. In addition, in accordance with Article XXXVIII, Contracting Parties, where appropriate, are to undertake programs of interest to developing countries in trade and development matters.

250. See: Chile: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 207; ASEAN: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 206; India: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 205; Nicaragua: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 204; Peru: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 204; Uruguay: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 222; Cote d'Ivoire: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 207; and Kenya: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 222.
251. See: "Taiwan sharpens its dragon teeth", The Economist, June 22, 1985, Vol. 295, no. 7399, at p. 69.
252. Rivers and Greenwald, supra note 52, at p. 1450.
253. Brazil's Informatic Policy, supra note 199; American Home Insurance Company, supra note 125 (Korea's insurance policies); Korea's Restrictions on Insurances Services, 50 Fed. Reg. 37,609 (USTR 1985) (initiation), The White House, Office of the Press Secretary, Statement by the Principal Deputy Press Secretary, 21 WEEKLY COMP. PRES. DOC. 1258 (October 16, 1985) (investigation), The White House, Office of the Press

Secretary, Statement by the Deputy Press Secretary (July 21, 1986), at pp. 1-2 (agreement with Korea concerning intellectual property rights); and Japan's Practice With Respect to the Manufacture, Importation and Sale of Tobacco Products, supra note 199.

254. See, for example, Peru: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 204; ASEAN: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 206; India: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 205; Chile: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 207.
255. See for example, Austria: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 200; Canada: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 222; Israel: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 222; and Australia: Statement by Hon. J.S. Dawkins, Minister for Trade, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/15 (16 September 1986). For those desiring restraint in the liberalization of trade in the agriculture sector, see, for example, EEC: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 200; France: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 222; and Belgium: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 200.
256. Concern over surplus and reduction programs: (1986) 19 Bulletin of the European Communities (no. 6), at pp. 62-64 and (1986) 19 Bulletin of the European Communities (no. 10), at pp. 44-47. For a discussion on the sale of butter by the European Economic Community at reduced prices and the reaction thereto, see: Edmund Neville-Rolfe, International Trade in Dairy Products - Special Report No. 204 (The Economist Publications Ltd., June, 1985) at p. 55. For the withdrawal of the United States of America from the Arrangement, see, supra note 241, and for the withdrawal of Austria from the Arrangement, see: Status of Acceptances of Protocols, Agreements and Arrangements, General Agreement on Tariffs and Trade, G.A.T.T. DOC. L/5517/Add. 16 (3 May 1985).
257. Graham Avery, "The Common Agricultural Policy: A Turning Point", (1984) 21 Common Market L. Rev. 481, at pp. 493-495.
258. Committee on Agriculture, News Release, U.S. House of Representatives, Tuesday, May 14, 1985, at p. 1 concerning the adoption of the trade and overseas food section of the Food Security Act of 1985, supra note 241.
259. See: Citrus/pasta dispute, supra notes 139, 140, 236 and 237; and Enlargement Dispute, supra note 238.

260. Critics argue that VER agreements between importers and exporters are against the philosophy of the G.A.T.T., assume quotas will be fully utilized, ignore the competitiveness of individual while setting quotas, and, especially with the Multifibre Arrangement, attempt to freeze existing trade patterns to the detriment of new entries into the market; see: Dilip K. Das, "Dismantling the Multifibre Arrangement?", (1985) 19 Journal of World Trade L. 67, at p. 78.
261. Textiles, (1985) 18 Bulletin of the European Communities (no. 7/8), at p. 83 and (1985) 18 Bulletin of the European Communities (no. 12), at p. 91.
262. Id.
263. Protocol Extending the Arrangement Regarding International Trade in Textiles, supra note 170.
264. Id., at p. 2.
265. Id., at pp. 5-6.
266. Id., at p. 4.
267. See: "Developed countries cling to textile accord", The Globe and Mail, Monday, January 13, 1986, at p. B14. See also, "Defying Reagan, Senate Votes Asian Textile Quotas", International Herald Tribune (H.K.), Friday, November 15, 1985, at p. 1 and "Textile briefing today", The Nation (Bangkok), Monday, November 18, 1985, at p. 18.
268. See, for example, India: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 205; Chile: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 207; Mexico: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 207; and Uruguay: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 222. For the viewpoint of a new entrant, see: Israel: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 222.
269. Press Release, "Ministerial Declaration On the Uruguay Round", General Agreement on Tariffs and Trade, G.A.T.T./1396 (25 September 1986).
270. It is not clear, however, that the availability of inexpensive labour of developing countries is threatening the survival of developed countries' textile industries in all cases especially when some developed countries have access to more capital-intensive technology. Das, supra note 260, at p. 76.
271. Arrangement restricting steel, supra note 155; and Arrangement restricting steel pipes and tubes, supra note 156.

272. 1982 Arrangement (Steel) with the USA, Council Regs. (EEC) 3708/85 and 3710/85, and Com. Dec. 712/85/ECSC, O.J. 1985, L355/1 et seq.; Com. Regs. (EEC) 977/86 and 979/86, and Com. Dec. 978/86, O.J. 1986, L91/1 et seq.; Arrangements with Spain and Romania, as well as the Arrangement with Brazil, see: (1985) 18 Bulletin of the European Communities (no. 1), at point 2.2.10 and (1985) 18 Bulletin of the European Communities (no. 3), at point 2.2.8.
273. Philip L. Comella, "Note: Escape Clause Causation After the Auto Case: 1.8 million Japanese Imports As Less Than A Substantial Cause of Injury", (1982) 16 George Wash. Jrl. Internat'l L. & Econ. 299, at p. 299.
274. See, generally, Issues Relating to the Domestic Auto Industry: Hearings Before the Subcommittee of International Trade of the Senate Finance Committee (pt. I), 97th Cong., 1st Sess. (1981); and Issues Relating to the Domestic Auto Industry: Hearings Before the Subcommittee of International Trade of the Senate Finance Committee (pt. II), 97th Cong., 1st Sess. (1981), at p. 35. See also: Michael William Lochmann, "The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the G.A.T.T. and the Free Market Principles of United States Antitrust Laws", (1986) 27 Harvard Internat'l L. Jrl. 99, at p. 100.
275. Senate Hearings (pt. II), supra note 274, at pp. 31, 35 and 39.
276. With respect to the entry of American automobiles into the Japanese market, Japan adds a commodity tax based on factory price of automobiles plus transportation costs, requires these automobiles to be "homologized", subject to a rig inspection and certification process for a fee, prohibits the automobiles to be sold in showrooms, and assesses a road tax based on the weight of the vehicle, see: Comella, supra note 273, at p. 300.
277. See, generally, Robert J. Leo, "An Update of the Japanese Automobile Export Restraint", 8 Brooklyn Jrl. of Internat'l L. 159, at pp. 159, 160, 168 and 170.
278. See: 45 Fed. Reg. 55,873 (1980) (initiation), 45 Fed. Reg. 85,194 (1980) (determination of no serious injury or threat thereof).
- The International Trade Commission found "injury" to the industry but held that other factors such as general recession and a shift in consumer demand toward smaller cars were the principle cause of the injury; id., at pp. 85, 199 and 85, 221-223.
279. U.S. Import Weekly (BNA) No. 76, at A-1, N-1 (May 6, 1981). The VER agreement, administered by Japan, was officially in effect until March 31, 1985. Lochmann, supra note 274, at p. 108.

280. Lochmann, supra note 274, at pp. 108, 109, and 112-114.
281. International Trade Reporter (BNA), Vol. 2, No. 14, at pp. 476-477 (April 3, 1985).
282. Canada followed the United States of America and also negotiated a VER agreement in respect of automobiles with the Japanese, see: supra notes 145-147. See, generally, Lochmann, supra note 274, at pp. 151-153.
283. For instance, Japanese manufacturers of automobiles had commenced investing in production facilities in the United States of America and in England; Chrysler and General Motors of the United States bought shares in certain Japanese subsidiaries in America (Mitsubishi, Mazda and Isuzu); the German automobile manufacturer, VW, concluded a joint venture agreement with the People's Republic of China; the Japanese with Mitsubishi, entered an agreement with Hyundai; and General Motors concluded an agreement with South Korean Daewoo. See: "Another turn of the wheel", The Economist, March 2, 1985, Vol. 294, no. 7383, at pp. 6, 7, 18 and 19.
284. Supra note 83.
285. Supra note 121.
286. Stanley A. Crossick and Mark Clough, "Is the European Community's Commercial Policy Protectionist? Article 115 - A Shield or a Sword?", (1986) 20 The International Lawyer 293, at p. 297.
287. Id., at pp. 296-297.
288. Id., at p. 296.
- See also: Council Regulation No. 1765/82 (State-trading), 23 O.J. EUR COMM. (No. L195/1) (1982) and Council Regulation NO. 3589/82 (textiles), 23 O.J. EUR. COMM. (No. L374/106) (1982).
289. Supra note 83.
290. Crossick and Clough, supra note 286, at pp. 295-297.
291. See: Joined Cases 21-24/72, International Fruit Company v. Produktschap voor Groenten en Fruit, [1972] E.C.R. 219; Case 266/81, Società Italiana per l'Oleodotto Transalpino v. Ministero delle Finanze et alii, [1983] E.C.R. 731; Joined Cases 267-269/81, Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA et alii, [1983] E.C.R. 801; and Joined Cases 290 and 291/81, Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato, [1983] E.C.R. 847.

For an excellent discussion of this area, see: Petersmann, supra note 178.

292. Single European Act, (1986) Bulletin of the European Communities Supplement 2.
293. Statement by President of the Commission, Mr. Jacques Delors on 18 February 1987, (1987) Bulletin of the European Communities Supplement 1, at p. 26.
294. Communication by the Commission to the Council, Intra-Community Road Haulage, COM (85) 742 (23 December 1985) (final). See also: George L. Close, "Inland Transportation Services: Recent Developments in Community Policy", (1985) 22 Common Market L. Rev. 587.
295. Jackson, supra note 157, at p. 325.
296. Paterson, supra note 112, at p. 264.
297. Jackson, supra note 157, at pp. 326-327.
298. Seventh Market Opening Package, 30th July 1985, translated in Japan Economic Journal, 6th August 1985, pp. 1, 4, 7; 13 August 1985, p. 5; and 20th August 1985, p. 5. See also: Paterson, supra note 112, at p. 270.
299. Other measures would include: opening up Japan's domestic market by removing all remaining restrictions to trade; increasing Japan's imports of manufactured goods; and making greater use of state incentives to encourage European investment in Japan. See: Japan - the thorn in Europe's side, (1986) 19 Bulletin of the European Communities (no. 9), at pp. 84-88; and Japan, (1986) 19 Bulletin of the European Communities (no. 10), at pp. 61-62.
300. Supra note 111.
301. Fred Lazar, "Canadian Industrial Strategy: A U.S. Impediment", (1982) 16 Journal of World Trade L. 223, at pp. 227-228. In addition, the United States retained a definition of bounty or grant in this legislation which included such domestic subsidies as the provision of capital, loans or loan guarantees; the provision of goods at preferential rates; the grant of funds or forgiveness of debt; and the assumption of any cost of manufacture, production or distribution; id. at p. 228.
302. Id., at p. 228.
303. Certain Softwood Lumber Products From Canada, supra note 4.

304. Lazar, supra note 301, at p. 229. U.S. competitors can now file less than fair market value petitions; id.
305. Warren M.H. Grover, "Problems of Exporting to the United States -- A Canadian Perspective" cited in New Dimensions in International Trade Law. A Canadian Perspective (Jacob S. Ziegel & William C. Graham, Q.C., Butterworth: Toronto, 1980) 177, at pp. 181-182 and 187-188.
306. A.G. Skol and C.H. Peterson, "Export Control Laws and Multinational Enterprises", 11 International Lawyer 29, at pp. 35-40.
307. See, for example, India: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 205; and Nicaragua: Statement at the Meeting of the G.A.T.T. Contracting Parties, supra note 204.
308. Cecil Hunt, "Multilateral Cooperation in Export Controls - The Role of COCOM", 14 Toledo L. Rev. 1285 (1983), at pp. 1285, 1286, 1289, 1291 and 1294. COCOM does permit specific export of an item to a controlled destination where COCOM members consider that the risks of the sale are acceptable, id. at p. 1291.
309. Id. at pp. 1294 and 1296. Hunt indicates that there is a growing sentiment of COCOM members that the United States should eliminate export controls where foreign availability exists or take steps to eliminate this foreign availability; id. at p. 1296.
310. Benz, supra note 197, at pp. 87 and 99.
311. Supra text, at p. 70.
312. Benz, supra note 197, at p. 101, citing a report prepared by the U.S. Dept. of Commerce -- US Services Industries in World Markets: Current Problems and Future Policy Development (Washington, 1976) at p. 31.
313. Benz, supra note 197, at pp. 102, 103, 105 and 106. In air transportation, problems are regulated through three associations: the International Civil Aviation Organization, the International Air Transportation Association, and the International Air Carriers Association.
314. Supra text, at pp. 70-71.
315. Ministerial Declaration on the Uruguay Round, supra note 269, at p. 11.
316. Margaret Prentis, "Unfair Trade Practices Dispute Resolution Under Canadian Law: The Canadian Import Tribunal", Conference on Canada and International Trade: Law, Business and Policy (Vol. 1) (University of Ottawa: May 3-4, 1985), at p. 10.

317. Footwear Import Quotas, (1985) 18 Bulletin of the European Communities (no. 11), at p. 85.
318. Canada, (1986) 19 Bulletin of the European Communities (no. 4), at p. 80.
319. EEC Complaint Against Canadian Beef, G.A.T.T. DOC. SCM/85 (13 October 1987); EEC Complaint Against Provincial Liquor Boards, G.A.T.T. Doc. L/6304 (November 1987); and "G.A.T.T. Swings Both Ways on Us", The Financial Post, Monday, November 23, 1987.
320. Red Raspberries from Canada, 51 Fed. Reg. 1005 (June 1985) (USITC); and Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 1010, 10041, 17785 (1985) (USITC).
321. U.S. Complaint Against Canadian Salmon and Herring Regulations, G.A.T.T. DOC. L/6268 (20 November 1987).
322. Department of External Affairs, Communiqué (No. 038) of February 23, 1987. The U.S. Department of Transportation is currently preparing a study of the implications of the tax for transborder trucking, id.
323. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 21205 (June 11, 1986) (investigation).
324. Certain Softwood Lumber Products from Canada, supra note 4.
325. Memorandum of Understanding, supra note 149. Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 315 (January 5, 1987) (Termination After Withdrawal of Petition).
326. Statement, supra note 152. See also: Speech in the House of Commons by the Minister for International Trade, The Honourable Pat Carney, on the Softwood Lumber Products Export Charge Act, January 19, 1987, Hansard, Issue no. 1, vol. 129 (Monday, January 19, 1987) 2371, at p. 2372.
327. Id. at pp. 2372-2374.
328. See: Minister for International Trade, "Introductory Statement at a Press Conference on Softwood Lumber by Mr. Don Campbell, Assistant-Deputy Minister, United States Branch, Department of External Affairs, and Chief Negotiator on Canada-United States Softwood Lumber Negotiations", Statement No. 87/01 (Ottawa, January 1st, 1987).
329. Photo albums with self-adhesive leaves from the People's Republic of China, Inquiry No. CIT-10-85 (February 14, 1986) (Material injury); Rubber hockey pucks from Czechoslovakia and the German Democratic Republic, Inquiry No. CIT-12-85 (March 18, 1986) (Material injury with exceptions); Whole potatoes from U.S.A. for use or consumption in the Province of British Columbia, Inquiry No. CIT-16-85 (April 18, 1986)

(Material injury with exceptions); Drywall screws from Taiwan, Inquiry No. CIT-1-86 (July 10, 1986) (Material injury); Subsidized grain corn from U.S.A., Inquiry No. CIT-7-86 (March 19, 1987) (Material injury); Fresh, whole, yellow onions, originating in or exported from the United States of America, for use or consumption in the Province of British Columbia, Inquiry No. CIT-1-87 (April 30, 1987) (Material injury); Gasoline powered chain saws originating in or exported from the Federal Republic of Germany, Sweden and the United States of America, Inquiry No. CIT-2-87 (July 3, 1987) (Material injury); and Photo albums originating in or exported from Singapore, Malaysia and Taiwan, Inquiry No. CIT-5-87 (November 3, 1987) (Material injury).

330. Special Import Measures Act, S.C. 1984, c. 25, ss. 42 and 43.
331. Textile and Clothing Board Act, S.C. 1970-71-72, c. 39.
332. Statement by the Minister of Industry, Trade and Commerce to the House of Commons, Hansard (14th May 1970), at p. 6953. See also, Orr, supra note 157, at p. 69.
333. Supra note 116.
334. Textile and Clothing Board, Clothing Inquiry: A Report to the Minister of Industry, Trade and Commerce (29th May 1977).
335. Stone, supra note 8, at p. 109 and Paterson, supra note 112, at pp. 88-89.
336. Report of the Textiles Committee Meeting, General Agreement on Tariffs and Trade, BISD, 24th Supp./4 (1977).
337. Textile and Clothing Board, Textile and Clothing Board Enquiry: Report to the Minister of Industry, Trade and Commerce (30th June 1980).
338. Department of External Affairs, Summary of Canada's Bilateral Restraint Arrangement - Textiles and Clothing (July 1983), at p. 2.
339. Id.
340. Id.
341. Department of External Affairs, Summary of Canada's Bilateral Restraint Arrangements - Textiles and Clothing (October 1987), at pp. 1-3.
342. Id.
343. Autopact, supra note 59. See also: Hugh M. Kindred and William Biggs, "Trade and Investment Issues: Patterns of Canadian-American Economic Problems", (1978) 1 Canada - United States L. Jrl. 114, at p. 128.

344. G.A.T.T. waiver, supra note 59.
345. Department of External Affairs, The Canada-U.S. Free Trade Agreement (December 10, 1987) (signed on January 2, 1988), at pp. 155 et seq. The Agreement allows for the waiver of customs duties for certain recipients and the gradual phasing out of import restrictions for used automobiles, id. at pp. 155-156.
346. See, supra note 147.
347. See: Minister for International Trade, "Notes for a Speech by the Honourable Pat Carney, Minister for International Trade to the Investment Seminar", Statement no. 86/74 (Osaka, Japan) (November 27, 1986), at p. 1. For Japan's response, see: Minister for International Trade, "Minister for International Trade Receives Japan Economic Mission Report on the Canadian Investment Climate", Communiqué no. 012 (January 27, 1987).
348. Statement, supra note 347, at p. 3.
349. "Settlement ends threat of penalty for potash", The Globe and Mail (Friday, January 8, 1988) at p. B-1. See also: "Canada-U.S. Potash Dispute Over", Ottawa Letter, Vol. XVIII, no. 54 (January 11, 1988) at p. 433.
350. With respect to customs valuation, see: Act to amend the Customs Act and the Customs Tariffs, S.C. 1984, c. 47; with respect to customs, see: Customs Act, S.C. 1986, c. 1; with respect to subsidies and countervailing duties as well as anti-dumping duties, see: Special Import Measures Act, supra note 330; and with respect to bovine meat, tropical products and trade in civil aircraft, see: S.C. 1980-81-82-83, c. 129.
351. For the administrative practices issued by the Department of Supply and Services on government procurement, see: Procedures Implementing the Agreement on Government Procurement, Canada Gazette, Part 1 (19 January 1985), at p. 416. For a discussion on the other agreements, see: Castel, supra note 112, at pp. 86-87.
352. Secretary of State for External Affairs, "Address by the Right Honourable Joe Clark, Secretary of State for External Affairs, to the Empire Club of Canada", Statement no. 86/64 (Toronto: November 12, 1986), at p. 2; Secretary of State for External Affairs, "Speech by the Right Honourable Joe Clark, Secretary of State for External Affairs, to the Scarborough Chamber of Commerce and the Chinese Business Association of Scarborough and North York", Statement no. 86/66 (Toronto: November 14, 1986), at p. 2; and Notes for an Opening Statement by the Honourable Pat Carney, Minister for International Trade, to the Standing

Committee on External Affairs and International Trade on the Estimates Examination, Minutes of Proceedings and Evidence of Standing Committee on External Affairs and International Trade, Issue no. 23 (Thursday, April 9, 1987) 5, at p. 10.

353. Export and Import Permits Act, supra note 116. Linked to this Act, in the area of trade law, are the following statutes: The Customs Tariffs S.C. 1984, c.47, The Customs Act, supra note 350, and the Excise Act, R.S.C. 1970, c. E-12.
354. Section 4 of the Export and Imports Act, supra note 353, states:
4. The Governor in Council may establish a list of countries, to be called an Area Control List, including therein any country to which he deems it necessary to control the export of any goods.

Section 5 of the said Act, id., states:

5. The Governor in Council may establish a list of goods, to be called an Import Control List, including therein any article the import of which he deems it necessary to control for any of the following purposes, namely:
- (a) to ensure, in accordance with the needs of Canada, the best possible supply and distribution of an article that is scarce in world markets or is subject to governmental controls in the countries of origin or to allocation by intergovernmental arrangement;
- (a.1) to restrict, for the purpose of supporting any action taken under the Farm Products Marketing Agencies Act, the importation in any form of a like article to one produced or marketed in Canada the quantities of which are fixed or determined under that Act;
- (a.2) to restrict, for the purpose of supporting any action taken under the Meat Import Act, the importation of products to which that Act applies;
- (a.3) to restrict the importation of arms, ammunition, implements or ammunitions of war, army, naval or air stores, or any articles deemed capable of being converted thereinto or made useful in the production thereof;

(b) to implement any action taken under the Agricultural Stabilization Act, the Fisheries Prices Support Act, the Agricultural Products Cooperative Marketing Act, the Agricultural Products Board Act or the Canadian Dairy Commission Act, to support the price of the article or that has the effect of supporting the price of the article; or

(c) to implement an intergovernmental arrangement or commitment;

and where any goods are included in the list for the purpose of ensuring supply or distribution of goods subject to allocation by intergovernmental arrangement or for the purpose of implementing an intergovernmental arrangement or commitment, a statement of the effect or a summary of the arrangement or commitment, if it has not previously been laid before Parliament, shall be laid before Parliament not later than fifteen days after the order of the Governor in Council including those goods in the list is published in the Canada Gazette pursuant to the Statutory Instruments Act or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

By sections 7 and 8 of this Act, the Minister may issue goods for the export or import of goods which are on one of the lists.

355. Section 5(2) of the Export and Import Permits Act; id., states:

(2) Where at any time it appears to the satisfaction of the Governor in Council on a report of the Minister made pursuant to

(a) an inquiry made by the Textile and Clothing Board with respect to the importation of any textile and clothing goods within the meaning of the Textile and Clothing Board Act, or

(b) an inquiry made under section 48 of the Special Import Measures Act by the Canadian Import Tribunal in respect of any goods,

that goods of any kind are being imported or are likely to be imported into Canada at such prices, in such quantities and under such conditions as to cause or threaten serious injury to the production in Canada of like or directly competitive goods, any goods of the same kind may, by order of the Governor in Council, be included on the

Import Control List, for the purpose of limiting the importation of such goods to the extent and, subject to subsection (5), for the period that in the opinion of the Governor in Council is necessary to prevent or remedy the injury.

356. In the area of regulations with respect to the Export and Import Permits Act, see, for example: Area Control List, SOR/86-110; Export Control List, CRC, Vol. VI, c. 601 (as amended); Export Permit Regulations, CRC, Vol. VI, c. 602 (as amended); Import Certificate Regulations, CRC, Vol. VI, c. 603; Import Control List, CRC, Vol. VI, c. 604 (as amended); and Import Permit Regulations, SOR/79-5.
357. I. Bernier, "La vente à l'exportation: les obstacles internes et externes", New Developments in Law of Export Sales, Meredith Memorial Lectures (McGill University Law Faculty, 1982) 17, at p. 18.
358. For agriculture, see: The Canadian Dairy Commission Act, R.S.C. 1970, c. C-7; The Canadian Wheat Board Act, R.S.C. 1970, c. C-12; the Freshwater Fish Marketing Act, R.S.C. 1970, c. F-13; the Agriculture Stabilization Act, supra note 71; and the Agricultural Products Standards Act, supra note 64.
- In other areas, see: The Food and Drug Act, R.S.C. 1970, c. F-27; the National Energy Board Act, R.S.C. 1970, c. N-6; the Gold Export Act, R.S.C. 1970, c. G-5; and the Cultural Property Export and Import Act, S.C. 1974-75-76, c. 50.
- In the area of licences, see: The Meat Inspection Act, R.S.C. 1970, c. M-7; the Fruit, Vegetable and Honey Act, R.S.C. 1970, c. F-31; The Pest Control Products Act, R.S.C. 1970, c. P-10; and the Motor Vehicle Safety Act, R.S.C. 1970 (1st Supp.), c. 26.
359. For an interesting discussion in this area, see, generally: Bernier, supra note 357.
360. With respect to financial assistance, see: Export Development Act, supra note 134 and Federal Business Development Bank, S.C. 1974-75-76, c. 14. With respect to foreign investment, see: Foreign Investment Review Act, S.C. 1973-74, s. 46 (repealed by S.C. 1985, c. 20, s. 46); and for energy, see: Canada Oil and Gas Act, 1980-81-82-83, c. 31 (repealed by S.C. 1986, c. 45, s. 130).
361. Paterson, supra note 112, at pp. 300-301.
362. OECD, Decision of the Council on National Treatment (Paris, June 21, 1976) reprinted in (1976) 15 I.L.M. 978.

363. See: Paterson, supra note 112, at pp. 301-302, and Donald S. Macdonald, "Canadian Industrial Policy Objectives and Article III of G.A.T.T.: National Ambitions and International obligations, (1981-82) 6 Canadian Bus. L. Jrl. 385, at pp. 397-399.
364. G.A.T.T. Panel Report on Canada's Foreign Investment Review Act, General Agreement on Tariffs and Trade, G.A.T.T. DOC. L/5504 (25h July 1983). See also, Paterson, supra note 112, at pp. 301-304.
365. The Investment Canada Act, S.C. 1985, c. 20.
366. Id. at ss. 2, 14, 21 and 23.
367. Statement by Thomas Barton, Senior Legal Counsel for Investment Canada given during CBAO Business Law Section meeting, Summary of Meeting, The New Investment Canada Act, CBAO Business Law Section, October 16, 1985.
368. Jean-Paul Lacasse, "Legal Issues Relating to the Canadian National Energy Program", (1983) 16 Vanderbilt Jrl. of Transnat'l L. 302, at pp. 334-339.
369. The controversial legislation, the Canada Oil and Gas Act, S.C. 1980-81-82-83, c. 81, was repealed by its replacement, the Canada Petroleum Resources Act, S.C. 1986, c. 45.
370. I. Bernier, "La Constitution Canadienne et la réglementation des relations économiques internationales au sortir du 'Tokyo Round'", 20 C. de D. 673 (1979), at pp. 683-687.
- See also: Citizens Insurance v. Parsons, 7 A.C. 96 (P.C. 1881-82); Carnation Co. v. Quebec Agricultural Marketing Board, et al., ~1968~ R.S.C. 238; Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan, ~1978~ 2 R.S.C. 545; Procureur général de Québec v. Kellogg's Co. of Canada et al., ~1978~ 2 R.S.C. 211; and Nova Scotia Board of Censors v. McNeil, ~1978~ 2 R.S.C. 662.
371. Constitution Act, 1982, s. 50 adding s. 92A to the Constitution Act, 1867.
372. Bernier, supra note 370, at pp. 688 and 689; I. Bernier, "Le concept d'union économique dans la Constitution Canadienne: de l'intégration commerciale à l'intégration des facteurs de production", (1979) 20 C. de D. 177, at pp. 189-192 and pp. 205-208.

Examples of provincial legislation include the following: Loi sur les abeilles, L.R.Q. 1977, c. A-1 (Québec); Bees Act, R.S.O. 1980, c. 42 (Ontario); Boilers and Pressure Vessels Act, R.S.O. 1980, c. 46 (Ontario); Agriculture and Marketing Act, R.S.N.S. 1967, c. 3 (Nova

- Scotia); Loi sur la protection sanitaire des animaux, L.R.Q. 1977, c. P-42 (Québec); Development Corporations Act, R.S.O. 1980, c. 117 (Ontario); Motor Vehicle Act, R.S.B.C. 1979, c. 204 (British Columbia); Loi sur l'utilisation des ressources forestières, L.R.Q. 1977, c. U-2 (Québec); and The Development Fund Act, R.S.M. 1970, c. D-60 (Manitoba).
373. See: supra notes 4, 326 and 327 (softwood lumber) and supra note 319 (alcoholic beverages).
374. John W. Comrie, "Current Problems in Canada/U.S. Trade", Annual Meeting Papers of the Canadian Bar Association (Ottawa, Ontario, August 1987) 21, at pp. 21 and 26.
375. See, for example: Softwood lumber, supra note 4; potassium chloride, 52 Fed. Reg. 6836 (ITA), 5202 and 10641 (ITC); fresh cut flowers, 52 Fed. Reg. 2126, 8491 (ITA) and 610, 8657 (ITC); welded carbon steel pipe, 52 Fed. Reg. 7287 (ITA); Canadian live cattle and beef in U.S. markets, 52 Fed. Reg. 5199 (ITC); carbon steel bars, 51 Fed. Reg. 23803 (ITA); fresh atlantic ground fish from Canada, supra note 320; red raspberries from Canada, supra note 320; iron construction castings from Canada, 51 Fed. Reg. 7646 (ITC); and oil country tubular goods from Canada, 51 Fed. Reg. 3270, 9540, and 21258 (ITC).
376. Comrie, supra note 375, at pp. 22-25.
377. See: X-Radial Steel Belted Tires from Canada, supra note 18. See also: Lazar, supra note 343, at p. 226 (Honeywell case).
378. Final Affirmative Countervailing Duty Determination; Railcars from Canada, supra note 18. See also: Paterson, supra note 112, at pp. 173-175.
379. Tariff Act of 1930, supra note 96.
380. Trade Act of 1974, supra note 93.
381. See: Lazar, supra note 302, at p. 233 and Comella, supra note 273, at p. 304.
382. Lazar, supra note 301, at p. 230. For a discussion on State and private "Buy American" preferences, see also: Grover, supra note 305, at pp. 187-189.
383. Special Import Measures Act, supra note 330 (hereinafter referred to as "SIMA").
384. Examples with respect to time limits are as follows: section 38 states that the Deputy Minister has to make a preliminary determination of dumping or subsidizing within 90 days after the initiation of the

complaint; section 31, provides that an investigation must be launched within 30 days of the receipt of a complaint; and section 41 provides that the Deputy Minister must make a final determination with respect to dumping or subsidization within 90 days of the preliminary determination. Id.

385. Grey Clark Shih and Associates, "Unfair Trade Practices Dispute Resolution Under Canadian Law: The Practitioner's Perspective", Conference on Canada and International Trade: Law, Business and Policy, Vol. II (University of Ottawa, May 3-4, 1985), at pp. 6-12.
- For an interesting discussion on the Federal government's view of the SIMA, see: Prentis, supra note 316.
386. Paterson, supra note 112, at pp. 136-138.
387. Foreign Extraterritorial Measures Act, S.C. 1984, c. 49. This legislation provides that the Attorney General of Canada, where a foreign tribunal or state is proposing to take measures affecting international trade or commerce which will seriously affect Canadian interests, may make an order prohibiting the production of documents, prohibiting a person from following the directives of the foreign tribunal or judgment, or refusing to recognize portions of a foreign judgment. (ss. 3, 5 and 8).
388. Canada's embargo policy is implemented through the Export and Import Permits Act, supra note 116.
389. D. Lasok, "Trade with the European Economic Community: A Challenge to Canadian Lawyers", (1983) 17 University of Western Ontario L. Rev. 155, at p. 160.
390. See, for example, supra note 329.
391. Joel Davidow, "Hegemony with a Vengeance: U.S. Trade Law Attacks on Foreign Government Equity Participation in Exporting Enterprises", cited in Conference on Canada and International Trade: Law, Business and Policy, Vol. I (University of Ottawa, May 3 - 4, 1985) at p. 3.
392. Siegfried Schultz, "Western Aid and Trade Policy Trends", (1985) 20 Intereconomics 40, at p. 43.
393. Christine A. Bogdanowicz-Bindert, "World Debt: The United States Reconsiders", (1985) 64 Foreign Affairs 259, at pp. 259 and 262.
394. IMF: Statement by J. DeLarosière, Managing Director of the International Monetary Fund, at the Meeting of the G.A.T.T. Contracting Parties at Ministerial Level, 15-19 September 1986, Punta del Este, Uruguay, G.A.T.T. DOC. MIN (86)/ST/12 (16 September 1986).

395. Bogdanowicz-Bindert, supra note 393, at p. 265.
396. IMF: Statement ... at the Meeting of the G.A.T.T. Contracting Parties, supra note 394.
397. Lawson A.W. Hunter, "The Relationship Between Trade Policy and Competition Policy", Conference on Canada and International Trade: Law, Business and Policy, Vol. II (University of Ottawa, May 3 - 4, 1985), at p. 8.
398. Id., at pp. 5 - 6.
399. J.W. Rowley, "Implications of International Trade Policy for Competition in Canada; Sub nom Competition Policy in Canada and Its Implications for International Trade", Conference on Canada and International Trade: Law, Business and Policy, Vol. II (University of Ottawa, May 3 - 4, 1985), at p. 3.
400. Hugh R. Cowan, "Export Trade Finance", (1986) 65 Canadian B. Rev. 368, at p. 368.

Among the major industrialized nations, only West Germany exceeds Canada in terms of exports as a percentage of Gross National Product; id..

401. Philip Slayton, "International trade Law: The Countervail Struggle", (1984) 1 Business and the Law 21, at p. 22.
402. Grover, supra note 305, at p. 179. Those strategies are particularly important vis-à-vis the United States market. Entering the American market on a reciprocal basis was demonstrated by Spar Aerospace in the space program; id..
403. Statement by Konrad Sigurdsson, Chairman of the Metropolitan Toronto Export Club, "The Export Club - - a better idea", Canadian Sailings, June 24, 1985, at p. 30.

The Toronto Export Club was founded in August 1982 and has as its membership importers, exporters, trade commissioners, consultants, accountants, engineers, bankers and customhouse brokers. Chapters of this club are found in British Columbia, Alberta, Quebec and Saskatchewan. Id. at p. 31.

404. Butler, supra note 50, at p. 106.
405. See, supra note 133.
406. See: "Selling state fossels", The Economist, February 23, 1985, Vol. 294, no. 7382, at p. 11; and "Making the modern dinosaur extinct", The Economist, February 23, 1985, Vol. 294, no. 7382, at pp. 76 - 77.

407. See: Canadair Limited Divestiture Authorization Act, S.C. 1986, c. 57; Teleglobe Canada Reorganization and Divestiture Act, S.C. 1987, c. 12; Canadian Arsenals Limited Divestiture Authorization, S.C. 1986, c. 20; and Canagrex Dissolution Act, S.C. 1987, c. 38.

408. Report of Special Committee on a National Trading Corporation, House of Commons of Canada, Canada's Trade Challenge (Minister of Supply and Services Canada, 4th Report, 1981), at p. 8.

National trading houses also exist: Brazil created the trading houses of Interbras and Cobec, Singapore has established a trading organization called Intraco, and New Zealand operates a national trading organization to promote the exports of small and medium firms; id. at pp. 8 - 9.

409. Id. at pp. [1]-[2] ("Report in Brief").

410. Id. at p. 18.

411. Canadian International Development Agency, "Business Relations with the Trading House Sector - Policy", Administrative Bulletin no. 86 - 11, dated May 14, 1986, at p. 1.

Trading houses are also encouraged to approach the Agency to enquire about business opportunities; id. at p. 2.

412. T.P. Chen, "Canadian Export Credits, Guarantee and Insurance Programs", cited in Studies in Canadian Business Law (G.H.L. Fridman, ed., Butterworths, Toronto, 1971) 368, at pp. 368 and 369.

413. Export Development Act, supra note 134, at section 10. The Export Development Corporation has three programs: export insurance, export loans and note purchases, and forfeiting.

414. Cowan, supra note 400, at p. 379.

415. Id. at pp. 369 and 380.

416. Government of Canada, "Export Financing - Consultation Paper", January 1985 at p.3. See also: Cowan, supra note 400, at p. 380.

Of the 10% export financing provided by Canadian government programs, support provided by the Export Development Corporation is estimated to be 5%, support provided by the Canadian Wheat Board at 1% to 2% and the remaining 1% to 2% is provided by such agencies as the Canadian Commercial Corporation, the Canadian Dairy Commission, the Freshwater Fish Marketing Corporation and the Canadian Salfish Corporation; id. at pp. 379 - 380.

417. Winston Arnold, "Aid for Trade Debate", Development Business (September 1985) 16, Reading Selection (CIDA, ed., November 1985), at p. 118.
418. Id. at p. 120. As an alternative to financial assistance, the Canadian International Development Agency encourages joint ventures between Canadian business and developing countries.
419. J. De Meramon, "Countertrade, a Modernized Barter System", OECD Observer (January, 1982), at p.13. See also: Walsh, supra note 230, at p. 3.
420. Thomas B. McVey, "Countertrade and Barter: Alternative Trade Financing By Third World Nations", (1980-81) 6 The International Trade L. Jrl. 197, at p. 197.

Countertrade exists in many forms and includes barter which is defined as a "two-way exchange of goods effectuated without the use of currency", id.
421. Scott J. Lochner, "Guide to Countertrade and International Barter", (1985) 19 The International Lawyer 725, at p. 745.
422. Id. at p. 747.
423. See: Howard M. Liebman, "Comment: G.A.T.T. and Countertrade Requirements", (1984) 18 Journal of World Trade L. 252, at pp. 253-260; Walsh, supra note 230, at p. 10; and Thomas B. McVey, "Countertrade: Commercial Practices, Legal Issues and Policy Dilemma", (1984) 16 Law and Policy in Internat'l Bus. 1, at pp. 3-4.
424. Department of External Affairs, Countertrade Primer for Canadian Exports (October, 1985), at p. 3. To-date Canada has been minimally affected by countertrade due to the dominance of the United States of America and other Organization for Economic Cooperation and Development countries as export markets for Canadian goods and as the predominance of food and raw materials exports have not been subject to extensive countertrade pressure. Id.
425. Lochner, supra note 421, at p. 745.
426. Parties to countertrade arrangements will sometimes resell goods to a third party buyer at below world market price or below the price which private firms might pay for the goods or request subcontractors and suppliers to purchase the goods. The firms subject to countertrade arrangements may also be under pressure to unload quantities of goods which do not always meet high quality standards; see: McVey, supra note 423, at p. 36.

427. See: The Canada-U.S. Free Trade Agreement, supra note 345. For recent analyses of this Agreement, see, for example, American Bar Association - National Institute, United States/Canada Free Trade Agreement: The Economic and Legal Implications (January 28-29, 1988); University of Ottawa - Faculty of Law, The Canada - US Free Trade Agreement: Analysis of the Text (January 22, 1988); and University of McGill - Institute of Comparative Law, Access to Markets Under the Canada - US Free Trade Agreement (February 12, 1988).
428. Cowan, supra note 400, at p. 368.
429. Speech in the House of Commons by the Honourable Pat Carney, Minister for International Trade, on the Trade Negotiations Debate, March 16, 1987, Hansard, vol. 129 (Monday, March 16, 1987) 4177.
- See also: Hansard, vol. 129 (Tuesday, March 17, 1987) 4281 (consideration of motion) and p. 4284 (motion carried).
430. Speech, supra note 429, at pp. 4177-4178.
431. Id. at pp. 4178-4179.
432. The Canada-U.S. Free Trade Agreement, supra note 345.
433. Rules of origin have been established in Article 301 for goods as tariffs for the importation of goods from third countries may still be applied by Canada or the United States of America.
434. Article 409 of the Agreement stipulates that export measures, for example, short supply and conservation of national resources where domestic production is similarly restrained, can be applied to reduce the proportion of the goods exported to the other Party relative to the supply of goods compared to the proportion exported prior to the imposition of the restriction.
435. In accordance with Article 702 of the Agreement, each party has the right, for a period of twenty years from the effective date of the agreement to apply a temporary duty on fresh fruits or vegetables originating from the territory of the other party and imported into its territory.
436. The term "service" is defined in Article 1401 of the Agreement by listing certain activities such as: the production, distribution, sale, marketing and delivery of a service listed in the Schedule to Annex 1408; access to, and use of, domestic distribution systems; and the establishment of a commercial presence (other than an investment).
437. After the transition period, paragraph 3 of Article 1101 stipulates that bilateral emergency action can be taken only with the consent of the other party, and with respect to any action taken pursuant to Article 1101, the party taking the action shall provide to the other party mutually agreed trade liberalizing compensation (Article 1101:4).

438. For the purposes of Article 1102 of the Agreement, imports that range from five to ten percent or less of total imports would not normally be considered to be substantial (Article 1102:1).
439. Article 1904 of the Agreement also sets out the time limits and procedures by which the panel will conduct its review. See, for example, paragraph 14 of Article 1904 of the Agreement.
440. Article 1801 of the Agreement states that disputes arising under this Agreement and the G.A.T.T. may be settled in any forum at the discretion of the complaining party, except that once the dispute settlement provisions of this Agreement or the G.A.T.T. have been initiated, the procedure initiated will be used to the exclusion of the other.
441. See, for example, chapters 8, 9, 10 and 17 of the Agreement.
442. John D. Richard, "Understanding Evolving Canada/U.S. Trade Relations, The Current Situation", Paper presented at the Canadian Bar Association, Annual Meeting (Ottawa, Ontario, 1987) at p. 5.
443. See, for example, the Central American Common Market and the Caribbean Market (CARICOM), General Agreement on Tariffs and Trade, BISD, 24 Supp./68-72 (1977) (adoption); and Association of South-East Asian Nations (ASEAN), General Agreement on Tariffs and Trade, BISD, 26 Supp./1979 (adoption).
444. See, for example, "Europe eyeing G.A.T.T. challenge to trade pact", The Gazette (Thursday, January 14, 1988) at p. B-3. Indeed, it is not clear that even with the Agreement that Canada would be exempt from protectionist trade legislation presently before the U.S. Congress.
445. Minister for International Trade, "Speaking Notes for the Honourable Pat Carney, Minister for International Trade, to the 43rd Session of Contracting Parties of the G.A.T.T.", Statement no. 87/69 (Geneva, December 1, 1987), at pp. 3-4.
446. See, supra, text at pp. 70, 71, 85, 87 and 88.
447. The Uruguay Round - Decisions of 28 January 1987, supra note 31.

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THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND NON-TARIFF
BARRIERS: IMPACT ON INTERNATIONAL LAW AND ON TRADE IN GENERAL AND ON
IMPORT AND EXPORT TRADE IN CANADA IN PARTICULAR

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III - APPENDICES

Thesis submitted to the School of Graduate
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The Appendices have been extracted from
The General Agreement on Tariffs and Trade,
G.A.T.T./1969-1 (Geneva, 1969) and The
Texts of the Tokyo Round Agreements,
G.A.T.T./1986-5 (Geneva, 1986).

APPENDIX 1
THE GENERAL AGREEMENT ON TARIFFS AND TRADE
(Extracts)

PART I

Article I
General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

....

Article II
Schedules of Concessions

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

....

PART II

Article III

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transpor-

tation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; Provided that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

....

Article VI
Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the

dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Article VII

Valuation for Customs Purposes

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party, review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

....

Article VIII

Fees and Formalities connected with Importation and Exportation

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connexion with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).

(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

....

Article XI

General Elimination of Quantitative Restrictions

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

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

- (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
- (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
- (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

Article XII

Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or

(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that sub-paragraph.

3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of

productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(c) Contracting parties applying restrictions under this Article undertake:

- (i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;
- (ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and
- (iii) not to apply restrictions which would prevent the importation of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(d) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2(a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them, the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in sub-paragraph (a) of this paragraph with the CONTRACTING PARTIES annually.

(c) (i) If, in the course of consultations with a contracting party under sub-paragraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

....

Article XIII

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions, and to this end shall observe the following provisions:

- (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;
- (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
- (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub-paragraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;
- (d) In cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such

total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

....

Article XIV

Exceptions to the Rule of Non-discrimination

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.

....

Article XV
Exchange Arrangements

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.

2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES, in reaching their final decision in cases involving the criteria set forth in paragraph 2 (a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

....

9. Nothing in this Agreement shall preclude:
- (a) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or
 - (b) the use by a contracting party of restrictions or controls on imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

Article XVI

Subsidies

Section A - Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B - Additional Provisions on Export Subsidies

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Article XVII
State Trading Enterprises

1. (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.

....

Article XVIII

Governmental Assistance to Economic Development

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (a) Consequently, a contracting party the economy of which can only support low standards of living and is in the early stages of development shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

....

Section A

7. (a) If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give

effect to such agreement, including any compensatory adjustments involved.

(b) If agreement is not reached within sixty days after the notification provided for in sub-paragraph (a) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES, which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in sub-paragraph (a) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.

....

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4(a) of this Article tend, when they are in rapid process of development, to experience balance of payment difficulties arising mainly from efforts to expand their internal markets as well as from the instability of their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4(a) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; Provided that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

- (a) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or
- (b) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; Provided that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and Provided further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12 (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(b) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in sub-paragraph (a) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; Provided that no consultation under this sub-paragraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(c) (i) If, in the course of consultations with the contracting party under sub-paragraph (a) or (b) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the

provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of the Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedures is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may

release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

....

Section C

13. If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.*

....

Article XIX

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the contracting parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b)

of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

Article XX General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importation or exportation of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of

Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of

this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Article XXI
Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXII
Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII
Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

PART III

Article XXIV

Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall,

exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

- (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
- (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that:

- (a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
- (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and
- (c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

....

Article XXV
Joint Action by the Contracting Parties

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.
2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.
3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.
4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.
5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote
 - (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and
 - (ii) prescribe such criteria as may be necessary for the application of this paragraph.

....

PART IV

TRADE AND DEVELOPMENT

Article XXXVI
Principles and Objectives

1. The contracting parties,
 - (a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;
 - (b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;
 - (c) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;
 - (d) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;
 - (e) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures - and measures in conformity with such rules and procedures - as are consistent with the objectives set forth in this Article;

- (f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.
3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.
4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.
5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Article XXXVII

Commitments

1. The developed contracting parties shall to the fullest extent possible - that is, except when compelling reasons, which may include legal reasons, make it impossible - give effect to the following provisions:

- (a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties,

including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;

(b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and

(c) (i) refrain from imposing new fiscal measures, and

(ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures,

which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

....

ANNEX I
Notes and Supplementary Provisions

....

Ad Article XVI

....

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

- (a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and
- (b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

....

Ad Article XVII

Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1 (a)

Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for

the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

Paragraph 1 (b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

Paragraph 2

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

....

APPENDIX 2

ANNEX

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

- (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.
- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exports.
- (e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes¹ or social welfare charges paid or payable by industrial or commercial enterprises².
- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production for domestic consumption, in the calculation of the base on which direct taxes are charged.

- (g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes¹ in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

- (h) The exemption, remission or deferral of prior stage cumulative indirect taxes¹ on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product³.

- (i) The remission or drawback of import charges¹ in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes of insurance or guarantee programmes against increases in the costs of exported products⁴ or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes⁵.

- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories⁶ to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

- (l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

NOTES

1. For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interest, rents royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes.

2. The signatories recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The signatories further recognize that nothing in this text prejudices the disposition by the CONTRACTING PARTIES of the specific issues raised in GATT document L/4422.

The signatories reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any signatory may draw the attention of another signatory to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the signatories shall normally

attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of signatories under the General Agreement, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a signatory from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another signatory.

Where measures incompatible with the provisions of paragraph (e) exist, and where major practical difficulties stand in the way of the signatory concerned bringing such measures promptly into conformity with the Agreement, the signatory concerned shall, without prejudice to the rights of other signatories under the General Agreement or this Agreement, examine methods of bringing these measures into conformity within a reasonable period of time.

In this connexion the European Economic Community has declared that Ireland intends to withdraw by 1 January 1981 its system of preferential tax measures related to exports, provided for under the Corporation Tax Act of 1976, whilst continuing nevertheless to honour legally binding commitments entered into during the lifetime of this system.

3. Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

4. The signatories agree that nothing in this paragraph shall prejudice or influence the deliberations of the panel established by the GATT Council on 6 June 1978 (C/M/126).

5. In evaluating the long-term adequacy of premium rates, costs and losses of insurance programmes, in principle only such contracts shall be taken into account that were concluded after the date of entry into force of this Agreement.

6. An original signatory to this Agreement shall mean any signatory which adheres ad referendum to the Agreement on or before 30 June 1979.

APPENDIX 3
AGREEMENT ON INTERPRETATION AND APPLICATION
OF ARTICLES VI, XVI AND XXIII OF THE GENERAL AGREEMENT
ON TARIFFS AND TRADE

(Extracts)

....

PART I

Article 1

Application of Article VI of the General Agreement³

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty⁴ on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

Article 2

Domestic procedures and related matters

1. Countervailing duties may only be imposed pursuant to investigations initiated⁵ and conducted in accordance with the provisions of this Article. An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be

initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Agreement⁶ and (c) a casual link between the subsidized imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

2. Each signatory shall notify the Committee on Subsidies and Countervailing Measures⁷ (a) which of its authorities are competent to initiate and conduct investigations referred to in this Article and (b) its domestic procedures governing the initiation and conduct of such investigations.

3. When the investigating authorities are satisfied that there is sufficient evidence to justify initiating an investigation, the signatory or signatories, the products of which are subject to such investigation and the exporters and importers known to the investigating authorities to have an interest therein and the complainants shall be notified and a public notice shall be given. In determining whether to initiate an investigation, the investigating authorities should take into account the position adopted by the affiliates of a complainant party⁸ which are resident in the territory of another signatory.

4. Upon initiation of an investigation and thereafter, the evidence of both a subsidy and injury caused thereby should be considered simultaneously. In any event the evidence of both the existence of subsidy and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5. The public notice referred to in paragraph 3 above shall describe the subsidy practice or practices to be investigated. Each signatory shall ensure that the investigating authorities afford all interested signatories and all interested parties⁹ a reasonable opportunity, upon request, to see all relevant information that is not confidential (as indicated in paragraphs 6 and 7 below) and that is used by the investigating authorities in the investigation, and to present in writing, and upon justification orally, their views to the investigating authorities.

6. Any information which is by nature confidential or which is provided on a confidential basis by parties to an investigation shall, upon cause shown, be treated as such by the investigating authorities. Such information shall not be disclosed without specific permission of the party submitting it.¹⁰ Parties providing confidential information may be requested to furnish non-confidential summaries thereof. In the event such parties indicate that such information is not susceptible of summary, a statement of reasons why summarization is not possible must be provided.

7. However, if the investigating authorities find that a request for confidentiality is not warranted and if the party requesting confidentiality is unwilling to disclose the information, such authorities may disregard such information unless it can otherwise be demonstrated to their satisfaction that the information is correct.¹¹

8. The investigating authorities may carry out investigations in the territory of other signatories as required, provided they have notified in good time the signatory in question and unless the latter objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the signatory in question is notified and does not object.

9. In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings¹², affirmative or negative, may be made on the basis of the facts available.

10. The procedures set out above are not intended to prevent the authorities of a signatory from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

11. In cases where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the country of importation.

12. An investigation shall be terminated when the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury.

13. An investigation shall not hinder the procedures of customs clearance.

14. Investigations shall, except in special circumstances, be concluded within one year after their initiation.

15. Public notice shall be given of any preliminary or final finding whether affirmative or negative and of the revocation of a finding. In the case of an affirmative finding each such notice shall set forth the findings and conclusions reached on all issues of fact and law

considered material by the investigating authorities, and the reasons and basis therefor. In the case of a negative finding each notice shall set forth at least the basic conclusions and a summary of the reasons therefor. All notices of finding shall be forwarded to the signatory or signatories the products of which are subject to such finding and to the exporters known to have an interest therein.

16. Signatories shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports will be available in the GATT secretariat for inspection by government representatives. The signatories shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months.

Article 3 Consultations

1. As soon as possible after a request for initiation of an investigation is accepted, and in any event before the initiation of any investigation, signatories the products of which may be subject to such investigation shall be afforded a reasonable opportunity for consultations with the aim of clarifying the situation as to the matters referred to in Article 2, paragraph 1 above and arriving at a mutually agreed solution.

2. Furthermore, throughout the period of investigation, signatories the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.¹³

3. Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a signatory from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

4. The signatory which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the signatory or signatories the products of which are subject to such investigation access to non-confidential evidence including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

Article 4

Imposition of countervailing duties

1. The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less are decisions to be made by the authorities of the importing signatory. It is desirable that the imposition be permissive in the territory of all signatories and that the duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.

2. No countervailing duty shall be levied¹⁴ on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.¹⁵

3. When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts, on

a non-discriminatory basis on imports of such product from all sources found to be subsidized and to be causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

4. If, after reasonable efforts have been made to complete consultations, a signatory makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this section unless the subsidy is withdrawn.

5. (a) Proceedings may¹⁶ be suspended or terminated without the imposition of provisional measures or countervailing duties, if undertakings are accepted under which:

(i) the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(ii) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under undertakings shall not be higher than necessary to eliminate the amount of the subsidy. Price undertakings shall not be sought or accepted from exporters unless the importing signatory has first (1) initiated an investigation in accordance with the provisions of Article 2 of this Agreement and (2) obtained the consent of the exporting signatory. Undertakings offered need not be accepted if the authorities of the importing signatory consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons.

(b) If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the exporting signatory so desires or the importing signatory so decides. In such a case, if a determination of no injury or threat thereof is made, the undertaking shall automatically lapse, except in cases where a determination of no threat of injury is due in large part to the existence of an undertaking; in such cases the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement.

(c) Price undertakings may be suggested by the authorities of the importing signatory, but no exporter shall be forced to enter into such an undertaking. The fact that governments or exporters do not offer such undertakings or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

6. Authorities of an importing signatory may require any government or exporter from whom undertakings have been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. In case of violation of undertakings, the authorities of the importing signatory may take expeditious actions under this Agreement in conformity with its provisions which may constitute immediate application of provisional measures using the best information available. In such cases definite duties may be levied in accordance with this Agreement on goods entered for consumption not more than ninety days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

7. Undertakings shall not remain in force any longer than countervailing duties could remain in force under this Agreement. The authorities of an importing signatory shall review the need for the continuation of any undertaking, where warranted, on their own initiative, or if interested exporters or importers of the product in question so request and submit positive information substantiating the need for such review.

8. Whenever a countervailing duty investigation is suspended or terminated pursuant to the provisions of paragraph 5 above and whenever an undertaking is terminated, this fact shall be officially notified and must be published. Such notices shall set forth at least the basic conclusions and a summary of the reasons therefor.

9. A countervailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury. The investigating authorities shall review the need for continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

....

Article 6 Determination of injury

1. A determination of injury¹⁷ for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products¹⁸ and (b) the consequent impact of these imports on domestic producers of such products.

2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing signatory. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing signatory, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the subsidized imports are, through the effects¹⁹ of the subsidy, causing injury within the meaning of this Agreement. There may be other factors²⁰ which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports.

5. In determining injury, the term "domestic industry" shall, except as provided in paragraph 7 below, be interpreted as referring to the domestic producers as a whole of the like products or to those of them

whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related²¹ to the exporters or importers or are themselves importers of the allegedly subsidized product the industry may be interpreted as referring to the rest of the producers.

6. The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

7. In exceptional circumstances the territory of a signatory may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

8. When the industry has been interpreted as referring to the producers in a certain area, as defined in paragraph 7 above, countervailing duties shall be levied only on the products in question

consigned for final consumption to that area. When the constitutional law of the importing signatory does not permit the levying of countervailing duties on such a basis, the importing signatory may levy the countervailing duties without limitation, only if (a) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 4, paragraph 5, of this Agreement, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

9. Where two or more countries have reached under the provisions of Article XXIV: 8(a) of the General Agreement such a level of integration that they have the characteristics of a single, unified market the industry in the entire area of integration shall be taken to be the industry referred to in paragraphs 5 to 7 above.

Part II

Article 7

Notification of subsidies²²

1. Having regard to the provisions of Article XVI:1 of the General Agreement, any signatory may make a written request for information on the nature and extent of any subsidy granted or maintained by another signatory (including any form of income or price support) which operates directly or indirectly to increase exports of any product from or reduce imports of any product into its territory.

2. Signatories so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting signatory. Any signatory which considers that such information has not been provided may bring the matter to the attention of the Committee.

3. Any interested signatory which considers that any practice of another signatory having the effects of a subsidy has not been notified in accordance with the provisions of Article XVI:1 of the General Agreement may bring the matter to the attention of such other signatory. If the subsidy practice is not thereafter notified promptly, such signatory may itself bring the subsidy practice in question to the notice of the Committee.

Article 8

Subsidies - General provisions

1. Signatories recognize that subsidies are used by governments to promote important objectives of social and economic policy. Signatories also recognize that subsidies may cause adverse effects to the interests of other signatories.

2. Signatories agree not to use export subsidies in a manner inconsistent with the provisions of this Agreement.

3. Signatories further agree that they shall seek to avoid causing, through the use of any subsidy

(a) injury to the domestic industry of another signatory²³,

(b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement²⁴, or

(c) serious prejudice to the interests of another signatory.²⁵

4. The adverse effects to the interests of another signatory required to demonstrate nullification or impairment²⁶ or serious prejudice may arise through

- (a) the effects of the subsidized imports in the domestic market of the importing signatory,
- (b) the effects of the subsidy in displacing or impeding the imports of like products into the market of the subsidizing country, or
- (c) the effects of the subsidized exports in displacing²⁷ the exports of like products of another signatory from a third country market.²⁸

Article 9

Export subsidies on products
other than certain primary products²⁹

1. Signatories shall not grant export subsidies on products other than certain primary products.

....

Article 10

Export subsidies on certain primary products

1. In accordance with the provisions of Article XVI:3 of the General Agreement, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares

of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.

2. For purposes of Article XVI: 3 of the General Agreement and paragraph 1 above:

- (a) "more than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;
- (b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining "equitable share of world export trade";
- (c) "a previous representative period" shall normally be the three most recent calendar years in which normal market conditions existed.

3. Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market.

Article 11

Subsidies other than export subsidies

1. Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important

policy objectives which they consider desirable. Signatories note that among such objectives are:

- (a) the elimination of industrial, economic and social disadvantages of specific regions,
- (b) to facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade,
- (c) generally to sustain employment and to encourage re-training and change in employment,
- (d) to encourage research and development programmes, especially in the field of high-technology industries,
- (e) the implementation of economic programmes and policies to promote the economic and social development of developing countries,
- (f) redeployment of industry in order to avoid congestion and environmental problems.

2. Signatories recognize, however, that subsidies other than export subsidies, certain objectives and possible form of which are described, respectively, in paragraphs 1 and 3 of this Article, may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition. Signatories shall therefore seek to avoid causing such effects through the use of subsidies. In particular, signatories, when drawing up their policies and practices in this field,

in addition to evaluating the essential internal objectives to be achieved, shall also weigh, as far as practicable, taking account of the nature of the particular case, possible adverse effects on trade. They shall also consider the conditions of world trade, production (e.g. price, capacity utilization etc.) and supply in the product concerned.

3. Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, inter alia, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such subsidies are: government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of equity capital.

Signatories note that the above form of subsidies are normally granted either regionally or by sector. The enumeration of forms of subsidies set out above is illustrative and non-exhaustive, and reflects these currently granted by a number of signatories to this Agreement.

Signatories recognize, nevertheless, that the enumeration of forms of subsidies set out above should be reviewed periodically and that this should be done, through consultations, in conformity with the spirit of Article XVI:5 of the General Agreement.

4. Signatories recognize further that, without prejudice to their rights under this Agreement, nothing in paragraphs 1-3 above and in particular the enumeration of forms of subsidies creates, in itself, any basis for action under the General Agreement, as interpreted by this Agreement.

Article 12
Consultations

1. Whenever a signatory has reason to believe that an export subsidy is being granted or maintained by another signatory in a manner inconsistent with the provisions of this Agreement, such signatory may request consultations with such other signatory.
2. A request for consultations under paragraph 1 above shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.
3. Whenever a signatory has reason to believe that any subsidy is being granted or maintained by another signatory and that such subsidy either causes injury to its domestic industry, nullification or impairment of benefits accruing to it under the General Agreement, or serious prejudice to its interests, such signatory may request consultations with such other signatory.
4. A request for consultations under paragraph 3 above shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question and (b) the injury caused to the domestic industry or, in the case of nullification or impairment, or serious prejudice, the adverse effects caused to the interests of the signatory requesting consultations.
5. Upon request for consultations under paragraph 1 or paragraph 3 above, the signatory believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

Article 13

Conciliation, dispute settlement and authorized countermeasures

1. If, in the case of consultations under paragraph 1 of Article 12, a mutually acceptable solution has not been reached within thirty days³⁰ of the request for consultations, any signatory party to such consultations may refer the matter to the Committee for conciliation in accordance with the provisions of Part VI.
2. If, in the case of consultations under paragraph 3 of Article 12, a mutually acceptable solution has not been reached within sixty days of the request for consultations, any signatory party to such consultations may refer the matter to the Committee for conciliation in accordance with the provisions of Part VI.
3. If any dispute arising under this Agreement is not resolved as a result of consultations or conciliations, the Committee shall, upon request, review the matter in accordance with the dispute settlement procedures of Part VI.
4. If, as a result of its review, the Committee concludes that an export subsidy is being granted in a manner inconsistent with the provisions of this Agreement or that a subsidy is being granted or maintained in such a manner as to cause injury, nullification or impairment, or serious prejudice, it shall make such recommendations³¹ to the parties as may be appropriate to resolve the issue and, in the event the recommendations are not followed, it may authorize such countermeasures as may be appropriate, taking into account the degree and nature of the adverse effects found to exist, in accordance with the relevant provisions of Part VI.

PART III

Article 14
Developing countries

1. Signatories recognize that subsidies are an integral part of economic development programmes of developing countries.
2. Accordingly, this Agreement shall not prevent developing country signatories from adopting measures and policies to assist their industries, including those in the export sector. In particular the commitment of Article 9 shall not apply to developing country signatories, subject to the provisions of paragraphs 5 through 8 below.
3. Developing country signatories agree that export subsidies on their industrial products shall not be used in a manner which causes serious prejudice to the trade or production of another signatory.
4. There shall be no presumption that export subsidies granted by developing country signatories result in adverse effects, as defined in this Agreement, to the trade or production of another signatory. Such adverse effects shall be demonstrated by positive evidence, through an economic examination of the impact on trade or production of another signatory.
5. A developing country signatory should endeavour to enter into a commitment³² to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs.
6. When a developing country has entered into a commitment to reduce or eliminate export subsidies, as provided in paragraph 5 above, countermeasures pursuant to the provisions of Parts II and VI of this Agreement against any export subsidies of such developing country shall not be authorized for other signatories of this Agreement, provided that the export subsidies in question are in accordance with the terms of the commitment referred to in paragraph 5 above.

7. With respect to any subsidy, other than an export subsidy, granted by a developing country signatory, action may not be authorized or taken under Parts II and VI of this Agreement, unless nullification or impairment of tariff concessions or other obligations under the General Agreement is found to exist as a result of such subsidy, in such a way as to displace or impede imports of like products into the market of the subsidizing country, or unless injury to domestic industry in the importing market of a signatory occurs in terms of Article VI of the General Agreement, as interpreted and applied by this Agreement. Signatories recognize that in developing countries, governments may play a large role in promoting economic growth and development. Intervention by such governments in their economy, for example through the practices enumerated in paragraph 3 of Article 11, shall not, per se, be considered subsidies.

8. The Committee shall, upon request by an interested signatory, undertake a review of a specific export subsidy practice of a developing country signatory to examine the extent to which the practice is in conformity with the objectives of this Agreement. If a developing country has entered into a commitment pursuant to paragraph 5 of this Article, it shall not be subject to such review for the period of that commitment.

9. The Committee shall, upon request by an interested signatory, also undertake similar reviews of measures maintained or taken by developed country signatories under the provisions of this Agreement which affect interests of a developing country signatory.

10. Signatories recognize that the obligations of this Agreement with respect to export subsidies for certain primary products apply to all signatories.

NOTES

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³The provisions of both Part I and Part II of this Agreement may be invoked in parallel: however, with regard to the effects of a particular subsidy in the domestic market of the importing country, only one form of relief (either a countervailing duty or an authorized countermeasure) shall be available.

⁴The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement.

⁵The term "initiated" as used hereinafter means procedural action by which a signatory formally commences an investigation as provided in paragraph 3 of this Article.

⁶Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of Article 6.

⁷As established in Part V of this Agreement and hereinafter referred to as "the Committee".

⁸For the purpose of this Agreement "party" means any natural or juridical person resident in the territory of any signatory.

⁹Any "interested signatory" or "interested party" shall refer to a signatory or a party economically affected by the subsidy in question.

¹⁰Signatories are aware that in the territory of certain signatories disclosure pursuant to a narrowly-drawn protective order may be required.

¹¹Signatories agree that requests for confidentiality should not be arbitrarily rejected.

¹²Because of different terms used under different systems in various countries the term "finding" is hereinafter used to mean a formal decision or determination.

¹³It is particularly important, in accordance with the provisions of this paragraph, that no affirmative finding whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part VI of this Agreement.

¹⁴As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

¹⁵An understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy.

¹⁶The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings, except as provided in paragraph 5(b) of this Article.

¹⁷Determinations of injury under the criteria set forth in this Article shall be based on positive evidence. In determining threat of injury the investigating authorities, in examining the factors listed in this Article, may take into account the evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom.

¹⁸Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.

¹⁹As set forth in paragraphs 2 and 3 of this Article.

²⁰Such factors can include inter alia, the volume and prices of non-subsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

²¹The Committee should develop a definition of the word "related" as used in this paragraph.

²²In this Agreement, the term "subsidies" shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory. However, it is recognized that for signatories with different federal systems of government, there are different divisions of powers. Such signatories accept nonetheless the international consequences that may arise under this Agreement as a result of the granting of subsidies within their territories.

²³Injury to the domestic industry is used here in the same sense as it is used in Part I of this Agreement.

²⁴Benefits accruing directly or indirectly under the General Agreement include the benefits of tariff concessions bound under Article II of the General Agreement.

²⁵ Serious prejudice to the interests of another signatory is used in this Agreement in the same sense as it is used in Article XVI: 1 of the General Agreement and includes threat of serious prejudice.

²⁶ Signatories recognize that nullification or impairment of benefits may also arise through the failure of a signatory to carry out its obligations under the General Agreement or this Agreement. Where such failure concerning export subsidies is determined by the Committee to exist, adverse effects may, without prejudice to paragraph 9 of Article 18 below, be presumed to exist. The other signatory will be accorded a reasonable opportunity to rebut this presumption.

²⁷ The term "displacing" shall be interpreted in a manner which takes into account the trade and development needs of developing countries and in this connection is not intended to fix traditional market shares.

²⁸ The problem of third country markets so far as certain primary products are concerned is dealt with exclusively under Article 10 below.

²⁹ For purposes of this Agreement "certain primary products" means the products referred to in Note Ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words "or any mineral".

³⁰ Any time periods mentioned in this Article and in Article 18 may be extended by mutual agreement.

³¹ In making such recommendations, the Committee shall take into account the trade, development and financial needs of developing country signatories.

³² It is understood that after this Agreement has entered into force, any such proposed commitment shall be notified to the Committee in good time.

APPENDIX 4

AGREEMENT ON IMPLEMENTATION OF
ARTICLE VI OF THE GENERAL AGREEMENT
ON TARIFFS AND TRADE
(Extracts)

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PART I
ANTI-DUMPING CODE

Article 1
Principles

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Code. The following provisions govern the application of Article VI of the General Agreement in so far as action is taken under anti-dumping legislation or regulations.

Article 2
Determination of Dumping

1. For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from

one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2. Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

3. In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or there is no comparable price for them in the country of export.

4. When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

5. In cases where there is no export price or where it appears to the authorities² concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

6. In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI: 1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in paragraph 5 of Article 2 allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

7. This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to the General Agreement.

Article 3 Determination of Injury³

1. A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

2. With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the dumped imports are, through the effects⁴ of dumping, causing injury within the meaning of this Code. There may be other factors⁵ which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

5. The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the dumped imports shall be assessed by the

examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

6. A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.⁶

7. With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

Article 4 Definition of Industry

1. In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

- (i) when producers are related⁷ to the exporters or importers or are themselves importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of the producers;
- (ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that

market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

....

Article 5

Initiation and Subsequent Investigation

1. An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry⁹ affected. The request shall include sufficient evidence of (a) dumping; (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code and (c) a causal link between the dumped imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

2. Upon initiation of an investigation and thereafter, the evidence of both dumping and injury caused thereby should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on

which in accordance with the provisions of this Code provisional measures may be applied, except in the cases provided for in paragraph 3 of Article 10 in which the authorities accept the request of the exporters.

....

Article 6 Evidence

1. The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect of the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.
2. The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 3 below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

....

Article 7 Price Undertakings

1. Proceedings may¹³ be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its

prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping.

2. Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing country have initiated an investigation in accordance with the provisions of Article 5 of this Code. Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons.

....

Article 8

Imposition and Collection of Anti-dumping Duties

1. The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories Parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

2. When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports

from those sources, from which price undertakings under the terms of this Code have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

3. The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

....

Article 9

Duration of Anti-Dumping Duties

1. An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.

2. The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

....

Article 12

Anti-Dumping Action on behalf of a Third Country

1. An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

2. Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

3. The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

4. The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

Article 13

Developing Countries

It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries.

....

NOTES

¹The term "initiated" as used hereinafter means the procedural action by which a Party formally commences an investigation as provided in paragraph 6 of Article 6.

²When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

³Under this Code the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

⁴As set forth in paragraphs 2 and 3 of this Article.

⁵Such factors include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

⁶One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

⁷An understanding among Parties should be developed defining the word "related" as used in this Code.

....

⁹As defined in Article 4.

....

....

¹³The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 3.

APPENDIX 5

AGREEMENT ON GOVERNMENT PROCUREMENT

(Extracts)

....

Article 1

Scope and Coverage

1. This Agreement applies to:

- (a) any law, regulation, procedure and practice regarding the procurement of products by the entities¹ subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se;
- (b) any procurement contract of a value of SDR 150,000 or more.² No procurement requirement shall be divided with the intent of reducing the value of the resulting contracts below SDR 150,000. If an individual requirement for the procurement of a product or products of the same type results in the award of more than one contract or in contracts being awarded in separate parts, the value of these recurring contracts in the twelve months subsequent to the initial contract shall be the basis for the application of this Agreement;
- (c) procurement by the entities under the direct or substantial control of Parties and other designated entities, with respect to their procurement procedures and practices. Until the

review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the lists of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I.

2. The Parties shall inform their entities not covered by this Agreement and the regional and local governments and authorities within their territories of the objectives, principles and rules of this Agreement, in particular the rules on national treatment and non-discrimination, and draw their attention to the overall benefits of liberalization of government procurement.

Article II

National Treatment and Non-Discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within the customs territories (including free zones) of the Parties, treatment no less favourable than:

- (a) that accorded to domestic products and suppliers; and
- (b) that accorded to products and suppliers of any other Party.

2. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, and other import regulations and formalities.

3. The Parties shall not apply rules of origin to products imported for purposes of government procurement covered by this Agreement from

other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of importation to imports of the same products from the same Parties.

Article III

Special and Differential Treatment for Developing Countries

Objectives

1. The Parties shall, in the implementation and administration of this Agreement, through the provisions set out in this Article, duly take into account the development, financial and trade needs of developing countries, in particular the least-developed countries, in their need to:

- (a) safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development;
- (b) promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy;
- (c) support industrial units so long as they are wholly or substantially dependent on government procurement;
- (d) encourage their economic development through regional or global arrangements among developing countries presented to the CONTRACTING PARTIES to the GATT and not disapproved by them.

2. Consistently with the provisions of this Agreement, the Parties shall, in the preparation and application of laws, regulations and

procedures affecting government procurement, facilitate increased imports from developing countries, bearing in mind the special problems of the least-developed countries and of those countries at low stages of economic development.

Coverage

3. With a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 above shall be duly taken into account in the course of the negotiations with respect to the lists of entities of developing countries to be covered by the provisions of this Agreement. Developed countries, in the preparation of their lists of entities to be covered by the provisions of this Agreement shall endeavour to include entities purchasing products of export interest to developing countries.

Agreed exclusions

4. Developing countries may negotiate with other participants in the negotiation of this Agreement mutually acceptable exclusions from the rules on national treatment with respect to certain entities or products that are included in their lists of entities having regard to the particular circumstances of each case. In such negotiations, the considerations mentioned in paragraph 1(a)-(c) above shall be duly taken into account. Developing countries participating in regional or global arrangements among developing countries referred to in paragraph 1(d) above, may also negotiate exclusions to their lists, having regard to the particular circumstances of each case, taking into account, inter alia, the provisions on government procurement provided for in the

regional or global arrangements concerned and taking into account, in particular, products which may be subject to common industrial development programmes.

....

Technical assistance for developing country Parties

8. Developed country Parties shall, upon request, provide all technical assistance which they may deem appropriate to developing country Parties in resolving their problems in the field of government procurement.

9. This assistance which shall be provided on the basis of non-discrimination among the developing country Parties shall relate, inter alia, to:

- the solution of particular technical problems relating to the award of a specific contract;
- any other problem which the Party making the request and another Party agree to deal with in the context of this assistance.

....

Special treatment for least-developed countries

11. Having regard to paragraph 6 of the Tokyo Declaration, special treatment shall be granted to the least-developed country Parties and to the suppliers in those countries with respect to products originating in

those countries, in the context of any general or specific measures in favour of the developing country Parties. The Parties may also grant the benefits of this Agreement to suppliers in the least-developed countries which are not Parties, with respect to products originating in those countries.

12. Developed country Parties shall, upon request, provide assistance which they may deem appropriate to potential tenderers in the least-developed countries in submitting their tenders and selecting the products which are likely to be of interest to entities of developed countries as well as to suppliers in the least-developed countries and likewise assist them to comply with technical regulations and standards relating to products which are the subject of the proposed purchase.

Review

13. The Committee shall review annually the operation and effectiveness of this Article and after each three years of its operation on the basis of reports to be submitted by the Parties shall carry out a major review in order to evaluate its effects. As part of the three-yearly reviews and with a view to achieving the maximum implementation of the provisions of this Agreement, including in particular Article II, and having regard to the development, financial and trade situation of the developing countries concerned, the Committee shall examine whether exclusions provided for in accordance with the provisions of paragraphs 4 to 6 of this Article shall be modified or extended.

14. In the course of further rounds of negotiations in accordance with the provisions of Article IX, paragraph 6, the developing country Parties shall give consideration to the possibility of enlarging their list of entities having regard to their economic, financial and trade situation.

Article IV
Technical Specifications

1. Technical specifications laying down the characteristics of the products to be purchased such as quality, performance, safety and dimensions, testing and test methods, symbols, terminology, packaging, marking and labelling, and conformity certification requirements prescribed by procurement entities, shall not be prepared, adopted or applied with a view to creating obstacles to international trade nor have the effect of creating unnecessary obstacles to international trade.

2. Any technical specification prescribed by procurement entities shall, where appropriate:

(a) be in terms of performance rather than design; and

(b) be based on international standards, national technical regulations, or recognized national standards.

3. There shall be no requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tenders.

Article V
Tendering Procedures

1. The Parties shall ensure that the tendering procedures of their entities are consistent with the provisions below. Open tendering procedures, for the purposes of this Agreement, are those procedures under which all interested suppliers may submit a tender. Selective

tendering procedures, for the purposes of this Agreement, are those procedures under which, consistent with paragraph 7 and other relevant provisions of this Article, those suppliers invited to do so by the entity may submit a tender. Single tendering procedures, for the purposes of this Agreement, are those procedures where the entity contacts suppliers individually, only under the conditions specified in paragraph 15 below.

Qualification of suppliers

2. Entities, in the process of qualifying suppliers, shall not discriminate among foreign suppliers or between domestic and foreign suppliers. Qualification procedures shall be consistent with the following:

- (a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;
- (b) any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to foreign suppliers than to domestic suppliers and shall not discriminate among foreign suppliers;
- (c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep foreign suppliers off a suppliers' list or from being considered for a particular proposed purchase. Entities shall recognize as

qualified suppliers such domestic or foreign suppliers who meet the conditions for participation in a particular proposed purchase. Suppliers requesting to participate in a particular proposed purchase who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

- (d) entities maintaining permanent lists of qualified suppliers shall ensure that all qualified suppliers so requesting are included in the lists within a reasonably short time;
- (e) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;
- (f) nothing in sub-paragraphs (a) to (e) above shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Notice of proposed purchase and tender documentation

3. Entities shall publish a notice of each proposed purchase in the appropriate publication listed in Annex II. Such notice shall constitute an invitation to participate in either open or selective tendering procedures.

4. Each notice of proposed purchase shall contain the following information:

- (a) the nature and quantity of the products to be supplied, or envisaged to be purchased in the case of contracts of a recurring nature;

- (b) whether the procedure is open or selective;
- (c) any delivery date;
- (d) the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers' lists, or for receiving tenders, as well as the language or languages in which they must be submitted;
- (e) the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;
- (f) any economic and technical requirements, financial guarantees and information required from suppliers;
- (g) the amount and terms of payment of any sum payable for the tender documentation.

The entity shall publish in one of the official languages of the GATT a summary of the notice of proposed purchase containing at least the following:

- (i) subject-matter of the contract;
- (ii) time-limits set for the submission of tenders or an application to be invited to tender; and
- (iii) addresses from which documents relating to the contracts may be requested.

5. To ensure optimum effective international competition under selective tendering procedures, entities shall, for each proposed purchase, invite tenders from the maximum number of domestic and foreign

suppliers, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.

6. (a) In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Annex III, a notice of the following:
 - (i) the enumeration of the lists maintained, including their headings, in relation to the products or categories of products to be purchased through the lists;
 - (ii) the conditions to be filled by potential suppliers in view of their inscription on those lists and the methods according to which each of those conditions be verified by the entity concerned;
 - (iii) the period of validity of the lists, and the formalities for their renewal.
 - (b) Entities maintaining permanent lists of qualified suppliers may select suppliers to be invited to tender from among those listed. Any selection shall allow for equitable opportunities for suppliers on the lists.
 - (c) If, after publication of the notice under paragraph 3 above, a supplier not yet qualified requests to participate in a particular tender, the entity shall promptly start the procedure of qualification.
7. Suppliers requesting to participate in a particular proposed purchase shall be permitted to submit a tender and be considered provided, in the case of those not yet qualified, there is sufficient

time to complete the qualification procedure under paragraphs 2-6 of this Article. The number of additional suppliers permitted to participate shall be limited only by the efficient operation of the procurement system.

....

9. (a) Any prescribed time-limit shall be adequate to allow foreign as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the proposed purchase, the extent of sub-contracting anticipated, and the normal time for transmitting tenders by mail from foreign as well as domestic points.
- (b) Consistent with the entity's own reasonable needs, any delivery date shall take into account the normal time required for the transport of goods from the different points of supply.

....

Submission, receipt and opening of tenders and awarding of contracts

14. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

- (a) tenders shall normally be submitted in writing directly or by mail. If tenders by telex, telegram or telecopy are

permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. The tender must be confirmed promptly by letter or by the despatch of a signed copy of the telex, telegram or telecopy. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or telecopy shall prevail where there is a difference or conflict between that content and any documentation received after the time-limit; requests to participate in selective tendering procedures may be submitted by telex, telegram or telecopy;

- (b) the opportunities that may be given to tenderers to correct unintentional errors between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice;
- (c) a supplier shall not be penalized if a tender is received in the office designated in the tender documentation after the time specified because of delay due solely to mishandling on the part of the entity. Tenders may also be considered in other exceptional circumstances if the procedures of the entity concerned so provide;
- (d) all tenders solicited under open and selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings as well as the availability of information from the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement. To this effect, and in connexion with open procedures, entities shall establish provisions for the

opening of tenders in the presence of either tenderers or their representatives, or an appropriate and impartial witness not connected with the procurement process. A report on the opening of tenders shall be drawn up in writing. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles VI and VII of this Agreement;

- (e) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from suppliers which comply with the conditions for participation. If an entity has received a tender abnormally lower than other tenders submitted, it may enquire with the tenderer to ensure that it can comply with the conditions of participation and be capable of fulfilling the terms of the contract;
- (f) unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous;
- (g) if it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation, the entity shall, in any subsequent negotiations, give equal consideration and treatment to all tenders within the competitive range;

- (h) entities should normally refrain from awarding contracts on the condition that the supplier provide offset procurement opportunities or similar conditions. In the limited number of cases where such requisites are part of a contract, Parties concerned shall limit the offset to a reasonable proportion within the contract value and shall not favour suppliers from one Party over suppliers from any other Party. Licensing of technology should not normally be used as a condition of award but instances where it is required should be as infrequent as possible and suppliers from one Party shall not be favoured over suppliers from any other Party.

Use of single tendering

15. The provisions of paragraphs 1-14 above governing open and selective tendering procedures need not apply in the following conditions, provided that single tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic producers:

- (a) in the absence of tenders in response to an open or selective tender, or when the tenders submitted have been either collusive or do not conform to the essential requirements in the tender, or from suppliers who do not comply with the conditions for participation provided for in accordance with this Agreement, on condition, however, that the requirements of the initial tender are not substantially modified in the contract as awarded;
- (b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, the products can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

- (c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the entity, the products could not be obtained in time by means of open or selective tendering procedures;
- (d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies or installations, or as the extension of existing supplies or installations where a change of supplier would compel the entity to purchase equipment not meeting requirements of interchangeability with already existing equipment;
- (e) when an entity purchases prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development. When such contracts have been fulfilled, subsequent purchases of products shall be subject to paragraphs 1-14 of this Article.³

16. Entities shall prepare a report in writing on each contract awarded under the provisions of paragraph 15 of this Article. Each report shall contain the name of the purchasing entity, value and kind of goods purchased, country of origin, and a statement of the conditions in paragraph 15 of this Article which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures of Articles VI and VII of this Agreement.

Article VI Information and Review

1. Any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract

clauses) regarding government procurement covered by this Agreement, shall be published promptly by the Parties in the appropriate publications listed in Annex IV and in such a manner as to enable other Parties and suppliers to become acquainted with them. The Parties shall be prepared, upon request, to explain to any other Party their government procurement procedures. Entities shall be prepared, upon request, to explain to any supplier from a country which is a Party to this Agreement their procurement practices and procedures.

2. Entities shall, upon request by any supplier, promptly provide pertinent information concerning the reasons why that supplier's application to qualify for the suppliers' list was rejected, or why that supplier was not invited or admitted to tender.

3. Entities shall promptly, and in no case later than seven working days from the date of the award of a contract, inform the unsuccessful tenderers by written communication or publication that a contract has been awarded.

4. Upon request by an unsuccessful tenderer, the purchasing entity shall promptly provide that tenderer with pertinent information concerning the reasons why the tender was not selected, including information on the characteristics and the relative advantages of the tender selected, as well as the name of the winning tenderer.

5. Entities shall establish a contact point to provide additional information to any unsuccessful tenderer dissatisfied with the explanation for rejection of his tender or who may have further questions about the award of the contract. There shall also be procedures for the hearing and reviewing of complaints arising in connexion with any phase of the procurement process, so as to ensure that, to the greatest extent possible, disputes under this Agreement will be equitably and expeditiously resolved between the suppliers and the entities concerned.

Article VII
Enforcement of Obligations

Institutions

1. There shall be established under this Agreement a Committee on Government Procurement (referred to in this Agreement as "the Committee") composed of representatives from each of the Parties. This Committee shall elect its own Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.
2. The Committee may establish ad hoc panels in the manner and for the purposes set out in paragraph 8 of this Article and working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

Consultations

3. Each Party shall afford sympathetic consideration to, and shall afford adequate opportunity for consultations regarding, representations made by another Party with respect to any matter affecting the operation of this Agreement.
4. If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of this Agreement is being impeded, by another Party or Parties, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Party or Parties in question. Each Party shall afford

sympathetic consideration to any request from another Party for consultations. The Parties concerned shall initiate requested consultations promptly.

5. The Parties engaged in consultations on a particular matter affecting the operation of this Agreement shall provide information concerning the matter subject to the provisions of Article VI, paragraph 8, and attempt to conclude such consultations within a reasonably short period of time.

Dispute settlement

6. If no mutually satisfactory solution has been reached as a result of consultations under paragraph 4 between the Parties concerned, the Committee shall meet at the request of any party to the dispute within thirty days of receipt of such a request to investigate the matter, with a view to facilitating a mutually satisfactory solution.

7. If no mutually satisfactory solution has been reached after detailed examination by the Committee under paragraph 6 within three months, the Committee shall, at the request of any party to the dispute establish a panel to:

- (a) examine the matter;
- (b) consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;
- (c) make a statement concerning the facts of the matter as they relate to application of this Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.

Enforcement

11. After the examination is complete or after the report of a panel, working party or other subsidiary body is presented to the Committee, the Committee shall give the matter prompt consideration. With respect to these reports, the Committee shall take appropriate action normally within thirty days of receipt of the report unless extended by the Committee, including:

- (a) a statement concerning the facts of the matter;
- (b) recommendations to one or more Parties; and/or
- (c) any other ruling which it deems appropriate.

Any recommendations by the Committee shall aim at the positive resolution of the matter on the basis of the operative provisions of this Agreement and its objectives set out in the Preamble.

12. If a Party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event, the Committee shall consider what further action maybe appropriate.

13. The Committee shall keep under surveillance any matter on which it has made recommendations or given rulings.

Balance of rights and obligations

14. If the Committee's recommendations are not accepted by a party, or parties, to the dispute, and if the Committee considers that the circumstances are serious enough to justify such action, it may authorize a Party or Parties to suspend in whole or in part, and for such time as maybe necessary, the application of this Agreement to any other Party or Parties, as is determined to be appropriate in the circumstances.

Article VIII
Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products of handicapped persons, of philanthropic institutions or of prison labour.

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NOTES

¹Throughout this Agreement, the word entities is understood to include agencies.

²For contracts below the threshold, the Parties shall consider, in accordance with paragraph 6 of Article IX, the application in whole or

in part of this Agreement. In particular, they shall review the procurement practices and procedures utilized and the application of non-discrimination and transparency for such contracts in connexion with the possible inclusion of contracts below the threshold in this Agreement.

³Original development of a first product may include limited production in order to incorporate the results of field testing and to demonstrate that the product is suitable for production in quantity to acceptable quality standards. It does not extend to quantity production to establish commercial viability or to recover research and development costs.

APPENDIX 6

AGREEMENT ON IMPORT LICENSING PROCEDURES
(Extracts)

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Article 1
General Provisions

1. For the purpose of this Agreement, import licensing is defined as administrative procedures¹ used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing country.

2. The Parties shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of the GATT including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing countries.

3. The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.

4. The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, and the lists of products subject to the licensing requirement shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Any changes in either the rules concerning licensing

procedures or the list of products subject to import licensing shall also be promptly published in the same manner. Copies of these publications shall also be made available to the GATT Secretariat.

5. Application forms and, where applicable, renewal forms shall be as simple as possible. Such documents and information as are considered strictly necessary for the proper functioning of the licensing regime may be required on application.

6. Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall have to approach only one administrative body previously specified in the rules referred to in paragraph 4 above in connexion with an application and shall be allowed a reasonable period therefor. In cases where it is strictly indispensable that more than one administrative body is to be approached in connexion with an application, these shall be kept to the minimum number possible.

7. No application shall be refused for minor documentation errors which do not alter basic data contained therein. No penalty greater than necessary to serve merely as a warning shall be imposed in respect of any omission or mistake in documentation or procedures which is obviously made without fraudulent intent or gross negligence.

8. Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the licence due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice.

9. The foreign exchange necessary to pay for licensed imports shall be made available to licence holders on the same basis as to importers of goods not requiring import licences.

10. With regard to security exceptions, the provisions of Article XXI of the GATT apply.

11. The provisions of this Agreement shall not require any Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 2
Automatic import licensing²

1. Automatic import licensing is defined as import licensing where approval of the application is freely granted.

2. The following provisions³, in addition to those in paragraphs 1 to 11 of Article 1 and paragraph 1 of Article 2 above, shall apply to automatic import licensing procedures:

- (a) Automatic licensing procedures shall not be administered in a manner so as to have restricting effects on imports subject to automatic licensing;
- (b) Parties recognize that automatic import licensing may be necessary whenever other appropriate procedures are not available. Automatic import licensing may be maintained as long as the circumstances which gave rise to its introduction prevail or as long as its underlying administrative purposes cannot be achieved in a more appropriate way;
- (c) Any person, firm or institution which fulfils the legal requirements of the importing country for engaging in import operations involving products subject to automatic licensing shall be equally eligible to apply for and to obtain import licenses;

- (d) Applications for licenses may be submitted on any working day prior to the customs clearance of the goods;
- (e) Applications for licences when submitted in appropriate and complete form shall be approved immediately on receipt, to the extent administratively feasible, but within a maximum of ten working days.

Article 3

Non-automatic import licensing

The following provisions, in addition to those in paragraphs 1 to 11 of Article 1 above, shall apply to non-automatic import licensing procedures, that is, import licensing procedures not falling under paragraphs 1 and 2 of Article 2 above:

- (a) Licensing procedures adopted, and practices applied, in connexion with the issuance of licences for the administration of quotas and other import restrictions, shall not have trade restrictive effects on imports additional to those caused by the imposition of the restriction;
- (b) Parties shall provide, upon the request of any Party having an interest in the trade in the product concerned, all relevant information concerning:
 - (i) the administration of the restrictions;
 - (ii) the import licences granted over a recent period;
 - (iii) the distribution of such licences among supplying countries;

- (iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. The developing countries would not be expected to take additional administrative or financial burdens on this account.
- (c) Parties administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change thereof;
- (d) In the case of quotas allocated among supplying countries, the Party applying the restrictions shall promptly inform all other Parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof;
- (e) Where there is a specific opening date for the submission of licensing applications, the rules and product lists referred to in paragraph 4 of Article 1 shall be published as far in advance as possible of such date, or immediately after the announcement of the quota or other measure involving an import licensing requirement;
- (f) Any person, firm or institution which fulfils the legal requirements of the importing country shall be equally eligible to apply and to be considered for a licence. If the licence application is not approved, the applicant shall, on request, be given the reasons therefor and shall have a right of appeal or review in accordance with the domestic legislation or procedures of the importing country;

- (g) The period for processing of applications shall be as short as possible;
- (h) The period of licence validity shall be of reasonable duration and not be so short as to preclude imports. The period of licence validity shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements;
- (i) When administering quotas, Parties shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilization of the quotas;
- (j) When issuing licences, Parties shall take into account the desirability of issuing licences for products in economic quantities;
- (k) In allocating licences, parties should consider the import performance of the applicant, including whether licences issued to the applicant have been fully utilized, during a recent representative period;
- (l) Consideration shall be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing countries and, in particular, the least-developed countries;
- (m) In the case of quotas administered through licences which are not allocated among supplying countries, licence holders⁴ shall be free to choose the sources of imports. In the case

of quotas allocated among supplying countries, the licence shall clearly stipulate the country or countries;

- (n) In applying paragraph 8 of Article 1 above, compensating adjustments may be made in future licence allocations where imports exceeded a previous licence level.

Article 4

Institutions, consultation and dispute settlement

1. There shall be established under this Agreement a Committee on Import Licensing composed of representatives from each of the Parties (referred to in this Agreement as "the Committee"). The Committee shall elect its own Chairman and shall meet as necessary for the purpose of affording Parties the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives.
2. Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement, shall be subject to the procedures of Articles XXII and XXIII of the GATT.

Article 5

Final provisions

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3. Entry into force

This Agreement shall enter into force on 1 January 1980 for the governments⁵ which have accepted or acceded to it by that date. For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

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Notes

¹Those procedures referred to as "licensing" as well as other similar administrative procedures.

²Those import licensing procedures requiring a security which have no restrictive effects on imports, are to be considered as falling within the scope of paragraphs 1 and 2 of Article 2 below.

³A developing country Party, which has specific difficulties with the requirements of sub-paragraphs (d) and (e) below may, upon notification to the Committee referred to in paragraph 1 of Article 4, delay the application of these sub-paragraphs by not more than two years from the date of entry into force of this Agreement for such Party.

⁴Sometimes referred to as "quota holders".

⁵For the purpose of this Agreement, the term "governments" is deemed to include the competent authorities of the European Economic Community.

APPENDIX 7

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

(Extracts)

....

Article 1
General provisions

1.1 General terms for standardization and certification shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.¹

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 All references in this Agreement to technical regulations, standards, methods for assuring conformity with technical regulations or standards and certification systems shall be construed to include any

amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

TECHNICAL REGULATIONS AND STANDARDS

Article 2

Preparation, adoption and application of technical regulations and standards by central government bodies

With respect to their central government bodies:

2.1 Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.

2.2 Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for inter alia such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health,

or the environment; fundamental climatic or other geographical factors; fundamental technological problems.

2.3 With a view to harmonizing technical regulations or standards on as wide a basis as possible, Parties shall play a full part within the limits of their resources in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations or standards.

2.4 Wherever appropriate, Parties shall specify technical regulations and standards in terms of performance rather than design or descriptive characteristics.

2.5 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation or standard is not substantially the same as the technical content of relevant international standards, and if the technical regulation or standard may have a significant effect on trade of other Parties, Parties shall:

- 2.5.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties to become acquainted with it, that they propose to introduce a particular technical regulation or standard;
- 2.5.2 notify other Parties through the GATT secretariat of the products to be covered by technical regulations together with a brief indication of the objective and rationale of proposed technical regulations;
- 2.5.3 upon request, provide without discrimination, to other Parties in regard to technical regulations and to interested parties in other Parties in regard to standards, particulars or copies of the proposed

technical regulation or standard and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.5.4 in regard to technical regulations allow, without discrimination, reasonable time for other Parties to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account;

2.5.5 in regard to standards, allow reasonable time for interested parties in other Parties to make comments in writing, discuss these comments upon request with other Parties and take these written comments and the results of these discussions into account.

2.6 Subject to the provisions in the heading of Article 2, paragraph 5, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Party, that Party may omit such of the steps enumerated in Article 2, paragraph 5 as it finds necessary provided that the Party, upon adoption of a technical regulation or standard, shall:

2.6.1 notify immediately other Parties through the GATT secretariat of the particular technical regulation, the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.6.2 upon request provide, without discrimination other Parties with copies of the technical regulation and interested Parties in other Parties with copies of the standard;

2.6.3 allow, without discrimination, other Parties with respect to technical regulations and interested parties in other Parties with respect to standards, to present their comments in writing upon request discuss these comments with other Parties and take the written comments and the results of any such discussion into account;

2.6.4 take also into account any action by the Committee as a result of consultations carried out in accordance with the procedures established in Article 14.

2.7 Parties shall ensure that all technical regulations and standards which have been adopted are published promptly in such a manner as to enable interested parties to become acquainted with them.

2.8 Except in those urgent circumstances referred to in Article 2, paragraph 6, Parties shall allow a reasonable interval between the publication of a technical regulation and its entry into force in order to allow time for producers in exporting countries, and particularly in developing countries, to adapt their products or methods of production to the requirements of the importing country.

2.9 Parties shall take such reasonable measures as may be available to them to ensure that regional standardizing bodies of which they are members comply with the provisions of Article 2, paragraphs 1 to 8. In addition Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with those provisions.

2.10 Parties which are members of regional standardizing bodies shall, when adopting a regional standard as a technical regulation or standard fulfil the obligations of Article 2, paragraphs 1 to 8 except to the extent that the regional standardizing bodies have fulfilled these obligations.

Article 3

Preparation, adoption and application of technical regulations and standards by local government bodies

3.1 Parties shall take such reasonable measures as may be available to them to ensure that local government bodies within their territories comply with the provisions of Article 2 with the exception of Article 2, paragraph 3, paragraph 5, sub-paragraph 2, paragraph 9 and paragraph 10, noting that provision of information regarding technical regulations referred to in Article 2, paragraph 5, sub-paragraph 3 and paragraph 6, sub-paragraph 2 and comment and discussion referred to in Article 2, paragraph 5, sub-paragraph 4 and paragraph 6, sub-paragraph 3 shall be through Parties. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such local government bodies to act in a manner inconsistent with any of the provisions of Article 2.

Article 4

Preparation, adoption and application of technical regulations and standards by non-governmental bodies

4.1 Parties shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories comply with the provisions of Article 2, with the exception of Article 2, paragraph 5, sub-paragraph 2 and provided that comment and discussion referred to in Article 2, paragraph 5, sub-paragraph 4 and paragraph 6, sub-paragraph 3 may also be with interested parties in other Parties. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such non-governmental bodies to act in a manner inconsistent with any of the provisions of Article 2.

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

Article 5

Determination of conformity with technical regulations or standards
by central government bodies

5.1 Parties shall ensure that, in cases where a positive assurance is required that products conform with technical regulations or standards, central government bodies apply the following provisions to products originating in the territories of other Parties:

- 5.1.1 imported products shall be accepted for testing under conditions no less favourable than those accorded to like domestic or imported products in a comparable situation;
- 5.1.2 the test methods and administrative procedures for imported products shall be no more complex and no less expeditious than the corresponding methods and procedures, in a comparable situation for like products of national origin or originating in any other country;
- 5.1.3 any fees imposed for testing imported products shall be equitable in relation to any fees chargeable for testing like products of national origin or originating in any other country;
- 5.1.4 the results of tests shall be made available to the exporter or importer or their agents, if requested, so that corrective action may be taken if necessary;
- 5.1.5 the siting of testing facilities and the selection of samples for testing shall not be such as to cause unnecessary inconvenience for importers, exporters or their agents;

5.1.6 the confidentiality of information about imported products arising from or supplied in connection with such tests shall be respected in the same way as for domestic products.

5.2 However, in order to facilitate the determination of conformity with technical regulations and standards where such positive assurance is required, Parties shall ensure, whenever possible, that their central government bodies:

accept test results, certificates or marks of conformity issued by relevant bodies in the territories of other Parties; or rely upon self-certification by producers in the territories of other Parties;

even when the test methods differ from their own, provided they are satisfied that the methods employed in the territory of the exporting Party provide a sufficient means of determining conformity with the relevant technical regulations or standards. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding self-certification, test methods and results, and certificates or marks of conformity employed in the territory of the exporting Party, in particular in the case of perishable products or of other products which are liable to deteriorate in transit.

5.3 Parties ensure that test methods and administrative procedures used by central government bodies are such as to permit, so far as practicable, the implementation of the provisions in Article 5, paragraph 2.

5.4 Nothing in this Article shall prevent Parties from carrying out reasonable spot checks within their territories.

Article 6

Determination by local government bodies and non-governmental bodies of conformity with technical regulations or standards

6.1 Parties shall take such reasonable measures as may be available to them to ensure that local government bodies and non-governmental bodies within their territories comply with the provisions of Article 5. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with any of the provisions of Article 5.

CERTIFICATION SYSTEMS

Article 7

Certification systems operated by central government bodies

With respect to their central government bodies:

7.1 Parties shall ensure that certification systems are not formulated or applied with a view to creating obstacles to international trade. They shall likewise ensure that neither such certification systems themselves nor their application have the effect of creating unnecessary obstacles to international trade.

7.2 Parties shall ensure that certification systems are formulated and applied so as to grant access for suppliers of like products originating in the territories of other Parties under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, including the determination that such suppliers are able and willing to fulfil the requirements of the system. Access for suppliers is obtaining certification from an importing Party under the rules of the system. Access for suppliers also includes

receiving the mark of the system, if any, under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country.

....

Article 8
Certification systems operated
by local government and non-governmental bodies

8.1 Parties shall take such reasonable measures as may be available to them to ensure that local government bodies and non-governmental bodies within their territories when operating certification systems comply with the provisions of Article 7, except paragraph 3, sub-paragraph 2, noting that the provision of information referred to in Article 7, paragraph 3, sub-paragraph 3 and paragraph 4, sub-paragraph 2, the notification referred to in Article 7, paragraph 4, sub-paragraph 1, and the comment and discussion referred to in Article 7, paragraph 4, sub-paragraph 3, shall be through Parties. In addition, Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with any of the provisions of Article 7.

8.2 Parties shall ensure that their central government bodies rely on certification systems operated by local government and non-governmental bodies only to the extent that these bodies and systems comply with the relevant provisions of Article 7.

Article 9
International and regional certification systems

9.1 Where a positive assurance, other than by the supplier, of conformity with a technical regulation or standard is required, Parties

shall, wherever practicable, formulate international certification systems and become members thereof or participate therein.

9.2 Parties shall take such reasonable measures as may be available to them to ensure that international and regional certification systems in which relevant bodies within their territories are members or participants comply with the provisions of Article 7, with the exception of paragraph 2 having regard to the provisions of Article 9, paragraph 3. In addition, Parties shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Article 7.

9.3 Parties shall take such reasonable measures as may be available to them to ensure that international and regional certification systems, in which relevant bodies within their territories are members or participants, are formulated and applied so as to grant access for suppliers of like products originating in the territories of other Parties, under conditions no less favourable than those accorded to suppliers of like products originating in a member country, a participant country or in any other country, including the determination that such suppliers are able and willing to fulfil the requirements of the system. Access for suppliers is obtaining certification from an importing Party which is a member of or participant in the system, or from a body authorized by the system to grant certification, under the rules of the system. Access for suppliers also includes receiving the mark of the system, if any, under conditions no less favourable than those accorded to suppliers of like products originating in a member country or a participant country.

....

INFORMATION AND ASSISTANCE

Article 10

Information about technical regulations, standards and certification systems

10.1 Each Party shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from interested parties in other Parties regarding:

- 10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;
- 10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;
- 10.1.3 any certification systems, or proposed certification systems, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional certification bodies of which such bodies are members or participants;
- 10.1.4 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and
- 10.1.5 the location of the enquiry points mentioned in Article 10, paragraph 2.

10.2 Each Party shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from interested parties in other Parties regarding:

10.2.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.2.2 any certification systems, or proposed certification systems, which are operated within its territory by non-governmental certification bodies, or by regional certification bodies of which such bodies are members or participants.

....

Article 12

Special and differential treatment of developing countries

12.1 Parties shall provide differential and more favourable treatment to developing country Parties to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Parties shall give particular attention to the provisions of this Agreement concerning developing countries' rights and obligations and shall take into account the special development, financial and trade needs of developing countries in the implementation of this Agreement both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Parties shall, in the preparation and application of technical regulations, standards, test methods and certification systems, take account of the special development, financial and trade needs of developing countries, with a view to ensuring that such technical regulations, standards, test methods and certification systems and the determination of conformity with technical regulations and standards do not create unnecessary obstacles to exports from developing countries.

12.4 Parties recognize that, although international standards may exist, in their particular technological and socio-economic conditions, developing countries adopt certain technical regulations or standards, including test methods, aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Parties therefore recognize that developing countries should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

....

12.8 It is recognized that developing countries may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards, test methods and certification systems. It is further recognized that the special development and trade needs of developing countries, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Parties, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing countries are able to comply with this Agreement, the Committee is enabled to grant upon request specified, time-limited exceptions in whole or in part from

obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards, test methods and certification systems and the special development and trade needs of the developing country, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall in particular, take into account the special problems of the least-developed countries.

....

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

Article 13

The Committee on Technical Barriers to Trade

There shall be established under this Agreement:

13.1 A Committee on Technical Barriers to Trade composed of representatives from each of the Parties (hereinafter referred to as "the Committee"). The Committee shall elect its own Chairman and shall meet as necessary but no less than once a year for the purpose of affording Parties the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives and shall carry out such responsibilities as assigned to it under this Agreement or by the Parties;

13.2 Working parties, technical expert groups, panels or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

....

Article 14
Consultation and dispute settlement

Consultation

14.1 Each Party shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by other Parties with respect to any matter affecting the operation of this Agreement.

14.2 If any Party considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the attainment of any objective of this Agreement is being impeded, by another Party or Parties, and that its trade interests are significantly affected, the Party may make written representations or proposals to the other Party or Parties which it considers to be concerned. Any Party shall give sympathetic consideration to the representations or proposals made to it, with a view to reaching a satisfactory resolution of the matter.

Dispute settlement

14.3 It is the firm intention of Parties that all disputes under this Agreement shall be promptly and expeditiously settled, particularly in the case of perishable products.

14.4 If no solution has been reached after consultations under Article 14, paragraphs 1 and 2, the Committee shall meet at the request of any Party to the dispute within thirty days of receipt of such a request, to investigate the matter with a view to facilitating a mutually satisfactory solution.

14.5 In investigating the matter and in selecting, subject, inter alia, to the provisions of Article 14, paragraphs 9 and 14, the appropriate procedures the Committee shall take into account whether the issues in dispute relate to commercial policy considerations and/or to questions of a technical nature requiring detailed consideration by experts.

....

Technical issues

14.9 If no mutually satisfactory solution has been reached under the procedures of Article 14, paragraph 4 within three months of the request for the Committee investigation, upon the request of any Party to the dispute who considers the issues to relate to questions of a technical nature the Committee shall establish a technical expert group and direct it to:

examine the matter;

consult with the Parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;

make a statement concerning the facts of the matter; and

make such findings as will assist the Committee in making recommendations or giving rulings on the matter, including inter alia, and if appropriate, findings concerning the detailed scientific judgments involved, whether the measure was necessary for the protection of human, animal or plant life or health, and whether a legitimate scientific judgment is involved.

....

14.13 If no mutually satisfactory solution has been reached after completion of the procedures in this Article, and any Party to the dispute requests a panel, the Committee shall establish a panel which shall operate under the provisions of Article 14, paragraphs 15 to 18.

Panel proceedings

14.14 If no mutually satisfactory solution has been reached under the procedures of Article 14, paragraph 4 within three months of the request for the Committee investigation and the procedures of Article 14, paragraphs 9 to 13 have not been invoked, the Committee shall, upon request of any Party to the dispute, establish a panel.

14.15 When a panel is established, the Committee shall direct it to:

examine the matter;

consult with Parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution;

make a statement concerning the facts of the matter as they relate to the application of provisions of this Agreement and make such findings as will assist the Committee in making recommendations or giving rulings on the matter.

....

Enforcement

14.19 After the investigation is complete or after the report of a technical expert group, working group, panel or other body is presented

to the Committee, the Committee shall give the matter prompt consideration. With respect to panel reports, the Committee shall take appropriate action normally within thirty days of receipt of the report, unless extended by the Committee, including:

a statement concerning the facts of the matter; or

recommendations to one or more Parties; or

any other ruling which it deems appropriate.

14.20 If a Party to which recommendations are addressed considers itself unable to implement them, it should promptly furnish reasons in writing to the Committee. In that event the Committee shall consider what further action may be appropriate.

14.21 If the Committee considers that the circumstances are serious enough to justify such action, it may authorize one or more Parties to suspend, in respect of any other Party, the application of such obligations under this Agreement as it determines to be appropriate in the circumstances. In this respect, the Committee may, inter alia, authorize the suspension of the application of obligations, including those in Articles 5 to 9, in order to restore mutual economic advantage and balance of rights and obligations.

14.22 The Committee shall keep under surveillance any matter on which it has made recommendations or given rulings.

....

Notes

1. See page 20.

ANNEX I

TERMS AND THEIR DEFINITIONS FOR THE
SPECIFIC PURPOSES OF THIS AGREEMENT

Note: References to the definitions of international standardizing bodies in the explanatory notes are made as they stood in March 1979.

1. Technical specification

A specification contained in a document which lays down characteristics of a product such as levels of quality, performance, safety or dimensions. It may include, or deal exclusively with terminology, symbols, testing and test methods, packaging, marking or labelling requirements as they apply to a product.

Explanatory note:

This Agreement deals only with technical specifications relating to products. Thus the wording of the corresponding Economic Commission for Europe/International Organization for Standardization definition is amended in order to exclude services and codes of practice.

2. Technical regulation

A technical specification, including the applicable administrative provisions, with which compliance is mandatory.

Explanatory note:

The wording differs from the corresponding Economic Commission for Europe/International Organization for Standardization definition because the latter is based on the definition of regulation which

is not defined in this Agreement. Furthermore the Economic Commission for Europe/International Organization for Standardization definition contains a normative element which is included in the operative provisions of this Agreement. For the purposes of this Agreement, this definition covers also a standard of which the application has been made mandatory not by separate regulation but by virtue of a general law.

3. Standard

A technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not mandatory.

Explanatory note:

The corresponding Economic Commission for Europe/International Organization for Standardization definition contains several normative elements which are not included in the above definition. Accordingly, technical specifications which are not based on consensus are covered by this Agreement. This definition does not cover technical specifications prepared by an individual company for its own production or consumption requirements. The word "body" covers also a national standardizing system.

4. International body or system

A body or system whose membership is open to the relevant bodies of at least all Parties to this Agreement.

5. Regional body or system

A body or system whose membership is open to the relevant bodies of only some of the Parties.

6. Central government body

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Economic Community the provisions governing central government bodies apply. However, regional bodies or certification systems may be established within the European Economic Community, and in such cases would be subject to the provisions of this Agreement on regional bodies or certification systems.

7. Local government body

A government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. Non-governmental body

A body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

9. Standardizing body

A governmental or non-governmental body, one of whose recognized activities is in the field of standardization.

10. International standard

A standard adopted by an international standardizing body.

Explanatory note:

The wording differs from the corresponding Economic Commission for Europe/International Organization for Standardization definition in order to make it consistent with other definitions of this Agreement.

....

APPENDIX 8

DECLARATION ON TRADE MEASURES TAKEN FOR
BALANCE-OF-PAYMENTS PURPOSES

(Extracts)

....

1. The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes. The application of restrictive import measures taken for balance-of-payments purposes shall be subject to the following conditions in addition to those provided for in Articles XII, XIII, XV and XVIII without prejudice to other provisions of the General Agreement:

- (a) In applying restrictive import measures contracting parties shall abide by the disciplines provided for in the GATT and give preference to the measure which has the least disruptive effect on trade¹;
- (b) The simultaneous application of more than one type of trade measure for this purpose should be avoided;
- (c) Whenever practicable, contracting parties shall publicly announce a time schedule for the removal of the measures.

The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement.

2. If, notwithstanding the principles of this Declaration, a developed contracting party is compelled to apply restrictive import measures for balance-of-payments purposes, it shall, in determining the incidence of its measures, take into account the export interests of the less-developed contracting parties and may exempt from its measures products of export interest to those contracting parties.

3. Contracting parties shall promptly notify to the GATT the introduction or intensification of all restrictive import measures taken for balance-of-payments purposes. Contracting parties which have reason to believe that a restrictive import measure applied by another contracting party was taken for balance-of-payments purposes may notify the measure to the GATT or may request the GATT secretariat to seek information on the measure and make it available to all contracting parties if appropriate.

4. All restrictive import measures taken for balance-of-payments purposes shall be subject to consultation in the GATT Committee on Balance-of-Payments Restrictions (hereafter referred to as "Committee").

....

7. The GATT secretariat, drawing on all appropriate sources of information, including the consulting contracting party, shall with a view to facilitating the consultations in the Committee prepare a factual background paper describing the trade aspects of the measures taken, including aspects of particular interest to less-developed contracting parties. The paper shall also cover such other matters as the Committee may determine. The GATT secretariat shall give the consulting contracting party the opportunity to comment on the paper before it is submitted to the Committee.

8. In the case of consultations under Article XVIII:12(b) the Committee shall base its decision on the type of procedure on such factors as the following:

- (a) the time elapsed since the last full consultations;
- (b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;
- (c) the changes in the overall level or nature of the trade measures taken for balance-of-payments purposes;
- (d) the changes in the balance-of-payments situation or prospects;
- (e) whether the balance-of-payments problems are structural or temporary in nature.

9. A less-developed contracting party may at any time request full consultations.

....

11. The Committee shall report on its consultations to the Council. The report on full consultations shall indicate:

- (a) the Committee's conclusions as well as the facts and reasons on which they are based;
- (b) the steps the consulting contracting party has taken in the light of conclusions reached on the occasion of previous consultations;

- (c) in the case of less-developed contracting parties, the facts and reasons on which the Committee based its decision on the procedure followed; and
- (d) in the case of developed contracting parties, whether alternative economic policy measures are available.

If the Committee finds that the consulting contracting party's measures

- (a) are in important respects related to restrictive trade measures maintained by another contracting party² or
- (b) have a significant adverse impact on the export interests of a less-developed contracting party,

it shall so report to the Council which shall take such further action as it may consider appropriate.

12. In the course of full consultations with a less-developed contracting party the Committee shall, if the consulting contracting party so desires, give particular attention to the possibilities for alleviating and correcting the balance-of-payments problem through measures that contracting parties might take to facilitate an expansion of the export earnings of the consulting contracting party, as provided for in paragraph 3 of the full consultation procedures.

13. If the Committee finds that a restrictive import measure taken by the consulting contracting party for balance-of-payments purposes is inconsistent with the provisions of Articles XII, XVIII:B or this Declaration, it shall, in its report to the Council, make such findings as will assist the Council in making appropriate recommendations designed to promote the implementation of Articles XII and XVIII:B and this Declaration. The Council shall keep under surveillance any matter on which it has made recommendations.

NOTES

¹It is understood that the less-developed contracting parties must take into account their individual development, financial and trade situation when selecting the particular measure to be applied.

²It is noted that such a finding is more likely to be made in the case of recent measures than of measures in effect for some considerable time.

APPENDIX 9

INTERNATIONAL DAIRY ARRANGEMENT

(Extracts)

....

PART ONE

GENERAL PROVISIONS

Article 1

Objectives

The objectives of this Arrangement shall be, in accordance with the principles and objectives agreed upon in the Tokyo Declaration of Ministers dated 14 September 1973 concerning the Multilateral Trade Negotiations,

- to achieve the expansion and ever greater liberalization of world trade in dairy products under market conditions as stable as possible on the basis of mutual benefit to exporting and importing countries;
- to further the economic and social development of developing countries.

Article II
Product Coverage

1. This Arrangement applies to the dairy products sector. For the purpose of this Arrangement, the term "dairy products" is deemed to include the following products, as defined in the Customs Co-operation Council Nomenclature:

	CCCN
(a) Milk and cream, fresh, not concentrated or sweetened	04.01
(b) Milk and cream, preserved, concentrated or sweetened	04.02
(c) Butter	04.03
(d) Cheese and curd	04.04
(e) Casein	ex 35.01

2. The International Dairy Products Council established in terms of Article VII:1(a) of this Arrangement (hereinafter referred to as the Council) may decide that the Arrangement is to apply to other products in which dairy products referred to in paragraph 1 of this Article have been incorporated if it deems their inclusion necessary for the implementation of the objectives and provisions of this Arrangement.

Article III
Information

1. The participants agree to provide regularly and promptly to the Council the information required to permit it to monitor and assess the overall situation of the world market for dairy products and the world market situation for each individual dairy product.

2. Participating developing countries shall furnish the information available to them. In order that these participants may improve their data collection mechanisms, developed participants, and any developing participants able to do so, shall consider sympathetically any request to them for technical assistance.

3. The information that the participants undertake to provide pursuant to paragraph 1 of this Article, according to the modalities that the Council shall establish, shall include data on past performance, current situation and outlook regarding production, consumption, prices, stocks and trade, including transactions other than normal commercial transactions, in respect of the products referred to in Article II of this Arrangement, and any other information deemed necessary by the Council. Participants shall also provide information on their domestic policies and trade measures, and on their bilateral, plurilateral or multilateral commitments, in the dairy sector and shall make known, as early as possible, any changes in such policies and measures that are likely to affect international trade in dairy products. The provisions of this paragraph shall not require any participant to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Note: It is understood that under the provisions of this Article, the Council instructs the secretariat to draw up, and keep up to date, an inventory of all measures affecting trade in dairy products, including commitments resulting from bilateral, plurilateral and multilateral negotiations.

Article IV

Functions of the International Dairy Products Council and Co-operation between the Participants to this Arrangement

1. The Council shall meet in order to:
 - (a) make an evaluation of the situation in and outlook for the world market for dairy products, on the basis of a status report prepared by the secretariat with the documentation

furnished by participants in accordance with Article III of this Arrangement, information arising from the operation of the Protocols covered by Article VI of this Arrangement, and any other information available to it;

(b) review the functioning of this Arrangement.

2. If after an evaluation of the world market situation and outlook, referred to in paragraph 1(a) of this Article, the Council finds that a serious market disequilibrium, or threat of such a disequilibrium, which affects or may affect international trade, is developing for dairy products in general or for one or more products, the Council will proceed to identify, taking particular account of the situation of developing countries, possible solutions for consideration by governments.

3. Depending on whether the Council considers that the situation defined in paragraph 2 of this Article is temporary or more durable, the measures referred to in paragraph 2 of this Article could include short-, medium- or long-term measures to contribute to improve the overall situation of the world market.

4. When considering measures that could be taken pursuant to paragraphs 2 and 3 of this Article, due account shall be taken of the special and more favourable treatment, to be provided for developing countries, where this is feasible and appropriate.

5. Any participant may raise before the Council any matter¹ affecting this Arrangement, inter alia, for the same purposes provided for in paragraph 2 of this Article. Each participant shall promptly afford adequate opportunity for consultation regarding such matter¹ affecting this Arrangement.

6. If the matter affects the application of the specific provisions of the Protocols annexed to this Arrangement, any participant which considers that its trade interests are being seriously threatened and which is unable to reach a mutually satisfactory solution with the other participant or participants concerned, may request the Chairman of the Committee for the relevant Protocol established under Article VII:2(a) of this Arrangement, to convene a special meeting of the Committee on an urgent basis so as to determine as rapidly as possible, and within four working days if requested, any measures which may be required to meet the situation. If a satisfactory solution cannot be reached, the Council shall, at the request of the Chairman of the Committee for the relevant Protocol, meet within a period of not more than fifteen days to consider the matter with a view to facilitating a satisfactory solution.

....

PART THREE

Article VII

Administration of the Arrangement

1. International Dairy Products Council

- (a) International Dairy Products Council shall be established within the framework of the GATT. The Council shall comprise representatives of all participants to the Arrangement and shall carry out all the functions which are necessary to implement the provisions of the Arrangement. The Council shall be serviced by the GATT secretariat. The Council shall establish its own rules of procedure.

(b) Regular and special meetings

The Council shall normally meet at least twice each year. However, the Chairman may call a special meeting of the Council either on his own initiative, at the request of the Committees established under paragraph 2(a) of this Article, or at the request of a participant to this Arrangement.

(c) Decisions

The Council shall reach its decisions by consensus. The Council shall be deemed to have decided on a matter submitted for its consideration if no member of the Council formally objects to the acceptance of a proposal.

(d) Co-operation with other organizations

The Council shall make whatever arrangements are appropriate for consultation or co-operation with inter-governmental and non-governmental organizations.

(e) Admission of observers

(i) The Council may invite any non-participating country to be represented at any meeting as an observer.

(ii) The Council may also invite any of the organizations referred to in paragraph 1(d) of this Article to attend any meeting as an observer.

2. Committees

- (a) The Council shall establish a Committee to carry out all the functions which are necessary to implement the provisions of the Protocol Regarding Certain Milk Powders, a Committee to carry out all the functions which are necessary to implement the provisions of the Protocol Regarding Milk Fat and a Committee to carry out all the functions which are necessary to implement the provisions of the Protocol Regarding Certain Cheeses. Each of these Committees shall comprise representatives of all participants to the relevant Protocol. The Committees shall be serviced by the GATT secretariat. They shall report to the Council on the exercise of their functions.

....

PART FOUR

Article VIII
Final Provisions

....

7. Relationship between the Arrangement and the GATT

Nothing in this Arrangement shall affect the rights and obligations of participants under the GATT².

8. Withdrawal

- (a) Any participant may withdraw from this Arrangement. Such withdrawal shall take effect upon the expiration of sixty days

from the day on which written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT.

- (b) Subject to such conditions as may be agreed upon by the participants, any participant may withdraw from any of the Protocols annexed to this Arrangement. Such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT.

....

ANNEX I

PROTOCOL REGARDING CERTAIN MILK POWDERS

PART ONE

Article 1

Product Coverage

1. This Protocol applies to milk powder and cream powder falling under CCCN heading No. 04.02, excluding whey powder.

PART TWO

....

Article 3
Minimum Prices

Level and observance of minimum prices

1. Participants undertake to take the steps necessary to ensure that the export prices of the products defined in Article 2 of this Protocol shall not be less than the minimum prices applicable under the present Protocol. If the products are exported in the form of goods in which they have been incorporated, participants shall take the steps necessary to avoid the circumvention of the price provisions of this Protocol.

....

Exports and imports of skimmed milk powder and buttermilk powder for purposes of animal feed

5. By derogation from the provisions of paragraphs 1 to 4 of this Article participants may, under the conditions defined below, export or import, as the case maybe, skimmed milk powder and buttermilk powder for purposes of animal feed at prices below the minimum prices provided for in this Protocol for these products. Participants may make use of this possibility only to the extent that they subject the products exported or imported to the processes and control measures which will be applied in the country of export or destination so as to ensure that the skimmed milk powder and buttermilk powder thus exported or imported are used exclusively for animal feed. These processes and control measures shall have been approved by the Committee and recorded in a register established by it.³ Participants wishing to make use of the provisions of this paragraph shall give advance notification of their intention to do so to the Committee which shall meet, at the request of a participant, to examine the market situation. The participants shall furnish the necessary information concerning their transactions in

respect of skimmed milk powder and buttermilk powder for purposes of animal feed, so that the Committee may follow developments in this sector and periodically make forecasts concerning the evolution of this trade.

Special conditions of sales

6. Participants undertake within the limit of their institutional possibilities to ensure that practices such as those referred to in Article 4 of this Protocol do not have the effect of directly or indirectly bringing the export prices of the products subject to the minimum price provisions below the agreed minimum prices.

....

Transactions other than normal commercial transactions

8. The provisions of paragraphs 1 to 7 of this Article shall not be regarded as applying to donated exports to developing countries or to exports destined for relief purposes or food-related development purposes or welfare purposes in developing countries.

....

Article 5

Obligations of Exporting Participants

1. Exporting participants agree to use their best endeavours, in accordance with their institutional possibilities, to supply on a priority basis the normal commercial requirements of developing

importing participants, especially those used for food-related development purposes and welfare purposes.

....

PART THREE

Article 7 Derogations

1. Upon request by a participant, the Committee shall have the authority to grant derogations from the provisions of Article 3, paragraphs 1 to 5 of this Protocol in order to remedy difficulties which observance of minimum prices could cause certain participants. The Committee shall pronounce on such a request within three months from the date of the request.

Article 8 Emergency Action

1. Any participant, which considers that its interests are seriously endangered by a country not bound by this Protocol, can request the Chairman of the Committee to convene an emergency meeting of the Committee within two working days to determine and decide whether measures would be required to meet the situation. If such a meeting cannot be arranged within the two working days and the commercial interests of the participant concerned are likely to be materially prejudiced, that participant may take unilateral action to safeguard its position, on the condition that any other participants likely to be affected are immediately notified. The Chairman of the Committee shall also be formally advised immediately notified (sic). The Chairman of the Committee shall also be formally advised immediately of the full circumstances of the case and shall be requested to call a special meeting of the Committee at the earliest possible moment.

ANNEX II

PROTOCOL REGARDING MILK FAT

PART ONE

Article 1

Product Coverage

1. This Protocol applies to milk fat falling under CCCN heading No. 04.03, having a milk fat content equal to or greater than 50 per cent by weight.

PART TWO

....

Article 3

Minimum Prices

Level and observance of minimum prices

1. Participants undertake to take the steps necessary to ensure that the export prices of the products defined in Article 2 of this Protocol shall not be less than the minimum prices applicable under the present Protocol. If the products are exported in the form of goods in which they have been incorporated, participants shall take the steps necessary to avoid the circumvention of the price provisions of this Protocol.

....

Special conditions of sales

5. Participants undertake within the limit of their institutional possibilities to ensure that practices such as those referred to in Article 4 of this Protocol do not have the effect of directly or indirectly bringing the export prices of the products subject to the minimum price provisions below the agreed minimum prices.

....

Transactions other than normal commercial transactions

7. The provisions of paragraphs 1 to 6 of this Article shall not be regarded as applying to donated exports to developing countries or to exports destined for relief purposes or food-related development purposes or welfare purposes in developing countries.

....

Article 5

Obligations of Exporting Participants

1. Exporting participants agree to use their best endeavours, in accordance with their institutional possibilities, to supply on a priority basis the normal commercial requirements of developing importing participants, especially those used for food-related development purposes and welfare purposes.

....

PART THREE

Article 7
Derogations

1. Upon request by a participant, the Committee shall have the authority to grant derogations from the provisions of Article 3, paragraphs 1 to 4 of this Protocol in order to remedy difficulties which observance of minimum prices could cause certain participants. The Committee shall pronounce on such a request within three months from the date of the request.

Article 8
Emergency Action

1. Any participant, which considers that its interests are seriously endangered by a country not bound by this Protocol, can request the Chairman of the Committee to convene an emergency meeting of the Committee within two working days to determine and decide whether measures would be required to meet the situation. If such a meeting cannot be arranged within the two working days and the commercial interests of the participant concerned are likely to be materially prejudiced, that participant may take unilateral action to safeguard its position, on the condition that any other participants likely to be affected are immediately notified. The Chairman of the Committee shall also be formally advised immediately of the full circumstances of the case and shall be requested to call a special meeting of the Committee at the earliest possible moment.

ANNEX III

PROTOCOL REGARDING CERTAIN CHEESES

PART ONE

Article 1
Product Coverage

1. This Protocol applies to cheeses falling under CCCN heading No. 04.04, having a fat content in dry matter, by weight, equal to or more than 45 per cent and a dry matter content, by weight, equal to or more than 50 per cent.

PART TWO

....

Article 3
Minimum Price

Level and observance of minimum price

1. Participants undertake to take the steps necessary to ensure that the export prices of the products defined in Articles 1 and 2 of this Protocol shall not be less than the minimum price applicable under the present Protocol. If the products are exported in the form of goods in which they have been incorporated, participants shall take the steps necessary to avoid the circumvention of the price provisions of this Protocol.

....

Special conditions of sale

5. Participants undertake within the limit of their institutional possibilities to ensure that practices such as those referred to in Article 4 of this Protocol do not have the effect of directly or indirectly bringing the export prices of the products subject to the minimum price provisions below the agreed minimum price.

....

Transactions other than normal commercial transactions

7. The provisions of paragraphs 1 to 6 of this Article shall not be regarded as applying to donated exports to developing countries or to exports destined for relief purposes or food-related development purposes or welfare purposes in developing countries.

....

Article 5

Obligations of Exporting Participants

1. Exporting participants agree to use their best endeavours, in accordance with their institutional possibilities, to supply on a priority basis the normal commercial requirements of developing importing participants, especially those used for food-related development purposes and welfare purposes.

....

PART THREE

Article 7
Derogations

1. Upon request by a participant, the Committee shall have the authority to grant derogations from the provisions of Article 3, paragraphs 1 to 4 of this Protocol in order to remedy difficulties which observance of minimum prices could cause certain participants. The Committee shall pronounce on such a request within thirty days from the date of the request.

2. The provisions of Article 3:1 to 4 shall not apply to exports, in exceptional circumstances, of small quantities of natural unprocessed cheese which would be below normal export quality as a result of deterioration or production faults. Participants exporting such cheese shall notify the GATT secretariat in advance of their intention to do so. Participants shall also notify the Committee quarterly of all sales of cheese effected under the provisions of this paragraph, specifying in respect of each transaction, the quantities, prices and destinations involved.

Article 8
Emergency Action

1. Any participant, which considers that its interests are seriously endangered by a country not bound by this Protocol, can request the Chairman of the Committee to convene an emergency meeting of the Committee within two working days to determine and decide whether measures would be required to meet the situation. If such a meeting cannot be arranged within the two working days and the commercial interests of the participant concerned are likely to be materially prejudiced, that participant may take unilateral action to safeguard its position, on the condition that any other participants likely to be

affected are immediately notified. The Chairman of the Committee shall also be formally advised immediately of the full circumstances of the case and shall be requested to call a special meeting of the Committee at the earliest possible moment.

NOTES

¹It is confirmed that the term "matter" in this paragraph includes any matter which is covered by multilateral agreements negotiated within the framework of the Multilateral Trade Negotiations, in particular those bearing on export and import measures. It is further confirmed that the provisions of Article IV:5 and this footnote are without prejudice to the rights and obligations of the parties to such agreements.

²This provision applies only among participants that are contracting parties to the GATT.

³See Annex I(c), "Register of Processes and Control Measures". It is understood that exporters would be permitted to ship skimmed milk powder and buttermilk powder for animal feed purposes in an unaltered state to importers which have had their processes and control measures inserted in the Register. In this case, exporters would inform the Committee of their intention to ship unaltered skimmed milk powder and/or buttermilk powder for animal feed purposes to those importers which have their processes and control measures registered. (Annex I(c) is not reproduced).

APPENDIX 10

UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE

1. The CONTRACTING PARTIES reaffirm their adherence to the basic G.A.T.T. mechanism for the management of disputes based on Articles XXII and XXIII.¹ With a view to improving and refining the G.A.T.T. mechanism, the CONTRACTING PARTIES agree as follows:

Notification

2. Contracting parties reaffirm their commitment to existing obligations under the General Agreement regarding publication and notification.

3. Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement. Contracting Parties should endeavor to notify such measures in advance of implementation. In other cases, where prior notification has not been possible, such measures should be notified promptly ex post facto. Contracting parties which have reason to believe that such trade measures have been adopted by another contracting party may seek information on such measures bilaterally, from the contracting party concerned.

Consultations

4. Contracting parties reaffirm their resolve to strengthen and improve the effectiveness of consultative procedures employed by contracting parties. In that connexion, they undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions. Any requests for consultation should include the reasons therefor.

5. During consultations, contracting parties should give special attention to the particular problems and interests of less-developed contracting parties.

6. Contracting parties should attempt to obtain satisfactory adjustment of the matter in accordance with the provisions of Article XXIII:1 before resorting to Article XXIII:2.

Dispute Settlement

7. The CONTRACTING PARTIES agree that the customary practice of the G.A.T.T. in the field of dispute settlement, described in the Annex, should be continued in the future, with the improvements set out below. They recognize that the efficient functioning of the system depends on their will to abide by the present understanding. The CONTRACTING PARTIES reaffirm that the customary practice includes the procedures for the settlement of disputes between developed and less-developed countries adopted by the CONTRACTING PARTIES in 1966² and that these remain available to less-developed contracting parties wishing to use them.

8. If a dispute is not resolved through consultations, the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less-developed contracting party may request the good offices of the Director-General who, in carrying out his tasks, may consult with the Chairman of the CONTRACTING PARTIES and the Chairman of the Council.

9. It is understood that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts and that, if disputes arise, all contracting parties will engage in these procedures in good faith in an effort to resolve the disputes. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

10. It is agreed that if a contracting party invoking Article XXIII:2 requests the establishment of a panel to assist the CONTRACTING PARTIES to deal with the matter, the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice. It is also agreed that the CONTRACTING PARTIES would similarly decide to establish a working party if this were requested by a contracting party invoking the Article. It is further agreed that such requests would be granted only after the contracting party concerned had had an opportunity to study the complaint and respond to it before the CONTRACTING PARTIES.

11. When a panel is set up, the Director-General, after securing the agreement of the contracting parties concerned, should propose the composition of the panel, of three or five members depending on the case, to the CONTRACTING PARTIES for approval. The members of a panel would preferably be governmental. It is understood that citizens of countries whose governments³ are parties to the dispute would not be members of the panel concerned with that dispute. The panel should be members of the panel concerned with that dispute. The panel should be constituted as promptly as possible and normally not later than thirty days from the decision by the CONTRACTING PARTIES.

12. The parties to the dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General and would not oppose nominations except for compelling reasons.

13. In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. For this purpose, each contracting party would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work.⁴

14. Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments would therefore not give them instructions nor seek to influence

them as individuals with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.⁵

* * *

16. The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2. In this connexion, panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

17. Where the parties have failed to develop a mutually satisfactory solution, the panel should submit its findings in a written form. The report of a panel should normally set out the rationale behind any findings and recommendations that it makes. Where a bilateral settlement of the matter has been found, the report of the panel may be confined to a brief description of the case and to reporting that a solution has been reached.

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20. The time required by panels will vary with the particular case.⁶ However, panels should aim to deliver their findings without undue delay, taking into account the obligation of the CONTRACTING PARTIES to ensure prompt settlement. In cases of urgency the panel would be called upon to deliver its findings within a period normally of three months from the time the panel was established.

21. Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES. The CONTRACTING PARTIES should take appropriate action on reports of panels and working parties within a reasonable period of time. If the case is one brought by a less-developed contracting party, such action should be taken in a specially convened meeting, if necessary. In such cases, in considering what appropriate action might be taken the CONTRACTING PARTIES shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of less-developed contracting parties concerned.

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Surveillance

24. The CONTRACTING PARTIES agree to conduct a regular and systematic review of developments in the trading system. Particular attention would be paid to developments which affect rights and obligations under the G.A.T.T., to matters affecting the interests of less-developed contracting parties, to trade measures notified in accordance with this understanding and to measures which have been subject to consultation, conciliation or dispute settlement procedures laid down in this understanding.

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ANNEX

Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)

1. Any dispute which has not been settled bilaterally under the relevant provisions of the General Agreement may be referred to the CONTRACTING PARTIES⁷ which are obliged, pursuant to Article XXIII:2, to investigate matters submitted to them and make appropriate recommendations or give a ruling on the matter as appropriate. Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.⁸

2. The CONTRACTING PARTIES adopted in 1966 a decision establishing the procedure to be followed for Article XXIII consultations between developed and less-developed contracting parties.⁹ This procedure provides, inter alia, for the Director-General to employ his good offices with a view to facilitating a solution, for setting up a panel with the task of examining the problem in order to recommend appropriate solutions, and for time-limits for the execution of the different parts of this procedure.

* * *

6. Concerning the customary elements of the procedures regarding working parties and panels, the following elements have to be noted:

- (i) working parties are instituted by the Council upon the request of one or several contracting parties. The terms of reference of working parties are generally "to examine the matter in the light of the relevant provisions of the General Agreement and to report to the Council". Working parties set up their own working procedures. The practice for working parties has been to hold one or two meetings to examine the matter and a final meeting to discuss conclusions. Working parties are open to participation of any contracting party which has an interest in the matter. Generally, working parties consist of a number of delegations varying from about five to twenty, according to the importance of the question and the interests involved. The countries who are parties to the dispute are always members of the Working Party, and have the same status as other delegations. The report of the Working Party represents the views of all its members and therefore records different views if necessary. Since the tendency is to strive for consensus, there is generally some measure of negotiation and compromise in the formulation of the Working Party's report. The

Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision.

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- (iii) Members of panels are expected to act impartially without instructions from their governments. In a few cases, in view of the nature and complexity of the matter, the parties concerned have agreed to designate non-government experts. Nominations are proposed to the parties concerned by the G.A.T.T. secretariat. The composition of panels (three or five members depending on the case) has been agreed upon by the parties concerned and approved by the G.A.T.T. Council. It is recognized that a broad spectrum of opinion has been beneficial in difficult cases, but that the number of panel members has sometimes delayed the composition of panels, and therefore the process of dispute settlement.

- (iv) Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General

Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels.

- (v) Where the parties have failed to develop a mutually satisfactory solution, the panel has submitted its findings in a written form. Panel reports have normally set out findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it has made. Where a bilateral settlement of the matter has been found, the report of the panel has been confined to a brief description of the case and to reporting that a solution has been reached.

* * *

- (ix) Although the CONTRACTING PARTIES have never established precise deadlines for the different phases of the procedure, probably because the matters submitted to panels differ as to their complexity and their urgency, in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months.

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NOTES

¹It is noted that Article XXV may, as recognized by the Contracting Parties, inter alia, when they adopted the report of the Working Party on particular difficulties connected with trade in primary products (L/930) also afford an appropriate avenue for consultation and dispute settlement in certain circumstances.

²BISD 14S/18.

³In the case customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

⁴The coverage of travel expenses should be considered within the limits of budgetary possibilities.

⁵A statement is included in the Annex describing the current practice with respect to inclusion on panels of persons from developing countries.

⁶An explanation is included in the Annex that "in most cases the proceedings of the panels have been completed within a reasonable period of time, extending from three to nine months".

⁷The Council is empowered to act for the Contracting Parties, in accordance with normal G.A.T.T. practice.

⁸At the Review Session (1955) the proposal to institutionalize the procedures of panels was not adopted by Contracting Parties mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the G.A.T.T.

⁹BISD 14S/18.